TAX UPDATE

For period: January 2025 to March 2025

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1. FOREWORD

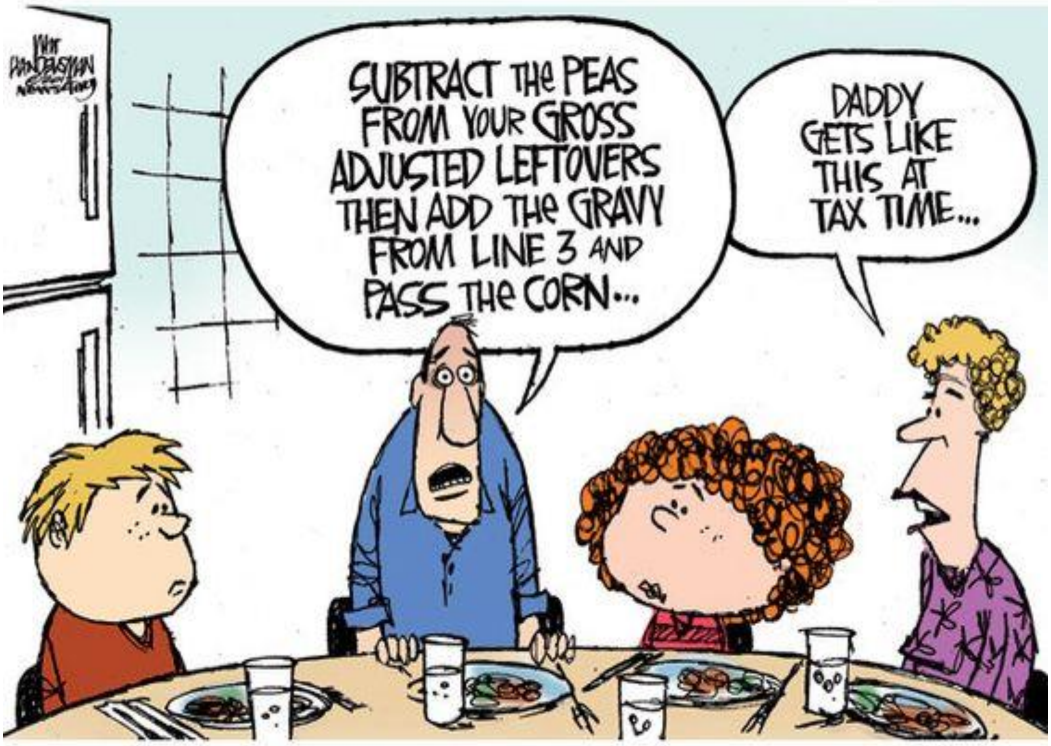
The purpose of this update is to summarise developments that occurred during the first quarter of 2025, specifically in relation to Income Tax and VAT. Johan Kotze, a Tax Executive at Shepstone & Wylie Attorneys, has compiled this summary.

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 to discuss their specific concerns and, for that matter, any other tax concerns.

Please 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!



2. BUDGET

2.1. Main proposal

Government proposes to increase VAT rate by 0.5% in 2025/26 and by 0.5% in 2026/27.

Personal income tax brackets and rebates are not adjusted for inflation in 2025/26.

To provide relief to lower-income households, government proposes additional VAT zero rating of essential food items and no changes to the fuel levy.

2.2. Personal tax rates

2025 year of assessment		**2026 year of assessment**	
Taxable Income	**Rates of tax**	**Taxable Income**	**Rates of tax**
R0 – R237 100	18% of each R1	R0 – R237 100	18% of each R1
R0 – R237 100	18% of each R1	R0 – R237 100	18% of each R1
R237 101 – R370 500	R42 678 + 26% of the amount above R237 100	R237 101 – R370 500	R42 678 + 26% of the amount above R237 100
R370 501 – R512 800	R77 362 + 31% of the amount above R370 500	R370 501 – R512 800	R77 362 + 31% of the amount above R370 500
R512 801 – R673 000	R121 475. + 36% of the amount above R512 800	R512 801 – R673 000	R121 475. + 36% of the amount above R512 800
..R 673 001 – R857 900	R179 147 + 39% of the amount above R673 000	..R 673 001 – R857 900	R179 147 + 39% of the amount above R673 000
R857 901 – R1 817 000	R251 258 + 41% of the amount above R857 900	R857 901 – R1 817 000	R251 258 + 41% of the amount above R857 900

R1 817 001 and above	R644 489 + 45% of the amount above R1 817 000	R1 817 001 and above	R644 489 + 45% of the amount above R1 817 000
Rebates		**Rebates**	
Primary Secondary Third rebate	R17 235 R9 444 R3 145	Primary Secondary Third rebate	R17 235 R9 444 R3 145
Tax threshold		**Tax threshold**	
Below age 65 Age 65 and over Age 75 and over	R95 750 R148 217 R166 895	Below age 65 Age 65 and over Age 75 and over	R95 750 R148 217 R166 895

2.3. Medical tax credits

Medical tax credits will remain unchanged at R364 per month for the first two members and R246 per month for additional members.

2.4. Adjustment of transfer duty

As part of the periodic reviews of monetary values in tax tables, the monetary thresholds for transfer duties will be adjusted by 10 per cent to compensate for inflation. The transfer duty tax rates will remain unchanged.

2024 / 25		**2025 / 26**	
Property value	**Rates of tax**	**Property value**	**Rates of tax**
R0 – R1 100 000	0% of property value	R0 – R1 210 000	0% of property value
R1 100 001 – R1 512 500	3% of property value above R1 100 000	R1 210 001 – R1 633 800	3% of property value above R1 210 000

R1 512 501 – R2 117 500	R12 375 + 6% of property value above R1 512 500	R1 633 801 – R2 329 300	R13 614 + 6% of property value above R1 633 800
R2 117 501 – R2 722 500	R48 675 + 8% of the amount above R2 117 501	R2 329 301 – R2 994 800	R53 544 + 8% of the amount above R2 329 300
R2 722 501 – R12 100 000	R97 075 + 11% of the amount above R2 722 501	R2 994 801 – R13 310 000	R106 784 + 11% of the amount above R2 994 800
R12 100 001 and above	R1 128 600 + 13% of the amount above R12 100 000	R13 310 001 and above	R1 241 456 + 13% of the amount above R13 310 000

2.5. Employment tax incentive values

Government proposes to maintain the value of the employment tax incentive at a maximum of R1 500 per month in the first 12 months and R750 per month in the second 12 months of eligibility.

Effective from 1 April 2025, the formula to calculate the incentive and the eligible income bands will be adjusted, in part due to adjustments of minimum wages since the last increase in the value of the incentive in 2022.

Employers will be able to claim the incentive at a rate of 60% of the wages below R2 500 per month, where such wage minimums are allowed due to existing exemptions. The maximum value of R1 500 per month will apply to employees earning between R2 500 and R5 500 monthly, up from R2 000 and R4 500 previously. The incentive value will decline as wages increase, tapering to zero at a monthly income of R7 500 (previously R6 500).

2.6. Extending the urban development zone tax incentive

The urban development zone tax incentive was introduced in 2003 to address urban decay within inner cities. To allow for certainty and planning for investors, and adequate time to consult with municipalities, it is proposed that the sunset date for this incentive be extended by five years to 31 March 2030.

2.7. *Review of the renewable energy allowance*

In 2023, government introduced a new temporary incentive for renewable energy.

The temporary incentive fell away on 28 February 2025.

The 2024 Budget Review noted that government would reconsider the leasing provisions and the generation threshold of 1 megawatt (MW) under the original incentive (12B).

After careful assessment, it is proposed that these two design features remain unchanged.

2.8. *Cross-border tax treatment of retirement funds*

The current treatment of cross-border retirement funds may result in double non-taxation, particularly where South Africa is granted the taxing right by treaty.

It is proposed that changes be made to the rules that currently exempt lump sums, pensions and annuities received by South African residents from foreign retirement funds for previous employment outside South Africa, with amendments in the current legislative cycle.

2.9. *Other matters under consideration and consultation*

- A discussion paper on collective investment scheme (CIS) taxation made three main proposals:
    - make CIS fully tax transparent,
    - provide a threshold for CIS and
    - remove hedge funds from the framework.

  Government acknowledges the administrative concerns raised with respect to the fully tax-transparent proposal and confirms that it does not intend to tax all CIS returns as revenue. Consultations will continue in 2025.
- Government intends to publish a consultation paper on unlocking institutional funding for infrastructure.

It will propose that certain investment vehicles be enabled to facilitate such investments and would offer a flow-through tax regime. Further consultations will take place during 2025.

- Government aims to expand South Africa's tax treaty network and renegotiate some existing treaties to strengthen economic and trade relations, prevent double taxation and tax abuse, and enhance regional cooperation.
- The VAT Act provides for a VAT exemption on the importation of certain low-value goods.

  Government will review legislation to bring parity to the VAT treatment of such goods purchased online, as many offshore suppliers of these goods are not registered for VAT.

2.10. Individuals, employment and savings – Amending the definition of 'remuneration proxy'

The term 'remuneration proxy' as defined in the Income Tax Act is often equated with 'remuneration' as defined in the Fourth Schedule to the Income Tax Act.

This equivalence is particularly relevant when the 'remuneration proxy' serves as a surrogate to calculate remuneration for the current year of assessment. However, an unintended benefit arises for certain employees who, in the previous year of assessment, qualified for and claimed an exemption for foreign employment income.

For example, these employees may have a reduced remuneration amount in the current year when determining the value of a domestic residential accommodation taxable benefit. In this context, variable 'A' in the formula relies on the definition of 'remuneration proxy' in section 1 of the Act.

It is proposed that the definition of 'remuneration proxy' be amended to include amounts exempted under section 10(1)(o)(ii) of the Act.

2.11. Individuals, employment and savings – Clarifying the inclusion of an amount assigned to a non-retirement fund member spouse under religious tenets

In 2024, the Pension Funds Act was amended to recognise court orders pertaining to the division of marital assets in accordance with religious tenets.

However, the Income Tax Act requires a consequential amendment to paragraph 2(1)(b)(iA) of the Second Schedule to the Act to include amounts assigned to a non-member spouse in compliance with the tenets of a religion.

2.12. Individuals, employment and savings – Closing loopholes in the ring-fencing of assessed losses

The current application of section 20A of the Income Tax Act enables taxpayers below the maximum marginal rate threshold to exploit the tax system by continuously offsetting losses from certain trades against other sources of income.

This creates a loophole that leads to substantial revenue losses for the fiscus, as taxpayers receive full refunds of their employees' tax when those losses are allowed.

It is proposed that the threshold at which ring-fencing rules apply be reviewed and amended.

2.13. Individuals, employment and savings – Reinstating the exemption for child maintenance payments funded from after-tax income

Child maintenance payments, which are not sourced from retirement funds, are made using after-tax income and paid to the parent or guardian living with the child.

The paying party receives no tax deduction or relief for these payments, while the recipient is taxed on the maintenance received.

Since these payments are intended to fulfil the fundamental obligation of supporting a child, taxing them in the hands of the recipient requires reconsideration to better align with government's social policy objectives.

It is proposed that amendments be made to exclude child maintenance payments from the recipient's taxable income to restore the original policy intent.

2.14. Retirement provisions – Clarifying payment of death benefits

With the enactment of the Revenue Laws Second Amendment Act (2024), a lump sum payable as a result of the death of a member is still a retirement fund lump sum benefit.

However, the definition of 'savings component' only makes provision for the treatment of the remaining balance in the savings component on retirement and not on death. As a result, any value in the savings component is only payable as a savings withdrawal benefit on death.

It is proposed that an amendment be made that, on the member's death, should the nominees or dependants choose to receive a lump sum benefit, such lump sum benefit will be considered part of the retirement fund lump sum benefit for Income Tax Act purposes.

2.15. Business (general) – Extending the anti-avoidance rules dealing with third-party backed shares

Third-party backed share anti-avoidance rules deem the accrual or receipt of dividends from preference shares backed by third parties through an enforcement right of the holder to be income, except where the funds derived from the issue of these third-party backed shares are used for a qualifying purpose.

For the purposes of these specific anti-avoidance rules, an enforcement right encompasses a right of the holder to enforce performance by another person in respect of that preference share. Structures have been identified that consist of transactions to circumvent these third-party backed share anti-avoidance rules.

It is proposed that additional measures be considered to address the circumvention of these anti-avoidance measures.

2.16. *Business (general) – Refining the definition of 'hybrid equity instrument'*

The Income Tax Act contains anti-avoidance measures designed to address concerns of undue tax advantages obtained through merging equity and debt features to change the nature of income.

The term 'hybrid equity instrument' is broadly defined to encompass any type of share that has essential characteristics of debt. This definition covers five different types of instruments, including preference shares. It has come to government's attention that the characteristics of the definition as it relates to preference shares can be circumvented, resulting in the potential non-application of this anti-avoidance measure.

It is proposed that the definition of 'hybrid equity instrument' be revised to address the circumvention of this anti-avoidance measure.

2.17. *Business (general) – Clarifying the ordering of set-off of balance of assessed losses and certain deductions*

With effect from 2023, the set-off of balance of assessed losses is limited to 80 per cent of taxable income for companies.

Deductions for donations and transfers from policyholder funds of long-term insurers are limited with reference to taxable income, as defined. Government is aware of certain instances where uncertainty exists regarding the ordering of the set-off of balance of assessed losses and deductions for donations and transfers from policyholder funds of long-term insurers.

It is proposed that amendments be introduced to clarify the ordering of these deductions in calculating taxable income.

