TAX UPDATE

For period: 1 April 2019 to 30 June 2019

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1. INTRODUCTION

The purpose of this update is to summarise developments that occurred during the second quarter of 2019, specifically in relation to Income Tax and VAT. Johan Kotze, a Tax Executive at Shepstone & Wylie Attorneys, has compiled this summary.

The aim of this summary is for readers to be exposed to the latest developments and to consider areas that may be applicable to their circumstances. Readers are invited to contact Johan Kotze to discuss their specific concerns and, for that matter, any other tax concerns.

Take some time and consider the tax cases.

Interpretation notes, rulings and guides are all important aspects of the developments that took place, as they give taxpayers an insight into SARS' application of specific provisions.

Enjoy reading on!

A fine is a tax for doing wrong. A tax is a fine for doing well.

Q: What's the difference between death and taxes?

A: Congress doesn't meet every year to make death worse.

2. MEDIA STATEMENT – INITIAL BATCH OF THE DRAFT TAXATION LAWS AMENDMENT BILL, 2019 - 10 JUNE 2019

National Treasury published an initial batch of the 2019 draft Taxation Laws Amendment Bill to cover specific provisions that require additional consultation. National Treasury will be publishing the full text of the 2019 draft Taxation Laws Amendment Bill for public comment in the mid July 2019. The publication of an initial batch of the 2019 draft Taxation Laws Amendment Bill for an initial shorter public comment process before a more detailed second round process of public comments, when these provisions are revised in the full text of the 2019 draft Taxation Laws Amendment Bill.

This initial batch of the 2019 draft Taxation Laws Amendment Bill is intended to solicit comments on two specific amendments that are more urgent and require further consultation. It also serves as notice to taxpayers of proposals for earlier effective dates for some of the proposed amendments.

The specific amendments in the first batch are:

1. Addressing abusive arrangements aimed at avoiding the anti-dividend stripping provisions

On 20 February 2019, the Minister of Finance made an announcement in Annexure C of the Budget Review regarding 'Addressing abusive arrangements aimed at avoiding the anti-dividend stripping provisions', with effect on 20 February 2019. This implies that the changes to the tax legislation addressing abusive arrangements aimed at avoiding the anti-dividend stripping provisions will come into effect from 20 February 2019 and apply to dividend stripping arrangements entered into on or after the date of that announcement (i.e. 20 February 2019). These legislative interventions will not apply in respect of dividend stripping arrangements entered into before 20 February 2019.

As stated in Annexure C of the 2019 Budget Review, the proposed amendments are aimed at structures that certain taxpayers have embarked on that aim at circumventing the current dividend stripping rules that were amended during the 2017 and 2018 legislative cycles. These schemes involve millions of rands, and have a potential of eroding the South African tax base. In order to curb this abuse, amendments are proposed in section 22B and paragraph 43A to the Eighth Schedule of the Income Tax Act.

2. Aligning the effective date of tax neutral transfers between retirement funds with the effective date of retirement reforms, which is 1 March 2021

In 2013, retirement fund reform amendments were effected to the Income Tax Act regarding the annuitisation requirements for provident funds. The main objective of these amendments was to enhance preservation of retirement fund interests during retirement and to have uniform tax treatment across the various retirement funds, thus resulting in provident funds being treated similarly to pension and retirement annuity funds with regard to the requirement to annuitise retirement benefits.

These retirement fund reform amendments were originally intended to come into effect on 1 March 2015. However, since then, further negotiations within NEDLAC have not been finalised, therefore necessitating the postponement of the effective date for the annuitisation requirements for provident funds to 1 March 2021. Each postponement of the effective date for the annuitisation requirements for provident funds requires several consequential amendments to various provisions of the Income Tax Act. In making changes to the effective dates, several consequential amendments were required, but one was inadvertently left out in paragraph 6(1)(a) of the Second Schedule to the Income Tax Act, which makes provision for tax neutral transfers between retirement funds. In order to correct this, it is proposed that urgent changes be made to the Income Tax Act to align the effective date of the tax neutral transfers from pension to provident or provident preservation funds with the effective date of the retirement reform amendments, which is 1 March 2021.

3. DRAFT TAXATION LAWS AMENDMENT BILL, 2019 – EXPLANATORY MEMORANDUM – INITIAL BATCH

3.1. Income tax: Individuals, savings and employment – Aligning the effective date of tax neutral transfers between retirement funds with effective date of all retirement reforms

[Applicable provisions: Paragraph 6(1)(a) of the Second Schedule to the Income Tax (‘the Act’)]

BACKGROUND

In 2013, retirement fund reform amendments were effected to the Income Tax Act regarding the annuitisation requirements for provident funds. The main objective of these amendments was to enhance preservation of retirement fund interests during retirement and to have uniform tax treatment across the various retirement funds, thus resulting in provident funds being treated similar to pension and retirement annuity funds with regard to the requirement to annuitise retirement benefits. These retirement fund reform amendments were supposed to come into effect on 1 March 2015.

However, when Parliament was passing legislative changes to these amendments, Parliament postponed the effective date for the annuitisation requirements for provident funds until 1 March 2016. During the 2016 legislative cycle, Parliament again postponed the effective date until 1 March 2019. Further, during the 2018 legislative cycle, Parliament once more postponed the effective date to 1 March 2021. These postponements were due to continuing negotiations within NEDLAC.

REASONS FOR CHANGE

Each postponement of the effective date requires several consequential amendments to various provisions of the Income Tax Act. In making changes to the effective dates in relation to the several consequential amendments required, but were inadvertently left out in paragraph 6(1)(a) of the Second Schedule to the

Income Tax Act, which makes provision for tax neutral transfers between retirement funds. Failure to change the effective date in the above-mentioned provision resulted in the non-taxable treatment of transfers from pension funds to provident or provident preservation funds with effect from 1 March 2019.

The earlier effective date of 1 March 2019 for the tax neutral transfers from pension to provident or provident preservation funds creates a loophole as the intention was to align the effective date of the tax neutral transfers from pension to provident or provident preservation funds with the effective date of retirement reform amendments, which is 1 March 2021.

PROPOSAL

In order to include the consequential amendment that was inadvertently left out, it is proposed that changes be made in the Income Tax Act to align the effective date of the tax neutral transfers from pension to provident or provident preservation funds with the effective date of retirement reform amendments, which is 1 March 2021. 4

EFFECTIVE DATE

The proposed amendments are deemed to have come into operation on 1 March 2019.

3.2. Income tax: Business (general) – Clarification of the interaction between the anti-avoidance rules dealing with dividend stripping and corporate re-organisation rules

[Applicable provisions: Paragraph 12A and paragraph 43A of the Eighth Schedule to the Act]

BACKGROUND

The anti-avoidance rules dealing with dividend stripping were first introduced in the Income Tax Act (the Act) in 2009. Dividend stripping normally occurs when a shareholder company that intends to disinvest in a target company avoids income tax (including capital gains tax) that would ordinarily arise on the sale of shares. This is achieved by the shareholder company ensuring that the target company declares a large dividend to it prior to the sale of shares in that target company to a prospective purchaser. This pre-sale dividend, which is exempt from Dividends Tax (in the case of a resident dividend that declares and pays a dividend to another resident company), decreases the value of shares in the target company. As a result, the shareholder company can sell the shares at a lower amount, thereby avoiding a much larger capital gains tax burden in respect of sale of shares.

In 2017, amendments were made in the Act in order to strengthen the anti-avoidance rules dealing with dividend stripping. According to the 2017 changes, exempt dividends that are regarded as extra-ordinary dividends, received by a shareholder company are treated as proceeds or income subject to tax in the hands of that shareholder company, provided that the shares in respect of which extra-ordinary dividends are received, are disposed of within a period of 18 months prior to that disposal.

Further, in 2018, amendments that were made in 2017 making provision for the anti-avoidance rules dealing with dividend stripping rules to override corporate re-ogarnisation rules were reversed to ensure that these 2017 amendments do not hinder legitimate re-organisation transactions.

REASONS FOR CHANGE

It has come to Government's attention that certain taxpayers have embarked on abusive tax schemes aimed at circumventing the current anti-avoidance rules dealing with dividend stripping arrangements. These schemes involve millions of rands and have a potential of eroding the South African tax base. These latest schemes involve, for example, a substantial dividend distribution by the target company to its shareholder company combined with the issuance, by that target company, of its shares to a third party or third parties. The ultimate result is a dilution of the shareholder company's effective interest in the shares of the target company that does not involve a disposal of those shares by the shareholder company. The shareholder company ends up, after the implementation of this arrangement, with a negligible effective interest in the shares of the target company without triggering the current anti-avoidance rules. This is because the current anti-avoidance rules are triggered when there is a disposal of shares while these new structures do not result in an ultimate disposal of the shares but a dilution of the effective interest in the target company.

PROPOSAL

It was proposed in Annexure C of the 2019 Budget Review that amendments should be made to the current anti-avoidance rules to curb the use of these new dividend stripping arrangements. Furthermore, given the abusive nature of these arrangements, it was proposed that the amendments should come into effect from the date of the announcement, which was on the 2019 Annual National Budget Day, (i.e. 20 February 2019). This means that the proposed amendments to the legislation on anti-avoidance rules dealing with dividend stripping will come into effect from 20 February 2019 and apply to dividend stripping schemes entered into on or after 20 February 2019.These legislative interventions will not apply in respect of dividend stripping schemes entered into before 20 February 2019.

In terms of the proposed amendments the anti-avoidance dealing with dividend stripping rules will operate as follows:

- The anti-avoidance rules will no longer apply only at the time when a shareholder company disposes of shares in a target company.

In addition, the new anti-avoidance rules will apply to the following anti-avoidance transactions:

- Shareholder companies will, for purposes of the anti-avoidance rules dealing with dividend stripping, be deemed to have disposed of and immediately reacquired its shares in the target company despite them not disposing of their shares, if the target company issues shares to another party and the market value of the shares held by the shareholder company in the target company is reduced by reason of the shares issued by the target company.
- In such an instance, the shareholder company will be deemed as having disposed of a percentage of the shares it holds in the target company

immediately after a share issue that results in a decrease in the value of the shares it holds. The percentage envisaged is the percentage by which the market value of those shares has been reduced by as a result of the issuance of shares.

As with the current anti-avoidance provisions, the amount to be re-characterised will be so much of the tax exempt dividends that were received by or accrued to the shareholder company within 18 months of the deemed that exceed 15 per cent of the higher of the market value of the shares in the target company at the beginning of such 18-month period or market value of the shares held by the shareholder company in the target company.

EFFECTIVE DATE

The proposed amendments will be deemed to have come into operation on 20 February 2019 and apply in respect of shares held by a company in another company if the market value of those shares is reduced by reason of shares issued by that other company, on or after 20 February 2019 to a person other than that company.

4. TAX CASES

4.1. Kangra Group (Pty) Ltd v C:SARS

Kangra Group (Pty) Ltd (Kangra) was a private company through which the late Mr Graham Beck, a well-known South African businessman (Mr Beck), had conducted his various commercial interests, each such interest in a separate operating division, before his death in 2010 but his primary business interest was the exploitation, beneficiation and sale of coal.

Kangra's coal business was hived off in 2003 from Kangra Group and Kangra Coal (Pty) Ltd was established with the necessary mining rights, contracts and the like being transferred to that entity.

Kangra, in December 2001, and an American coal trader, AMCI Export Corporation (AMCI) concluded an agreement which was partly oral and partly written for the delivery of 540 000 metric tons of coal by Kangra to AMCI between January and December 2002 and this was referred to by Kangra as ‘the first agreement’ and it was common cause that both parties had duly performed, at least in part, their obligations in terms thereof.

Kangra and AMCI in December 2002 had concluded a further partly oral, partly written agreement for the delivery by Kangra of a further 750 000 metric tons of coal to AMCI and this was referred to by the parties as ‘the second agreement’ and pursuant thereto Kangra was obliged to deliver that quantity of coal to AMCI during the period January to December 2003.

The agreement in terms whereof Kangra Coal was established (‘the sale agreement’) was concluded on 25 March 2003 with Mr Beck signing on behalf of both parties and the effective date of the sale agreement was 1 July 2003, a date which fell squarely within the currency of the second agreement.

AMCI claimed that Kangra did not deliver the full quantity of coal due under both the first and second agreements by the end of 2003 and it relied on a further oral agreement extending the duration of the agreements so that the balance of the order would be delivered in 2004 at the rate which applied to the second agreement – US$27.50 per metric ton but that extension agreement was disputed.

During the currency of the second agreement there was a significant escalation in the international price of coal and that while the rate agreed upon under the first agreement was US$24.50 per metric ton, in the market place it went up to around US$40 per metric ton in 2003. Notwithstanding the increase in price, and after the establishment of Kangra Coal, Mr Beck accepted that that corporate entity was contractually bound, under the sale agreement, to supply coal to AMCI at US$27.50 per ton.

The effect of the relevant terms of the sale agreement was that Kangra Coal was likely to be less profitable because the Group was locked into the deals with AMCI and Kangra Coal could not sell its coal on the open market at the prevailing higher price.

An attempt was made by Mr Beck to persuade AMCI to accept the delivery of coal in 2004 at a higher price but the buyer stood its ground and hence Mr Beck thereafter elected not to abide by the terms of the second agreement and thereby placed the Group in default of its obligations to AMCI.

It was reasonable to infer in the circumstances that Mr Beck, an astute businessman with an eye for a bargain, looked at the numbers and decided to take his chances on the profits to be made by Kangra Coal selling coal on the open market at the higher price per ton while permitting the Group to default on its obligations to AMCI and, in the result, during August 2004 Kangra refused to deliver the balance of the order to AMCI, thereby repudiating its contractual obligations.

As a consequence of the Group's failure to fulfil its obligations to AMCI, the latter commenced arbitration proceedings in Johannesburg in 2006 for contractual damages for the non-delivery of coal, claiming in excess of US$15 million from the Group and the claim was based on alleged short deliveries under the first and second agreements.

AMCI had averred that as a consequence of the Group failing to honour its contractual obligations, AMCI was in turn unable to honour its obligations to a third party to which it was contractually bound to on-sell the coal and had been exposed to claims for damages.

The arbitration proceedings were opposed but were eventually settled on 5 September 2007 when Mr Beck conceded the claims and agreed that the Group would pay AMCI the sum of R90 million and a simple two page agreement was concluded between the two corporate principals.

Mr Beck had effectively conceded the entirety of AMCI's claim and had settled it with a lump sum payment which was due and payable forthwith and it was common cause that such payment was duly made by Kangra to AMCI the following day, 6 September 2007.

Although a black empowerment partner, Shanduka, subsequently acquired effective control of Kangra Coal, that was not relevant to these proceedings as all executive and management decisions relevant to this matter were made by Mr

Beck personally and the events relevant to this case occurred before Shanduka acquired control of Kangra Coal.

When Kangra had submitted its return for the 2007 tax year it had sought to claim a deduction of R90 million arising from the settlement with AMCI.

Kangra's stance was that the aforesaid amount had been reasonably and bona fide incurred by the Group in the production of income and that the amount had been wholly and exclusively laid out and expended for the purposes of the Group's trade.

SARS had assessed Kangra on the basis that the said amount of R90 million was not deductible, hence the appeal by Kangra to the Cape Town Tax Court (see ITC 1909 (2017) 80 SATC 342 per Allie J).

Kangra was unsuccessful in the Tax Court where the nub of the case was whether the payment by the Group of the amount agreed upon in settlement of the arbitration proceedings was deductible as 'relevant expenditure' in terms of s 11(a) read with s 23 of the Income Tax Act.

Kangra thereafter approached the Western Cape Division on appeal in terms of section 133 of the Tax Administration Act.

