TAX UPDATE

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1. INTRODUCTION

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

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

Take some time and consider the tax cases.

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

Enjoy reading on!

'Ons moet nie die wet oortree nie – veral nie wanneer die maklik is en almal dit doen nie. Ons moet ons belasting korrek en eerlik betaal, uit erkentenis vir die genade van 'n werk en 'n inkomste – 'n voorreg waarvoor soveel mense in ons land hul voortande sal gee.' – Jan Jan Joubert, Gaan Suid-Afrika oukei wees?

2. TAXATION LAWS AMENDMENT BILL [B18 – 2019]

2.1. Section 11(j) – Income Tax Act

Section 11 of the Income Tax Act is hereby amended— (a) by the substitution for paragraph (j) of the following paragraph:

'(j) an allowance in respect of any debt due to the taxpayer, if that debt would have been allowed as a deduction under any other provision of this Part had that debt become bad, of an amount equal to—

(i) if IFRS 9 is applied to that debt by that person for financial reporting purposes, the sum of—

(aa) 40 per cent of the aggregate of—

(A) the loss allowance relating to impairment that is measured at an amount equal to the lifetime expected credit loss, as contemplated in IFRS 9, in respect of debt other than in respect of lease receivables as defined in IFRS 9; and

(B) the amounts of debts included in the income of the taxpayer in the current or any previous year of assessment that are disclosed as bad debt written off for financial reporting purposes and that have not been allowed as a deduction under section 11(a) or (i) for the current or any previous year of assessment; and

(bb) 25 per cent of the loss allowance relating to impairment, as contemplated in IFRS 9, in respect of debt other than in respect of lease receivables as defined in IFRS 9 or debt taken into account under item (aa); or

(ii) if IFRS 9 is not applied to that debt by that person for financial

reporting purposes, the sum of—

(aa) 40 per cent of so much of any debt, other than a debt contemplated in subparagraph (i), due to the taxpayer, if that debt is 120 days or more in arrears; and

(bb) 25 per cent of so much of any debt, other than a debt contemplated in subparagraph (i) or item (aa), due to the taxpayer, if that debt is 60 days or more in arrears: Provided that an allowance under this paragraph must be included in the income of the taxpayer in the following year of assessment:

Provided further that the Commissioner may, on application by a taxpayer, issue a directive that the percentage contemplated in subparagraph (i)(aa) or (ii)(aa) may be increased, to a percentage not exceeding 85 per cent after taking into account—

(a) the history of a debt owed to that taxpayer, including the number of repayments not met, and the duration of the debt;

(b) steps taken to enforce repayment of the debt;

(c) the likelihood of the debt being recovered;

(d) any security available in respect of that debt;

(e) the criteria applied by the taxpayer in classifying debt as bad; and

(f) such other considerations as the Commissioner may deem relevant;'

2.2. Section 72 – VAT Act

The following section is hereby substituted for section 72 of the Value-Added Tax Act, 1962:

'Decisions to overcome difficulties, anomalies or incongruities

72. (1) If in any case the Commissioner is satisfied that in consequence of the manner in which any vendor or class of vendors conducts his, her or their business, trade or occupation, difficulties, anomalies or incongruities have arisen or may arise in regard to the application of any of the provisions of this Act and similar difficulties, anomalies or incongruities have arisen or may arise for any other vendor or class of vendors of the same kind or who make similar supplies of goods or services, the Commissioner may make a decision as to—

(a) the manner in which such provisions shall be applied; or

(b) the calculation or payment of tax provided in this Act

in the case of such vendor or class of vendors or any person transacting with such vendor or class of vendors as appears to overcome such difficulties, anomalies or incongruities: Provided that such decision shall not—

(i) have the effect of reducing or increasing the liability for tax levied under this Act; or

(ii) be contrary to the construct and policy intent of this Act as a whole or any specific provision in this Act.'

3. TAX ADMINISTRATION LAWS AMENDMENT BILL [B19 – 2019]

3.1. Section 11(4) of the TA Act

Section 11 of the Tax Administration Act, 2011, is hereby amended by the substitution for subsection (4) of the following subsection:

'(4) Unless the court otherwise directs, no legal proceedings may be instituted in the High Court against the Commissioner, unless the applicant has given the Commissioner written notice of at least [**one week**] <u>10 business days</u> of the applicant's intention to institute the legal proceedings.'