2.18. *Corporate reorganisation rules – Clarifying the rollover relief for listed shares in an asset-for-share transaction*

The Income Tax Act contains rollover rules for asset-for-share reorganisation transactions. The provisions generally prescribe that the tax cost for assets acquired by a company in exchange for the issue of shares in that company to the seller be equal to the same tax cost of that seller.

In 2010, a unified special rollover regime for asset-for-share reorganisations was introduced to address the tax cost tracing problem where the relevant assets are listed shares, as the acquiring company could not be realistically expected to know the tax cost of the target shares held by each shareholder disposing of the listed shares (disposing shareholders). At issue is that government's policy intent was to specifically limit the special rollover regime relief to disposing shareholders holding less than 20 per cent of the listed shares in the target company before the transaction.

It is proposed that the legislation be amended to align with the original policy intent and that the special rollover regime for listed shares be limited to shareholders holding less than 20 per cent of the equity shares in the target company before the transaction.

2.19. Corporate reorganisation rules – Reviewing asset-for-share and amalgamations transactions involving collective investment schemes

According to the discussion document on the tax treatment of collective investment schemes (CISs) published on 13 December 2024, transferring shares to a CIS without tax implications has allowed for unintended tax avoidance during changes of shareholdings in listed companies, as the realised gains in the shares are not taxed on transfer. The realised gains are also not taxed when the CIS disposes of the shares as part of a corporate restructuring.

It is proposed that these provisions relating to asset-for-share transactions and amalgamations transactions be reviewed

2.20. Clarifying the interest limitation rules

In 2021, the Income Tax Act was amended to strengthen rules that govern the limitation of interest deductions.

These rules limit interest deductions in two instances.

- The first is when a South African debtor incurs interest and there is a direct or indirect controlling relationship between the debtor and creditor, plus the interest income is not taxed in the hands of the creditor (per section 23M of the Income Tax Act).

- The second is in respect of reorganisation and acquisition transactions (per section 23N of the Income Tax Act). It has come to government's attention that these measures require further clarification in the following areas.

2.21. *Clarifying the interest limitation rules – Refining and clarifying the definition of 'interest' to enhance certainty*

Government acknowledges the complexity surrounding the definition of 'interest' in section 23M of the act and its use in the calculation of 'adjusted taxable income'.

It is proposed that this definition of 'interest' only pertain to interest deductions that are tested for limitation. As a result, taxpayers should rely on the definition of 'interest' contained in section 24J of the Income Tax Act to calculate 'adjusted taxable income'.

2.22. *Clarifying the interest limitation rules – Reviewing the carve-out for the interest limitation rules*

The interest limitation rules do not apply to interest on debt in instances where the ultimate lending institution has no controlling relationship with the debtor and if the interest charged does not exceed the official rate of interest plus 100 basis points.

It is proposed that back-to-back lending arrangements where there is no controlling relationship between the ultimate lending institution and the debtor also be eligible for carve-out from these rules.

2.23. *Clarifying the interest limitation rules – Clarifying the treatment of foreign exchange differences when there is no accrual for the creditor*

The interest limitation rules acknowledge foreign exchange differences on foreign exchange instruments under section 23M(7) of the act. However, it is unclear how foreign exchange differences should be treated when foreign exchange gains do not accrue to creditors.

It is proposed to make it clear that the objective is to first test whether the underlying debt should be limited. Where this is the case, the foreign exchange difference thereon will also be limited.

2.24. Clarifying the interest limitation rules – Limiting interest deductions for reorganisation and acquisition transactions

In 2024, amendments were made to align the definition of ‘adjustable taxable income’ and the formula applied to limit an interest deduction in section 23N of the act with the definition of ‘adjustable taxable income’ and the formula applied in section 23M of the act. The effective date for the amendments is 1 January 2027 to give the National Treasury and affected stakeholders time to consider the impact of the proposed amendments.

It is proposed that government review the impact of the 2024 amendments during the 2025 legislative cycle with the potential for a proposal in the 2026 Budget.

2.25. Business (financial sector) – Aligning the tax treatment of dividends with the accounting treatment by a covered person

A ‘covered person’ (banks and brokers) is taxed in accordance with accounting principles of International Financial Reporting Standards 9. It has come to government’s attention that covered persons are investing in shares and receiving dividends to hedge financial liabilities like equity-linked notes where the payments are tax deductible.

To ensure consistent tax treatment, it is proposed that dividends from these hedges be taxed to align the tax treatment of these dividends with their financial accounting treatment.

2.26. Business (financial sector) – Anomaly in the act relating to capital distributions by collective investment schemes

According to the discussion document on the tax treatment of CISs published on 13 December 2024, since the 2009 change to tax CISs in securities according to an adjusted trust system, there has been no clear legal rule regarding ‘capital distributions’ to holders of participatory interests.

If a CIS portfolio in securities is liquidated, any payments at that time could be considered proceeds from the disposal of participatory interests. However, there is no specific rule for ongoing payments from the portfolio’s capital.

It is proposed that the tax treatment of these capital distributions be considered.

2.27. *Business (financial sector) – Tax treatment of first loss after capital (FLAC) instruments as defined in the Financial Sector Regulation Act (2017)*

The Reserve Bank has the authority to instruct the Prudential Authority to establish Prudential Standards that define the features of FLAC instruments and to mandate designated institutions, such as banks, to hold a minimum amount of FLAC instruments, as specified by the Reserve Bank under the Financial Sector Regulation Act, to cover all liabilities of the designated institution.

It is proposed that the tax treatment of these FLAC instruments be clarified where necessary.

2.28. *International – Refining the definition of 'equity shares' to cater for transfers by foreign companies*

The terms 'dividends' and 'return of capital' are defined in section 1 of the Income Tax Act. Both definitions refer to amounts transferred by residents. There are separate definitions for 'foreign dividends' and 'foreign return of capital'. Based on the current wording of the 'equity share' definition, it seems that shares in a foreign company are not considered and cannot be classified as equity shares.

It is proposed that the definition of 'equity share' be updated.

2.29. *International – Interaction between sections 6quat and 23(m) of the Income Tax Act*

Section 6quat(1C) of the Income Tax Act allows for the sum of any taxes paid or proved to be payable to any sphere of government of any country other than South Africa to be deducted against income when determining that person's taxable income. Section 23(m) of the Income Tax Act, subject to certain exclusions, prohibits deductions in relation to any remuneration received from employment. At issue is that the list of exclusions to the application of section 23(m) does not include a reference to the deduction contemplated in section 6quat.

It is proposed that the list of exclusions contemplated in section 23(m) be extended to include any deductions contemplated in section 6quat(1C).

2.30. International – Interaction of controlled foreign company rules in section 9D with section 9H

Section 9H of the Income Tax Act, also known as the exit charge, provides that when a foreign company ceases to be a controlled foreign company (CFC), it is deemed to have disposed of all its worldwide assets on the date immediately before the date it ceases to be a CFC. Section 9D(2A) of the act requires that the ‘net income’ of a CFC be calculated as if the CFC were a taxpayer and tax resident. It has come to government’s attention that some arrangements between South African holding companies and their foreign subsidiaries, which are CFCs, involve the CFCs acquiring all shares in the South African holding companies without triggering an exit charge.

It is proposed that the act be amended to ensure that the exit charge is triggered in this case.

2.31. International – CFC rules and comparable tax exemption

South Africa has a comparable tax exemption that applies to CFCs. This exemption allows the net income of CFCs not to be imputed under CFC rules if the tax they pay to foreign countries is at least 67.5 per cent of what they would have paid in South Africa had they been a South African tax resident. However, the comparable tax exemption does not consider tax systems of countries that allow a refund to certain shareholders of a foreign company for tax paid by the company declaring the dividend.

It is proposed that a tax refund to a shareholder should also be taken into account in applying the comparable tax exemption.

2.32. International – Taxation of trusts and their beneficiaries

In 2023, amendments were made to the rules relating to the taxation of trusts and their beneficiaries by limiting the flow-through principle to resident beneficiaries. It has come to government’s attention that the interaction between sections 7 and 25B of the Income Tax Act and the tax treatment of income and assets vested in beneficiaries of trusts could have unintended consequences where non-residents are involved.

It is proposed that these aspects be reviewed.

2.33. International – Refining deferral of exchange difference rules on debt between related companies

Section 24I of the Income Tax Act deals with the tax treatment of gains and losses on foreign exchange transactions. However, rules apply for postponing the taxation of exchange differences until the debt is realised.

It is proposed that the policy be reconsidered so that deferred exchange differences are triggered on the portion of an exchange item realised during the year of assessment.

In addition, it is proposed to clarify the classification of debt that is not recognised in the financial statements for financial reporting purposes.

2.34. VAT – Debit and credit notes relating to a going concern as per section 8(25) of the VAT Act

The VAT Act only allows the vendor who acquired an enterprise as a going concern under section 11(1)(e) to issue debit and credit notes for the return of goods or services that were supplied by the selling vendor. It is proposed that section 21(1)(d)(ii) of the VAT Act be expanded to include the return of goods or services that were supplied by the transferor of a business as a going concern under section 42 or 45 of the Income Tax Act, where the goods or services are returned to the transferee.

2.35. VAT – Reviewing the scope of the intermediary provisions

Intermediaries may account for VAT on supplies made on behalf of foreign suppliers of ‘electronic services’ as if these supplies were made by the intermediary. This, however, does not extend to supplies made on behalf of local suppliers. This results in the intermediary not being able to issue a single consolidated tax invoice for these supplies to the customer. It is proposed that widening the intermediary provisions be considered to include supplies facilitated on behalf of local suppliers.

2.36. VAT – Reviewing VAT rules dealing with documentary requirements for silver exports

The main purpose of refineries is to refine and smelt ore received from various customers, namely depositors. In most instances, the refineries also act as agents and sell or export ore on behalf of these depositors. Silver from more than one depositor is typically required to make up the volume ordered for sale or export. After the refining or smelting, it is difficult to determine which depositor's silver is sold or exported because the silver loses its original identity during refinery and smelting. As a result, depositors find it difficult to obtain the documentary evidence to support the application of the zero rate on a transaction-by-transaction basis for their silver as contemplated in paragraph (a) of the definition of 'exported' in section 1(1) of the VAT Act as well as the regulations issued in terms of section 74(1) of the VAT Act, read with paragraph (d) of the definition of 'exported' in section 1(1) of that act. It is proposed that changes be made to the VAT Act to address this.

2.37. VAT – Updating a portion of the Export Regulations

The wording of regulation 8(2)(e)(ii) of the 'Regulations issued in terms of section 74(1) read with paragraph (d) of the definition of 'exported' in section 1(1) of the VAT Act' (the Export Regulations) seems to be causing practical difficulties in application. It is proposed that the wording of regulation 8(2)(e)(ii) be revised for ease of administration.

Reviewing the VAT treatment of testing services supplied to non-residents who are outside South Africa at the time of the supply, where services are supplied directly in connection with movable property situated in South Africa.

Testing services supplied to non-residents, such as testing of medication or devices on patients (generally during clinical trials) or samples in South Africa, raises a problem because, for example, the patient also derives a benefit and section 11(2)(l)(iii) of the VAT Act will apply irrespective of the fact that the supply is being made to a non-resident.

In certain cases, the testing services may be performed directly in respect of movable property, which is not subsequently exported, resulting in section 11(2)(l)(ii) of the VAT Act applying despite such movable property having no commercial value.

Although it may be argued that the results of the clinical trials are consumed offshore by non-residents, the current wording of section 11(2)(l) of the VAT Act prohibits the application of the zero rating on the testing services. It is proposed that changes be made to the VAT Act to address this.

2.38. VAT – Updating the regulations on the domestic reverse charge mechanism relating to valuable metal

The definition of 'residue' is limited to residue derived from or incidental to a mining operation due to concerns that the general inclusion of waste was too broad. The introduction of the de minimis rule, however, sufficiently covers the exclusion of waste from, for example, the medical and the electronic industries from the ambit of the regulations. Furthermore, practical difficulties arise in distinguishing scrap derived from or incidental to a mining operation and other waste items, as gold scrap may consist of various waste items.

It is therefore proposed that the regulations be amended to remove this limitation in the definition of 'residue'.

2.39. VAT – Reviewing the definition of 'insurance'

In light of the decision in the Constitutional Court matter of Capitec Bank Limited v Commissioner for the South African Revenue Service (CCT 209/22) [2024] ZACC 1, it is proposed that the definition of 'insurance' be revised.

2.40. VAT – Clarifying the VAT treatment of temporary letting of residential properties

For ease of administration, it is proposed that the VAT treatment of the temporary letting of residential properties under section 18D of the VAT Act and consequential sections of this act be reviewed and updated.

2.41. VAT – Reviewing the VAT treatment of airtime vouchers supplied in South Africa for exclusive use in an export country

The supply of airtime vouchers in South Africa through the distribution chain for a foreign telecommunications supplier comprises two components, namely telecommunication services to be provided outside of South Africa and distribution services of the airtime vouchers in the country. Distributors that sell airtime vouchers that can only be used in a foreign country are charging such supplies at the standard rate.

As these vouchers are typically supplied to distributors in South Africa or to foreign residents located in the country for consumption of telecommunication services by such foreign residents' family members in a foreign country, it is proposed that the VAT Act be amended in this regard.

2.42. Tax Administration – Income Tax Act – Clarifying the meaning of audit certificate to be issued by public benefit organisations

Section 18A of the Income Tax Act provides that a claim for a deduction for a donation made to an organisation as specified in that section is not allowed unless supported by a receipt issued by the organisation containing the information as prescribed in that section. The section further prescribes that the organisation conducting mixed section 18A and non-section 18A activities must obtain and retain an audit certificate confirming that all donations received or accrued in the year for which receipts were issued were used solely to undertake activities covered by section 18A of the Act.