At the commencement of the trial Kangra made certain additional concessions to the effect that:

- Kangra Coal delivered coal to AMCI in terms of the second agreement on its own behalf and not on behalf of Kangra:
- The obligation to deliver coal to AMCI in terms of the second agreement was transferred from the Group to Kangra Coal;
- On 5 August 2004 Kangra Coal and not Kangra repudiated its further obligation to deliver coal to AMCI in terms of the second agreement.

Judge Gamble held the following:

(i) That section 11(a) of the Income Tax Act, which dealt with deductions which may legitimately be made by a taxpayer in relation to its taxable income provided that in determining the taxable income derived by any person from carrying on any trade, deductions may be allowed in respect of expenditure and losses actually incurred in the production of the income, provided that such expenditure and losses are not of a capital nature.

(ii) That the approach to the question of whether an expense had been incurred in the production of income, as contemplated in section 11(a), involved determining whether the act to which the expenditure was attached was performed in the production of income and whether the expenditure was linked to it closely enough. Accordingly, it has been said that there must be a sufficiently distinct and direct relationship or link between the expenditure incurred and the actual earning of the income.

(iii) That, consequently, it was incumbent on Kangra to establish before the Tax Court that the conclusion of the settlement agreement with AMCI was linked 'distinctly and directly' with the actual earning of income by the Group before it could qualify as a deduction. In other words, the question was whether Kangra had proved that such income as was produced by repudiating the supply agreements with AMCI had accrued to it as a consequence of such repudiation and to answer that question it was necessary to have regard to the interplay between the relevant contractual obligations at play in 2003-4.

(iv) That in considering the application of the relevant provisions of the Income Tax Act, it was necessary to consider the contractual obligations imposed on Kangra and these were two-fold. Firstly, there were the obligations arising from the first and second agreements in terms whereof the coal was to be delivered by the Group to AMCI and, secondly, there were the terms relating to the sale agreement.

(iv) That the interpretation of the various agreements(the settlement agreement, the purchase orders with their sale terms and conditions (STCs) and the sale of the coal business) must be considered in accordance with the established principles enunciated in KPMG Chartered Accountants (SA) v Securefin Ltd 2009 (4) SA 399 (SCA) at [39].

(v) That, accordingly, it will be seen that clause 9 of the STC's preserves

AMCI's common law right to hold the Group liable for any damages suffered by it as a consequence of the latter's failure to perform in terms of the purchase order. Further, one finds that clause 11 of the STC's precludes an assignment by the Group of its obligations under either the first or second agreement to any other party without the prior written consent of AMCI and all of these rights and obligations were subject to the sole memorial clause contained in clause 1 of the STC's, which precludes reliance on, for instance, an oral variation of the STC's.

(vi) That, in regard to SARS' contention that Kangra had actually ceded the right to claim any income tax deduction in respect of the settlement agreement to Kangra Coal, there was no evidential basis for SARS' bald assertion that the obligation to deliver the balance of the coal due under the second agreement must have been ceded by Kangra to Kangra Coal. On the contrary, the deeming provisions of clause 12.3 apply to the facts at hand and that was the complete answer to the SARS' argument regarding the purported cession and, in the circumstances, absent any such cession, there was no privity of contract between the AMCI and Kangra Coal and it could only look to Kangra for its contractual damages.

(vii) That, therefore, Kangra was contractually bound to AMCI to deliver the quantity of coal agreed upon, and, when Mr Beck gave the instruction not to deliver further, Kangra (and not Kangra Coal) was the party which repudiated the first and second agreements. Further, such repudiation was fundamental to the settlement agreement and no other reasonable interpretation can be placed on the agreement in the circumstances.

(ix) That the fact that Kangra Coal invoiced AMCI directly for the coal it supplied to it and received payment therefore directly from AMCI, did not negate or undermine the existence of Kangra's on-going obligation vis a vis AMCI to deliver coal to it and Kangra Coal was obliged, in terms of clause 12.3 of the sale agreement, to assume Kangra's obligations to AMCI and it was entitled, as an adjectus solutionis causa, to receive payment directly from AMCI.

(x) That, further, it must be noted that under clause 12 of the STC's the parties expressly agreed that Kangra would be liable for any tax implications arising from, inter alia, the second agreement and pursuant thereto this obligation naturally fell at the door of Kangra.

(xi) That it could be said that the settlement agreement was the price that was paid for the opportunity to earn additional income from selling coal at US$40 rather than US$25 per ton: a return of more than 60% over what would have been received had the coal been sold to AMCI. The question that follows is, once again, two-fold. Can the payment of contractual damages such as that incurred by Kangra in settling the arbitration claim be termed expenditure in terms of section 11(a) of the Act and, if so, did such expenditure result in Kangra earning income?

(xii) That it may well be that an incident of trading in coal is the breaching of a contract of sale. For example, there may be a breakdown in the railway system resulting in the load not reaching the port on time and the supplier may have to face a damages claim from the buyer arising out of non-delivery. But that is a wholly different situation to one where the supplier wantonly breaches its obligations in order to secure a more lucrative contract elsewhere.

(xiii) That if the law will not tolerate the consequences of commercial inefficiency for purposes of a deduction how can it be suggested that an intentionally unlawful act can qualify as such? And this was precisely what the court held in Port Elizabeth Electric Tramway Co Ltd v CIR 8 SATC 13.

(xiv) That in the result payment of the sum of R90 million by Kangra in settlement of the claim in arbitration did not constitute expenditure as contemplated under s 11(a) of the Act but even if the court was wrong on that score, it was of the view that the payment in question could not be regarded as allowable expenditure under the Act because it was not incurred in the production of Kangra's income.

(xv) That in the result Kangra had not established that the relevant expenditure had resulted in it earning any income, either in that tax year or subsequent thereto: all income from coal sales after 1 July 2003 had accrued for the benefit of Kangra Coal. Furthermore, the fact that Kangra had continued to earn income from other sources after the disposal of the coal division to Kangra Coal in 2003 did not, in the court's view, establish a sufficiently direct link between the expenditure claimed and the income earned by the Group.

(xvi) That it was evident, furthermore, that any income associated with the alleged expenditure actually accrued to the benefit of Kangra Coal. That was the entity which reflected a substantial increase in turnover for the fiscal years in question and that entity had already rendered its tax returns and had claimed all related expenditure for those years.

(xvii) That in the result the court agreed with the conclusion arrived at by the Trial Court (see ITC 1909 80 SATC 342) that Kangra had not discharged the onus of establishing that it was entitled to claim the general deduction contended for and the appeal against that finding had to fail.

(xviii) That, in regard to the levying of section 89quat interest, the authorities had clearly established that reliance on incorrect professional advice was not a bar to claiming a remittance of interest. What mattered only was whether such advice had been sought by the taxpayer and it followed that the failure on the part of the taxpayer in this case to produce the opinion from Senior Counsel before the Tax Court in order that that court could assess the cogency of the advice rendered to the client, was not fatal to its case. What was important was the fact that the taxpayer took such professional advice – something which was not disputed by SARS – and therefore had behaved reasonably in the circumstances.

(xix) That, consequently, the appeal against the refusal of the Tax Court to grant Kangra a remission in the payment of interest should succeed.

Appeal dismissed save that the interest levied by the Commissioner in terms of s 89quat(3) should be remitted to Kangra.

4.2. L Taxpayer v C:SARS

The taxpayer was a qualified solicitor in England and Wales but was not qualified as an attorney in South Africa but had been offered a position by a firm of attorneys within its corporate department which he had accepted and took up employment in early October 2004.

At all material times it had been a term of his employment contract that he must loan funds to the firm to assist with ongoing working capital requirements. Initially this loan had been funded by crediting his loan account with 20% of his annual gross remuneration in 36 equal monthly instalments.

The taxpayer had participated in the profits of his firm at a percentage (his participation percentage) that varied marginally year-on-year and his budgeted profit share for each year was determined as his participation of the budgeted profits for that year. He was entitled to a monthly draw (akin to a salary, including deductions) which, after expiration of the initial period referred to above, was determined as 65% of his budgeted profit share for the year, spread over 12 months. The remaining 35% was retained in part as a margin for any shortfall between actual profit and budgeted profit, and as an obligatory loan to fund cash flow and this obligatory loan constituted the growth in the firm's loan, year-on-year. Interest accrued monthly at prime rate on the amount standing to the credit of the firm's loan from time to time.

Distributions based on actual profit and available cash on hand were made periodically and, in the case of the taxpayer, were debited against the firm's loan. The taxpayer also received payment of interest accrued on that loan which was treated as taxable income in his hands and he could not demand repayment of the firm's loan for so long as he remained an employee.

The taxpayer, about ten months after he had commenced his employment, in August 2005, had purchased an immovable property for residence purposes and the purchase price was paid with the proceeds of a loan from Investec Bank (the Investec loan) secured by way of a mortgage bond registered against the title deed of that immovable property. This loan was a so-called access facility and by 1

March 2009 the taxpayer had made payments into, and withdrawals from, the facility to fund a variety of expenses and continued to do so. The capital balance of the Investec loan attracted interest during the relevant period at the rate of prime minus 1.85% per annum.

The taxpayer, for the tax years in issue, claimed as a deduction a portion of the interest accruing on the Investec loan ('the interest expense') against the interest received on his firm's loan ('the interest income').

The interest deduction claimed was limited in two respects. First, it was calculated on an amount equivalent to the capital balance of the taxpayer's firm's loan and, second, it was less than the interest income received on his firm's loan due to the interest rate differential between the two loans.

The taxpayer had testified that, had the full amount of his firm's loan been repaid in the discretion of his employer during the 2010 to 2012 tax years, he would have paid it into the Investec loan.

He also testified that, although clear from the agreement concluded in respect of the Investec loan that its initial purpose had been to fund the purchase of his residence, if he had no obligation to maintain his firm's loan its proceeds would have been paid into the Investec loan, thereby reducing the capital and interest incurred thereon.

The taxpayer contended that it was for the aforesaid reasons that he had claimed the deductions in question on the basis that there was a sufficiently close connection between the interest income and the interest expense for purposes of s 11(a) of the Income Tax Act as read with Practice Note 31.2.

The central issue in this case was whether, as the taxpayer contended, there was a sufficiently close connection between the interest expense incurred by him on a loan facility with Investec Bank and the interest earned from time to time on the outstanding balance of his director's loan to his employer for purposes of s 11(a) of the Income Tax.

The taxpayer, in his tax returns for the years in question, had claimed as a deduction a portion of the interest expense on the Investec loan to the extent that he had to 'fund' his firm's loan.

The taxpayer's principal argument was that there was a direct causal link between the interest income and the interest expense, supported by his uncontested evidence that if the firm's loan were to be repaid to him, such repayment would in fact be appropriated to reduce the balance of the Investec loan (and concomitantly the interest incurred thereon) as evidenced also by what actually occurred since at least March 2010 and, consequently, the reduction in the interest accrual brought about by such repayment directly resulted and would result in a reduction of the interest expense.

SARS had disallowed the deduction essentially on three grounds:

- SARS Practice Note 31 requires the underlying capital to be borrowed and then lent for the interest income to qualify for the purposes of s 11(a) of the Act;
- The interest on the amount owed under the Investec loan was not incurred in the production of interest income on the taxpayer's firm's loan;
- The firm's loan was not sourced from the Investec loan.

This case was an appeal in terms of section 133 of the Tax Administration Act against the judgment of Yekiso J in ITC 1895 (2016) 79 SATC 179 in which it had upheld the SARS' disallowance of the interest deductions claimed by the taxpayer in respect of the 2010 to 2012 years of assessment.

The Cape Town Tax Court had formulated the issue before it as follows:

> 'The question . . . .is whether the amount in credit in the taxpayer's loan account constitutes monies borrowed on the basis of which the expenditure incurred, in the form of interest paid on the home loan account, [is such as] to justify a conclusion that the interest so paid could be said to have been expended to earn interest income.'

It found that from the outset the taxpayer knew that the firm's loan could never be applied to 'reduce' the Investec loan for so long as he remained employed. This was thus a fact known to him when he took out the Investec loan. The taxpayer was not entitled to the exemption contained in PN 31.2 because it contemplates interest earned on capital or surplus funds actually invested whereas in the taxpayer's case it was simply interest income earned on income retained by his employer in terms of his contract of employment. Moreover, it found that the interest contemplated in PN 31.2 was that earned on funds first received and thereafter invested at the taxpayer's election.

SARS contended that the purpose for which the Investec loan was taken was unrelated to the existence of the firm's loan and that there was thus no direct causal link between the interest income on the firm's loan and the interest expense on the Investec loan and, further, the interest incurred by the taxpayer on the Investec loan was a private expense 'totally unrelated to the income earning part of his business.'

Judge Cloete held the following:

(i) That, as a starting point, and as correctly identified by the Tax Court, SARS did not disallow the deduction claimed due to the taxpayer's failure to comply with the requirements contained in PN 31.2 but instead those contained in PN 31.1.

(ii) That PN 31.1 concerned itself with whether or not a deduction should be allowed on the basis that the interest expense was incurred in the carrying on of a trade, whereas PN 31.2 proceeds from the premise that the person concerned does not carry on a trade with regard to the expense, in which event the deduction is allowed under certain specified circumstances.

(iii) That although given SARS' abandonment of its reliance on s 23(g) of the Act, the taxpayer was not obliged to show that the interest expense was incurred for the purposes of trade, it did not therefore follow that the taxpayer had himself relied on PN 31.1 in claiming the deduction as he had always relied on PN 31.2.

(iv) That, accordingly, the only question to be answered was whether the interest expense on the Investec loan was incurred in the production of the interest income on the firm's loan and this in turn required an assessment of the closeness of the connection between the income and the expense.

(iv) That where there is a 'clear and close causal connection' this is an important consideration. The causal connection is also not necessarily established between the raising of the loan and the initial use to which the capital raised is put. It is the purpose of the expenditure, i.e. the purpose in incurring the interest expense that must be considered, together with what that expenditure actually effects, i.e. causes to happen or brings about.

(v) That the taxpayer's essential contention is that the purpose of maintaining the relevant portion of the Investec loan was to allow him to facilitate the firm's loan, which generated interest income for him and, therefore, the purpose of the incurral of the interest expense, to that degree, was to produce such interest income and it also had that effect.

(vi) That the Tax Court appeared to have misconstrued the evidence before it in two material respects. First, it stated that the periodical distributions made by the taxpayer's employer pertained only to interest accrued on the firm's loan. Second, it stated that the Investec loan was initially a 'pure' home loan which was converted at a later stage to an access facility. The taxpayer's evidence instead established that distributions were not limited to the interest component only, and that the access facility had been in place from the time that he had purchased his residence.

(vii) That in the present matter the taxpayer fell somewhere between the facts in CIR v Smith 60 SATC 397 and ITC 1583 57 SATC 58. On the one hand, he cannot demand repayment of his firm's loan for so long as he remained employed and this not only applied to the full amount of the loan, but also to any portion thereof. On the other hand, as a fact, he received payment of distributions which were debited against his firm's loan.

(ix) That, assuming in his favour that the funds standing to the credit of his firm's loan from time to time were 'capital' or 'surplus' funds, any distributions made are nevertheless entirely within the discretion of his employer. Put differently, he could not rely on the existence of any anticipated distribution. It was also a term of his employment contract that a certain amount must at all times be retained in his firm's loan for his employer to fund working capital requirements. Potentially therefore, and depending upon actual profit and available cash on hand, he might not receive any distribution (other than interest earned) at all and that he in fact received such periodic distributions during the relevant period should not be conflated with any entitlement or potential entitlement to receive them.