3.2. *Section 256 of the TA Act*

The Tax Administration Act, 2011, is hereby amended by the substitution for section 256 of the following section:

'Tax compliance status

256. (1) A taxpayer may apply, in the prescribed form and manner, to SARS for [**a confirmation of**] third party access to the taxpayer's tax compliance status.

(2) SARS must **[issue]** provide or decline to **[issue the confirmation of]** provide third party access to the taxpayer's tax compliance status within 21 business days from the date the application is submitted or such longer period as may reasonably be required **[if a senior SARS official is satisfied that the confirmation of]** to confirm the correctness of the taxpayer's tax compliance status **[may prejudice the efficient and effective collection of revenue]**.

(3) **[A senior SARS official may provide a taxpayer with confirmation of the]** The taxpayer's tax compliance status may only be indicated as compliant **[only]** if **[satisfied that]** the taxpayer—

(a) is registered for tax as required in terms of a tax Act; **[and does not have any—]**

[(a)](b) does not have any outstanding tax debt, excluding a tax debt—

(i) contemplated in section 167 or 204; or

(ii) [a tax debt] that has been suspended under section 164; or

(iii) that may not be recovered for the period specified in section 164(6); or

(iv) that does not exceed the amount referred to in section 169(4) or any higher amount that the Commissioner may determine by public notice; **[or]** and

[(b)](c) does not have any outstanding return, unless an arrangement

[acceptable to the] with SARS **[official]** has been made for the submission of the return.

(4) **[A confirmation]** An indication of the tax compliance status of a taxpayer must **[be in the prescribed format and]** include at least—

(a) the **[original]** date of **[issue of]** the tax compliance status **[confirmation to]** of the taxpayer;

(b) the name**[,]** and taxpayer reference number **[and identity number or company registration number]** of the taxpayer;

[**(c) the date of the confirmation of the tax compliance status of the taxpayer to an organ of state or a person referred to in subsection (5);]** and

[(d)](c) **[a confirmation of]** the taxpayer's tax compliance status **[of the taxpayer]** as at the date referred to in paragraph **[(c)]**(a).

(5) Despite the provisions of Chapter 6, SARS may **[confirm]** indicate the taxpayer's tax compliance status as at a current date **[the date of the request]**, or a previous date as prescribed by the Minister in a regulation under section 257(2A), [by] to—

(a) an organ of state; or

(b) a person to whom the taxpayer has **[presented]** provided third party access to the taxpayer's tax compliance status **[confirmation]**.

(6) SARS may revoke third party access to **[alter]** the taxpayer's tax compliance status **[to non-compliant]** if the **[confirmation]** access—

(a) was issued in error; or

(b) was **[obtained]** provided on the basis of fraud, misrepresentation or non-disclosure of material facts,

and SARS has given the taxpayer prior notice and an opportunity to respond to the allegations of at least **[14]** 10 business days prior to the **[alteration]** revocation.

(7) A taxpayer's tax compliance status will be indicated as non-compliant by SARS for the period commencing on the date that the taxpayer no longer complies with a requirement under subsection (3), or such later date as the Commissioner may prescribe, and ending on the date that the taxpayer remedies the non-compliance.'

4. TAX CASES

4.1. Ntayiya v SARS

Ntayiya was an attorney practising as a sole practitioner in Mthatha.

Ntayiya's erstwhile tax advisors, MNG Business Consultants, had previously prepared tax returns for the period of 2008 to 2013 and had submitted such returns to SARS together with annual financial statements for the years in question.

During the course of 2014 SARS had advised Ntayiya that the annual financial statements were incorrect and had given him an opportunity to make the necessary amendments and MNG Business Consultants obliged accordingly on Ntayiya's behalf.

Thereafter SARS audited the assessment of Ntayiya's tax liability made by MNG Business Consultants and found that Ntayiya had submitted nil tax returns for the period of 2008 to 2013 and had based these on MNG Business Consultants' original annual financial statements.

SARS further explained that when Ntayiya's bank statements were analysed it was discovered further that Ntayiya had not declared certain payments that he had received from the State. SARS had added together the funds that were deposited into both Ntayiya's business and private bank accounts and had compared the total with what was reflected in Ntayiya's annual financial statements and, upon comparison, it was clear that Ntayiya had grossly understated his income.

SARS had consequently deemed the above to be tax evasion and had imposed understatement penalties.

Ntayiya had subsequently delivered notices of objection in respect of SARS' assessment and this resulted in MNG Business Consultants submitting a revised set of annual financial statements.