Some uncertainty exists about how the term 'audit certificate' must be interpreted and whether it should bear reference to terminology contained in the Auditing Profession Act (2005). It is proposed that the term be clarified in the context of this section

2.43. Tax Administration – Income Tax Act – Reviewing the Fourth Schedule to allow for one nominated employer for company group structures and employee share scheme trusts of a group of companies

The provisions of the Fourth Schedule to the Income Tax Act will be reviewed to determine if they should be amended to allow one employer to be nominated by a group of companies, or by an employee share scheme trust for a group of companies, to apply to be registered as the employer on their behalf for purposes of pay-as-you-earn withholding and payment, return submissions and IRP5 certificate generation of multiple companies in a group context or an employee share scheme trust.

This may require, among others, extending the joint and several liability principles in the Fourth Schedule for the entities concerned.

2.44. Tax Administration – VAT disputes on the importation of goods

VAT on the importation of goods, as well as penalties or interest emanating from an import transaction, is imposed in terms of the VAT Act. For practical administrative purposes, VAT disputes in this context (for example, refusal to remit penalties and interest with regard to VAT on the importation of goods) are dealt with in terms of the customs internal administrative appeals framework provided in terms of Chapter XA of the Customs and Excise Act. However, nothing precludes the vendor from instituting an objection and appeal under the Tax Administration Act. This raises practical and administrative challenges as the customs and VAT disputes are interrelated and should ideally be dealt with as part of one dispute resolution mechanism.

It is proposed that the dispute resolution framework of both acts be reviewed to determine the best way to deal with these types of disputes.

2.45. Tax Administration – Trustee's role as the representative taxpayer of the pre-insolvent person

An amendment is proposed to confirm that the liability of a trustee of an insolvent estate, in their representative capacity, also extends to any income received or accrued to the insolvent person prior to the sequestration of the estate.

2.46. Tax Administration – Inspecting an enterprise that submits a voluntary VAT registration application

To curb VAT fraud and abuse, SARS implements risk-mitigating measures throughout the VAT product life cycle, including VAT registration. When voluntary VAT registration applications are submitted, SARS may require a site inspection to be conducted to verify that the enterprise business address given on the application exists and the premises are conducive to conducting the activities reflected on the application.

The Tax Administration Act provides that SARS may conduct an inspection at business premises under certain circumstances.

It is proposed that its provisions or those of the VAT Act be expanded to include inspections for this purpose.

2.47. Tax Administration – Clarifying 'bona fide inadvertent error' for purposes of understatement penalties

The concept and scope of a 'bona fide inadvertent error' has proven to be contentious. This concept is not explicitly used in similar understatement penalty frameworks, because these do not mix purely factual tests such as 'substantial understatement' with taxpayer behaviours in a single provision.

To clarify the scope of 'bona fide inadvertent error', it is proposed that 'bona fide inadvertent error' be explicitly linked with 'substantial understatement'.

2.48. Tax Administration – Tax clearance status

The interaction between the current tax compliance status system and SARS' entity scoring model will be reviewed to determine if synergies in approach can be achieved.

3. NOTICES / REGULATION

3.1. Table of interest

Interest rates charged on outstanding taxes, duties and levies and interest rates payable in respect of refunds of tax on successful appeals and certain delayed refunds

DATE FROM	DATE TO	RATE
1 November 2020	28 February 2022	7,00%
1 March 2022	30 April 2022	7,25%
1 May 2022	30 June 2022	7,50%
1 July 2022	31 August 2022	7,75%
1 September 2022	31 October 2022	8,25%

1 November 2022	31 December 2022	9,00%
1 January 2023	28 February 2023	9,75%
1 March 2023	30 April 2023	10,50%
1 May 2023	30 June 2023	10,75%
1 July 2023	31 August 2023	11,25%
1 September 2023	31 December 2024	11,75%
1 January 2025	28 February 2025	11,50%
1 March 2025	Until change in the Public Finance Management Act rate	11,25%

Interest rates payable on credit amounts (overpayment of provisional tax) under section 89*quat*(4) of the Income Tax Act

DATE FROM	DATE TO	RATE
1 September 2020	31 October 2020	3,25%
1 November 2020	28 February 2022	3,00%
1 March 2022	30 April 2022	3,25%
1 May 2022	30 June 2022	3,50%
1 July 2022	31 August 2022	3,75%
1 September 2022	31 October 2022	4,25%
1 November 2022	31 December 2022	5,00%
1 January 2023	28 February 2023	5,75%
1 March 2023	30 April 2023	6,50%
1 May 2023	30 June 2023	6,75%
1 July 2023	31 August 2023	7,25%

1 September 2023	31 December 2024	7,75%
1 January 2025	28 February 2025	7,50%
1 March 2025	Until change in the Public Finance Management Act rate	7,25%

As from 1 April 2003 the 'prescribed rate' is linked to the rate determined in terms of section 80(1)(b) of the Public Finance Management Act, but for income tax purposes the rate only becomes effective as from the first day of the second month following the date on which the PFMA rate comes into operation

A taxable benefit (fringe benefit) arises if an employee incurs a debt in favour of the employer, any other person by arrangement with the employer, or an associated institution in relation to the employer, if no interest is payable or if the interest payable is less than the 'official rate of interest'. The difference between the amount which would have been payable if the debt had incurred interest at the official rate, and the interest actually paid by the employee, is taxed as a fringe benefit.

DATE FROM	DATE TO	RATE
1 August 2020	30 November 2021	4,50%
1 December 2021	31 January 2022	4,75%
1 February 2022	31 March 2022	5,00%
1 April 2022	31 May 2022	5,25%
1 June 2022	31 July 2022	5,75%
1 August 2022	30 September 2022	6,50%
1 October 2022	30 November 2022	7,25%
1 December 2022	31 January 2023	8,00%
1 February 2023	31 March 2023	8,25%

1 April 2023	31 May 2023	8,75%
1 June 2023	30 September 2024	9,25%
1 October 2024	30 November 2024	9,00%
1 December 2024	Until change in the Repurchase rate as announced by the Reserve Bank	8,75%

The 'official rate' as defined in section 1(1) of the Act is linked to the repurchase rate plus one%. The official rate is adjusted at the beginning of the month following the month during which the Reserve Bank changes the repurchase rate.

4. TAX CASES

4.1. Enviroserv Waste Management (Pty) Ltd v C:SARS (87 SATC 1)

Enviroserv Waste Management (Pty) Ltd (Enviroserv) conducted a business of waste management services and this entailed collection of pre-classified solid waste from clients in return for fees. The waste was taken to designated landfill sites where the waste was treated, recycled and disposed of as defined in section 1 of the National Environment Management: Waste Act. Enviroserv collected and managed waste of more than ten tonnes in every month.

At the landfill sites, the waste was weighed, its classification (per truck) was confirmed and it was taken into the ‘workface’ (the inside of a cell). The cells were constructed by a process of excavation on a landfill site, and the installation in the cells of a subsoil and drainage system. Inside the cell, the waste was treated, prior to its disposal, to ‘change its physical, biological, or chemical character or composition’ to reduce its hazardous impact on the environment.

Enviroserv described the process that took place in the cells as follows: ‘The waste that is collected contains organic or inorganic elements or compounds that may have a detrimental impact on the environment because of inherent physical, chemical or toxicological characteristics. It is therefore treated with chemicals, which include lime, cement, caustic soda, ferrous sulphate, hydrogen peroxide, sulphur, sodium metabisulphite, and other chemicals in order to remove the hazardous compounds. It is deposited into the cells where it gets broken down and decomposes, producing a liquid substance known as leachate (contaminated fluid). The cells are designed in such a manner that the toxin laden leachate is produced in the cells from decomposition and biodegradation of the hazardous solid waste in the cells. The leachate gathers at the bottom of the cell and is drained and pumped away to a storage dam or tank. There it is treated through processes such as reverse osmosis, nano filtration, freeze crystallisation, and evaporation or micro encapsulation, for further removal of toxins before it is disposed of safely as prescribed in legislation. The remaining solid waste is stored in the cells indefinitely and the landfill is monitored for thirty years to ensure that no leakage of toxic substances occurs.

Enviroserv contended that the process that took place within the cells was ‘manufacturing’ or a process akin thereto. Consequently, so it argued, the cells constituted plant used directly in the process of its manufacturing activities or a process similar thereto as provided in section 12C(1)(a) of the Income Tax.

SARS in its statement filed in terms of Rule 31 of the Tax Court Rules, pleaded that ‘the process in which the cells are used (the storage of waste) is ancillary to manufacture.’ Howev,er, SARS ultimately insisted that the cells were essentially used for storage of waste and not for a process similar to manufacture.

SARS alleged that leachate was not manufactured, but was rather an ‘unwanted’ product that happens when water entered the landfill. SARS’ theory was that the landfills were constructed in order to avoid formation of leachate inside them and if leachate somehow formed in the landfill, it was treated and did not enter the environment.

SARS furthermore asserted that cells were buildings rather than plant, because they were ‘…immovable property that has been structured to fulfil the purpose of waste disposal.’

The dispute between the parties emanated from claims made by Enviroserv to SARS as depreciation allowances in respect of the cells, for the 2015 and 2016 income tax assessment years. The amounts claimed were R48 947 694.61 in respect of 2015 and R41 306 206.93 for 2016. These amounts constituted 40% and 20% depreciation in respect of the cells for the years 2015 and 2016 respectively.

SARS disallowed the claimed amounts, maintaining that the cells were waste disposal assets as defined in section 37B of the Income Tax Act, and that Enviroserv was only entitled to claim depreciation at 5% per year in respect thereof and he then raised additional assessments in respect of the disallowed claims.

SARS furthermore levied an understatement penalty (USP) of 25% in respect of claims for future expenditure made under section 24C of the Income Tax Act against Enviroserv for the same years. During the same years Enviroserv had failed to declare interest income of R25 910 000 due to it in respect of a loan advanced to its Ugandan subsidiary. Because of financial constraints, the subsidiary had not been able to pay the interest and Enviroserv had impaired it for accounting purposes, as 'not fully recoverable, but still due.'

The court a quo, being the Tax Court of the Western Cape High Court (per Cloete J), approached the issues in the following way: first, to enquire whether the landfills and the cells built thereon constituted a plant qualifying as an environmental treatment and recycling asset or whether they were environmental waste disposal assets. While accepting that the treatment of leachate commenced in the cells, the court found that 'the principal activity of the constructed cells' was the final disposal of the waste streams managed by Enviroserv.

It concluded that the landfills were manufacturing buildings rather than plant and, therefore, they qualified as waste disposal assets provided for under section 37B(2)(b) rather than manufacturing plant as provided in section 12C of the Act. The court then made adjustments to Enviroserv's income tax assessments for the years 2015 and 2016 from the claimed depreciation of 40% and 20%, to 5%.

The Tax Court also agreed with SARS that there had been a misstatement in Enviroserv's tax returns in that the interest of R25 910 000 should have been included as accrued gross income for the assessment year 2016, and that the failure to include it resulted in an overstatement of Enviroserv's losses. The parties had, in any case, agreed that an upward adjustment of R25 910 000 should be effected on Enviroserv's taxable income.

SARS had also conceded, in the Tax Court, that the penalty rate be reduced because Enviroserv had made a voluntary disclosure of the understatement, after notification of the commencement of the SARS audit.

The Tax Court reduced the penalty rate from 25% to 15% (from a standard case of reasonable care not taken in preparing the tax returns to voluntary disclosure after notification of audit).

In this appeal, in addition to appealing the dismissal of its depreciation claims, Enviroserv contended that SARS should not have levied any penalty on the section 24 claims, because the understatement resulted from a 'bona fide, inadvertent error' as contemplated by sections 222(1) to 223 of the Tax Administration Act (TA Act).

Under section 223 of the TA Act, 15% is the penalty percentage rate applicable for understatement in standard cases where reasonable care has not been taken in completing an income tax return.

This appeal to the Supreme Court of Appeal was with the leave of the Tax Court.

Judge Dambuza held the following:

As to Enviroserv's claim for depreciation allowances

(i) That it was not in dispute that Enviroserv's waste management services entailed treatment of hazardous solid waste so that it would be safe for storage. In reaching the conclusion that the cells were used for waste storage, a purpose that was ancillary to manufacture, SARS had ignored the process of separation of the leachate from solid waste in the cells prior to the draining of the leachate from the cells. The omission of the process that occurred in the cells, and consideration only of the ultimate storage of treated waste in the cells, which was the final stage in the chain of waste management steps, was incorrect.

(ii) That, by all accounts, the generation of leachate through decomposition and biodegradation occurred in the cells. SARS admitted this much in his Rule 31 statement, stating that 'SARS accepts that the treatment of leachate into a form that is suitable for lawful disposal ('treated leachate')…is a process similar to manufacture.' It was not in dispute that the purpose of treatment of the hazardous waste was essential for change in the physical, biological and chemical character of the waste in order to minimise its impact on the environment and the Tax Court had accepted that the treatment of leachate and the production of leachate was a process similar to manufacture.

(iii) That in as far as the Tax Court's interpretation of the section was founded on the 'principal activity' of the cells, it found no support in the words used in the section 12C(1)(a). Importantly, there was no evident reason why such principal activity should be based on the number of years of waste storage and not the process of manufacture which was essential for safe storage of the waste.