(x) That the taxpayer had intended to pay, and did pay, those distributions he received into the Investec loan did not necessarily mean, that without them, he was unable to reduce the balance on the Investec loan. There was no evidence to suggest that he was solely reliant on those distributions for this purpose and this was where the taxpayer's argument broke down.

(xi) That the chronology showed that the Investec loan, albeit an access facility from inception, was only acquired some ten months after the taxpayer became employed, at a time when he well knew that he could not place any reliance upon receipt of either the full payment, or partial repayment, of the firm's loan. The distributions he received were to all intents and purposes fortuitous, being dependent upon extraneous factors.

(xii) That had the taxpayer not received the distributions he would still have had to maintain the Investec loan in order to benefit from the access facility. He has in fact maintained the Investec loan and therefore must have done so from resources other than the distributions alone, whether from income or other capital injections. While his evidence that he would have repaid the Investec loan had he received repayment of his firm's loan must be accepted, the purpose of the Investec loan, during the relevant periods, was to provide him with an access facility and not to maintain, as he submits, his firm's loan. Nor did the interest expense on the Investec loan bring about the interest income on the firm's loan as that interest income accrued to him irrespective of the existence of the Investec loan.

(xiii) That, accordingly, there was not a sufficiently close connection between the interest expense incurred by the taxpayer on the loan facility with Investec Bank and the interest earned from time to time on the outstanding balance of his director’s loan to his employer.

Appeal dismissed with no order as to costs.

4.3. C:SARS v Danwet 202 (Pty) Ltd

Danwet 202 (Pty) Ltd (Danwet) had conducted business as a property owning company and had received its income from letting property.

SARS had, during 2013, conducted an audit of Danwet’s business and, as a result, had raised an additional assessment for the 2012 year of assessment in the sum of R1 208 919.44 which represented a significant increase from the initial assessment of R19 915.

Danwet, on 7 October 2013, had objected to this additional assessment and on 7 November 2013 SARS responded to the objection by partially reducing the amount of the additional assessment.

Danwet’s tax consultant, Mr Jan Coetzee, had on 9 December 2013 filed a notice of appeal against the partial disallowance of the objection on the e-filing platform of SARS and attached to the notice of appeal was a document which set out the reasons for Danwet’s appeal in some detail.

More than six months passed without any attempt by Danwet to enquire into the status of its appeal until 30 June 2014 when Mr Coetzee telephoned SARS call centre to enquire about the status of the appeal and he was advised that there was no record of the appeal on SARS' e-filing platform.

According to Mr Coetzee he had then spoken to a compliance officer in the SARS' office who had advised him to re-submit the appeal and on 2 July 2014 he had done so, together with a request for condonation, explaining that he believed that the notice of appeal had been correctly uploaded but cited the non-functionality of the ADSL line in that the Telkom ADSL lines had been water logged in the area where his office was situated and he suggested that in the process of submitting the notice of appeal, the Telkom ADSL line had stopped working, thereby preventing the full transmission of the relevant documents on SARS' e-filing platform.

SARS had refused to grant condonation as the appeal was filed out of time in terms of the Rules of Court and on the basis of its interpretation of section 107(2)(a) and 2(b) of the Tax Administration Act.

SARS contended that section 107(2)(a) or (b) provided that a senior SARS official may extend the period within which an appeal must be lodged up to 21 days if reasonable grounds exist for the delay or up to 45 days if exceptional grounds exist for the delay and no discretion is provided to SARS to extend the period beyond 75 days. In this case the notice of appeal was delivered on 2 July 2014 which was more than 75 days late and accordingly SARS had no discretion to condone and hence justified its refusal of an extension for the lodging of an appeal.

Danwet then successfully applied for condonation for the late filing of the appeal before the Gauteng Tax Court (Case No 0018/2016 per Masipa J).

The issue to be determined was whether the Tax Court had the necessary jurisdiction to entertain and thereafter grant an application for condonation of the late filing of the appeal against the assessment.

Judge Davis held the following:

(i) That a decision in terms of section 107(2) of the Act is ‘a decision’ for the purposes of sections 104(2) and 129(2) of the Act and it followed that, irrespective of the merits of the interpretation of section 107(2) as contended for by SARS, a decision not to extend the prescribed period fell within the definition of ‘decision’ for the purposes of section 129(2) of the Act and hence the Tax Court, subject to compliance with the procedures set out in section 104(3) of the Act, had the jurisdiction to determine an application for condonation for the failure by a taxpayer to lodge an appeal timeously.

(ii) That, had Danwet objected to SARS' decision to refuse an extension of time, as it was obliged to do by section 104(3), the Tax Court would have had the power to order that an extension should be granted in terms of section 117(3) of the Act read with Rule 53 of the Tax Court Rules which confers on the Tax Court the power to grant condonation and allow an extension of time in which to lodge a notice of appeal.

(iii) That it followed that a decision to condone the late lodgement of an appeal was appealable to the Supreme Court of Appeal in terms of section 129 read with section 133(1) of the Act, but Danwet had failed to comply with the requirements set out in section 104(3) and accordingly the Tax Court did not have jurisdiction to hear the condonation application.

(iv) That section 104(3) provided that 'a taxpayer entitled to object to an assessment or 'decision' must lodge an objection in the manner, under the terms, and within the period prescribed in the 'rules'. It was common cause that no objection was lodged against the decision taken by SARS' representatives to invalidate the appeal by refusing to extend the period within which the appeal could be brought.

(iv) That the Tax Court Rules were hardly a model of clarity when dealing with the prescribed period within which a taxpayer must object to a decision such as a refusal to extend the prescribed period. What was clear however was that, in the event that a taxpayer seeks to have such a refusal reversed, section 104(3) provides expressly that the taxpayer is obliged to lodge an objection against the decision taken by a senior SARS official acting in terms of section 107(2) of the Act.

(v) That, accordingly, section 104(3) obliged Danwet to object to the decision taken by SARS on 15 February 2015 to invalidate its appeal and it failed to do so and it followed that there was no valid application before the Tax Court which, therefore, did not have jurisdiction to hear the application.

Appeal upheld with costs, including the costs of two counsel.

4.4. C:SARS v Digicall Solutions (Pty) Ltd

Digicall Solutions (Pty) Ltd (Digicall) name on incorporation on 24 February 2000 was B Clear and Simple Telecommunications South Africa (Pty) Ltd which later changed its name to that of Digicall and its sole shareholder was B Digital Ltd.

Digicall established a call centre facility in Cape Town which sold MTN and Vodacom contracts via the call centre to customers.

Digicall had an assessed loss in 2001 and in December 2001 it terminated its service provider contracts and disposed of its subscriber bases to MTN and Vodacom. After December 2001 disputes arose between the Digicall and MTN over amounts owing to it.

Digicall, despite terminating the service provider contracts and disposing of its subscriber bases, continued to own the Cape Town call centre which had movable assets and it was bound to a lease agreement in respect of its premises.

At the beginning of 2002 B Digital Ltd wished to disinvest from South Africa and Ian Lloyd, then a director and employee of the Digicall, offered an investment company, Global Capital, the opportunity to acquire the Digicall's shares and to provide services to Cell C. Global Capital took up the offer and for this purpose acquired a shelf company, Basfour 2544 (Pty) Ltd, later changing its name to SDM. Global Capital and Lloyd were SDM's major shareholders and other shareholders were Messrs Nestadt, Bloch and Benatar of Global Capital.

On 15 March 2002 SDM, B Digital and the Digicall concluded an agreement with an effective date of 1 March 2002. In terms of that agreement, SDM acquired the Cape Town call centre at a purchase price of R1 million, took over the lease and secured an option to purchase the Digicall's shares. B Digital did not wish to dispose of the shares at that stage because of the Digicall's pending claims against MTN and SAS Security.

SDM proceeded to provide services to Cell C from the Cape Town call centre, but only utilised 30 of its 120 seat capacity for this purpose. A decision was then taken to sell the Cape Town call centre because Cell C was able to accommodate SDM's business in its own call centre.

The litigation between the Digicall and MTN was resolved on 10 September 2002 and certain amounts became payable to it by MTN. On 19 September 2002 SDM exercised its option to purchase the shares. The written agreement giving effect thereto was ultimately only concluded on 5 March 2003. SDM purchased the shares for R1.00. It was a condition of the share sale agreement that B Digital (and not the Digicall) would receive any amounts recovered as a result of the litigation with MTN and SAS Security.

During the latter part of 2002 SDM had, however, already started looking for a buyer for the Digicall in accordance with the earlier decision to sell. It was at this point that Glasfit had expressed interest.

On 7 May 2003, SDM resold to the Digicall its ‘business and assets’ for R1 million with effect from 6 March 2003. In reality what was resold was the infrastructure of the Cape Town call centre which was essentially comprised of movables.

The Cell C service provider contracts remained with SDM and it would appear that the lease also remained with SDM. Payment of the sum of R1 million was effected by crediting SDM’s loan account in the Digicall. The effect of this transaction was thus that SDM owned 100% of the shares in the Digicall and the Digicall in turn owned ‘the business’ of the Cape Town call centre and it was common cause that, on conclusion of the share sale agreement on 5 March 2003, the Digicall was a shell.

On 3 October 2003 SDM offered to sell 100% of the shares in the Digicall to Glasfit for the sum of R3.68 million. The offer was accepted subject to satisfactory due diligence and certain other conditions. The formal agreement was concluded on 25 November 2003 with effect from 1 October 2003, with SDM disposing of its shares in the Digicall to Glasfit (the shares were ultimately transferred directly to Nutbridge as Glasfit’s nominee). At the same time Glasfit and SDM concluded an agreement in which SDM was to rent 30 seats at the Cape Town call centre from the Digicall at R7000 per seat per month for a period of 18 months terminating on 31 March 2005, with the lease remaining valid and enforceable until at least that date (the lease was assigned to Nutbridge by SDM). Again, the Digicall’s claims against MTN and SAS Security were excluded in favour of B Digital.

After conclusion of the agreement on 25 November 2003 the Glasfit group moved its central electronic branch into the Digicall, conducted the business which PG Glass outsourced to it in the Digicall and, following the establishment of its consolidated call centre (CCC) in Bryanston, Johannesburg, in the first part of 2004, operated the CCC in the Digicall.

Under the control of Nutbridge, the Digicall's name was changed to Digicall Solutions and it received income or income accrued to it, and it utilised the Digicall's assessed losses during the 2004 to 2008 years of assessment.

Digicall had accumulated an assessed loss of approximately R86 million by the end of its 2003 year of assessment, 30 June 2003.

The distinctive feature in the present case was that two changes in the shareholding of the Digicall occurred in successive tax years. The first sale of shares took place on 5 March 2003, during the Digicall's 2003 year of assessment, when they were purchased by SDM. The second, on 25 November 2003, during the Digicall's 2004 year of assessment, when they were purchased from SDM by Glasfit, which thereafter nominated Nutbridge as the purchaser.

A portion of the consolidated assessed loss in question was set-off against the Digicall's income during the 2004 year of assessment, after the shares had been acquired by Nutbridge. The balance was thereafter set-off against the income of the Digicall during the 2005–2008 income tax periods and these amounts were subsequently disallowed SARS.

It was common cause that only the first change in shareholding was relevant to the determination of the appeal and it was also common cause that the change in shareholding requirement in s 103(2) of the Act had been met.

Prior to the determination of the dispute before the Tax Court, SARS applied to amend the grounds of assessment to include the second change in shareholding as justification for the disallowance of the assessed loss during the 2005–2008 income tax periods but the application was dismissed (see ITC 1876 77 SATC 175) on the basis that the first change in shareholding was foundational to SARS' disallowance of the use of the assessed loss.

SARS had issued additional assessments against the Digicall during November 2010 in respect of the 2005–2008 income tax periods, disallowing the utilisation by the Digicall of certain assessed losses during these periods.

Digicall, having been aggrieved at the additional assessments, lodged an objection which was dismissed by SARS and thereafter successfully appealed to the Cape Town Tax Court (see ITC 1888 79 SATC 23) which granted an order setting aside the assessments and referred the matter back to SARS for re-assessment on the ground that the Digicall was entitled to set-off the assessed loss against its income during the relevant years.

SARS then appealed to the full court of the Western Cape Division of the High Court (see C:SARS v Digicall Solutions (Pty) Ltd 80 SATC 125) which dismissed the appeal with costs on the ground, inter alia, that the requirements of s 103(2) of the Income Tax Act had not been satisfied and special leave to appeal was thereafter granted by the Supreme Court of Appeal to SARS.

In terms of section 103(2) of the Act SARS had to be 'satisfied' that three requirements were fulfilled to justify the disallowance of the assessed loss, namely:

- A change in the shareholding of the Digicall had been effected; and
- The change in the shareholding resulted directly or indirectly in income being received by, or accruing to the Digicall, during any year of assessment, and;
- The change in the shareholding was a transaction concluded for the sole or main purpose of utilising the Digicall's assessed loss, in order to avoid liability for the payment of tax on income.

Digicall had contended that the first change in shareholding could not have been effected for the sole or main purpose of utilising the assessed loss, as there was no income during its 2003 year of assessment, against which the assessed loss could be offset.

Judge Swain held the following:

(i) That section 103(2) of the Act expressly provides for 'the purpose of utilising any assessed loss' to avoid liability 'for the payment of any tax.' It also expressly disallows the set-off of 'any such assessed loss' against 'any such income.' Therefore, the set-off of any assessed loss against any income that is received directly or indirectly by the taxpayer company, as a result of the change in its shareholding, will be disallowed where the sole or main purpose in effecting the change in its shareholding, is to avoid liability for, or to reduce the amount of tax payable, by the taxpayer.

(ii) That the purpose requirement of the subsection may accordingly be satisfied by reference to any year of assessment in which income is received, whether directly or indirectly as a result of the change in shareholding of the taxpayer company, which was effected, whether solely or mainly, for the prohibited purpose and the court in any event would show that the first change in shareholding was directed at that ultimate purpose – utilisation of the assessed loss by the Digicall.

(iii) That section 103(2) provides that when it is proved that a change in shareholding has occurred which results in the avoidance, or the postponement of liability for payment of any tax, or its reduction, it will be presumed that the change in shareholding was entered into, or effected solely or mainly for the purpose of utilising the assessed loss, in order to avoid liability for the payment of any tax on income.

(iv) That in Glen Anil Development Corporation Ltd v SIR 37 SATC 319 it was held that the Digicall therefore bore the onus in terms of section 103(4) of the Act to rebut the presumption by proving that the change in shareholding was not effected solely or mainly for the prohibited purpose.

(iv) That central to a determination of the issue of whether the first change in shareholding was effected solely or mainly for the prohibited purpose, was an examination of the interaction between Mr Benatar, Mr Evans, Mr Kluever and Mr Allers during the period after SDM had exercised the option to purchase the shares on 19 September 2002, their subsequent purchase by SDM on 5 March 2003 and their purchase by Glasfit from SDM on 25 November 2003 and in order to place this crucial period in context, it was necessary to briefly examine the unsuccessful financial history of the Digicall, before the first acquisition of the shares in the Digicall by SDM.

(v) That it was clear that the Digicall was not profitable from the outset and had reflected a staggering assessed loss for the year of assessment ending 30

June 2001, of R47 884 445, which they all realised had a built-in tax advantage, with a concomitant commercial benefit. The professed reason for selling the shares in the Digicall to Global Capital was to provide services to a rival cellular provider namely Cell C, with the object of making a profit but no details were furnished of any business strategy to transform the Digicall from an abject failure into a profitable entity, by selling services for Cell C in competition with its former suppliers and for a number of reasons it was improbable that this was the true reason for selling the shares in the Digicall.

