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THE POLICIES CONTAINED HEREIN ARE STILL SUBJECT TO APPROVAL BY NATIONAL TREASURY, AS ALL THE APPROPRIATE MEMBERS HAVE NOT BEEN FULLY BRIEFED. CHANGES MAY BE MADE TO THIS DRAFT AFTER DISCUSSION AND FINAL REVIEW BY THE MINISTER OF FINANCE. IN ADDITION, THIS DRAFT ALSO MAY BE SUBJECT TO CHANGE BASED ON THE STRENGTH OF PUBLIC COMMENT RECEIVED.

SOUTH AFRICAN REVENUE SERVICE

R. NO.

AUGUST 2001

REGULATIONS ISSUED IN TERMS OF PARAGRAPH 84 OF THE EIGHTH SCHEDULE TO THE INCOME TAX ACT, 1962 (ACT NO. 58 OF 1962), TO DETERMINE A CAPITAL GAIN OR CAPITAL LOSS RELATING TO FOREIGN CURRENCY

By virtue of the power vested in me by paragraph 84(1) of the Eighth Schedule to the Income Tax Act, 1962, I, Trevor Andrew Manuel, hereby issue the regulations as set out in Schedule 1 hereto, to determine a capital gain or capital loss in respect of—

- (a) a conversion of a foreign currency into another currency;
- (b) a payment, settlement, prescription or other transfer of a foreign debt, forward exchange contract or foreign currency option contract; and
- (c) the foreign currency consequences of certain events and disposals contemplated in the Eighth Schedule to that Act.

T. A. MANUEL
MINISTER OF FINANCE

SCHEDULE 1

Definitions

1. In these regulations, unless the context otherwise indicates, any word or expression to which a meaning has been assigned in the Income Tax Act, 1962, bears the meaning assigned thereto, and for the purposes of this Schedule—

“foreign currency” means in relation to any person, any currency which is not legal tender in the country of which that person is a resident, as defined in section 1 of the Income Tax Act, 1962;

“foreign currency asset” means—

- (a) any foreign currency; and
- (b) any—
 - (i) loan, advance or debt;
 - (ii) stock, bond, debenture, bill, promissory note, certificate or similar arrangement; or
 - (iii) deposit with a bank or other financial institution, the value of which is denominated in and primarily determined with reference to any foreign currency, (but excluding any policy or right in a pension fund which gives rise to any benefit contemplated in paragraph 54 of the Eighth Schedule or an amount contemplated in section 10(1)(gC));

“foreign currency base cost” means the base cost in respect of a foreign currency asset, as determined in accordance with regulation 10;

“foreign currency contract” means any right or obligation in terms of any forward exchange contract or foreign currency option contract;

“foreign currency liability” means the liability of a person in terms of any loan, advance or debt denominated in any foreign currency;

“foreign currency value” in relation to any foreign currency asset means the value denominated in the relevant foreign currency;

“foreign currency proceeds” means the proceeds from the disposal of a foreign currency asset, as determined in regulation 11;

“local currency” in relation to a person, means the currency of the country of which that person is a resident;

“local currency value” means the value denominated in the local currency;

“spot rate” means the appropriate quoted exchange rate at a specific time for delivery of currency.

“valuation date” means 1 October 2001 or where a person becomes a resident after that date, means the date that such person becomes a resident.

Application of regulations

2. These regulations apply in respect of the acquisition and disposal of any foreign currency asset by any person who is a resident, other than—

- (a) any company; and
- (b) any trust carrying on any trade

Foreign currency capital gain

3. A person’s foreign currency capital gain for the year of assessment in respect of—

- (a) the disposal of a foreign currency asset, is the amount by which the foreign currency proceeds exceed the foreign currency base cost;

- (b) the granting of an option in terms of a foreign currency option contract is the amount of any premium or consideration received in respect of the option so granted;
- (c) the disposal of any right or obligation in terms of forward exchange contract, is the amount determined in accordance with regulation 12(1);
- (d) the disposal of any right in terms of any foreign currency option contract, is the amount determined in accordance with regulation 13;
- (e) the discharge for no consideration of any foreign currency liability of that person, is the foreign currency value of that foreign currency liability translated into the local currency at the spot rate on the date of such discharge; and
- (f) the settlement or part settlement of any foreign currency liability due by that person, is the amount determined in accordance with regulation 14.