(iv) That any dictionary meaning used to interpret the process of manufacture must be informed by the words used in section 12C(1)(a), the purpose of that section and the context within which the section applies. The dictionary interpretation advanced by SARS that, for a process of manufacturing to have taken place, there must have been 'manual labour or mechanical process' found no support in the words used in section 12C(1)(a). Nor did it find support in the context where the production of the end-product (in this case the leachate) was drained from the solid waste as a result of the design of the plant or machinery (in this case the cells). The dictionary definition of 'manufacture' as 'the act or process of producing something' was more consistent with the words used in the section, except that the end-product must be different from the original material.

(iv) That, furthermore, nothing in the section could be interpreted to mean that raw material was 'insufficient' as an end-product of the process of manufacture as contended by SARS. The test was whether that which is made is different from that out of which it was made.

(v) That in the present case, the fact that the decomposition and biodegradation resulted in the formation of unhazardous waste and leachate (raw material) did not detract from the fact that the leachate, produced from the process that occurred in the cells, was essentially different from the components that went into its production and in the same vein, no words in section 12C(1)(a) supported the interpretation that the end-product must be useful or wanted and this was supported by this court in SIR v Cape Lime Company Ltd 29 SATC 131.

(vi) That, as to whether section 37B of the Income Tax Act was the correct provision to apply, the first issue raised by SARS in this regard was that the cells did not constitute plant as envisaged in section 12C(1)(a) and they were not fixtures, implements, machinery or apparatus used in conducting or promoting Enviroserv's business. Instead, they were rather structures, 'something akin to dumps or reservoirs as provided in section 37B.' The Tax Court had agreed with SARS, highlighting the fact that the cells were used as storage facilities in perpetuity and could not be re-used.

(vii) That the correct approach, however, was to enquire into whether the apparatus, fixture, or machinery was utilised in conducting the activities of the business –

referred to as the functionality test: 'If it is, it does not matter that it consists of some structure attached to the soil.' In this case, the utilisation of the cells by Enviroserv for extraction of leachate and for storage of non-hazardous waste was clearly in the conduct of its business.

(ix) That section 37B(2)(b) regulated depreciation of environmental treatment and recycling assets, and environmental waste disposal assets of a permanent nature which were used by a taxpayer in a process that was ancillary to a process of manufacture or any process similar thereto.

(x) That a sensible interpretation of the definition of 'environmental waste deposit asset' in section 37B(1) was that, where a disposal asset is not an indispensable part of the process of manufacture but is utilised for the ancillary purpose of compliance with legal prescripts aimed at protecting the environment, then the provisions of this section are applicable. In other words, where the desired results can be achieved without utilisation of the asset, then the asset is ancillary to the process of manufacture or similar process. Where, as in this case, the asset is an indispensable part of the manufacturing process, it cannot be ancillary to that process.

(xi) That, significantly, clause 5.4.1 of Enviroserv's licence prescribed that: 'All leachate produced by the site must be collected in containment works constructed according to condition 4.13 from where it must be treated in a leachate treatment plant.'

(xii) That the decomposition, biodegradation and extraction of the hazardous leachate was an indispensable part of the treatment of the hazardous solid waste. The fact that the cells, in which leachate generation occurred, were also used to permanently store the non-hazardous material, did not detract from their use directly in the process of manufacture or a process similar thereto. The conversion of the collected hazardous solid waste material into waste that was safe for storage was the purpose of Enviroserv's business. The 'unwanted' leachate was an intended or desired product of the processes performed by that business.

(xiii) That, consequently, contrary to SARS' contention, the cells were not waste disposal assets. Neither were they 'buildings' as envisaged in section 13 of the Income Tax Act. The cells were constructed with the specific intention that they would be used as plant wherein the extraction, collection and disposal of leachate would occur, with a special drainage system installed for collection of leachate.

As to the understatement penalties

(xiv) That the basis for imposition of an understatement penalty as provided for under section 223 of the TA Act was the prejudice suffered by SARS as a result of understatement of income by a taxpayer. 'Understatement' is defined in section 221 of the Act as 'any prejudice to SARS or the fiscus in respect of a tax period as a result of – (a) a default in rendering a return; (b) an omission from a return; (c) an incorrect statement in a return; or (d) if no return is required, the failure to pay the correct amount of 'tax'.'

(xv) That SARS, in the statement prepared in terms of Rule 31 of the Tax Court Rules, gave no details of any prejudice suffered by SARS. SARS merely identified, as one of the issues in dispute, the issue 'whether the understatement penalties issued by SARS ought to be remitted or reduced.'

(xvi) That in Purlish Holdings (Pty) Ltd v C:SARS 81 SATC 204 it was held that it was not sufficient for SARS to merely show that a taxpayer's conduct falls within the provisions of section 221 (read with section 223(1) of the Act). SARS must show that the reprehensible conduct caused prejudice to SARS or the fiscus.

(xvii) That Enviroserv contended that because it had suffered losses amounting to R4 billion during the relevant period, the erroneous understatement would not have resulted in any prejudice to SARS. That was because no income tax liability would have arisen from the understated amount. There was no response from SARS on this aspect.

(xviii) That the high watermark of SARS' case towards discharging the burden of proving prejudice, was a submission at the hearing of this appeal, that prejudice was not limited to financial prejudice: it included the risk that the misstatement will hamper the ability of SARS to effectively administer tax legislation.

(xix) That, however, these arguments did not assist SARS in the court's view. Even if the prejudice included mere risk to SARS (which is not decided in this matter) SARS made no effort to prove that risk. It remained incumbent upon SARS to do so given the express onus to prove prejudice. Having failed to make any averment regarding any risk it was exposed to as a result of the misstatement, SARS did not discharge the onus placed on it under sections 221 and 223(1).

As it was submitted on behalf of Enviroserv, the Tax Court should have considered whether SARS had discharged the burden to prove the prejudice suffered by SARS.

Appeal upheld with costs.

Enviroserv's 2015 and 2016 additional assessments were referred back to SARS in terms of section 129(2)(b) of the Tax Administration Act 28 of 2011, to be altered accordingly.

4.2. Wiese and others v C:SARS (87 SATC 14)

SARS had instituted action against the Appellants, in terms of section 183 of the Tax Administration Act ('TA Act') for payment of R216.6 million. SARS claimed that the Appellants had caused, or assisted in causing, Energy Africa Propriety Limited ('Energy Africa') to dissipate its assets in order to obstruct the collection of a tax debt owed by it to SARS. The dissipation was alleged to have occurred by transferring a loan account claim Energy Africa had held in Titan Share Dealers (Pty) Ltd ('TSD') as a dividend in specie to Elandspad Investments (Pty) Ltd ('Elandspad'), its holding company.

The factual background here was that Tullow Oil Plc and its subsidiaries ('the Tullow Group') had undertaken a restructuring of its African operations ('the restructure') during January 2007. Prior to the restructure, Energy Africa formed part of the Tullow Group. Energy Africa sold its shares and claims in Energy Africa Holdings (Pty) Ltd ('EAH') to Tullow Overseas Holdings BV ('TOH') ('the EAH disposal') on 25 January 2007 and the tax return submitted for that period did not raise any liability for CGT.

SARS had conducted an audit on the Tullow transaction and, based on this audit, on 16 November 2012 it delivered a notice to Energy Africa in terms of section 80J(1) of the Income Tax Act (the IT Act). SARS notified Energy Africa in this notice that it intended to make certain adjustments to its 2007 income tax assessment and this would result in the inclusion of capital gains tax ('CGT') of R453 126 518 on the disposal of a subsidiary in terms of the IT Act. SARS would also raise an assessment for secondary tax on companies ('STC') in the amount of R487 205 316, deemed to have arisen in terms of section 64C(2)(a) of the IT Act.

Appellants, on 15 April 2013, had disputed SARS' audit findings and on 19 April 2013, Energy Africa disposed of its sole asset which consisted of a loan account credit held by it in TSD by declaring a dividend in specie to the value of the loan account in favour of Elandspad.

On 21 August 2013, SARS communicated its finalisation of the audit and it issued an additional assessment of income tax for CGT and an original assessment of STC in the amount of R453 126 518, together with understatement penalties of 150% (the CGT assessment) and R488 282 886 together with interest and understatement penalties of 150% (the STC assessment) respectively.

On 11 September 2013, Energy Africa's attorneys disputed its liability for any tax and informed SARS that it would lodge a formal objection to the assessments. SARS was also informed that Energy Africa had no cash or assets and was therefore not able to pay the disputed tax.

On 1 November 2013, Energy Africa filed its objections to both the STC and CGT assessments. On 3 February 2014, SARS afforded Energy Africa an opportunity to also object to the understatement penalties levied and these were filed on 20 March 2014.

On 3 April 2014, SARS allowed Energy Africa's objections in part. It accepted an adjustment based on the foreign exchange translation rate used in the assessment of income tax and reduced the understatement penalties to 100% of the capital of tax due. Apart from this the objections were dismissed.

On 29 May 2014, SARS was informed that Energy Africa would not appeal the disallowance of the objections.

In the absence of an appeal, SARS issued a final demand in respect of both the STC and CGT assessments and on 30 July 2014, SARS obtained a certified statement in terms of section 172(1) of the TA Act in respect of both the STC and the CGT liability. The Third Appellant informed SARS on 24 October 2014, that Energy Africa was dormant.

On 10 July 2015, SARS applied for the designation by a judge for purposes of an inquiry in terms of Part C of Chapter 5 of the TA Act. An inquiry was conducted during which the Appellants testified.

On 25 October 2016, notices of personal liability were sent in terms of section 183 of the TA Act, by SARS to the Appellants. These notices stated that First and Second Appellants had knowingly assisted Energy Africa in dissipating its only asset of value to obstruct the collection of a tax debt.

During April 2016, Energy Africa was liquidated by order of court.

On 16 January 2017, written representations were addressed to SARS on behalf of the Appellants in terms of section 184 of the TA Act. They maintained that, because the dissipation of Energy Africa's assets had occurred prior to the raising of the STC and the CGT assessments, there existed no tax debt as defined in the TA Act at the time.

The same issues as served before the Western Cape Division of the High Court, being the court *a quo* (see C:SARS v Wiese and Others 85 SATC 141 per Le Grange J), now served before the Supreme Court of Appeal, namely:

- whether the term 'tax debt' as used in section 183 of the TA Act envisaged that an assessed tax debt should exist at the time that the dissipation of assets occurred, and
- whether the transcript of proceedings at an inquiry was admissible upon production in subsequent civil proceedings in terms of section 56 of the TA Act.

The High Court found that section 183 of the TA Act did not contemplate that the debt be assessed at the time of dissipation. It found that the indebtedness in respect of both CGT and STC existed prior to its subsequent assessment.

The High Court also found that section 56(4) of the TA Act entitled SARS to use evidence given at the inquiry in the action brought by it against the Appellants and that the trial court was best positioned to determine for which purpose the evidence may be used and decided the separated issues in favour of SARS.

Appellants contended that in order to establish liability under section 183, the person concerned must have knowingly assisted in the dissipation of assets 'in order to obstruct the collection of a tax debt.' A 'tax debt' must necessarily exist at the time of the alleged dissipation and the person concerned must know that the tax debt existed. A tax debt was an amount which was due and payable, as the ordinary meaning of the term suggested. In this instance the tax debt only arose upon notice of assessment and the particular assessments to tax, in this case, did not constitute tax debts as contemplated by section 183 of the TA Act.

Judges Goosen and Tolmay held the following:

As to the meaning of the term 'tax debt'

(i) That in its present form, section 1 of the TA Act defines a 'tax debt' to mean an amount referred to in section 169(1) of the TA Act. The latter section in turn provides that: 'An amount of tax due or payable in terms of a tax Act is a tax debt due to SARS for the benefit of the National Revenue Fund.'

(ii) That on 19 April 2013, when the dissipation at issue in this matter occurred, the term 'tax debt' was defined to mean 'an amount of tax due by a person in terms of a tax Act.' In order to avoid a challenge to the lawfulness of the subsequent retrospective amendment of the definition, SARS agreed that for the purposes of this matter the definition should be read as if no amendment had occurred and section 169(1) of the TA Act at all times read as it now did.

(iii) That it was important to bear in mind the ambit of the issue that required separate determination. Section 183 established a set of requirements to render a third party jointly and severally liable for the recovery of a tax debt which was due by a taxpayer. There were three obvious requirements. They were: (a) that the third person should 'knowingly assist in the dissipation of a taxpayer's assets'; (b) that the dissipation should be undertaken 'in order to obstruct the collection of a tax debt'; and (c) that the assistance should have rendered the taxpayer unable to discharge the tax debt.

(iv) That the court was not required to interpret the aforementioned requirements or to provide an exposition of what test(s) should be applied in determining whether they were met. The separated question was confined to an interpretation of the term 'tax debt' and whether it contemplated an existing liability for tax, though not yet assessed at the time that the dissipation occurred.

(iv) That to answer that question required an analysis of the purpose of section 183, the language employed in its formulation and the context within which the language was employed. The court began with the debate about the definition as provided in section 1 of the TA Act. It was true that the introductory portion of section 1 referred to context of the use of the defined terms. However, what it stated was that unless the context otherwise indicated, the defined terms had the meaning assigned to them in other tax Acts. In other words the defined terms, if defined in other tax Acts, carried the meaning ascribed in those tax Acts unless the context indicated to the contrary. In that event, they had the meaning ascribed by the TA Act. This formulation of the definitions therefore sought to ensure consistency of meaning between tax Acts and in the light of the overall object and purpose of the TA Act, this was understandable.