(vi) That it was grossly improbable that Mr Benatar and Mr Lloyd, who had intimate knowledge of the Digicall's lack of success in selling contracts for MTN and Vodacom, would have been willing to be shareholders in SDM and acquire the business of the Digicall with the sole object of making a profit, without a prior commitment from Cell C and again it was improbable that Mr Benatar with his intimate knowledge of the history of the Digicall, only came to the realisation that they only needed 30 out of the 120 seats in the call centre after they had restarted the business of the Digicall.

(vii) That such ill-informed conduct was only explicable on the basis that the purpose in acquiring the Digicall was not to make a profit, but to ensure that it was trading, albeit at a loss, as at 30 June 2002. SDM was aware of the large assessed loss of R47 884 445 which could only be preserved and carried forward to the following tax year, if the Digicall traded and the acknowledgement by Mr Benatar that if the assessed loss was to be utilised the Digicall would as it were, have to be 'brought back from the grave' and start trading again, revealed their true purpose.

(ix) That a number of concessions made by Mr Benatar together with the fact that a decision had been taken to sell the shares in the Digicall even before they had been purchased by SDM, again revealed that their true purpose in acquiring the shares even at this early stage, must have been to utilise the assessed tax loss.

(x) That the objective fact was that the Digicall was a dormant company with a very large tax loss and this was known by the board of Glasfit from the outset, when it discussed the proposed purchase of the shares from SDM.

(xi) That the purpose of SDM in acquiring the shares in the Digicall and thereafter transferring the business back to the Digicall, must therefore have been to ensure that the Digicall was a going concern as at the end of June 2003, in order to satisfy the requirements of section 20 of the Act. This goal having been achieved, the Digicall again ceased trading at the end of June 2003, in the same manner and with the same goal as it had ceased trading at the end of June 2002 and the result was that the assessed loss in the Digicall was not only preserved by SDM, but was increased whilst under its control during the period 5 March 2003 to 30 September 2003, by R21 115 220.

(xii) That the evidence revealed that the relevant role players were all posturing with the objective of the utilisation of the assessed loss by the Digicall.

(xiii) That the conduct of SDM during this period was directed at preserving the assessed loss, by ensuring that it was carried over to the following tax year and, on the probabilities, the object in maintaining that negotiations had broken down with Glasfit must have been to prevent an inference being drawn that the conduct of SDM in preserving the assessed loss was to benefit Glasfit and it was improbable that the negotiations broke down in March 2003.

(xiv) That the oft repeated evidence of Mr Allers and Mr Kluever that the purpose in buying the shares in the Digicall was the acquisition of the Cape Town call centre, and not the opportunity to utilise the assessed loss to avoid liability for the payment of tax, was grossly improbable for several reasons.

(xv) That the repeated attempts by Mr Allers and Mr Kluever to diminish the importance of the tax loss in the Digicall, by steadfastly maintaining the assessed loss only affected the value to be offered for the Digicall, were not only disingenuous, but were also cogent evidence of what their real purpose was in acquiring the shares in the Digicall.

(xvi) That an objective review of all the relevant facts and circumstances was required in order to determine the motive, purpose and intention of SDM in acquiring the shares in the Digicall. The direct evidence of Mr Benatar that the purpose of SDM in purchasing the shares in the Digicall, was to provide services to the cellular provider Cell C with the object of making a profit, falls to be rejected when weighed and tested against the probabilities and inferences to be drawn from the established facts. For the same reasons, the evidence of Mr Allers and Mr Kluever that the purpose of Glasfit in purchasing the shares in the Digicall, was to acquire the Cape Town call centre for the venture, also falls to be rejected. In both the first and second acquisition of the shares in the Digicall, the sole or at the very least the main purpose of SDM and Glasfit respectively in purchasing the shares, was to utilise the assessed loss by setting it off against income to be received by the Digicall in the ensuing tax years, in order to avoid liability for the payment of tax on such income. Mr Benatar, Mr Lloyd, Mr Kluever and Mr Allers were intimately involved in all the dealings from inception and all the related transactions were structured so as to enable the utilisation of the assessed loss ultimately by Glasfit or its nominee.

(xvii) That, therefore, the Digicall had failed to discharge the onus of proving that the first change in shareholding when SDM purchased the shares in the Digicall, was not effected solely or mainly for this prohibited purpose and the court a quo had accordingly erred in directing its attention to the second acquisition of the shares in the Digicall by Glasfit, in order to determine whether the purpose requirement of section 103(2) of the Act, had been satisfied.

(xviii) That the court then considered the further requirement of section 103(2) of the Act, namely whether the first change in shareholding in the Digicall when SDM acquired the shares, had the direct or indirect result that income was received by, or accrued to the Digicall, during any year of assessment.

(xix) That section 103(2) provided that the change in shareholding must result, directly or indirectly, in income being received by, or accruing to the

Digicall, during any year of assessment and it was therefore clear that the direct or indirect receipt of income by the Digicall, did not have to occur in the same tax year as the change in shareholding of the Digicall and it may occur in any year of assessment, provided that it resulted directly or indirectly from the change in shareholding.

(xx) That in ITC 1123 31 SATC 48 it was held whether income had been received by, or had accrued to a company 'as a direct or indirect result' of the change in shareholding, was a question of fact and, consequently, whether the second change in shareholding precluded a finding that the income received by the Digicall resulted directly or indirectly from the first change in shareholding, was an issue of fact which had to be resolved on a consideration of the evidence.

(xxi) That in the court's view the second change in shareholding would preclude a finding that the income in question resulted directly from the first change in shareholding but it would not, however, preclude a finding that the income resulted indirectly from the first change in shareholding.

(xxii) That the conclusion that SDM purchased the shares in the Digicall with the sole, or at the very least, the main purpose, of utilising the assessed loss to avoid liability on the part of the Digicall for the payment of tax in the following tax years, must have had as its objective, the enablement of Glasfit to utilise the assessed loss for the same prohibited purpose and, on the unique facts of this case, it would be artificial to ignore this objective when determining whether this income received by the Digicall, resulted indirectly from the first change in shareholding.

(xxiii) That the first change in shareholding therefore resulted indirectly in income being received by or accruing to the Digicall during the 2005 to 2008 years of assessment and SARS was accordingly correct in concluding that the provisions of section 103(2) of the Act had been satisfied and in disallowing the Digicall's claim to set-off the assessed loss against such income, during these years of assessment.

Appeal upheld with costs.

Assessments forming the subject of the appeal confirmed.

4.5. Sasol Oil (Pty) Ltd v C:SARS

Sasol Oil (Pty) Ltd (Sasol Oil) was at all times a subsidiary of Sasol Ltd and its business was the refining of crude oil and the marketing of fuels produced from coal. It did this at a refinery inland and it made its profits by buying crude oil at a lower price than the refined products that it sold and supplied throughout South Africa.

Before oil sanctions were lifted in 1991, Sasol Oil had purchased its crude oil from the State's Strategic Fuel Fund and when sanctions were lifted, Sasol Oil started sourcing and importing crude oil from a number of suppliers in the Middle East, mostly from Iran, Saudi Arabia and Kuwait and it had in place term contracts for the supply of crude oil, which gave it security of supply and lower prices than were available in the open market, for crude oil bought on the spot.

From 1991 to 1997 Sasol Oil purchased and shipped crude oil from the suppliers in the Middle East, and spot oil from Western African suppliers. At that time as well, the Sasol Group started to 'globalize.' There were companies established in different locations, the relevant ones being Sasol Trading International Ltd ('STI'), incorporated in November 1997 in the Isle of Man. Sasol Trading Services Limited was incorporated in the United Kingdom, based in London, in December 1997 and its name was changed to Sasol International Services UK ('SISL') in February 1998. STI and SISL were wholly owned subsidiaries of Sasol International Holdings (Pty) Ltd ('SIH'), incorporated in South Africa in September 1997.

The Sasol Group undertook a major restructuring of entities within the group and this restructuring resulted in a change of oil procurement functions. From 1997 STI, rather than Sasol Oil, started procuring from Middle Eastern suppliers, and sold the crude oil acquired in terms of term contracts to Sasol Oil. It shipped the oil to the Durban port on a DES basis (delivered ex ship) and Sasol Oil paid STI for the oil and its services.

In the period July 2001 to July 2004 STI had procured crude oil from the Middle

Eastern suppliers in terms of their term contracts and sold it to SISL, delivering on an FOB basis (Free on Board). SISL in turn sold the crude oil to Sasol Oil, delivering it to Sasol Oil at the Durban port on a DES basis. The name of SIH was changed to Sasol Investment Company (SIC) in June 2002 and in April 2004 Sasol Oil International ('SOIL') was established in the Isle of Man, as a wholly owned subsidiary of Sasol Oil. STI and SISL remained wholly owned subsidiaries of SIC.

The Sasol Group, from 1997, had one office in the Isle of Man, the business establishment of STI, which procured crude oil for on sale to Sasol Oil and there was an office in London where SISL performed shipping and marketing services, mostly for STI. By the end of 2000, the people running the businesses of STI and SISL were concerned about the duplication of office accommodation and staff required and had discussed rationalization of the offices in the Isle of Man and London.

When the Sasol Group had started the internationalization project, they had envisaged a base in London, which was the leading oil trading and financial centre, and which had excellent shipping infrastructure but because of UK tax rates they had also needed to set up a business establishment on the Isle of Man which was considered to be a 'tax haven', and the decision had been made to locate the trading function there, hence STI's incorporation in the Isle of Man in 1997 and it was anticipated that the profits made by STI would serve as capital for foreign expansion and would not be subject to South African exchange control regulation.

In September 1998 STI and Sasol Oil entered into a crude oil supply agreement (the Original Supply Agreement) in terms of which STI would procure crude oil and sell and ship it to Sasol Oil on a DES basis. STI would be near London and would therefore benefit from SISL's expertise in marketing intelligence in tracking crude oil prices and from introductions to other traders operating in London.

In 2000 the Sasol Group made a bid to acquire a German chemicals group, Condea. The board of directors of SIH (the holding company of STI and SISL) had requested a review of the SIH structure in anticipation of the acquisition of Condea and pursuant to this a proposal was prepared in early December 2000 which suggested that the crude oil trading function be relocated from STI in the Isle of

Man to SISL in London and the cost saving of rationalizing the respective functions of STI and SISL was estimated to be R3 million per year.

Sasol Oil's board resolved to obtain a legal opinion on the UK tax implications of the proposed restructuring which was done when the solicitors' firm Lovells was consulted and it confirmed that the proposed relocation of the crude oil trading function from the Isle of Man to London would not have any adverse UK implications for SISL, save that there would be an increase in SISL's UK tax as a result of the increase in the ambit of the business. The proposal was that while STI would remain in the Isle of Man to continue its other activities there, the crude oil trading function would be moved to London and that had staffing and office implications for SISL and STI. SISL would need additional staff in London and Mr Jan Bredenkamp of STI, as the principal oil trader at STI, with considerable experience and many contacts in the crude oil trading market, would have to move to London.

Bredenkamp's move to London was a key component of the proposed new structure but it transpired that Bredenkamp was not willing to move away from the Isle of Man and it was partly for this reason that the Sasol Group decided not to follow the Lovells advice in its entirety.

The commercial reasons for relocating the STI operation to London – rationalization of staff and proximity to the London trading market – had thus to be weighed against the disadvantages of relocating the crude oil supply there as well. The particular problem that the Sasol Group had anticipated was the cancellation of the term contracts- that might give the Middle Eastern suppliers the opportunity not to renegotiate contracts with the Sasol Group and to find other purchasers and the evidence revealed that the Sasol Group had been fortunate in securing these term contracts as there were many entities waiting in line for the allocation of crude oil on a term contract.

Bredenkamp recommended that the crude oil trading function (acquisition from the Middle Eastern suppliers) remain with STI, and all other business, such as shipping, be moved to SISL in London and as Bredenkamp had stated in his proposal – this will entail SISL buying the crude oil on a FOB basis, arrange the shipping insurance, inspections, etc. and assume the risk. And it would also entail cancelling the supply agreement between STI and Sasol Oil.

Bredenkamp's proposal was accepted by the STI board of directors on 23 June 2001 and this meant that the crude oil procurement would remain with STI on the Isle of Man, which, having bought it, would sell it in turn to SISL, and SISL would sell the oil and ship it to Sasol Oil.

The aforementioned was the chief element in the structure that SARS had complained of. There was no reason, he contended, for STI, having procured the crude oil, to sell it to SISL and for SISL to sell it (back-to-back) to Sasol Oil in South Africa. The 'interposition' of SISL was an element that could not be explained other than as a stratagem to avoid the payment of tax in South Africa and that was SARS' chief reason for the argument that the sales of crude oil by STI to SISL and then from SISL to Sasol Oil were simulated.

The policy of the Sasol Group was to submit proposals and draft agreements to the tax department in the group for approval and hence the modified proposal for the relocation of shipping to London by SISL was sent to the Group Tax department of Sasol Ltd for advice on whether the proposed structure was optimal from a tax point of view. An opinion followed which confirmed that the modified proposal was tax compliant and optimal and PWC provided a confirmatory opinion.

PWC pointed out that SISL already had access to oil market information which, before the relocation, had been transmitted to STI in the Isle of Man. SISL also had experience and expertise in managing volatile shipping rates, oil losses and negotiating co-freight arrangements and STI, they said, had experience and expertise in the negotiation of contracts for the supply of crude oil on the open market but did not have the expertise to arrange shipping of the purchased oil.

However, PWC cautioned that there had to be 'sufficient commercial justification for SISL to sell the crude oil to Sasol Oil and to undertake the shipping of the crude oil.' If not, the use of SISL could be seen as a scheme to avoid tax in South Africa and the new structure could be disregarded for South African tax purposes. PWC also advised that 'sufficient real risks and functions should be transferred into SISL to provide sufficient commercial justification and to limit the UK and SA transfer pricing risks.'

In this appeal against a decision of the Johannesburg Tax Court (see ITC 1910 (2017) 80 SATC 353 per Mali J) the first issue was whether two contracts for the sale of crude oil sourced in the Middle East, acquired by a company in the Sasol Group in the Isle of Man, sold to another company in the Sasol Group based in London, and in turn sold and shipped to Sasol Oil in Durban, were simulated transactions and should be disregarded by SARS in the assessment of taxation in 2005, 2006 and 2007.

The second issue was whether, if the transactions were not simulated, they fell within the provisions of section 103(1) of the Income Tax Act, and were thus to be disregarded for the purpose of assessing liability for income tax in the hands of Sasol Oil.

The two contracts in issue before the Tax Court were entered into between Sasol Oil and Sasol International Services Ltd ('SISL') and between SISL and Sasol Oil International Ltd ('SOIL'). In terms of these contracts SISL agreed to sell crude oil and deliver it to Sasol Oil on a DES (delivered ex ship) basis, and SOIL agreed to procure crude oil and deliver it to SISL on an FOB (free on board) basis.

The Tax Court had found that the impugned transactions were simulated and it did not therefore consider the implications of section 103(1). It had upheld SARS' assessments and confirmed the imposition of penalties and the obligation to pay interest.

This appeal was with the leave of the Tax Court.

SARS had issued additional assessments in the years in question, against which Sasol Oil had appealed and the amounts in dispute were in excess of R68 million, penalties in terms of section 76 of over R68 million and interest in terms of section 89quat.

SARS' contention both in the Tax Court and on appeal was that the scheme was devised by Sasol Oil in order to avoid the payment of a newly introduced residence tax in 2001 but Sasol Oil denied that this was so.

SARS' additional assessments attributed the income of SOIL (which had stepped into STI's shoes in the Isle of Man) to Sasol Oil in 2005, 2006 and 2007, invoking section 9D of the Income Tax Act in order to do so, on the basis that the sales from SOIL to SISL and then on to Sasol Oil were simulated transactions, in fraudem legis.