Foreign currency capital loss

4. A person's foreign currency capital loss for the year of assessment in respect of—

- (a) the disposal of a foreign currency asset is the amount by which the foreign currency base cost in respect of that asset exceeds the foreign currency proceeds;
- (b) the acquisition of an option in terms of a foreign currency option contract is the amount of any premium or consideration paid in respect of the option so acquired;
- (c) the disposal of any right or obligation in terms of any forward exchange contract, is the amount determined in accordance with regulation 12(2);
- (d) the discharge for no consideration of any foreign currency liability due to that person, is the foreign currency value of that foreign currency liability translated into the local currency at the spot rate on the date of such discharge; and

- (e) any settlement or part settlement of any foreign currency liability due by that person, is the amount determined in accordance with regulation 14.

Aggregate foreign currency capital gain

5.(1) A person's aggregate foreign currency capital gain for the year of assessment is the amount by which that person's foreign currency capital gains for that year exceeds that person's foreign currency capital losses for that year.

(2) The amount of a person's aggregate foreign currency capital gain for any year of assessment shall be treated as a capital gain for the purposes of the determination of—

- (a) the aggregate capital gain of that person in terms of paragraph 6; or
(b) the aggregate capital loss of that person in terms of paragraph 7, of the Eighth Schedule to the Income Tax Act, 1962, for that year.

Aggregate foreign currency capital loss

6.(1) A person's aggregate foreign currency capital loss for the year of assessment is the amount by which that person's foreign currency capital losses for that year exceeds that person's foreign currency capital gains for that year.

(2) The amount of a person's aggregate foreign currency capital loss for any year of assessment shall be treated as a foreign currency capital loss of that person for purposes of determining that person's aggregate foreign capital gain or aggregate foreign capital loss in the immediately succeeding year of assessment.

Disposal of foreign currency asset or foreign currency contract

7.(1) A disposal of a foreign currency asset includes—

- (a) the conversion of any foreign currency into another foreign currency;
 - (b) the sale, donation, expropriation, cession, exchange or any alienation or transfer of any foreign currency asset;
 - (c) the forfeiture, termination, redemption, cancellation, surrender, discharge, relinquishment, release, waiver, renunciation, expiry, abandonment or loss of any foreign currency asset;
 - (d) the vesting of any foreign currency asset of a trust in a beneficiary.
- (2) A disposal of a foreign currency contract includes—
- (a) the sale, donation, expropriation, cession, exchange or any alienation or transfer of any foreign currency contract;
 - (b) the forfeiture, termination, redemption, cancellation, surrender, discharge, relinquishment, release, waiver, renunciation, expiry, abandonment or loss of any foreign currency contract;
 - (c) the vesting of any foreign currency contract of a trust in a beneficiary;
 - (d) the maturity of a forward exchange contract; and
 - (e) the exercising of an option granted in terms of a foreign currency option contract.
- (3) There is no disposal of a foreign currency asset or foreign currency contract—
- (a) where that foreign currency asset is exchanged for, or converted into, another foreign currency asset, which is denominated in the same currency;
 - (b) by a person who transfers that foreign currency asset or foreign currency contract as security for a debt or by a creditor who transfers that foreign currency asset or foreign currency contract back to that person upon release of the security;
 - (c) by a trustee in respect of the distribution of that foreign currency asset or foreign currency contract of the trust to a beneficiary who has a vested interest in that foreign currency asset or foreign currency contract prior to distribution;
 - (d) by a trustee, executor, curator or administrator in respect of a change in ownership in a foreign currency asset or foreign currency contract as a

result of the termination of the appointment of a trustee, executor, curator or administrator or the appointment of a new trustee, executor, curator or administrator; or

- (e) expiry of an option granted in terms of an foreign currency option contract.

Events treated as acquisition and disposal of foreign currency asset

8.(1) A person will be treated as having acquired on valuation date all foreign currency assets owned and not disposed of by that person on that date, at a cost equal to the foreign currency value of those foreign currency assets translated into the local currency at the spot rate on that date.

(2) Where a person—

- (a) ceases to be a resident; or
- (b) who is a resident, is as a result of the application of any agreement entered into by the Republic for the avoidance of double taxation, treated as not being a resident,

that person must be treated as having disposed of all foreign currency assets held and not disposed of and all foreign currency contracts on the date that such person ceases to be a resident or is treated as not being a resident.

Foreign currency asset pool

9. (1) A person must maintain a separate foreign currency pool for each foreign currency in which any foreign currency asset acquired by that person is denominated.