(v) That the introductory portion of section 1 did not mean that the term 'tax debt' had the meaning ascribed unless the context of its use in the TA Act differed. What then was the meaning of the definition prior to its amendment? Counsel for the Appellants suggested the ordinary meaning of the term 'due', when used to describe a debt, was that the amount was liquidated and was immediately claimable as being due and payable by the creditor. But that ignored the nature of the debt which was said to be due and it also ignored the multiple meanings for both a 'debt' and what was 'due'.

(vi) That the determination of the amount of tax which was due to SARS occurred by way of assessment. In the case of tax payable by an 'ordinary' taxpayer liable for the payment of income tax, the assessment by SARS was in the form of an original assessment based upon the information submitted by the taxpayer in their return. CGT was a tax impost which arose upon the occurrence of the sale or disposal of a capital asset subject to tax. The taxable event, being the sale or disposal of the capital asset, gave rise to the liability for the payment of an amount of tax due to SARS. Since the capital gain was deemed to be income accrued within a tax period, the determination of the amount occurred by way of assessment based upon the taxpayer's return.

(vii) That other forms of tax were subject to self-assessment. In that event, the determination of the amount of tax due, in the sense of being owed to SARS, was made by the taxpayer. VAT involved such self-assessment which was in the form of the submission of mandatory returns together with payment. Secondary Tax on Companies was another. In the case of the latter, where a taxpayer company declared a dividend payable to its shareholders, the declaration of the dividend was a taxable event. The company was liable for the payment of the tax on the dividend and, upon submission of the return to SARS, the company was self-assessed to payment of the amount due, by law, to SARS.

(ix) That, in this sense, a 'tax debt' is that amount of tax for which the taxpayer was chargeable to tax which is payable by a taxpayer to SARS. The determination of the amount of tax due to SARS occurred by way of assessment. An assessment, however, did not establish or impose liability. The liability existed, by operation of law, whether or not there had been an assessment. The definition of the terms 'tax debt' and 'assessment' bore this out. An 'assessment' meant 'a determination of the amount of tax liability or refund, by way of self-assessment by the taxpayer or assessment by SARS.' If the definition of 'tax debt' was substituted, then an 'assessment' meant 'a determination of a tax debt' which a taxpayer is obliged to pay to SARS. The tax debt exists, with or without an assessment. An assessment merely determined it and rendered it recoverable in accordance with the recovery mechanisms provided by the TA Act.

(x) That an indebtedness to SARS for the payment of tax was not dependent upon an assessment to tax. The architecture of the tax administration system is based upon this distinction. SARS may raise an original assessment based upon the information disclosed by a taxpayer in a mandatory return. Such assessment is subject to an objection and appeal process and may be subjected to judicial review or appeal. It was also open to re-assessment within specified time periods, which may result in an additional assessment being issued. SARS enjoyed extensive powers of investigation by which it was entitled to make determinations of the tax indebtedness of a taxpayer retrospectively. In such cases the assessment to additional tax did not originate the liability. It determined that which was, by virtue of the tax impost, due by the taxpayer.

(xi) That the term 'tax debt' in section 183 undoubtedly referred to a recoverable tax debt, in the sense of a determined tax debt, insofar as it permits recovery from the third party. But that was not its exclusive meaning. The term also encompassed the amount of tax a taxpayer was liable to pay to SARS. If a taxpayer is chargeable to tax the taxpayer is indebted notwithstanding that the amount of the indebtedness had not yet been determined. A tax debt existed, irrespective of the absence of an assessment of the tax debt.

(xii) That it was the court's view that the language of section 183, construed within its context, did not require that the taxpayer's liability to pay tax due to SARS should have been determined by assessment at the time that the dissipation of assets occurred.

(xiii) That to hold that the section required that, at the time of the dissipation, the taxpayer's obligation to pay tax due to SARS should be liquidated and immediately claimable by action, would defeat the purpose of the section. It would also give rise to absurdity, in that a culpable third party who intentionally assisted a taxpayer to dissipate assets so that payment of a yet to be assessed tax debt cannot be made, would escape liability despite culpable conduct to evade tax, simply on the basis that an anticipated assessment had not yet been issued.

(xiv) That, accordingly, the High Court order in regard to the separated issue as framed, was correct, i.e. the term 'tax debt' did not refer to an assessed indebtedness at the time of the dissipation. In the circumstances the appeal against the High Court order on this question had to fail.

(xv) That the court noted the onerous requirements which section 183 sets for third party liability. The third party must knowingly have assisted in a dissipation for the purpose of obstructing the collection of a tax debt. Whether that requirement and the requisite intention was established will be a matter dependent upon the facts in each case. So too, what the relevant parties knew or ought to have known at the time that the dissipation occurred.

As to the admissibility of the transcript

(xvi) That the Appellants had testified at an inquiry during 2015 and 2016 as envisaged in section 50 of the TA Act. SARS wished to rely upon the evidence obtained during this inquiry at the trial in the High Court. The Appellants contended that the evidence was inadmissible. Their stance was in essence that the evidence was inadmissible, because relying on it would conflict with section 69 of the TA Act and that section 56(4) of the TA Act did not allow for the admissibility of evidence procured in a section 50 inquiry in subsequent civil proceedings.

(xvii) That in light of the text of the relevant sections of the TA Act and the approach to comparable provisions in the Companies Act and the Insolvency Act, the transcript of the evidence given at the section 50 inquiry, was admissible in the litigation between the parties. The evidence obtained pursuant to section 50 of the TA Act served a legitimate purpose, which was to enable SARS to execute its statutory duty, inter alia to recover tax debts due to the fiscus.

(xviii) That it was the primary responsibility of a trial court to ensure the fairness of a trial and it did so by careful consideration of the circumstances in which evidence sought to be admitted was obtained and the purpose for which it was to be admitted. The High Court was therefore correct to find that the trial court is best placed to determine the latter question and the probative value and weight that should be given to the evidence, if any.

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

4.3. ITC 1979 (87 SATC 49)

SARS following an income tax audit of the taxpayer's 2015 year of assessment, had issued a letter of audit findings dated 8 December 2017 in which it indicated that it intended to disallow the deduction in question and to impose an understatement penalty ('USP') in terms of the Tax Administration Act ('the TA Act').

The taxpayer thereafter lodged an objection to the additional assessment and following its disallowance by SARS it lodged a notice of appeal to the Tax Court against the disallowance of the objection.

The disallowed deduction claimed by the taxpayer was in respect of losses incurred by it in the form of time-expired claims for refunds of duties and levies paid by it in its 2013 year of assessment under the rubric of the Customs and Excise Act.

The taxpayer had incurred the losses because of the excise duties and levies not being refundable and therefore such losses were claimable as a deduction in terms of section 11(a) of the Income Tax Act ('the IT Act') in its 2015 year of assessment.

After an unsuccessful attempt to resolve the dispute through alternate dispute resolution proceedings, SARS issued its statement of grounds of assessment and opposing appeal which was later replaced by an amended statement on 20 November 2019.

The taxpayer filed its amended statement of grounds of appeal on 31 January 2020 and contended that its claim for the deduction of the prescribed claims should be permitted as they constituted a loss for purposes of section 11(a) of the IT Act.

SARS had contended that the taxpayer had thus far failed to prove that the total claimed as a deduction would have been permitted as a refund for customs purposes had they not prescribed.

On the day that the appeal in the Tax Court was due to proceed, SARS objected to the Tax Court's jurisdiction to hear the matter.

SARS did not raise its objection to the jurisdiction of the Tax Court by way of a special plea or by way of an exception but, instead, pleaded in its amended statement of grounds of assessment and opposing appeal that the amount properly claimed to be refundable by the taxpayer could only be established with reference to the customs legislation and the Tax Court did not have jurisdiction in respect of the Customs and Excise Act and the jurisdiction of the Tax Court did not extend to being the first arbiter in a tax dispute.

SARS further contended that a 'tax Act' was defined in section 1 of the TA Act to mean the Tax Administration Act or an Act referred to in section 4 of the South African Revenue Service Act which excluded the Customs and Excise Act.

The taxpayer contended that the Tax Court did have the requisite jurisdiction to adjudicate its appeal against SARS' disallowance of its objection and thus against SARS' additional assessment.

The taxpayer contended that in terms of section 117(1) of the TA Act a Tax Court had jurisdiction over tax appeals lodged under section 107 of the TA Act and in the present instance the taxpayer's appeal was one lodged under section 107(1) of the TA Act and the matter for adjudication before the Tax Court was that of an appeal against an assessment or decision, as contemplated in section 107 of the TA Act.

The taxpayer further contended that the manner in which SARS had elected to raise its objections against the jurisdiction of the Tax Court, as well as the substantive content thereof, could not be allowed to stand.

Judge Dosio held the following:

(i) That the court found that the issue of the jurisdiction of the Tax Court constituted an issue that could conveniently be decided separately prior to the continuation of the Tax Court appeal hearing.

(ii) That it was clear that at no point did SARS dispute the correctness of the quantum of the losses claimed by the taxpayer in the form of a deduction from income, to determine taxable income, under section 11(a) of the IT Act.

(iii) That the court was aware that the definition of 'tax Act' in the TA Act meant the TA Act or an Act, or portion of an Act, referred to in section 4 of the South African Revenue Service Act, excluding customs and excise legislation. However, this had to be read in conjunction with section 107 of the TA Act.

(iv) That section 107 of the TA Act allowed a taxpayer objecting to an assessment or 'decision' to appeal against an assessment or decision to the tax board or Tax Court. The definition of assessment in the TA Act 'means the determination of the amount of a tax liability or refund, by way of self-assessment by the taxpayer or assessment by SARS.' In terms of section 107(1) 'a taxpayer objecting to an assessment or 'decision' may appeal against the assessment or 'decision' to the tax board or tax court in the manner, under the terms and within the period prescribed in this Act and the 'rules'.

(v) That section 105 of the TA Act as amended adds that 'a taxpayer may only dispute an assessment or 'decision' as described in section 104 in proceedings under this Chapter, unless a High Court otherwise directs.' Thus, the goal of section 105 of the TA Act was plainly to ensure that tax disputes are brought before the Tax Court in the ordinary process. As a result, unless otherwise directed, the High Court has no jurisdiction in tax issues.

(vi) That in the matter *in casu*, a High Court has not directed otherwise. The purpose of section 105 of the TA Act was clearly to ensure that in the ordinary course tax disputes are taken to the Tax Court. If this Tax Court does not have jurisdiction, no other court can potentially have jurisdiction to adjudicate on the raising of the additional assessment and the disallowance of the objection thereto. That is the subject matter for adjudication in this court.

(vii) That from the wording in the matter of United Manganese of Kalahari (Pty) Ltd v C:SARS 85 SATC 529 the purpose of section 105 of the TA Act is clearly to ensure that, in the ordinary course, tax disputes are taken to the Tax Court. The High Court consequently does not have jurisdiction in tax disputes unless it directs otherwise. It was worth noting that in the matter of C:SARS v Rappa Resources (Pty) Ltd 85 SATC 517 the Supreme Court of Appeal noted that there could be a deviance from this process, but only under 'exceptional circumstances.'

(viii) That, based on the decision of MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas 2002 (6) SA 150 (C) this court finds that the Tax Court does have jurisdiction to hear and decide the matter at hand. There were no 'exceptional circumstances' in this case that would justify deviating from the ordinary provisions of section 105 of the TA Act as amended.

(ix) That once the jurisdiction of a Tax Court has been established it continues to exist. Thus, SARS cannot approbate and reprobate. SARS cannot argue that this court has jurisdiction to adjudicate whether the taxpayer ought to have claimed a deduction of expenditure incurred in 2013, namely, the duties and levies paid by the taxpayer, yet also argue that if this court finds that the taxpayer correctly claimed the deduction of losses incurred in 2015, then jurisdiction of the court ceases to exist.

(x) That once a Tax Court has jurisdiction to adjudicate a case, which in the matter *in casu* the main case was the income-tax Tax Court appeal, it assumed jurisdiction over all ancillary matters relevant thereto, which included of course the calculation of the quantum.

(xi) That, without having all the relevant facts, SARS in the matter *in casu* disallowed the deduction by the taxpayer, which had prescribed and which related to customs and excise duties. SARS did not dispute the amount claimed. Whether this was done negligently or not, the fact remains that a decision was made by SARS.

(xii) That, as a result, SARS reached a decision subject to objection and appeal in terms of section 105, read with section 104, and then also under the rubric of section 117 of the TA Act. The taxpayer accordingly has a right in terms of section 11A(c) of the IT Act to appeal a decision where a deduction was disallowed. Even if the quantum of the losses was still in dispute, after it was claimed by the taxpayer, such nature of the losses claimed as a deduction cannot be determinative of the jurisdiction of the Tax Court.

(xiii) That even though the definition of 'tax Act' in the TA Act excludes customs and excise legislation, SARS in its finalisation of audit letter dated 24 May 2018 stated that the taxpayer had a 'right to lodge an objection in terms of section 104 of the Tax Administration Act.' As a result, the taxpayer filed its appeal as directed by SARS. According to section 117 of the TA Act, the Tax Court has jurisdiction over appeals lodged under section 107 and this appeal had been brought by the taxpayer in terms of section 107.

(xiv) That as regards the objection that the Tax Court would be the first arbiter, yes, this Tax Court appeal hearing takes the form of a trial, whereupon everything will be adjudicated and the Tax Court places itself in the shoes of or decides what SARS ought to have done. However, it is not the first arbiter, as alluded to in SARS' heads of argument. The first decision, namely, the appealed decision, was the decision that formed the subject-matter for adjudication in this Tax Court appeal which was the decision to raise the additional assessment, in 2015, in respect of income tax, not customs and excise type of duties.