SARS' contention was that the conceived structure had been designed to avoid the implications of the new residence based tax, and was not the result of the factors adverted to, ie the importance of maintaining term contracts for the supply of crude oil, and the fact that Bredenkamp was determined to remain on the Isle of Man.

It was common cause that in the years of assessment (2005 to 2007) SOIL was a controlled foreign company of Sasol Oil. SOIL was resident in the Isle of Man and had a foreign business establishment there. SOIL (as STI had done prior to SOIL's incorporation in 2004) had received amounts of money (or the rights to it accrued) from the sale of crude oil; these amounts would have fallen within the taxable income of SOIL, if it had been a resident and these amounts were attributable to the foreign business establishment. Accordingly, unless such amounts were derived from sales of crude oil to a person connected to SOIL, the connected person being a resident of South Africa, those amounts were not to be taken into account in determining the net income of SOIL for the purposes of section 9D.

SISL too was not resident in South Africa, but in the UK. Thus if the crude oil was sold by SOIL to SISL, the foreign business exclusion would apply and these amounts would not be taken into account in determining the net income of SOIL for the purpose of section 9D. On the other hand, if SOIL had sold the crude oil directly to Sasol Oil, which was both a connected person and a South African resident, the foreign business exclusion did not apply (in terms of the proviso in (ii)(aa) of section 9D(9)(b). If SOIL had purchased crude oil within its country of residence from any entity that was not a connected person, the subparagraph (A) exclusion would apply.

The back-to-back sale of crude oil by SOIL, which procured it from the Middle Eastern suppliers, to SISL, and the sale and the supply then by SISL to Sasol Oil in South Africa were attacked by SARS as being simulated, designed only to achieve the avoidance of residence based tax in the hands of Sasol Oil. He considered that he was entitled to disregard the sales from SOIL to SISL and to regard the sales as having been directly to Sasol Oil.

Judges Lewis, Ponnan and Cachalia held the following:

<u>As to the substance over form argument</u>

(i) That SARS had contended that the impugned transactions had been devised in order to tailor the Sasol Group's liability for tax when section 9D of the Act was introduced. The apparent transfer of the shipping function to SISL by STI and the sale to SISL and the onward sale to Sasol Oil were transactions that were simulated in order to avoid Sasol Oil paying tax on income earned by an entity that was resident in South Africa. SARS contended that Sasol Oil's entire case was based on the contention that the crude oil was transferred to SISL, and that it did not discharge the onus of proving that it was STI's, and later, SOIL's intention to pass ownership to SISL rather than to Sasol Oil and that the supply contracts were simulated dishonestly.

(ii) That, however, it had to be recalled that when the back-to-back supply agreements were first concluded, in 2001, neither STI nor SISL were subsidiaries (foreign controlled companies) of Sasol Oil; Sasol Oil would not have been liable, at that stage, and until 2004, for residence based tax on STI's income. The transactions thus did not have the effect of avoiding liability for tax and so the Sasol Group could not have anticipated, in 2001, that subsequently a subsidiary of Sasol Oil itself would have earned income for which it would become liable for tax.

<u>As to the test for simulation</u>

(iii) That this court has held on several occasions that the mere production of agreements does not prove that the parties genuinely intended them to have the effect they appear to have and this court has confirmed that a taxpayer must show on a balance of probabilities that the agreements reflect the actual intention of the parties. The court must ascertain the intention of the parties having regard not only to the terms of the impugned transactions but also to other factors, including the improbability of the parties intending to give them effect.

(iv) That in C:SARS v NWK Ltd 73 SATC 55 the court stated that the test to determine simulation should go further and require an examination of the commercial sense of the transaction; of its real substance and purpose. If the purpose of the transaction is only to achieve an object that allows the evasion of tax, or of a peremptory law, then it will be regarded as simulated. And the mere fact that parties do perform in terms of the contract does not show that it is not simulated; the charade of performance is meant to give credence to their simulation.

(iv) That the judgment in NWK was apparently thought to have changed the law. It did not. It pointed out merely that in order to establish simulation one could not look only at the terms of the disputed transaction. And it suggested that simulation was to be established not only by considering the terms of the transactions but also the probabilities and the context in which they were concluded.

(v) That Wallis JA had twice explained the passages in NWK that had apparently given rise to confusion and he explained in Roshcon (Pty) Ltd v Anchor Auto Bodybuilders CC 2014 (4) SA 319 (SCA) at paras 35 to 37 that the position remained that the court examines the transaction as a whole, including all surrounding circumstances, any unusual features of the transaction and the manner in which the parties intend to implement it, before determining in any particular case whether a transaction is simulated. And in C:SARS v Bosch 77 SATC 61 at para 40 he stressed that simulation was a question of the genuineness of the transaction under consideration. If it is genuine then it is not simulated and if it is simulated then it is a dishonest transaction, whatever the motives of those who concluded the transaction.

(vi) That Lewis JA had stated in NWK at para 42 that there was, in principle, nothing wrong with arrangements that are tax effective but there is something wrong with dressing up or disguising a transaction to make it appear to be something that it was not, especially if that has the purpose of tax evasion, or the avoidance of a peremptory rule of law.

(vii) That one of the pillars of SARS' argument in respect of simulation was that the Sasol Group had followed PWC's advice on the 'ultimate modus operandi.' The purpose of that advice was to minimize the Group's tax liability, and in particular the newly introduced residence based tax in effect from June 2001. However, there was nothing sinister in that. In any event, the mere fact that parties have followed professional advice (in this case from PWC) in order to minimize the tax payable by them is not wrong nor does it point to deceit. The real question was whether they actually intended a sale by STI (then later SOIL) to SISL and whether SISL intended to acquire ownership of the crude oil from STI (SOIL). Or did they dishonestly purport to do so solely for the purpose of avoiding the tax that would be payable by Sasol Oil?

(ix) That SARS argued that the right that SISL purported to acquire in the crude oil while shipping it to Durban was a hollow one. It was not ownership in the true sense. SISL could not freely dispose of the crude oil; it had to deliver it to Sasol Oil in Durban. That was in terms of the supply agreements between the Middle Eastern suppliers and STI (SOIL). The port of destination had to be known to the suppliers so SISL could not change the destination of the oil once it was on board. Moreover, SISL did not need or use the oil as it was but a shipper and SISL's requirements met those of Sasol Oil exactly. SISL did not determine either the quantity or quality of the crude oil that would be sourced by STI (SOIL). In addition, the price that would be paid by Sasol Oil to SISL was agreed in advance by a guaranteed price formula.

(x) That, furthermore, although SISL bore the risk in the crude oil while it was in transit, this was provided for in the supply agreement between SISL and Sasol Oil. SARS argued that this provision in the contract would not have been necessary if in fact ownership had been transferred to SISL. As owner, SISL would have borne the risk. As pointed out by Sasol Oil, however, the fact that the normal consequences of a transfer of ownership are spelled out in a contract is a result of the caution exercised by the drafters of the contract, rather than being necessary to give effect to the contract.

(xi) That Sasol Oil pointed out that the above was very little different from the issue in CCE v Randles, Brothers and Hudson Ltd 33 SATC 48 where the parties to a number of contracts had agreed that ownership of material would be passed by the importer of the material to manufacturers of garments but the terms of their contracts took all the entitlements of ownership, including to use and dispose of the material, away from the manufacturer. The contract was agreed so that the importer could obtain a customs rebate. Watermeyer JA said, however, in Randles, that there was no requirement that the parties intended to transfer an untrammelled right and he found that the parties had intended ownership to be transferred, and thus it had been.

(xii) That it was true that SISL's right in the crude oil was fettered as it could not do with it what it chose. In Randles the majority was clear that the parties had so much wanted ownership to pass that they must have intended that as a consequence of their contract. Sasol Oil, on the other hand, was in a stronger position than was the importer in Randles. Indeed, Sasol Oil was able to show commercial justification for the sale of the oil to SISL in London, which the importer in Randles could not do and there were reasons for SISL controlling and managing the risk as owner while the oil was in transit.

(xiii) That SARS contended that it was inconceivable, if the parties had genuinely intended that ownership would pass to SISL, that their contract made no provision for the mode of delivery. Sasol Oil argued, however, that there was constructive delivery to STI and then to SISL in both the Isle of Man and London, and actual delivery to Sasol Oil in Durban. Whether there was actual or constructive delivery was a matter of law. There was no need to provide for the mode of delivery in the contracts of sale.

(xiv) That there was a good commercial reason for SISL, in London, taking over the supply of crude oil to Sasol Oil, and the fact that the estimated savings in costs anticipated by the rationalization of the Isle of Man and the London offices were lost, was probably justified by the profits that Sasol Oil would make and the fees that SISL would earn in terms of the supply agreements.

(xv) That the documents referred to by SARS had of course to be considered as part of the factual context in which the transactions were disregarded in the tax years in question. However, they also had to be weighed against the evidence of Sasol Oil's witnesses as to the reasons for SISL acquiring ownership in the crude oil that it shipped. Although that evidence was labelled as unreliable and not credible by SARS, the court considered that evaluation to be unwarranted.

(xvi) That Sasol Oil had refuted SARS' allegations that several features of the supply agreements between STI, SISL and Sasol Oil had an aura of artificiality and that there was no commercial justification for them. In addition, Sasol Oil argued that the documents demonstrated that there was no artifice in the arrangements. In regard to SARS' allegations that senior staff in a major conglomerate would have been complicit in an elaborate fraud over the years, there was not a shred of evidence that this was the case and the evaluation of Sasol Oil's witnesses as untruthful and unreliable was simply not fair.

(xvii) That, in conclusion, on the substance over form argument, the court considered that Sasol Oil had discharged the onus of proving that the supply agreements between STI (SOIL), SISL and Sasol Oil were genuine transactions which they had implemented from 1 July 2001 through to the years of assessment being 2005, 2006 and 2007. The transactions had a legitimate purpose and there was nothing impermissible about following the PWC advice, and so reducing Sasol Oil's tax liability. Moreover the transactions were not false constructs created solely to avoid residence based taxation. There was good commercial reason for introducing SISL into the supply chain and SISL had, from the beginning of 2001, been envisaged as the oil trader and shipper in the supply chain and the PWC advice was not the trigger for the transactions.

As to the subparagraph (A) exclusion

(xviii) That Sasol Oil had argued that the effect of section 9D(9)(b)(ii)(aa)(A) of the Income Tax Act was that its liability for tax on SOIL's net income was excluded. SARS took the view that the exclusion in para (A) did not apply and his interpretation was consistent with the Treasury's explanation of the exclusion which was that the controlled foreign company must have a nexus with the place in which the goods are produced but it was, however, not necessary to decide this in view of the court's conclusion that the supply agreements were not simulated.

As to the application of section 103(1) of the Income Tax Act

(xix) That SARS contended that, even if the supply agreements were found to be genuine, they nonetheless must be disregarded in the assessment of Sasol Oil's income tax liability. For section 103(1) to be applied by SARS he must be satisfied that a transaction, operation or scheme had been entered into and, if so, did it have the effect of avoiding, postponing or reducing the liability for the payment of tax and, if so, it must have entered into the transaction, operation or scheme solely or mainly for the purposes of obtaining a tax benefit and it must have been abnormal in one of the respects referred to in para (b).

(xx) That SARS contended that the relevant transactions were the supply agreement between SOIL and SISL, and the supply agreement between SISL and Sasol Oil and they were referred to as the 'impugned transactions.' The question to be posed was: Did they satisfy the other requirements of section 103(1) and, if so, which remedy should be invoked?

(xxi) Sasol Oil argued that the impugned transactions must, in order to fall foul of section 103(1), have the effect of getting out of the way of, escaping or preventing, an anticipated tax liability. Thus it must have anticipated liability for tax, which it avoided through the impugned transactions. If the parties had not entered into the impugned transactions, would Sasol Oil have had a liability for tax that it avoided, or escaped from, by entering into them. In answering this question one must determine what liability for tax Sasol Oil had avoided by entering into the impugned transactions.

(xxii) That SARS had not shown that the impugned transactions had the effect of avoiding liability for tax or that there was anything abnormal about them and the application of section 103(1) by SARS in the additional assessments was therefore unfounded.

<u>As to interest and penalties</u>

(xxiii) That the Tax Court had confirmed the imposition of section 76 penalties and section 89quat interest on Sasol Oil, having determined that the impugned transactions were simulated. In view of this court's findings that the transactions were not simulated and that the application of section 103(1) was ill-founded, it followed that Sasol Oil should not be required to pay these sums.

Appeal upheld with the costs of two counsel.

Judges Mothle and Makgoka, dissenting, held the following:

(xxiv) That the Tax Court had concluded, with reference to the evidence and in answer to the question of substance over form raised by SARS that the interposition of SISL in the crude oil supply chain from SOIL to Sasol Oil was a sham in that there was no commercial justification for the role of SISL in the supply chain. In arriving at this conclusion, the Tax Court found the interposition of SISL to be an unusual feature in the supply chain as provided for in the supply agreements. The question whether there was a commercial justification for SISL's role in the supply agreement is best understood within the context of the restructuring alluded to earlier in this judgment.

(xxv) That the supply agreements presented unusual features of independent trading companies. Firstly, the agreements provide that the crude oil acquired by STI was intended to be sold to SISL and to no other third party.

Similarly, the crude oil purchased by SISL from STI, was intended to be sold to Sasol Oil and to no other external party. Secondly, the agreements ensured that the purchase price remained constant in that, from STI to Sasol Oil, there was no room to change the price, by either STI or SISL, with a view to making a profit. In essence therefore, SISL traded by purchasing crude oil only from STI and on-selling it only to Sasol Oil without making any profit. Thirdly, the sale of crude oil by STI to SISL did not result in transfer of ownership in the sale transactions involving SISL. SARS contends that this is a sham and I agree. The absence of transfer of ownership, though not necessarily invalidating the transaction, would within the context of the two supply agreements, be one of the relevant factors indicative of a simulated transaction.

(xxvi) That it must be borne in mind that Sasol Oil bore the onus to establish a commercial justification for the interposition of SISL in the supply chain. It thus fell upon the witnesses testifying for Sasol Oil to explain to the court such commercial justification. Did Sasol Oil, through its witnesses, discharge that onus? In this regard it was important to have careful regard to the contemporaneous documents and the evidence. As a general observation, it is instructive that in the contemporaneous documents, including correspondence between PWC and Sasol Oil, no such commercial justification is recorded, other than the duplicated costs under the existing structure. Startlingly, the PWC structure, instead of doing away with duplication, entrenches it by the interposition of SISL in the buying and selling of crude oil and it makes no commercial sense at all.

(xxvii) That it was trite that an appeal court is bound by the trial court's findings of credibility, unless they were found to be affected by a material misdirection or to be clearly wrong. The appeal court will only reverse these findings where it is convinced that the findings are wrong. I am unable to find any misdirection by the Tax Court in regard to the finding of credibility and contradictions on the part of Sasol Oil's witnesses, in particular Messrs Gird and Loubser.

(xxviii) That, on the conspectus of the evidence, I would find that Sasol Oil had failed to demonstrate to the Tax Court the commercial justification for interposing SISL in the supply chain. The role of SISL as stated in the supply agreements was a simulation. The continued reference to SISL, well beyond the adoption of the supply agreements, as a company with shipping functions and providing a service instead of trade functions, exposes its real role in the supply chain. No explanation could be provided to the Tax Court by Sasol Oil as to why it now had to take two companies to conduct a trade function that was initially handled by one company. I would therefore agree with the finding by the Tax Court that the interposing of SISL was not with the intention to avoid duplication and reduce costs, it was initially set out to achieve, but resulted in an entrenched duplication of trade functions by two subsidiary companies, clearly to evade the clutches of section 9D of the Act. The failure to provide commercial justification for SISL, revealed the absence of bona fides behind the transactions and as such the additional assessments were justified.