(2) The foreign currency asset pool in respect of a specific foreign currency must include—

- (a) all foreign currency assets held on valuation date;

- (b) the total amount converted into that foreign currency after valuation date; and
- (c) the total amount of any foreign currency assets received after valuation date.
- (3) The foreign currency pool for a specific currency, contemplated in regulation 9(2), must reflect—
- (a) the total foreign currency value of all foreign currency assets included therein; and
- (b) subject to regulations 16 and 17, the total local currency value, determined as the sum of the foreign currency values in respect of each foreign currency asset contemplated in regulation 9(3)(a), translated into the local currency at the spot rate on the valuation date, date of conversion or date of receipt of the relevant foreign currency asset, as the case may be.
- (4) Where a person disposes of any foreign currency asset included in the foreign currency asset pool in terms of regulation 9(2)—
- (a) the total foreign currency value, contemplated in regulation 9(3)(a), must be reduced by the foreign currency value of that foreign currency asset; and
- (b) the total local currency value, contemplated in regulation 9(3)(b), must be reduced by the base cost of that foreign currency asset determined in terms of regulation 10.

Foreign currency base cost of foreign currency asset

10. The base cost of a foreign currency asset disposed of by a person is an amount determined in accordance with the formula—

$$A = (B/C \times D)$$

where,

“A” represents the amount to be determined;

“B” represents the foreign currency value of the foreign currency asset so disposed of;

“C” represents the total foreign currency value of the relevant foreign currency pool, prior to such disposal; and

“D” represents the local currency value of that foreign currency pool, determined in terms of regulation 9(3) and (4), prior to such disposal.

Foreign currency proceeds

11. The proceeds from the disposal by a person of a foreign currency asset shall be the foreign currency value of that foreign currency asset, translated into the local currency at the spot rate on the date of disposal.

Forward exchange contracts

12.(1) A person shall be treated as having a foreign currency capital gain from the disposal of a right in terms of a forward exchange contract, to the extent that—

- (a) the amount of the foreign currency receivable in terms of that contract, translated into the local currency at the spot rate on the date of disposal, exceeds the amount of such foreign currency translated into the local currency at the forward rate specified in such contract; or
- (b) the amount of the foreign currency payable in terms of the contract, translated into the local currency at the forward rate specified in such contract, exceeds the amount of such foreign currency translated into the local currency at the spot rate on the date of disposal.

(2) A person shall be treated as having a foreign currency capital loss from the disposal of a forward exchange contract, to the extent that—

- (a) the amount of the foreign currency receivable in terms of that contract, translated into the local currency at the forward rate specified in such contract, exceeds the amount of such foreign currency translated into the local currency at the spot rate on the date of disposal; or
- (b) the amount of the foreign currency payable in terms of the contract, translated into the local currency at the spot rate on the date of disposal, exceeds the amount of such foreign currency translated into the local currency at the forward rate specified in such contract.

Foreign currency option contracts

13. A person shall be treated as having a foreign currency capital gain from the disposal of an option in terms of a foreign currency option contract to the extent that—

- (a) in the case where that person may in terms of that option acquire any foreign currency, the amount of the foreign currency stipulated in that option contract, translated into the local currency at the spot rate on the date of the disposal of that option, exceeds that amount translated into the local currency at the rate specified in that contract; and
- (b) in the case where that person may in terms of that option dispose of any foreign currency, the amount of the foreign currency stipulated in that option contract, translated into the local currency at the rate specified in that contract, exceeds that amount translated into the local currency at the spot rate on the date of the disposal of that option.

Settlement of foreign currency liability

14.(1) A person shall be treated as having a foreign currency capital gain from the settlement or part settlement by that person of any foreign currency liability, to the extent that the amount settled or part settled, translated into the local currency at the spot rate on the date of incurring that foreign currency liability, exceeds that amount translated into the local currency at the spot rate on the date of settlement or part settlement of that foreign currency liability.

(2) A person shall be treated as having a foreign currency capital loss from the settlement or part settlement by that person of any foreign currency liability, to the extent that the amount settled or part settled, translated into the local currency at the spot rate on the date of settlement or part settlement of that foreign currency liability, exceeds that amount translated into the local currency at the rate on the date of incurring that foreign currency liability.