(xv) That this started as an income tax dispute and it remained such. It will not change in nature. If this is an appeal in terms of section 107 of the TA Act, then nothing is to be excluded. Once the Tax Court has jurisdiction, it continues to have jurisdiction up to the end, inclusive of the determining of the quantum of a loss or losses claimed as a deduction in terms of section 11A of the IT Act.

(xvi) That, accordingly, the objection raised by SARS as to the Tax Court's jurisdiction was to be dismissed.

(xvii) That, in regard to costs, in terms of section 130(3)(b) read with section 117(3) of the TA Act, it provides *inter alia* that the Tax Court may hear and decide an interlocutory consideration and the Tax Court may in the exercise of its judicial discretion make an order as to costs. The issue of jurisdiction was such an issue.

(xviii) That, furthermore, in accordance with SARS' directions, the taxpayer had noted an appeal timeously in the correct form. In addition, the attack on jurisdiction ought to have been contained in a special plea or an *in limine* defence format. It was not. It was slipped into the Rule 33 statement and also into the heads of argument pertaining to the appeal.

(xix) That in the light of the dismissal of SARS' objection to this court having jurisdiction, there was no reason why costs should not follow the event.

4.4. ITC 1980 (87 SATC 64)

The taxpayer was a South African telecommunications company with subsidiaries worldwide and these subsidiaries were operating companies, with local shareholders, but having the taxpayer as a significant shareholder.

The taxpayer licenced its intellectual property to these operating companies (referred to as Opcos) in return for which they paid the taxpayer a royalty.

The present case involved the royalty payments made by fourteen of the Opcos to the taxpayer during the periods 2009 to 2012.

The taxpayer charged all of them the same royalty rate of 1% for the right to use its intellectual property.

The calculation of the royalty rate was based on two factors: The size of the profit earned by the Opco from the use of the intellectual property (IP) and then how that profit was divided between the Opco and the taxpayer.

What was evident in this litigation was that there were different methodologies that experts may use in performing the necessary calculations, but there was at least agreement on the principle to be applied, that the royalty must be at arm's length, i.e. what would it be if it was between two independent enterprises as opposed to a company taxed in one jurisdiction and its subsidiary taxed in another.

The taxpayer had retained the services of a consultancy known as Company A to advise it on what royalty it should charge its various Opcos. Company A procured research on the subject and then, informed by that, came up with the recommendation that a royalty of 1% could be justified.

SARS contended that the 1% royalty rate was not an arms' length royalty and on various occasions it issued an additional assessment to increase the royalty rate to what it calculated should have been the arms' length royalty rate for the taxpayer's 2009 to 2012 tax years and it relied on SARS' powers in terms of section 31(2) of the ITA to adjust the consideration to reflect an arm's length price if he considered that the price received was less than it would have been in an arm's length transaction between independent persons.

For that purpose, SARS first relied on the expertise of a Mr David whose report led to an additional assessment being levied by SARS and which the taxpayer had considered to be excessive and formed the basis of this appeal.

However, during the course of the appeal proceedings, in October 2020, SARS retained the services of a new expert, an economist, Dr Slate and, based on his recommendation, SARS sought to adjust the royalty rate further to conform with what he calculated should have been the arms' length royalty rates payable in the tax years from 2009 to 2012.

In contrast to the taxpayer's flat royalty rate of 1% for all the Opcos over the entire four-year period, SARS, advised by Dr Slate, now contended that the taxpayer should have charged a variable royalty rate depending on the country and the year it was earned. The fluctuations created by adopting his approach were considerable.

The taxpayer's principal relief was for the court to uphold its appeal and for the court to set aside the additional assessments for the 2009 to 2012 tax years.

SARS' relief was for the court to alter the additional assessments in terms of section 129(2)(b) of the Tax Administration Act (the TA Act) to reflect the quantifications done by Dr Slate.

The dispute between the taxpayer and SARS had its origins with the taxpayer's 2009 assessment as SARS had initially accepted the taxpayer's royalty calculations in 2009 but in 2014 SARS undertook a transfer pricing audit and the outcome was that in March 2014 SARS issued an additional assessment for the taxpayer's 2009 tax year.

The taxpayer had accused SARS of a 'flip flop', because it had relied on the work of Dr Slate its new expert in 2020 for the additional assessments which led to a much greater liability for the taxpayer than would have been the case under the earlier David based assessments.

Both sides in the case relied on a document produced by the Organisation for Economic Cooperation and Development (OECD) titled 'OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations' (Guidelines). The court referred to the definition of an arm's length transaction in the Guidelines and the solution in the Guidelines to adopt one of the various methodologies that it recommends be followed in determining what an arm's length price would be in a specific situation.

In this case four experts testified about what the appropriate methodology to be used was, and conversely, what was not. Testifying for the taxpayer were three experts but they relied on different methodologies. Two of them, Mr Brine and Ms Sana, testified that the royalty represented that of an arm's length transaction using a method known as the Transactional Profit Split Method or TPSM. However, a third expert for the taxpayer, Dr John, employed what was known as the Comparable Uncontrolled Price Method, or CUP. Ms Sana gave supporting evidence for Dr John on the CUP application as well.

Thus, what the taxpayer sought to do was to justify its royalty as one that was arm's length based on two distinct methodologies while SARS relied in the hearing on a single expert, Dr Slate, who also used the TPSM method but had relied on a different data set to that used by Mr Brine and Ms Sana.

Judge Manoim held the following:

(i) That transfer pricing refers to the prices of goods and services that are exchanged between companies under common control. For example, if a subsidiary company sells goods or renders services to its holding company or a sister company, the price charged is referred to as the transfer price. Entities under common control refer to those that are ultimately controlled by a single parent corporation (Corporate Finance Institute).

(ii) That multinational corporations use transfer pricing as a method of allocating profits (earnings before interest and taxes) among their various subsidiaries within the organization. Transfer pricing strategies offer many advantages for a company from a taxation perspective, although regulatory authorities often frown upon the manipulation of transfer prices to avoid taxes. Effective but legal transfer pricing takes advantage of different tax regimes in different countries by raising transfer prices for goods and services produced in countries with lower tax rates (Corporate Finance Institute).

(iii) That the taxpayer makes the point that it had no incentive to charge its Opcos a lower royalty to avoid paying higher taxes in South Africa. A table in the record sets out the marginal tax rates in both South Africa and the jurisdictions. This showed that for most of them the tax rates in the jurisdictions where the Opcos were located, were equal to or higher than the South African tax rate. But it was argued that there was a further disincentive to under charge on the royalty. The taxpayer had minority shareholders in most of the Opcos. If it were to undercharge the Opcos through the royalty, this would mean that it inflated its profits in the Opcos and the result of this was that the minority shareholders would be rewarded with profits that exceeded their shareholdings.

(iv) That SARS did not place the aforementioned facts in dispute. Rather it stated that this consideration was irrelevant to the assessment of the current matter. That may be so but it was relevant to the genesis of the rate that the taxpayer had adopted. The taxpayer had commissioned Company A, a consultancy, to advise it on the value of its intellectual property and it followed the advice that Company A gave it which had two aspects to it: that the taxpayer should apply a rate that was an average of the rates of the territories considered and this led to an adoption of a rate of 1% and, secondly, that applying a uniform rate had practical implications for both the taxpayer and the Opcos.

(iv) That what emerged in this litigation was that there were different methodologies that experts may use in calculating the royalty rate. Nevertheless, there was at least agreement on the principle to be applied: the royalty must be at arm's length, i.e., what would it be if it was between two independent enterprises as opposed to a company taxed in one jurisdiction and its subsidiary taxed in another.

(v) That SARS had the power in terms of section 31(2) of the ITA to adjust the consideration to reflect an arm's length price if he considered the price received was less than it would have been in an arm's length transaction between independent persons and that begged the question central to this case: how does one determine an arm's length price?

(vi) That the case was unusual in that neither side, despite lengthy heads of argument, had produced a single case on the central topic of the case – the approach a court should adopt to the subject of transfer pricing. Instead, both sides have relied on a document produced by the Organisation for Economic Co-operation and Development (OECD) titled 'OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations' (Guidelines).

(vii) That the Guidelines contained useful definitions of the key terms used in the case including the concept of an arm's length transaction which is defined as one where: 'conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.'

(ix) That, however, it was important not to pay mere lip service to the concept of the arm's length principle. Its rationale for trade consequences and for fairness must be appreciated and the Guidelines in the foreword explain: 'A major reason is that the arm's length principle provides broad parity of tax treatment for members of MNE groups and independent enterprises. Because the arm's length principle puts associated and independent enterprises on a more equal footing for tax purposes, it avoids the creation of tax advantages or disadvantages that would otherwise distort the relative competitive positions of either type of entity.'

(x) That the relationship between the taxpayer and its Opcos was described as one between 'associated enterprises'. They were considered 'associated' because the taxpayer exercised control over the Opcos. As the Guidelines noted, when independent enterprises transact with one another, market forces will govern their relationship. Thus, if the taxpayer were to licence an independent entity and not one it controlled, and they agreed on a royalty, the assumption is that the amount of the royalty was a product of market forces. Where the enterprises are not independent, viz the taxpayer and the Opcos, the lingering question was whether the taxpayer's ability to control the Opco or market forces determined the royalty.

(xi) That the above considerations led onto the central problem faced in this case. How did one assess whether a transaction between associated enterprises was one at arm's length and hence from a tax perspective of the jurisdiction in question, benign? The solution in the Guidelines was to adopt one of the various methodologies it recommended be followed. They served as the litmus test to a transaction – was it or was it not the equivalent of an arm's length transaction – one between independent enterprises shaped by the operation of market forces.

(xii) That the two methods of relevance used by the parties in this case were the TPSM and the CUP methods. In the Guidelines TPSM is defined as: 'A transactional profit split method that identifies the relevant profits to be split for the associated enterprises from a controlled transaction….and then splits those profits between the associated enterprises on an economically valid basis that approximates the division of profits that would have been agreed at arm's length.' In the Guidelines a CUP is defined as: 'A transfer pricing method that compares the price of property or services transferred in a controlled transaction to the price charged for property or services transferred in a comparable uncontrolled transaction in comparable circumstances.'

(xiii) That there was a further definition that was relevant to the issues in this case, i.e. that of intangibles given that the asset in this case was a set of intellectual property rights, which the Guidelines defined as: '… something which is not a physical asset or a financial asset, which is capable of being owned or controlled for use in commercial activities, and whose use or transfer would be compensated had it occurred in a transaction between independent parties in comparable circumstances…'

(xiv) That the transfer pricing study presented by the taxpayer which used the TPSM method was vulnerable in disputes about intangibles when based on evidence from surveys, bearing in mind intellectual property which was the asset class of the royalty rate in question in this case. Nevertheless, the taxpayer did not need to succeed on both methodologies that it sought to rely on as it only needed to succeed on one. The court, for this reason, went on to discuss the case made out by the taxpayer on the application of the CUP method.

(xv) That the Guidelines made it clear that where a CUP was applicable, it was the preferred method to be used: 'Where it is possible to locate the comparable cup, it is the preferred method for the determination of arm's length price.' The reasons for this go back to the original analysis of the transfer pricing problem. It is the one method that seeks to replicate how market forces would work for a transaction between independent entities. However, the criteria for selecting an appropriate CUP were strict.

(xvi) That the taxpayer had identified a similar transaction involving the same intellectual property that it had concluded previously with an unrelated company and that it considered met the requirements for a CUP and more specifically an 'internal CUP.' The transaction was known as the Cyprus transaction as it involved the taxpayer's sale of a subsidiary based in Cyprus to a third party on 15 July 2018. On 3 September 2018 the parties had concluded a brand licence agreement when the Cyprus entity was independently owned. The taxpayer contended that the parties were at arm's length at the time the agreement to licence the brand was concluded.

(xvii) That SARS did not contest the idea that if a suitable internal CUP was available, it was the most reliable method to use. It could hardly not do so given that SARS accepted the authority of the Guidelines. Rather, SARS questioned whether the Cyprus transaction was a reliable comparable based again on what it said the Guidelines required.

(xviii) That the Guidelines set out certain requirements that were common to all methodologies and these included:

- The contractual terms of each transaction;
- The assets used and risks assumed in each transaction;
- The characteristics of property transferred or services provided in each transaction;
- The economic circumstances of the parties and of the market in which the parties operated;
- The business strategies pursued by the parties.

(xix) That what the Guidelines state in relation to the CUP method was that where there are differences in comparables the CUP method is still recommended, provided that these differences could be measured and hence accounted for.

(xx) That the test for when the enterprise is considered independent must be at the time that the Intellectual Property agreement is concluded because at that time the negotiations take place between independent parties thus replicating a situation where market forces operate to determine the royalty rate.

(xxi) That in regard to SARS' reliance on the TPSM method, its expert developed a 'willingness to pay' (WTP) test to determine an arm's length royalty and in doing so he had relied on a methodology that was unorthodox and outside of the mainstream approaches. Given that this technique had not to the court's knowledge been used in litigation before, in a transfer pricing case, the court had to approach its usage with caution. The methodology employed as well as the survey questions had been justifiably criticised. Perhaps the WTP survey may prove useful as a benchmark when a taxpayer is negotiating with an authority but in contested litigation the current survey and application of the WTP method has not yet been shown to be a reliable foundation for the application of the TPSM.

(xxii) That, by way of contrast, the Cyprus CUP has, of all the three models presented to the court, proved to be the most persuasive. The Guidelines suggested that this was the preferred method when it could be used. The Cyprus CUP most closely resembled what would be achieved in a market-based arm's length negotiation. Whilst there are criticisms of its application, they were not conclusive.