(xxix) That in the light of the conclusions I have reached, in line with that of the Tax Court, I deem it unnecessary to deal with SARS' alternative ground of attack based on section 103 of the Act. In this regard, I agree with the view expressed in the first judgment concerning section 103 debate and conclusion.

(xxx) I also agree with the Tax Court's decision on the interest and penalties payable to SARS on the additional assessments and in the circumstances I would dismiss the appeal with costs.

Judges Ponnan, Lewis and Cachalia held the following:

(xxxi) That the court was not concerned here with a dispute between the parties to the agreements. It is a third party – SARS – who contends that the parties did not really intend the agreements to have, inter partes, the legal effect which its terms conveyed to the outside world. The fact that no evidence was led for SARS is not without its consequence. It means that there was nothing to gainsay the evidence of Sasol Oil's five factual witnesses and one expert witness. It was unclear why the Tax Court took the view that the evidence of Sasol Oil's witnesses fell to be rejected. The criticism of their evidence was not only unduly generalized, but also rather severe. The rejection of the evidence of senior employees, two of whom were retired, absent any countervailing evidence, was disquieting. They had no motive to lie in order to save tax for Sasol Oil. No ready answer presents itself as to why these professional persons would perjure themselves and there thus appears to be no reason to question the reliability of their evidence, much less their integrity or to brand them untruthful or evasive witnesses.

(xxxii) That for the written agreements to have been a sham would have required the most extensive and elaborate fraud, stretching over a period of many years. It would have required the involvement of the persons participating directly, as well as the boards of directors of not just Sasol Oil, but also their related companies. There is not the slightest hint or suggestion in the wide array of documents introduced into evidence that the transactions were a sham or disguise. What is more, the financial statements of the relevant companies were entirely consonant with the supply agreements. The conclusion that such a sham was intended would mean that the production of these documents would have involved an elaborate fraud on the part of the authors of the documents and the members of the boards of directors of the relevant companies, as also their auditors. When one has regard to the history and background, the genesis and conclusion of the agreements in accordance with their terms, makes perfect sense.

(xxxiii) That it goes without saying that the evidence must be looked at holistically. The Tax Court approached the evidence piecemeal. It appears to have focused rather too intently upon selected pieces of evidence to support its conclusion that the transactions were simulated. Here, a proper consideration of the entire evidential mosaic, leads the court to the conclusion that the alternative hypothesis sought to be advanced by SARS, namely that the agreements are simulated, is without a proper foundation and remains but a speculative and conjectural one.

(xxxiv) That it was clear that the relevant agreements were genuine agreements and truly intended by the parties in accordance with their terms. There was no simulation or, more particularly, dishonest intention by the parties to deceive by concealing the real agreements. There is accordingly no basis for finding that the ostensible agreements were a pretense or that there was any secret or unexpressed agreement, at odds with the apparent agreements.

4.6. BMW South Africa (Pty) Ltd v C:SARS

BMW South Africa (Pty) Ltd (BMW SA) was the BMW group of South Africa, a world-wide organisation who from time to time seconded its expatriate employees from their home countries to work in South Africa for a short or medium term period.

Material to the secondment and by agreement between BMA SA and the expatriate employees was that BMW SA would settle the expatriate employees' tax liability during the expatriate employees' secondment to South Africa and the objective was to ensure that the expatriate employees remained tax neutral and were in no worse a position in South Africa and this practice was commonly known as tax equalisation.

The expatriate employee was required to comply with the relevant tax legislation of both the host country and that of South Africa.

In terms of the agreement between the expatriate employees and BMW SA, BMW SA had to instruct a tax consultancy firm, in this case KPMG, PWC and Raffray Tax Consultant CC ('the consulting firms) for taxation services and professional fees rendered by the consulting firm were paid by BMW SA for taxation services provided in respect of the expatriate employees of BMW SA.

SARS had issued assessments for the expatriate employee's tax for the period 2004-2009 on the basis that the payments to the consulting firms constituted taxable benefits which accrued to the expatriate employees in terms of par. (i) of the definition of 'gross income' in section 1 of the Income Tax Act 58 of 1962 read with par. 2(e) and 2(h) of the Seventh Schedule to the Act.

The court a quo, being the Johannesburg Tax Court (see ITC 1894 79 SATC 167 per Keightley J) had found that the payments for professional fees fell within the ambit of par. (i) of section 1 of the Income Tax Act read with par. 2(e) of the Seventh Schedule to the Act.

The court a quo further found that it was not necessary to address the applicability of par. 2(h) of the Seventh Schedule to the Act.

On appeal to a full bench of the Gauteng Local Division, Johannesburg, the court was required to determine whether or not SARS was correct in his determination that the professional fees paid by BMW SA to the consultancy firms amounted to taxable benefits in terms of par. (i) in section 1 of the Act read with par. 2(e) of the Seventh Schedule and, accordingly, it was not necessary to deal with the applicability of par. 2(h) of the Seventh Schedule.

BMW SA contended that if no cash equivalent was included in the expatriate employees' remuneration, then the expatriate employees did not receive 'a benefit or advantage' and therefore par. (i) in section 1 of the Act did not apply.

BMW SA had conceded that if local employees of the BMW group were given the same services as expatriate employees then for all intents and purposes such services in respect of local employees would amount to a taxable fringe benefit. However, BMW SA contended that expatriate employees were different primarily because of the taxable equalisation policy to the extent that expatriate employees received the same remuneration as if they were in their home country. The professional services rendered did not place the expatriate employees in an advantageous position and, that being so, the payments to the consultancy firms did not affect the expatriate employees' remuneration and, therefore, 'no benefit or advantage' as contemplated in par. (i) in section 1 of the Act was received.

BMW SA had further contended that the court a quo had incorrectly approached the matter when it compared the position of the local employees to that of the expatriate employees and it submitted that the consultancy firms had only rendered professional services to expatriate employees and not to local employees.

Judge Carelse held the following:

(i) That the test to determine whether the professional fees paid by BMW SA to the consultancy firms amounted to taxable benefits in terms of par. (i) in section 1 of the Income Tax Act read with par. 2(e) of the Seventh Schedule thereto was an objective one and therefore the court a quo's approach could not be faulted.

(ii) That the court a quo had correctly held that as a consequence of the contractual arrangement between BMW SA and the expatriate employees, the latter had become entitled to the services of a tax consultant free of charge and whether the tax consultants' services actually resulted in a further benefit to the employees concerned, or to BMW SA, was irrelevant. The service itself, which was provided free of charge to the expatriate employees, was the benefit. Furthermore, the benefit had a monetary value and accordingly fell within the definition of 'gross income' for the purposes of the first issue in dispute between the parties.

(iii) That, accordingly, the expatriate employees had received a benefit or advantage when BMW SA had paid the tax consultancy firms for tax services.

(iv) That the court then turned to deal with the question whether or not the benefit fell squarely within the ambit of par. 2(e) of the Seventh Schedule and, if so, the benefit was taxable and in this regard BMW SA submitted that because the services rendered by the consultancy firms were not used for private or domestic purposes by expatriate employees as contemplated in par. 2(e), the deeming provisions in the sub-paragraph did not apply.

(iv) That it was BMW SA's case that the services in issue rendered by the consultancy firm were not wholly private but were also used for the business or affairs of BMW SA. However, BMW SA's reliance on the common cause facts as well as the engagement letter from KPMG to itself was misplaced and there was no evidence that KPMG had rendered any services to BMW SA's group.

(v) That, accordingly, the services rendered by the consultancy firm were rendered wholly for private use, not partially and there was no evidence that the tax services were rendered partially for BMW SA's group and partially for the expatriate employees and hence the tax services rendered by the consultancy firm fell squarely within the meaning of par. 2(e) of the Seventh Schedule to the Act.

(vi) That, accordingly, it was not necessary to deal with par. 2(h) of the Seventh Schedule to the Act and, in any event, par. 2(h) was not before the court on appeal.

Appeal dismissed with costs.

4.7. Rampersadh & another v C:SARS

The tax affairs of the Applicants and of the Close Corporation of which they were members had a turbid history and at the heart of the problems were the loan accounts of the Applicants in the Close Corporation.

The Close Corporation had been audited by SARS for tax purposes for the tax periods 2011 to 2013.

Due to the loan accounts the audit had been extended to the Applicants and, having made representations, they had furnished revised loan accounts.

SARS had issued revised assessments for income tax to the Applicants and they had lodged objection thereto.

SARS had requested further information arising from the loan accounts and this provoked further revised loan accounts resulting in a further objection and, in all, no less than three different versions of the loan accounts were submitted by the Applicants and this finally resulted in SARS disallowing some of the objections and led to revised assessments.

The Applicants did not appeal against the assessments and nor did they request clarity on the disallowance of certain of their objections.

Thereafter the Applicants gave notice that they intended to appeal and would seek condonation for not having appealed in time but SARS informed them that its power to condone a late appeal did not extend beyond 75 days but the Applicants still did not lodge an appeal nor did they approach the Tax Court for condonation.

The Applicants, instead, made three requests to SARS under section 93(1)(d) of the Tax Administration Act for reduced revised assessments which were all refused.

They claimed that the revised assessments contained 'readily apparent undisputed errors'.

The Applicants thereafter approached the High Court for a review of the SARS' administrative decision refusing their requests, in particular, the third refusal, in terms of the Promotion of Administrative Justice Act (PAJA).

SARS opposed the relief sought and, apart from dealing with the merits, he raised a number of initial points:

- That under PAJA a party seeking judicial review is obliged to exhaust any available internal remedies (section 7(2)(a) of PAJA). It was submitted that the Applicants had a right of appeal under the Tax Administration Act against the decision to refuse the third request;
- Whether the High Court had jurisdiction to deal with a review of matters arising under the Tax Administration Act.

Section 7(2) of PAJA provided at the relevant time:

'(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.'

Judge Gorven held the following:

As to the exhaustion of internal remedies

(i) That section 7(2) of PAJA provides that there are thus only two bases on which a court may consider such a review application as has been brought by the Applicants. First, if available internal remedies have been exhausted and, secondly, if there were exceptional circumstances warranting the grant of an exemption from doing so in the interest of justice.

(ii) That the initial question under this head was whether section 7(2)(a) of PAJA applied and that would be so if an objection or appeal under the Tax Administration Act was available to the Applicants. It was common ground that, in the present matter, the SARS took a decision to refuse the third request for a reduced assessment and the crisp issue was: Does the Act allow for an objection or appeal to lie from such a decision? The court had found no case law on this issue and neither party referred to any and hence the provisions of the Tax Administration Act must be interpreted in order to yield an answer.

(iii) That, on an examination of section 93 of the Act, it seemed, therefore, that there were four procedures by which an assessment could be reduced by SARS. The first two are by way of objection or appeal. The next by way of SARS mero motu deciding to do so without the taxpayer having objected or appealed. The fourth and final one was by the taxpayer requesting a reduction.

(iv) That, however, the basis on which a taxpayer can have a matter considered under section 93(1)(d) is clearly not by way of objection to, or appeal against, an assessment. A separate procedure is available for these. Neither does it envisage a formal application and it seems that it is simply by way of a request.

(iv) That the question that arose was whether the refusal of such a request gave rise to a right of objection or appeal under the Act. Chapter 9 of the Act dealt with dispute resolution and the procedure for dispute resolution is governed by Part B of Chapter 9. From an examination of section 104(1) to (3) it is clear that objections precede any appeal. They may be lodged against assessments and certain decisions. The question is whether a decision to refuse a request under section 93(1)(d) falls within the ambit of section 104(2)(c). In other words, does such a decision amount to 'any other decision that may be objected to or appealed against under a tax Act'?

(v) That, clearly, if an assessment is reduced, it qualifies under section 104(1) for the dispute resolution procedure. All assessments qualify. The question is whether a refusal to reduce an assessment qualifies.

(vi) That it was clear, therefore, that certain decisions refusing relief are made subject to the objection and appeal procedure in Chapter 9. They each accordingly fall within the provisions of section 104(2)(c) of the Act as being a 'decision that may be objected to or appealed against under a tax Act.' There is no similar provision for a decision to refuse relief under section 93(1)(d) of the Act. The inclusion of one provision may indicate that the legislature intended to exclude other provisions. However, for this principle of expressio unius est exclusio alterius to apply, it must be concluded that the legislature formed this specific intention.

(vii) That the language of section 104(2)(c) indicated that a tax Act must make a decision subject to objection or appeal. The range of decisions which can and must be dealt with under Chapter 9, absent a High Court order, is circumscribed. If the legislature had intended to make all decisions subject to the dispute resolution procedures in Chapter 9, it would have been a simple matter to do so. The three categories of decisions mentioned in section 104(2) would not have been mentioned.

(ix) That the Income Tax Act does not make a decision to refuse a request under section 93(1)(d) subject to objection or appeal. It was therefore not a decision referred to in section 104(2)(c) of the Act. This meant that the objection and appeal provisions in Chapter 9 were not available to the Applicants and the language and context of the provision supported this interpretation.

(x) That a decision to refuse a request under section 93(1)(d) did not change the tax liability of a taxpayer. The taxpayer can object to the assessment and invoke the appeal machinery. The interpretation that a refusal of a request to reduce an assessment under section 93(1)(d) does not fall within the third category of decisions mentioned in section 104(2)(c) would also not lead to unbusinesslike results.

(xi) That, accordingly, the decision of SARS to refuse the third request under section 93(1)(d) was not subject to the machinery set up in Chapter 9 of the Act. This, then, meant that internal objection and appeal remedies under the Act were not available to the Applicants and no other jurisdiction is given to either the tax board or tax court to deal with any issues arising from such a refusal. The Applicants had no internal remedies available to them and they were accordingly not disqualified from bringing an application for judicial review under PAJA.

As to the High Court's jurisdiction to entertain a review of decisions under the Act

(xii) That it therefore became necessary to determine whether the court had jurisdiction to entertain a review of decisions made under the Act and, in particular, a decision to refuse a request under section 93(1)(d). The specialist machinery set up under the Act did not apply and the jurisdiction of the High Court to deal with such an application was not ousted by section 105. Section 6(1) of PAJA allows any person to institute proceedings in a court for the judicial review of administrative action and it was not disputed that the decision in question amounted to administrative action under PAJA. The High Court therefore had jurisdiction to deal with this application.

As to the substantive issues of the review

(xiii) That the Applicants must make out a case for a review of the refusal of the third request and they called in aid certain provisions of section 6 of PAJA which listed grounds upon which the court might review the decision.

(xiv) That, in regard to the grounds under PAJA relied on by the Applicants, it was clear that they had failed to show that SARS took into account irrelevant considerations or had failed to consider relevant ones. They failed to show that the actions of SARS were arbitrary or capricious. They failed to show that the refusal of the third request by SARS was so unreasonable that no reasonable person could have refused it. The Applicants had accordingly failed to make out a case that the refusal of the third request to reduce the assessment should be reviewed and set aside.

Application dismissed with costs.

4.8. C:SARS v Respublica (Pty) Ltd

Respublica (Pty) Ltd (Respublica) owned immovable property situated within the Tshwane Metropolitan Municipality which consisted of six buildings configured into a number of furnished apartment-style living units suitable for student accommodation, as well as communal areas and facilities.

Respublica, as lessor, on 9 December 2011, concluded an agreement of lease with Tshwane University of Technology (TUT) as lessee in respect of the immovable property, being the lease agreement.

The lease period was five years, renewable for an indefinite number of further periods of five years each and the lease agreement provided that TUT could lease the property to its students and for no other purpose as well as use it to accommodate holiday groups during university vacations.