Disregarding of foreign currency capital gains and losses

15.(1) A person must disregard any foreign currency capital gain or foreign currency capital loss where that person disposes of a foreign currency asset—

- (a) for purposes of the payment of any travelling and subsistence expenses of that person and his or her dependants in respect of any foreign travel for a period of less than six months, and that foreign currency asset was acquired by that person exclusively for the purposes of funding such travelling and subsistence expenses;
- (b) for purposes of the payment of any—
 - (i) domestic, private or personal expenses incurred outside the Republic;
 - (ii) expenses in respect of foreign accommodation (excluding the acquisition of any immovable property) or foreign personal-use assets; or
 - (iii) travelling or maintenance expenses,

- of that person and his or her dependants, relating to any period contemplated in section 10(1)(o)(ii) during which such person and dependants are outside the Republic, regardless of whether or not that person rendered any services outside the Republic during that period;
- (c) by way of donation or bequest to any public benefit organisation approved by the Commissioner under section 30 of the Income Tax Act, 1962.
- (2) A person must disregard any foreign currency capital loss determined in respect of the disposal of any foreign currency asset or any foreign currency contract to any connected person in relation to that person, subject to regulation 15(4).
- (3) A person's foreign currency capital loss which is disregarded in terms of regulation 15(2) may be deducted from that person's foreign currency capital gains determined in respect of disposals of foreign currency assets during that year or subsequent years to the same person to whom the disposal giving rise to that foreign currency capital loss was made, if at the time of those subsequent disposals, that person is still a connected person in relation to that person.
- (4) For the purposes of regulations 15(2) and (3), a connected person in relation to a natural person does not include a relative of that person other than a spouse, parent, child, stepchild, brother, sister, grandchild or grandparent of that person.
- (5) A person must disregard any foreign currency capital loss determined in respect of the settlement of any foreign currency liability, where the amount to which that foreign currency liability relates was utilised to acquire an asset to which the provisions of paragraph 43(1) applies.

Transfer of foreign currency asset between spouses

16. Where a person disposes of a foreign currency asset to his or her spouse, as contemplated in regulation 16(2) or regulation 17(1)(a), the person disposing of that foreign currency asset must be treated as having disposed of that foreign

currency asset for proceeds equal to the foreign currency base cost thereof and the spouse acquiring the foreign currency asset must for purposes of regulation 9(3)(b) reflect that foreign currency base cost as the local currency value of that asset.

(2) A person must be treated as having disposed of a foreign currency asset or foreign currency contract to his or her spouse, if that asset is transferred to that spouse in consequence of a divorce order or, in the case of a union contemplated in paragraph (b) or (c) of the definition of “spouse” in section 1 of the Income Tax Act, 1962, an agreement of division of assets which has been made an order of court.

Disposal by deceased estate

17. A deceased person must be treated as having disposed of—
- (a) a foreign currency asset or foreign currency contract to his or her surviving spouse, if that foreign currency asset or foreign currency contract accrues to that surviving spouse upon the death of that person;
 - (b) a foreign currency asset or foreign currency contract to a public benefit organisation approved by the Commissioner under section 30 of the Income Tax Act, 1962, if that foreign currency asset or foreign currency contract accrues to that public benefit organisation upon the death of that person;
 - (c) all foreign currency assets (other than any foreign currency asset contemplated in item (a) or (b) of this regulation) held and not disposed of on the date of his or her death, and that person’s estate will be treated as having acquired those foreign currency assets on that date; and
 - (d) all foreign currency contracts to his or her estate on the date of his or her death.

Disposal by deceased estate to heir or legatee

18. Where a foreign currency asset is disposed of by a deceased estate to an heir or legatee (other than the surviving spouse of the deceased person as contemplated in regulation 17(1)(a) or an approved public benefit organisation as contemplated in regulation 17(1)(b)) or a trustee of a trust—

- (a) the deceased estate must be treated as having disposed of that asset for proceeds equal to the foreign currency base cost of the deceased estate in respect of that asset; and
- (b) the heir, legatee or trustee must be treated as having acquired that asset at a cost equal to the foreign currency base cost of the deceased estate in respect of that asset.

Application of provisions of Eighth Schedule to the Income Tax Act

19. The provisions of paragraphs 14, 68, 69, 70, 71, 72, 73, 80 and 83 of the Eighth Schedule to the Income Tax Act, 1962, shall apply *mutatis mutandis* in respect of any foreign currency capital gain or foreign currency capital loss resulting from the disposal of any foreign currency asset.

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