(xxiii) That in this case the choice of the Cyprus CUP advanced by Dr John, and supported by Ms Sana, as opposed to the TPSM, based on the WTP method, advanced by Dr Slate, has been based on the reasoning advanced, not the credibility of either expert.

(xxiv) That, in conclusion, the Cyprus CUP served as a comparable internal CUP. The royalty in that agreement was 1% and on that basis the royalty of 1% charged by the taxpayer to the other Opcos constituted a reasonable arm's length royalty. That being the case there was no factual justification for SARS to have adjusted the royalty in terms of the then section 31 of the ITA.

Appeal upheld.

4.5. ITC 1981 (87 SATC 90)

The taxpayer, being a registered bank and VAT vendor, made certain supplies that attracted VAT ('taxable supplies') and others that did not ('exempt supplies').

Where a VAT vendor made only taxable supplies the position in regard to the deduction of input tax was relatively simple, but not so where a vendor acquired supplies which were used, consumed, or supplied in making both taxable and exempt supplies or supplies outside the scope of VAT, i.e. supplies acquired for mixed purposes.

In the latter case it was necessary to formulate and apply an apportionment method whereby the permissible deductions were determined.

In the aforementioned scenario section 17(1) of the Value-Added Tax Act ('the VAT Act') found application by obliging a VAT vendor, that acquired supplies for mixed purposes, to make permissible deductions of input tax in accordance with an apportionment ruling made by SARS.

On 25 March 2013, SARS, as contemplated in section 17(1) of the VAT Act, fulfilled its obligation to make an apportionment by issuing Binding General Ruling 16 ('BGR 16'). BGR 16 imposed a standard turnover-based method ('the STB method') which served as the default apportionment method when determining the ratio. However, BGR 16 contained a proviso that 'The vendor may only use this method if it is fair and reasonable. Where the method is not fair and reasonable or inappropriate, the vendor must apply to SARS to use an alternative method.'

The effect of BGR 16 was that the STB method could be applied by VAT vendors as a default method, with the proviso that they apply to SARS for an alternative method if the STB method is not fair and reasonable or if it is inappropriate in their case.

In this matter there had been several applications by the taxpayer for specific apportionment rulings under section 17(1) ('ruling requests') and SARS had responded to these requests by making apportionment rulings.

On 17 June 2016 SARS had ruled that a varied turnover-based method ('the VTB method') be applied subject to a proviso that should there be a fluctuation of more than 10% in the apportionment ratio and a fluctuation of more than 5% in bad debts, the taxpayer would have to approach SARS to continue being permitted to apply the VTB method. This came to pass on 27 March 2017 when the taxpayer requested a ruling that the VTB method continue to apply, which request was granted by SARS on 7 July 2017. A similar request was made on 23 November 2018, but this time SARS declined the request and in its stead imposed a transaction count methodology ('the TCM method'). On 12 August 2019 SARS issued a revised ruling which clarified the application of the TCM method, to expire on 30 September 2020 ('the revised TCM method').

On 21 September 2020, the taxpayer requested a ruling that the revised TCM method continue to apply. However, on 23 September 2021 SARS declined this ruling request and ruled that a varied standard turnover-based method ('the varied STB method') apply ('the ruling').

The taxpayer objected to the ruling, the objection was disallowed, and the appeal followed.

In the appeal the taxpayer requested that the ruling be altered to one approving the ruling request.

The appeal hearing was due to commence on 6 November 2023, but three days prior SARS brought an interlocutory application in terms of section 118(3) of the Tax Administration Act ('the TA Act') read with Tax Court Rules ('the Rules') 35, 42(1) and 51(2).

The application brought by SARS was that SARS be permitted, by way of a special plea, as a separate and preliminary point, to introduce a challenge to the Tax Court's jurisdiction.

SARS in its special plea pleaded that the Tax Court lacked jurisdiction to hear and determine the appeal as the 'decision' by SARS, i.e. the ruling, was not subject to appeal in terms of section 32(1)(a)(iv) of the VAT Act.

In essence, SARS pleaded that the Tax Court did not have jurisdiction to determine the appeal against the imposition of the varied STB method as opposed to the revised TCM method, which had been requested.

Judge Myburgh held the following:

(i) That the Tax Court was a creature of statute and its jurisdiction did not extend beyond the confines of its empowering statutory provisions which, in this case, was section 104 of the TA Act read with sections 17(1) and 32(1)(a)(iv) of the VAT Act.

(ii) That, as to the nature of the Tax Court, it was a specialist court of revision rather than 'a court of appeal in the ordinary sense.' It hears evidence and considers

SARS' assessment or decision which it then either upheld or overruled. It was also at liberty to substitute SARS' assessment or decision with one of its own.

(iii) That proceedings in a Tax Court were, in this sense, akin to civil trial proceedings and the Tax Court had powers of review in relation to tax appeals before it.

(iv) That of relevance in this case was section 104(2)(c) which provided that, in the absence of an assessment (as was the case here) the objection procedure may be utilised to challenge a SARS decision if it is 'a decision that may be objected to or appealed against under a tax Act.'

(iv) That section 32(1)(a)(iv) of the VAT Act was a provision in a tax Act and section 32(1) provided that the following decisions of SARS were subject to objection and appeal: 'any decision given in writing by SARS – refusing to approve a method for determining the ratio contemplated in section 17(1).'

(v) That the question was whether SARS' ruling that the varied STB method must apply was a 'refusal to approve a method for determining the ratio contemplated in section 17(1)'

(vi) That in ITC 1930 82 SATC 271 where SARS challenged the Tax Court's jurisdiction to determine a dispute regarding the retrospective application of a SARS apportionment ruling issued in terms of section 17(1) of the VAT Act, Savage J held that on a purposive and contextual reading of section 32(1)(a)(iv) of the VAT Act a refusal to approve a method for determination of the ratio contemplated in section 17(1) must necessarily include the refusal to apply any method approved retrospectively and to find differently would be to strain at the language of the provision and lead to an unbusinesslike and unwieldy result and hence the matter fell squarely within the ambit of the court's jurisdiction.

(vii) That the VAT Act was a tax Act and section 32 thereof subjected to the process of objection and appeal *inter alia* a decision given in writing 'refusing to approve a method for determining the ratio contemplated in section 17(1).' As already mentioned above, the question then is whether the ruling was 'a refusal to approve a method for determining the ratio contemplated in section 17(1).' The other decisions listed in section 32(1)(a)(iv) of the VAT Act were the refusal to register a person as a VAT vendor, a decision by SARS to cancel the registration of a VAT vendor or a refusal to cancel the registration of a VAT vendor.

(ix) That the purpose of the provision in question was thus to describe the decisions that fell into the objection and appeal net and the question, in this case, was whether the ruling in issue in this case fitted the description of one such decision.

(x) That the question, in the court's view, was simply whether the ruling in issue fitted the description of the type of decision described in section 32(1)(a)(iv) of the VAT Act and it was not whether SARS refused to do something it should have.

(xi) That none of the four decisions listed in section 32(1)(a) of the VAT Act could be described as 'refusals' by SARS to do something. The refusal to approve an apportionment method was not the refusal to do something, such as refusing to deal with a ruling request, it was the making of a decision that the apportionment method requested by the VAT vendor was not fit for purpose. Put differently it was 'the product of deciding' rather than an omission, as would be the refusal or failure to make a decision at all.

(xii) That SARS did not refuse to do what section 17(1) of the VAT Act required of it to do. The contrary was true. SARS made an apportionment ruling as it was required to do. The quarrel that the taxpayer had with SARS was not that it refused to do something but that it did the wrong thing, i.e. made the wrong decision by refusing the ruling sought by it. In the court's view the interpretation advanced on behalf of SARS was untethered to the text and structure of the provisions in question.

(xiii) That the meaning advanced by SARS strained the language of the provision and led to an unbusinesslike and unwieldy result as was the case in ITC 1930 82 SATC 271, supra. In that case Savage J stated that the unbusinesslike and unwieldy result was that the VAT vendor would be limited to a review, and this would 'serve to remove the right of appeal only in respect of a narrow group of disputes, from the ambit of this court's jurisdiction without as much being expressly stated in the statute.'

(xiv) That in the court's view the facts of this case were, in an essential sense, similar to those in ITC 1930, supra. The ruling, by definition, encapsulated the refusal to approve the method requested by the taxpayer. In its stead SARS ruled that a different method should apply. SARS thus made a decision as contemplated in section 17(1) of the VAT Act. As in ITC 1930, SARS also refused what was requested and ruled that something different should apply, and similarly made a decision as contemplated in section 17(1) of the VAT Act.

(xv) That SARS' interpretation was unbusinesslike and unwieldy in the sense that if it refused to do anything at all (i.e. ignored the ruling request), that would be subject to objection and appeal – permitting the court to order the decision to be altered to one approving a particular apportionment method under section 129(2)(b) of the TA Act to one which the court considered fair and reasonable. However, if it refused the method suggested by a vendor and approved a different method, then the taxpayer in terms of section 105 would have to challenge the ruling within the narrow scope of a review.

(xvi) That a ruling in terms of section 17(1) of the VAT Act and Chapter 7 of the TA Act was made in response to a request to apply a particular method. If SARS agrees with the vendor, it approves the method contained in the request. If SARS disagrees with the method requested by the vendor, it refuses or declines the request and determines which method is to apply. That decision was subject to objection and appeal to this court, which may in the exercise of its powers of revision discard the method imposed by SARS and approve a different method and this was in keeping with the purpose of section 17(1), which was to ensure that the most appropriate apportionment method for a particular vendor is adopted. The interpretation of section 32(1)(a)(iv) of the VAT Act referred to above advanced this purpose.

SARS' application to introduce a special plea was granted.

The special plea challenging the jurisdiction of the Tax Court to this appeal was dismissed with costs.

5. INTERPRETATION NOTES

5.1. Limitation of allowances granted to lessors of affected assets – No.53 (Issue 4)

This Note provides clarity and guidance on the application of section 23A, which ringfences specified capital allowances granted to a lessor for certain machinery, plant, implement, utensil, article, aircraft or ship ('affected assets').

Section 23A limits the deduction of specified capital allowances on affected assets to a lessor's taxable income derived from the letting of these assets, before taking into account the specified capital allowances. Any specified capital allowances not allowed because the limitation are carried forward to the next year of assessment and, subject to any section 23A limitation, are available for deduction against any net rental income from the letting of affected assets. Disallowed capital allowances are thus ring-fenced, and cannot be deducted against other taxable income earned by the taxpayer.
Section 23A limits capital allowances claimed by a lessor under sections 11(e) and (o), 12B, 12BA, 12C, 12DA or 37B(2)(a) on any 'affected asset' to the net rental income derived from the letting of those assets. The limitation does not apply to an asset let under an 'operating lease' or any asset mainly used during the year of assessment by the lessor in the ordinary course of trade other than letting of such asset. The exclusion from an affected asset, and therefore section 23A, for assets leased under an operating lease does not apply to letting of assets in carrying on the business of banking, financial services or insurance.

In determining net rental income from letting affected assets, expenditure relating to both rental income and other income must be apportioned on a reasonable basis.

Any specified capital allowances disallowed are carried forward to the succeeding year of assessment when they will again be considered for deduction, subject to limitation under section 23A(2).

5.2. Public benefit organisations: Non-professional sport and recreation – No. 136

This Note provides guidance on the interpretation and application of PBA 9 that provides for the administration, development, co-ordination or promotion of sport or recreation in which the participants take part on a non-professional basis as a pastime.

The National Sport and Recreation Act was promulgated to provide for the promotion and development of sport and recreation and the co-ordination of the relationships between:

- Sport and Recreation South Africa;
- Sports Confederation;
- national federations; and
- other agencies.

The National Sport and Recreation Act also provides for measures aimed at correcting imbalances in sport and recreation, to promote equity and democracy in sport and recreation and to provide for dispute resolution mechanisms in sport and recreation. The Minister is empowered by that Act to make regulations, and to provide for matters connected with sport and recreation.

The National Sport and Recreation Plan assists in the implementation of policies and specifies programmes, projects, and activities to be undertaken by the various role-players within the sport and recreation sector in South Africa.

The Constitution provides that sport is a provincial and local competence. However, the three spheres of government, namely, the national, provincial and local sphere, must plan and deliver services in an integrated manner.

Provincial sport and recreation entities are very important to the promotion and development of sport and recreation because they are closest to their communities, and therefore provide ideal platforms to encourage greater participation in sport and recreation in general. The focus of sport and recreation at provincial level is generally on provincial teams comprised largely of non-elite athletes, to ensure the highest number of athletes competing in intra-provincial competition from which interprovincial teams can be chosen.

The local sphere of government, comprising municipalities, has the right to govern on its own initiative the affairs of its community such as local amenities, sports facilities and municipal parks and recreation subject to national and provincial legislation.

Sport and Recreation South Africa is required to encourage the provincial sport and recreation departments and municipalities to form partnerships, with other related organisations having an interest in sport and recreation to procure financial assistance and exchange ideas.

From the above it is clear that the roles and responsibilities of government in sport and recreation in South Africa is reliant on many diverse levels, namely, national, provincial, local levels, and several types of organisations on those levels. This consolidated approach has justified the inclusion of PBA 9 for purposes of an exemption from income tax for qualifying organisations.

An organisation carrying on PBA 9 must be approved by SARS as a PBO and must on application, and after obtaining such approval on submission of its annual income tax return (IT12EI), satisfy SARS that:

- its sole or principal object is the carrying on of the administration, development, co-ordination or promotion of sport or recreation in which the participants take part on a non-professional basis as a pastime; and
- the receipts and accruals derived by the organisation carrying on PBA 9 meet the requirements of section 10(1)(cN).