Respublica played no role in the selection and placement of students at the residence, nor did it select the holiday visitors as this was done by TUT. TUT undertook to take all necessary measures to control and ensure the proper discipline of the students accommodated on the leased premises, including ensuring strict compliance with the house rules.

Respublica also supplied domestic goods and services, i.e. water, electricity, maintenance, cleaning and laundry services.

Respublica's performance under the lease agreement was a taxable supply for purposes of the VAT Act, with VAT chargeable at 14% of the value of the supply, unless one of the exemptions, exceptions, deductions or adjustments contained in the Act applied.

Respublica contended that the provisions of section 10(10) of the Act applied and that it was only obliged to charge VAT on 60% of the total consideration received from TUT under the agreement.

The section provided that where domestic goods and services are supplied at an all-inclusive charge in any enterprise supplying commercial accommodation for an unbroken period exceeding 28 days, the consideration in money is deemed to be 60% of the all-inclusive charge.

Section 1 of the Act defines 'commercial accommodation', inter alia, as 'lodging or board and lodging…' and the question was therefore whether Respublica could be said to have provided lodging to TUT.

The issue before the court concerned the proper characterisation, for VAT purposes, of the supply of a building and related goods and services to an educational institution under a written agreement, more particularly, whether that supply amounted to the supply of 'commercial accommodation' as defined in section 1 of the VAT Act.

Respublica further contended that its supply to TUT met the definition of commercial accommodation because the accommodation supplied by it was used by the students, who were in truth the 'lodgers.'

Respublica had successfully applied to the court a quo, being the Gauteng Division, Pretoria (see Respublica (Pty) Ltd v C:SARS 78 SATC 368 per Semenya AJ) for a declaratory order confirming that the letting of accommodation by Respublica to TUT in terms of the lease agreement comprised of a taxable supply of commercial accommodation for VAT purposes and that it was obliged to levy and account for VAT in accordance with the Act on the rental payments that it received as consideration and, accordingly, it was liable to account for VAT on only

60% of the rental that it received in accordance with section 10(10) of the Act.

SARS appealed against the aforesaid judgment with the leave of the Supreme Court of Appeal.

Judge Ponnan held the following:

(i) That the first and perhaps decisive question was whether Respublica could be said to have provided lodging to TUT. On the ordinary meaning of the word, a 'lodger' is a natural person who actually takes up temporary accommodation and, if so, lodging cannot be provided to a juristic person that has 'no body to kick and no soul to damn.' The notion that Respublica provides 'lodging' to a juristic person such as TUT, which is by its nature incapable of living in accommodation, was therefore inconsistent with the ordinary meaning of the word as used in the Act.

(ii) That, what was more, there may be a distinction between a 'lodger' and a tenant under a conventional agreement of lease. The judgment in SA Breweries Ltd v Rent Control Board 1943 NPD 64 highlighted the fact that the provision of board and lodging was a very personal one and, if it is a lease, is one subject to stringent terms not normally encountered in a conventional lease. The relationship between TUT and Respublica bore little resemblance to conventional arrangements for the provision of board and lodging.

(iii) That Respublica contended that its supply to TUT met the definition of commercial accommodation, because the accommodation supplied by it was used by the students, who, so the contention went, were in truth the 'lodgers.' In the court's view Respublica's approach was analytically unsound in that it failed to take proper account of the nature of the contractual arrangements and conflated two distinct supplies.

(iv) That two distinct legal relationships were contemplated. The first, between Respublica and TUT, and, the second, between TUT and its students and holiday visitors. There was no contractual relationship between Respublica and the students or holiday visitors for the lease of the premises or the provision of accommodation. The students looked to TUT for a place in the residence, which the latter hired from Respublica. TUT made a separate supply of accommodation to its students and that supply, 'being a supply necessary for and subordinate and incidental to the supply of [educational services] [and] supplied for a consideration in the form of…payment for board and lodging', was exempt from VAT by virtue of section 12(h)(ii) of the Act.

(iv) That Respublica supplied the immovable property and leased premises to TUT under an agreement of lease. It handed over possession and occupation of the property to the latter for the duration of the lease period and in return received a specified monthly rental. The lease contained a full range of terms typically found in a property lease. It is so that Respublica was required in terms of the lease agreement, in addition, to provide TUT with residential management services on the premises but these supplies were plainly ancillary to the lease and they did not detract from the core basis for TUT's occupation of the premises, namely a lease of immovable property.

(v) That Respublica's approach was contrary to the general principles, as recognised in other VAT jurisdictions, that the VAT consequences of a supply must be assessed by reference, first and foremost, to the contractual arrangements under which the supply is made.

(vi) That, so viewed, one cannot legitimately attribute to Respublica's supply, governed as it was by its own contractual terms, the characteristics of an altogether different supply of accommodation to third parties under separate contracts, with whom it had no contractual nexus. The test for whether Respublica supplied lodging cannot be whether the end-use of the property under the second set of supplies by TUT was temporary in nature or constituted the supply of lodgings to the students. The relevant contractual rights and obligations were those as between Respublica and TUT, and did not involve the supply of temporary accommodation. The fact that TUT supplied temporary accommodation in the form of lodging to its students was res inter alios acta and was irrelevant.

(vii) That, accordingly, as the supply by Respublica to TUT did not meet the first requirement of the 'commercial accommodation' definition that suffices to determine the appeal against it and it was thus unnecessary to consider whether the other requirements had been met. Nor was it necessary to consider whether the supply by Respublica is 'a dwelling supplied in terms of an agreement for the letting and hiring thereof', because counsel were agreed that the exclusion did not find application.

Appeal upheld with costs.

5. INTERPRETATION NOTES

5.1. Section 18A: Audit certificate – No. 112

This Note provides guidance on the interpretation and application of section 18A(2B) and (2C) in relation to the audit certificate that must be obtained and retained in specified circumstances for section 18A receipts issued by an approved organisation or department.

Section 18A(1) and (2) potentially provide a taxpayer with a deduction for *bona fide* donations paid or transferred to any approved organisation, agency, programme, fund, High Commissioner, office, entity, organisation or department, if the donation is supported by a section 18A receipt issued by that approved organisation, agency, programme, fund, High Commissioner, office, entity, organisation or department.

Generally speaking, under section 18A(2A) a PBO, an institution, board or body or a department may issue section 18A receipts only to the extent that the donation will be used to carry on PBAs in Part II or, in the case of a conduit PBO, that 50% of the donations will be distributed within 12 months and that the funds will be used to fund PBOs, or institutions, boards or bodies, which carry on PBAs in Part II.

A section 18A receipt issued by an approved organisation, agency, programme, fund, High Commissioner, office, entity, organisation or department is required to include a certification to the effect that the receipt is issued for the purposes of section 18A and that the donation has been or will be used exclusively for the object of that organisation, agency, programme, fund, High Commissioner, office, entity or organisation or, in the case of a department, in carrying on the relevant PBA.

Part I of the Ninth Schedule lists a variety of activities that are recognised as PBAs for purposes of section 30(1). Part II of the Ninth Schedule lists some, but not all, of the activities listed in Part I for the purposes of section 18A. An organisation may conduct a combination of PBAs in Part I and PBAs in Part II. In this situation section 18A receipts can be issued only for donations that will be used for purposes of carrying on PBAs in Part II. Concerns arose regarding whether approved organisations and departments in these situations would restrict the issuing of section 18A receipts to donations that would be used for PBAs in Part II.

As a result, the requirement for an approved organisation or department to obtain an audit certificate was introduced as a control measure to ensure that section 18A receipts were issued only for donations received or accrued during the year of assessment6 that would be and ultimately are used for purposes of PBAs in Part II. It is not unreasonable to require control over donations for which an approved organisation or department issues a section 18A receipt since this potentially entitles the donor to claim a tax deduction that has a real cost to the *fiscus* given that the donee is normally not subject to tax on the donation received.

Section 18A(2B) and (2C) merely refer to an audit certificate. No detailed requirements are prescribed with regards to the information that must be contained on the audit certificate, or from whom the audit certificate should be obtained, with the exception of who must issue it in the case of a department. Thus uncertainty exists on how to comply with the audit certificate requirement.

This Note therefore provides guidance on what would be regarded as acceptable information on an audit certificate referred to in section 18A(2B) and (2C) and from whom such a certificate may be obtained.

Strict control measures must be applied to donations received by or accrued to approved organisations, agencies, programmes, funds, High Commissioners, offices, entities, organisations and departments for which section 18A receipts are issued, since such donations may qualify for a tax deduction from the taxable income of taxpayers and as such represent a cost to the *fiscus*. Approved organisations, agencies, programmes, funds, High Commissioners, offices, entities, organisations and departments are therefore required to maintain proper control over the application and spending of such donations.

Approved organisations and departments must obtain and retain, or submit as appropriate, an audit certificate confirming that such donations were used in conducting PBAs in Part II and, in the case of conduit PBOs, also confirm that donations were distributed in accordance with section 18A(2A)(*b*)(i).

6. BINDING PRIVATE RULINGS

6.1. BPR 320 – Conversion of association to private company

This ruling determines the income tax, value-added tax (VAT), transfer duty and securities transfer tax (STT) consequences of the conversion of an unincorporated *universitas* to a newly formed private company and certain related matters.

In this ruling references to sections are to sections of the relevant Act applicable as at 19 January 2019. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the relevant Act.

This is a ruling on the interpretation and application of:

- Income Tax Act:
  - section 1(1) – definition of 'company';
  - section 11(*a*) read with section 23(g);
  - section 41(1) and (4);
  - section 44; and
  - section 56.
- the VAT Act:

- section 8(25).

- the Transfer Duty Act:
  - section 9(1)(*l*).
- the STT Act:
  - section 8(1)(*a*)(ii); and
  - section 8(1)(*r*).

Parties to the proposed transaction

The applicant: An unincorporated *universitas* that is a resident

Company A: A new company that is a resident and a wholly-owned subsidiary of the applicant

Clubs: 32 clubs that are members of the applicant immediately before the proposed transaction takes place (Current Clubs) as well as such Clubs that hold A or B shares in Company A from time to time (Promoted/Relegated Clubs)

Description of the proposed transaction

The applicant intends to convert to a company, using the provisions of section 44 of the Act. To this end the following transaction steps will be implemented:

- The applicant will incorporate Company A as a subsidiary, subscribing for one (1) share (the Incorporation Share) at a nominal amount.
- The applicant will transfer its business assets (including the contracts) as a going concern to Company A, in exchange for an issue of thirty-two (32) shares by Company A (Consideration Shares) and the assumption of the applicant's liabilities by Company A.
- These liabilities comprise trade creditors, general operational liabilities and an amount due to a counterparty in consequence of a cumulative surplus on previous sponsored events which is payable on request or for the exclusive use in future sponsored events. The general operational liabilities include accruals, payments due to SARS, commissions and provisions relating to leave pay and bonuses.

- To the extent that capital assets, allowance assets and trading stock are transferred by the applicant to Company A, they will not change their usage and will be acquired by the latter as capital assets, allowance assets and trading stock.
- Company A will buy back the Incorporation Share for a nominal amount.
- The 32 Consideration Shares will be distributed by the applicant to the 32 Current Clubs.
- The applicant's existence will be terminated.

The applicant, which consists of two leagues, is organised in ascending tiers. The 16 club higher league is above the 16 club lower league. The right to compete in these leagues stems from sporting performance. A team in the lower league that wants to compete in the higher league has to be promoted into the higher league by winning the lower league in the previous season. Every season, the top two teams of the lower league is promoted to the higher league, whilst the bottom two teams of the higher league is relegated to the lower league.

The applicant qualifies as a *universitas* in that it is a separate legal entity that has perpetual succession, existence independent from that of its members, the capacity to own property and the right to sue and be sued in its own name.

The applicant (as *universitas*) constitutes a 'company', as defined in the Act by virtue of paragraph (*d*) of the definition of that term which includes any *'association … formed in the Republic to serve a specified purpose, beneficial to the public or a section of the public;'* and currently pays income tax at the corporate rate. The Applicant is also a registered VAT vendor.

The Current Clubs have voting rights and rights to participate in a distribution on liquidation as well as certain contractual rights. Voting rights are weighted in favour of higher league clubs.

Only clubs may be members of the applicant. The applicant is managed and controlled by an executive committee, comprised of members appointed by the clubs. Although these committee members are likely to be involved in the management and control of their respective clubs, they do not hold any interest in the applicant, nor will they hold shares in Company A after the restructuring. Their voting rights do not reach the 20% threshold for a connected person relationship to come about.

Current Clubs have the right to participate equally in a distribution on the liquidation of the applicant.

The applicant pays monthly grants and preparation fees to the member clubs. These amounts are paid to the clubs in consideration for and to facilitate their participation in the leagues, which in turn ensures income for the applicant in the form of sponsorships for the leagues, the sale of broadcasting rights and gate takings at the league matches. The services that the clubs render in exchange for the monthly grants and fees comprise the following:

- participation in league matches;
- provision of suitable venues, complying with the regulations relating to lighting, pitch dimensions, pitch conditions and designated areas for match officials, medical staff and substitutes;
- provision of equipment and services at match venues, including suitable substitution boards, availability of medical personnel and equipment, a match ball of suitable quality, access to dressing rooms and adequate security;
- provision of junior teams.

The applicant levies VAT on the service fees paid to member clubs.

The constitution of the applicant confers no membership rights that are capable of being traded by the member clubs. The clubs do not have the right to sell or otherwise deal in their membership rights in the applicant.

There are circumstances in which the member clubs may lose their membership rights. The most frequent manner in which this occurs is through relegation. At the end of each season, the bottom-placed teams of the lower league are relegated, and lose their membership of the applicant. No compensation is paid to the two relegated teams for surrendering their membership rights in the applicant.

There are also other less frequent instances in which member clubs may surrender their membership rights. For instance, the applicant's executive committee may cancel the membership of a club if it is found that the club has misrepresented material information, either on its initial application or any subsequent application for renewal of membership. As with relegation, the (former) member clubs receive no financial benefit for the surrender of their membership rights. Lastly, clubs may choose to resign from the higher league.

It is intended that Company A will continue the business of the applicant seamlessly subsequent to the implementation of the proposed conversion. To this end, the draft Memorandum of Incorporation contains the following limitations:

- Company A has restrictions on the transferability of its shares, which echoes the applicant's constitution and provides that no shares of Company A will be transferred without the approval of a resolution of the Board, who will refuse such transfer unless it is in the context of promotion and relegation. There are also restrictions on the shareholders of Company A that provide that only persons registered as member clubs of the higher or lower leagues will be entitled to hold A and B shares, as appropriate.
- The price of A and B shares are fixed at R1 each for purposes of transfer.
- Company A is prohibited from offering any of its securities to the public.
- Company A is authorised to issue 16 A and 16 B shares, the holders of which participate proportionally with other A and B shareholders in any distribution made by Company A and in the net assets upon its liquidation.
- Company A may make distributions from time to time, provided that solvency and liquidity requirements are met.

<u>Conditions and assumptions</u>

This binding private ruling is subject to the following additional conditions and assumptions:

- Company A will be incorporated in terms of the Companies Act and will be a 'resident', as defined in section 1(1) of the Act.