An organisation bears the burden of proving that it complies with the requirements relative to the approval as a PBO carrying on PBA 9 as discussed in this Note, and must retain the necessary evidence to support the view taken. The burden may be discharged by way of supporting evidence submitted by the organisation, provided such evidence is reasonable Whether an organisation complies with the requirements of PBA 9 will be a factual enquiry, and since the facts and circumstances pertaining to each organisation may differ, each case will be considered on its own merits.

5.3. Tax treatment of the receipt or accrual of government grants – No. 59 (Issue 3)

This Note deals with:

- the tax consequences of the receipt or accrual of government grants;
- the exemptions from normal tax applicable to government grants; and
- anti-double-dipping rules applicable to expenditure funded by such grants.

Government grants are generally intended to stimulate various aspects of the economy. Allocation of funding can occur in a variety of ways. A grant may:

- be received in advance by a taxpayer for anticipated purchases of goods and services;
- be made directly for goods and services purchased for the benefit of a taxpayer;
- be intended to reimburse the taxpayer after the goods or services have been purchased; or
- be in the nature of a reward for achieving a milestone, such as creating a specified number of jobs.

The income tax rules relating to government grants were spread over a number of sections in the Act which resulted in inconsistent treatment, with some grants being exempted and others not. In order to address this problem, a unified system for exempting or taxing government grants was introduced. Specific exemptions in section 10(1)(zA), (zG), (zH) and (zI) were deleted, while section 12P and the Eleventh Schedule were inserted with effect from years of assessment commencing on or after 1 January 2013. Section 12P exempts specified government grants paid by government in the national, provincial and local spheres, while the previous system exempted only selected grants paid by national authorities.

On or after 1 January 2016 government grants paid to PPPs to effect improvements on land or to buildings owned by any sphere of government or over which any of the three spheres of government holds a servitude are exempt under section 12P(2A).

These grants were previously exempt under section 10(1)(zI) which was deleted with effect from 1 January 2016.

With effect from 19 January 2017, all government grants received by or accrued to a taxpayer must be included in gross income under paragraph (lC) of the definition of 'gross income' in section 1(1), regardless of whether they are of a capital nature.

A government grant received by or accrued to a taxpayer before the above date would have to be analysed to determine whether it was of a capital or revenue nature in order to determine whether it should be included in gross income.

The examples in this Note generally consider the treatment in circumstances where a government grant is received to fund a specific asset. The appropriate allocation of a government grant which is received in respect of several assets or expenses will depend on the facts of the specific case, including the contract between the government and the taxpayer.

In determining whether a government grant is subject to normal tax, regard must be had to:

- specific inclusions in gross income (for example, farming subsidies and government grants, and recoupments);
- any exemption available, for example, under section 10 or under section 12P and the Eleventh Schedule; and
- the facts and circumstances of the particular case.

In addition, it is important to consider the impact on deductions, allowances and base cost. For example, the specific anti-double dipping rules under section 12P(3) to (6) which are applicable to government grants as contemplated in section 12P(2) and (2A).

5.4. *Deduction of security expenditure – No. 45 (Issue 4)*

This Note provides guidance on the deductibility of security expenditure incurred by a taxpayer for income tax purposes. It also considers the fringe benefits tax implications for employees when their employers fund such expenditure

Some taxpayers incur high costs to secure assets and human safety in South Africa. These costs include, amongst others, alarm and video surveillance systems, access control systems, perimeter fencing, outdoor lighting, security officers, and other security related measures. In addition to incurring these security expenses, many taxpayers also make contributions to organisations that focus on preventing and combatting crime.

Such security expenditure usually falls within one or more of the following categories:

- Expenditure of a domestic or private nature
- Donations
- Business-related expenditure

This Note considers the deductibility of each of these categories of expenditure.

In considering whether the security expenditure incurred by a taxpayer qualifies for a deduction, regard must be had to:

- whether the expenditure is of a domestic or private nature;
- whether a donation meets the requirements under section 18A(1);
- whether the business-related expenditure meets the requirements under section 11(a) read with section 23(g) that it be actually incurred, in the production of income and not be of a capital nature; and
- any expenditure incurred is in respect of any National Key Point or specified important place or area under section 24D.

Capital assets may qualify for a deduction of wear and tear under section 11(e).

Security expenditure of a capital nature may qualify as part of the base cost of immovable property held for domestic or private purposes, such as a primary residence or holiday home.

Security expenses incurred by an employer in relation to employees may give rise to a taxable benefit in the hands of the employees under the Seventh Schedule with associated employees' tax implications.

The facts and circumstances of each case must be taken into account.

5.5. Recoupment of amounts deducted or set-off when an asset commences to be held as trading stock

This Note provides guidance on the interpretation and application of section 8(4)(k)(iv), which is relevant when a depreciable asset (not previously classified as trading stock) has had an amount allowed to be deducted or set off under a provision listed in section 8(4)(a) and subsequently commences to be held as trading stock.

The Act allows for various deductions and allowances that reduce the cost price of an asset when determining its tax value. Disposing of such an asset for an amount that exceeds its tax value (but not its cost price) will typically result in a taxable recoupment of the difference. If the asset is disposed of for a consideration that surpasses its cost price, a capital gain may arise.

Section 8(4)(a) serves as a general recoupment provision, stipulating that any amount previously allowed as a deduction or set-off under sections 11 to 20, 24D, 24F, 24G, 24I, 24J, 27(2)(b), and 37B(2) (subject to certain exclusions) must be included in a taxpayer's gross income if it has been recovered or recouped during the year of assessment. This means that whenever a taxpayer claims a deduction or allowance under the specified sections and later recovers or recoups that amount, it must be added to their gross income.

The application of section 8(4)(a) is limited to amounts recovered or recouped upon the disposal of an asset or when an expense is otherwise recovered. However, there are situations when a receipt or accrual of an amount equal to market value does not occur, or when the transaction does not constitute a disposal, leading to no recovery or recoupment despite a deduction or allowance having been granted for the relevant asset. Section 8(4)(k) addresses this by providing for a deemed disposal at market value under four specific circumstances. Before its amendment to include a fourth circumstance, the deemed disposal at market value under section 8(4)(k) applied only when, during any year of assessment, any person has:

- donated any asset;
- in the case of a company,transferred any assets to another shareholder in that company in any manner or form; or

- disposed of any asset to a person who is a connected person in relation to that person.

Notably, section 8(4)(k) did not consider situations when a depreciable asset was subsequently held as trading stock. Therefore, when a taxpayer ceases to hold a depreciable asset on capital account and begins to hold it as trading stock, the allowances or deductions previously granted are not recouped in the year of assessment in which the change in usage occurs or in any subsequent year of assessment.

Paragraph 12(2)(c) establishes a deemed disposal for CGT purposes when an asset, whether depreciable or non-depreciable, that is not held as trading stock commences to be held as trading stock. To create a similar deemed disposal rule for normal tax purposes, section 8(4)(k) was amended to include subparagraph (iv). This provision stipulates a deemed disposal at market value when a taxpayer starts to hold any allowance asset as trading stock.

The Explanatory Memorandum on the Taxation Laws Amendment Bill, 2019 provides the basis for the insertion of section 8(4)(k)(iv) as follows:

> 'Currently, paragraph 12(2)(c) of the Eighth Schedule to the Act triggers a deemed disposal for capital gains tax purposes when an asset which was not held as trading stock commences to be held as trading stock. However, there is no similar deemed disposal and reacquisition rules in the recoupment provisions in section 8(4)(k) of the Act for allowance assets to trigger a recoupment of previous allowances. In order to address this anomaly, it is proposed that changes be made in the Act by inserting a new subparagraph (iv) in section 8(v)(k) of the Act.'

Section 8(4)(a) provides for the recoupment of all amounts allowed to be deducted or set off under specified sections of the Act when an asset is disposed of or when an expense is otherwise recovered or recouped.

On or after 15 January 2020, section 8(4)(k)(iv) triggers a deemed disposal for the purposes of section 8(4)(a) when an allowance asset commences to be held as trading stock. This does not apply to an asset contemplated in paragraph (jA) of the definition of 'gross income', as such an asset remains trading stock from inception, regardless of whether it is subsequently used as a capital asset.

6. DRAFT INTERPRETATION NOTES

6.1. Taxation of amounts received by or accrued to missionaries

This Note provides clarity on the tax treatment of amounts received by or accrued to missionaries who are performing religious or related activities.

A missionary is a member of a religious mission. A religious mission comprises a group of people sent by a religious body to perform religious and social work, educational or hospital work, or to spread that religious body's faith. Often, missionaries operate under the 'banner' of a missionary organisation.

Typically, a missionary is not employed by a missionary organisation and depends on contributions to meet costs related to both the missionary work undertaken and personal expenditure. The contributions are usually made by a community or members of a missionary organisation of which the missionary is a member. Often, these amounts are paid directly by individuals to the missionary organisation, which controls and administers the amounts received for its own benefit and on its own behalf, and then passes on all or part of the amounts to the relevant missionary. In other instances, the contributions can either be made directly to the missionary, or the missionary organisation may simply act as a conduit for the amounts received.

This Note clarifies the correct income tax treatment of the amounts received by or accrued to missionaries. Any donations tax implications of amounts paid to missionaries, as well as the implications of any tax treaty, are beyond the scope of this Note.

Amounts received by or accrued to missionaries for missionary services rendered in South Africa must be included in the missionary's 'gross income' and will be subject to normal tax. Employed missionaries may qualify for a tax exemption if missionary services are rendered outside of South Africa. Missionaries outside of the employees' tax system must consider whether they are provisional taxpayers.

7. GUIDES

7.1. Tax Exemption Guide for Institutions, Boards or Bodies (Issue 2)

This guide provides general guidance on the exemption from income tax of qualifying institutions, boards, or bodies under section 10(1)(cA)(i) of the Income Tax Act.

An absolute exemption from income tax of the receipts and accruals is provided in:

- section 10(1)(cA)(i) for any institution, board or body established by or under any law engaged in specified prescribed activities; and
- section 10(1)(cA)(ii) for any association, corporation or company all the shares of which are held by any such institution, board or body. The approval of this exemption will not be discussed in this guide.

The exemption under section 10(1)(cA)(i), however, will apply only to the extent that such institution, board or body:

- has been approved by SARS subject to any conditions deemed necessary to ensure that the activities of that institution, board or body are wholly or mainly directed to the furtherance of its sole or principal object, and
- complies by law or under its constitution with the prescribed requirements.

Any institution, board or body approved by SARS under section 10(1)(cA)(i) carrying on PBAs in Part II in South Africa potentially qualifies for approval under section 18A subject to the requirements of that section being met.

An institution, board or body bears the burden of proving that it complies with the requirements relative to the approval and exemption under section 10(1)(cA)(i) and the approval under section 18A(1)(a)(ii) and must retain the necessary supporting evidence.

7.2. Tax Exemption Guide for Public Benefit Organisations in South Africa (Issue 7)

This guide provides general guidance on the:

- approval by SARS of an organisation as a public benefit organisation (PBO) under section 30 of the Income Tax Act;
- partial taxation of PBOs under section 10(1)(cN) of the Act; and
- approval by SARS of a PBO under section 18A(1)(a)(i) of the Act to issue section 18A receipts potentially entitling donor taxpayers to an income tax deduction for bona fide donations actually paid or transferred during a year of assessment.

Non-profit organisations, non-governmental organisations and other organisations with worthy causes are internationally granted some degree of preferential tax treatment, including donor incentives. Although the eligibility criteria, the benefits available, and the fiscal methodology differ in many instances there, however, is broad consensus in the international community on the justification for such beneficial treatment. Factors most frequently cited include that such organisations:

- as civil society initiatives, are seen to promote important values in society, including voluntarism, self-responsibility, and participative democracy;
- play a significant role in society by undertaking shared responsibility for the social and developmental needs of a country on a relatively cost-effective manner;
- relieve the financial burden that would otherwise fall on the state; and
- represent an important mechanism for encouraging philanthropy and promoting greater equity and redistributive policies especially in societies such as South Africa where gross disparities of income and wealth exist.

Preferential tax treatment for organisations approved as PBOs may include the benefit of a partial exemption from the payment of income tax. In addition to being partially exempt from income tax on certain receipts and accruals, eligible organisations may also enjoy the benefit of being exempt from certain other taxes and duties. These tax benefits are designed to assist PBOs by augmenting their financial resources and providing them with an enabling environment in which to achieve their objectives.

The terms 'public benefit activity' and 'public benefit organisation' are defined in section 30(1) and form the basis for the preferential tax treatment of a PBO. An organisation having a non-profit motive or established or registered as an NPO under the NPO Act or incorporated as an NPC under the Companies Act does not automatically qualify for preferential tax treatment or approval as a PBO. An organisation will enjoy preferential tax treatment only if it complies with the relevant prescribed requirements set out in the Act and has been granted approval as a PBO by SARS. These requirements must continuously be met to retain the approval status.

Government has recognised that organisations are dependent on the generosity of the public, and, to encourage that generosity, has provided an income tax deduction for certain bona fide donations made by donor taxpayers. Donations made by donor taxpayers represent expenditure of a private and philanthropic nature and therefore as a general matter are not deductible, unless such bona fide donations fall within the special dispensation provided for in section 18A. This limitation stems from revenue collection and anti-avoidance concerns.

The eligibility to issue section 18A receipts is therefore restricted to PBOs approved by SARS that use the bona fide donations for which they issue section 18A receipts to carry on or fund specific PBAs listed in Part II in South Africa.

8. 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.