- The debt (including contingent liabilities) that the applicant will transfer to Company A is attributable to and arose in the ordinary course of the applicant's business undertaking and was not incurred by the applicant for the purpose of procuring, enabling, facilitating or funding the acquisition by Company A of any asset in terms of the proposed transaction.
- Company A will be a 'vendor' as defined in section 1(1) of the VAT Act at the time of the proposed transfer of the applicant's assets to it as part of the proposed amalgamation transaction.
- In a general meeting the Current Clubs of the applicant will pass a resolution authorising the winding up and dissolution of the applicant. A copy of such a resolution will be submitted to the Commissioner, as will all tax returns and other information required to be submitted in terms of any tax administered by the Commissioner, or arrangements will be made with the Commissioner to do so within 36 months of the amalgamation transaction or such longer period as the Commissioner may approve.
- The public officer of Company A will make a sworn affidavit or solemn declaration that the acquisition of immoveable property from the applicant complies with the provisions of section 44 when furnishing transfer duty documents to the Commissioner.
- The public officer of the applicant and the Current Clubs (and such clubs that may hold A or B shares in Company A) will make the sworn affidavits or solemn declarations that the acquisition of securities in the Co-applicant complies with the provisions of sections 8(1)(*a*)(ii) and 8(1)(*r*) of the STT Act.
- The market value of the Consideration Shares that the Current Clubs will receive will be equal to the market value of the membership rights in the applicant immediately before the proposed transaction.

<u>Ruling</u>

The ruling made in connection with the proposed transaction is as follows:

- The proposed transaction will qualify as an 'amalgamation transaction' as defined in paragraph (a) of the definition of that term in section 44(1) of the Act.
- The applicant may disregard, for purposes of determining its taxable income or assessed losses, the disposal of the Consideration Shares in Company A to the Current Clubs in terms of section 44(8) of the Act.
- The applicant will be regarded as having taken the necessary steps to terminate its corporate existence as required by the definition of an 'amalgamation transaction' as defined in paragraph (a) of the definition in section 44(1), read with sections 44(13) and 41(4) of the Act, provided that:
  - The applicant passes a special resolution authorising its dissolution as envisaged in its founding document;
  - The applicant submits copies of the aforementioned resolution to the Commissioner;
  - All the returns or information required to be submitted or furnished to the Commissioner in terms of any Act administered by the Commissioner by the end of the relevant period within which the aforementioned steps must be taken are submitted or furnished or arrangements are made to the satisfaction of the Commissioner for the submission of any outstanding returns or furnishing of information; and
  - The aforementioned steps are taken within 36 months after the date of the proposed transaction, or such further period as the Commissioner may allow.
- No donations tax is payable in consequence of the transfer by the applicant of all its assets to Company A in terms of the amalgamation transaction.
- No VAT will be imposed on the disposal of the assets to Company A by virtue of section 8(25) of the VAT Act.
- No transfer duty will be payable by Company A on the acquisition of

immovable property from the applicant by virtue of section 9(1)(*l*)(iB) of the Transfer Duty Act.

- No STT will be imposed on the transfer of the Consideration Shares from the applicant to the Current Clubs by virtue of section 8(1)(*a*)(ii) of the STT Act.
- It is not appropriate to place a value on the A and the B shares. Consequently, Company A will not be subject to STT when A or B shares are transferred between promoted or relegated clubs under section 8(1)(*r*).
- Provided that the amounts of the monthly fees and preparation fees paid by Company A to the clubs that hold A or B shares are not excessive with reference to the services to be rendered in exchange for such fees, the expenditure will be deductible under section 11(*a*), read with section 23(*g*), of the Act.
- Monthly fees paid by Company A to the clubs that hold A or B shares will constitute 'gross income', as defined in section 1(1) of the Act, for those clubs and such gross income will accrue in their favour when the relevant resolution to pay is made.

7. BINDING GENERAL RULINGS

7.1. BGR (VAT) 51 – Cancellation of registration of a foreign electronic service supplier

For the purpose of this ruling '**foreign electronic services supplier'** means a non-resident vendor supplying electronic services in the course or furtherance of an enterprise contemplated in paragraph (*b*)(vi) of the definition of 'enterprise' in section 1(1);

<u>Purpose</u>

The purpose of this BGR is to make an arrangement under section 72 for a foreign electronic services supplier that will have taxable supplies of a value not exceeding

R1 million in a 12-month period to apply to cancel their registration.

Background

A foreign electronic services supplier became liable to register for VAT at the end of any month where the total value of taxable supplies exceeded R50 000 in respect of supplies made in terms of the regulations published in Government Notice R.221 of 28 March 2014. With effect from 1 April 2019, the registration threshold for which a foreign electronic services supplier is obliged to register for VAT, was increased from R50 000 to R1 million. As a result of the increase in the threshold, a foreign electronic services supplier may wish to cancel its registration if its total value of taxable supplies will not exceed the threshold of R1 million, in any consecutive 12-month period.

Section 24(1) and (2) allows the Commissioner to cancel a vendor's registration where the total value of taxable supplies made by a vendor will not be more than R1 million in any consecutive 12-month period. However, section 24(1) and (2) does not apply to a foreign electronic services supplier by virtue of an omission of the reference to section 23(1A) in section 24(1). This therefore results in a difficulty for a foreign electronic services supplier in applying to cancel its registration if the total value of taxable supplies will not exceed the threshold of R1 million in any consecutive 12-month period.

Ruling

This ruling constitutes a BGR issued under section 89 of the Tax Administration Act insofar as it relates to the items listed below:

An arrangement is hereby made under section 72 that:

- a foreign electronic services supplier that wishes to have its registration cancelled in the circumstances where the total value of taxable supplies will not exceed R1 million in any consecutive period of 12 months, may make a written request to have the registration cancelled; and
- the Commissioner being satisfied that the circumstances above apply, shall:

- cancel the registration of that foreign electronic services supplier with effect from the last day of the tax period during which the Commissioner is satisfied the aforementioned circumstances are met, or from another date determined by the Commissioner, and
- notify the foreign electronic services supplier of the effective date of the cancellation of the registration, including its last tax period.

A foreign electronic service supplier must continue charging VAT on its supplies, filing VAT returns and making payments of VAT to the Commissioner, even if it has submitted a request to have its registration cancelled. The Commissioner will communicate to the foreign electronic services supplier as to its last tax period for which a VAT return must be filed and the VAT that was charged on its supplies in respect of that tax period must be paid.

8. BINDING CLASS RULINGS

8.1. BCR 67 – Tax consequences for members arising out of conversion of association to private company

This ruling determines the income tax and VAT, consequences for the members of an unincorporated *universitas*, formed to administer a national sporting league, (the Applicant) of its conversion to a newly formed private company (Company A) and related matters.

In this ruling references to sections are to sections of the relevant Act applicable as at 19 January 2019. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the relevant Act.

This is a ruling on the interpretation and application of:

- the Act

- section 41(1) and (4);
- section 44; and
- section 56.

- the VAT Act
  - section 2(1)(*d*), read with the definition of 'equity security' in section 2(2).

Class

The class members to whom this ruling applies are the Clubs referred to below.

Parties to the proposed transaction

The applicant: An unincorporated *universitas* that is a resident

Company A: A new company that is a resident and a wholly-owned subsidiary of the applicant

Clubs: 32 clubs that are members of the applicant immediately before the proposed transaction takes place (Current Clubs) as well as such Clubs that will hold A or B shares in Company A from time to time (Promoted/Relegated Clubs)

Description of the proposed transaction

The applicant intends to convert to a company, using the provisions of section 44 of the Act. To this end the following transaction steps will be implemented:

- The applicant will incorporate Company A as a subsidiary, subscribing for one (1) share (the Incorporation Share) at a nominal amount.
- The applicant will transfer its business assets (including the contracts) as a going concern to Company A, in exchange for an issue of thirty-two (32) shares by Company A (Consideration Shares) and the assumption of the applicant's liabilities by Company A.

These liabilities comprise trade creditors, general operational liabilities and an amount due to a counterparty in consequence of a cumulative surplus on previous sponsored events which is payable on request or for the exclusive use in future for such sponsored events. The general operational liabilities include accruals, payments due to SARS, commissions and provisions relating to leave pay and bonuses.

To the extent that capital assets, allowance assets and trading stock are transferred by the applicant to Company A, they will not change their usage and will be acquired by the latter as capital assets, allowance assets and trading stock.

- Company A will buy back the Incorporation Share for a nominal amount.
- The 32 Consideration Shares will be distributed by the applicant to the 32 Current Clubs.
- The applicant's existence will be terminated.

The applicant, which consists of two leagues, is organised in ascending tiers. The 16 club higher league is above the 16 club lower league. The right to compete in these leagues stems from sporting performance. A team in the lower league that wants to compete in the higher league has to be promoted into the higher league by winning the lower league in the previous season. Every season, the top two teams of the lower league are promoted to the higher league, whilst the bottom two teams of the higher league are relegated to the lower league.

The applicant qualifies as an *universitas* in that it is a separate legal entity that has perpetual succession, existence independent from that of its members, the capacity to own property and the right to sue and be sued in its own name.

The applicant (as *universitas*) constitutes a 'company', as defined in the Act by virtue of paragraph (*d*) of the definition of that term, which includes any *'association … formed in the Republic to serve a specified purpose, beneficial to the public or a section of the public;'* and currently pays income tax at the corporate rate. The applicant is also a registered VAT vendor.

The Current Clubs have voting rights and rights to participate in a distribution on liquidation as well as certain contractual rights. Voting rights are weighted in favour of higher league Clubs.

Only clubs may be members of the applicant. The applicant is managed and controlled by an executive committee, comprised of members appointed by the clubs. Although these committee members are likely to be involved in the management and control of their respective clubs, they do not hold any interest in the applicant, nor will they hold shares in Company A after the restructuring. Their voting rights do not reach the 20% threshold for a connected person relationship to come about.

Current Clubs have the right to participate equally in a distribution on the liquidation of the applicant.

The applicant pays monthly grants and preparation fees to the clubs. These amounts are paid to the clubs in consideration for and to facilitate their participation in the leagues, which in turn ensures income for the applicant in the form of sponsorships for the leagues, the sale of broadcasting rights and gate takings at the league matches. The services that the clubs render in exchange for the monthly grants and fees comprise the following:

- participation in league matches;
- provision of suitable venues, complying with the regulations relating to lighting, pitch dimensions, pitch conditions and designated areas for match officials, medical staff and substitutes;
- provision of equipment and services at match venues, including suitable substitution boards, availability of medical personnel and equipment, a match ball of suitable quality, access to dressing rooms and adequate security;
- provision of junior teams.

The applicant levies VAT on the service fees paid to clubs.

The constitution of the applicant confers no membership rights that are capable of being traded by the clubs. The clubs do not have the right to sell or otherwise deal in their membership rights in the applicant.

There are circumstances in which the clubs may lose their membership rights. The most frequent manner in which this occurs is through relegation. At the end of each season, the bottom-placed teams of the lower league are relegated, and lose their membership of the applicant. No compensation is paid to the two relegated teams for surrendering their membership rights in the applicant.

There are also other less frequent instances in which clubs may surrender their membership rights. For instance, the applicant's executive committee may cancel the membership of a club if it is found that the club has misrepresented material information, either on its initial application or any subsequent application for renewal of membership. As with relegation, the (former) clubs receive no financial benefit for the surrender of their membership rights. Lastly, clubs may choose to resign from the higher league.

It is intended that Company A will continue the business of the applicant seamlessly subsequent to the implementation of the proposed conversion. To this end, the draft Memorandum of Incorporation contains the following limitations:

- Company A has restrictions on the transferability of its shares, which echoes the applicant's constitution and provides that no shares of Company A will be transferred without the approval of a resolution of the Board, who will refuse such transfer unless it is in the context of promotion and relegation. There are also restrictions on the shareholders of Company A that provide that only persons registered as member clubs of the higher or lower leagues will be entitled to hold A and B shares, as appropriate.
- The price of A and B shares are fixed at R1 each for purposes of transfer.
- Company A is prohibited from offering any of its securities to the public.
- Company A is authorised to issue 16 A and 16 B shares, the holders of which participate proportionally with the holders of other A and B shares in any distribution made by Company A and in the net assets upon its liquidation.
- Company A may make distributions from time to time, provided that solvency and liquidity requirements are met.

Conditions and assumptions

This binding class ruling is subject to the following additional conditions and assumptions:

- Company A will be incorporated in terms of the Companies Act and will be a 'resident', as defined in section 1(1) of the Act.

- The debt (including contingent liabilities) that the applicant will transfer to Company A is attributable to and arose in the ordinary course of the applicant's business undertaking and was not incurred by the applicant for the purpose of procuring, enabling, facilitating or funding the acquisition by Company A of any asset in terms of the proposed transaction.

- In a general meeting the Current Clubs of the applicant will pass a resolution authorising the winding up and dissolution of the applicant. A copy of such a resolution will be submitted to the Commissioner and all tax returns and other information required to be submitted in terms of any tax administered by the Commissioner will be submitted or arrangements will be made with the Commissioner to do so within 36 months of the amalgamation transaction or such longer period as the Commissioner may approve.

- The market value of the Consideration Shares that the Current Clubs will receive will be equal to the market value of the membership rights in the applicant immediately before the proposed transaction.

Ruling

The ruling made in connection with the proposed transaction is as follows:

- The Current Clubs will acquire the equity shares in Company A by virtue of their memberships in the applicant and pursuant to the Proposed Transaction in respect of which sections 44(2) and (3) of the Act apply.

- The Current Clubs are deemed to have disposed of their membership rights in the applicant for an amount equal to the expenditure incurred.

- The provisions of sections 44(6)(*d*) and (*e*) will not apply to the Proposed Transaction.
- The Promoted/Relegated Clubs will not be subject to capital gains tax in respect of the transfer of shares in NSL pursuant to their promotion or relegation.
- The Promoted/Relegated Clubs will not be subject to donations tax in respect of the transfer of shares in Company A pursuant to their promotion or relegation.
- The Promoted/Relegated Clubs will not be subject to VAT when they transfer their shares in Company A pursuant to their promotion or relegation.
- Monthly fees paid by Company A to the clubs that hold A or B shares will constitute 'gross income', as defined in section 1(1) of the Act, for those clubs and such gross income will accrue in their favour when the relevant resolution to pay is made.

9. GUIDES

9.1. Guide to the Employment Tax Incentive (Issue3)

The employment tax incentive was introduced by the Employment Tax Incentive Act 26 of 2013 which was promulgated on 18 December 2013. This Act has since been amended on a number of occasions.

This guide provides general guidance on the incentive. While this guide reflects SARS' interpretation of the law, taxpayers who take a different view may use the normal avenues for resolving such differences.

The ETI is a temporary tax incentive that may be claimed by eligible employers and is aimed at encouraging such employers to employ young employees between the ages of 18 and 29, and employees of any age in special economic zones and in any industry identified by the Minister by notice in the *Government Gazette*. Payment of the incentive is effected by eligible employers being able to reduce the employees' tax due by them by the amount of the ETI that they may claim – provided of course that they meet the requirements of the ETI Act. The ETI is administered by SARS through the employees' tax system that is deducted and withheld and accounted for to SARS (usually monthly) via the Pay-As-You-Earn (PAYE) system.

As mentioned, the ETI is a temporary programme initially covering a period of three years. The Taxation Laws Amendment Act 15 of 2016 extended the ETI for a further two years and two months. The Taxation Laws Amendment Act 23 of 2018 extends the ETI for a further ten years. During this period an eligible employer may claim the ETI for a maximum of 24 months per qualifying employee. The ETI will be subject to continuous review of its effectiveness and impact in order to determine the extent to which its core objective of reducing youth unemployment is achieved. The ETI commenced on 1 January 2014 and will end on 28 February 2029. It applies to qualifying employees employed on or after 1 October 2013 by eligible employers.

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10. INDEMNITY

Whilst every reasonable care has gone into the preparation and production of this update, no responsibility for the consequences of any inaccuracies contained herein or for any action undertaken or refrained from taken as a consequence of this update will be accepted.