SARS had partially allowed Ntayiya's objection on the basis of the revised set of annual financial statements and this was communicated to Ntayiya who was also informed that he had the right to appeal by completing and submitting the relevant form within 30 business days.

Ntayiya had thereafter introduced new tax advisors, APAC Professional Accountants and Tax Specialists, who prepared a further set of annual financial statements and submitted these to SARS together with a notice of appeal.

SARS had informed Ntayiya that his appeal was late as it fell outside the prescribed time period.

Ntayiya had thereafter applied for the reduction of the assessments made in respect of the tax years 2008 to 2013, as contemplated under section 93, read with section 99 of the Tax Administration Act 28 of 2011 ('the TA Act').

SARS notified Ntayiya on 15 August 2016 that the assessments would not be revised and in the event that Ntayiya wished to pursue the matter further, he was advised to seek legal advice with regard to the remedies available.

Ntayiya then instituted the present proceedings in the High Court on 11 October 2016 for the review and setting aside of SARS' assessment and also sought an order that the annual financial statements for the tax years of 2008 to 2013, submitted by APAC Professional Accountants and Tax Specialists, be accepted as correct.

The court had to consider and determine the following:

- SARS had raised two points *in limine*. Firstly, Ntayiya had failed to comply with the provisions of section 11(4) of the TA Act inasmuch as he did not give SARS at least one week's written notice of his intention to institute legal proceedings and, secondly, Ntayiya had failed to comply with the provisions of section 11(5) of the TA Act inasmuch as he did not ensure

that his application was served at the address specified by SARS in terms of public notice to that effect.

- The issues to be determined were as follows: Whether SARS' points *in limine* should succeed, which would dispose of the matter; Whether Ntayiya had made out a case for the review and setting aside of the assessment made by SARS; and whether Ntayiya had made out a case for the acceptance of the correctness of the annual financial statements for 2008-2013, as prepared by APAC Professional Accountants and Tax Specialists.

Section 11 of the TA Act provided as follows at the relevant time:

'11. *Legal Proceedings involving Commissioner.* – (1) . . . . .

(2) . . .

(3) . . .

(4) Unless the court otherwise directs, no legal proceedings may be instituted in the High Court against SARS unless the applicant has given SARS written notice of at least one week of the applicant's intention to institute the legal proceedings.

(5) The notice or any process by which the legal proceedings referred to in subsection (4) are instituted, must be served at the address specified by SARS by public notice.'

Judge Laing held the following:

<u>As to whether there had been compliance with ss 11(4) and 11(5) of the TA Act</u>

(i) That the applicable provisions were statutory mechanisms that are designed to encourage dispute resolution instead of litigation. The effective and efficient collection of tax may have significant implications for a taxpayer. This is all the more so where the taxpayer is an individual rather than a corporate entity. In the present case, SARS' imposition of understatement penalties on Ntayiya is likely to have a devastating effect on his personal finances in the event that such penalties have a proper basis. Clearly, it would be in the interests of both parties to avoid protracted

and expensive litigation where an alternative dispute resolution process is provided.

(ii) That the requirement of prior notice under section 11(4) of the TA Act is nothing unusual in relation to actions brought against organs of state or their functionaries. Case law corresponds with the academic commentary mentioned above. In *Mohlomi* v *Minister of Defence* 1997 (1) SA 124 (CC), the court said, at par. [9], that the reason for the statutory requirement is that 'with its extensive activities and large staff tends to shift… [an organ of state] needs the opportunity to investigate claims laid against it, to consider them responsibly and to decide, before getting embroiled in litigation at public expense, whether it ought to accept, reject or endeavour to settle them.'

(iii) That the TA Act does not contain any condonation provisions as found in other legislation but, nevertheless, section 11(4) can be interpreted to mean that a court may direct that legal proceedings be instituted in the absence of prior notice. This presupposes that Ntayiya has made application to court for such an order and that he or she has motivated why no prior notice is necessary. The question arises as to whether, conversely, a court may issue directions in the absence of prior notice but after legal proceedings have already been instituted and, in effect, this would amount to a decision on an application for condonation of Ntayiya's non-compliance with a statutory instrument.

(iv) That the text in section 11(4) of the TA Act provides no ready answer to the above and the prohibition against the institution of legal proceedings in the absence of prior notice is qualified by the clause 'unless the court otherwise directs'. The text provides no assistance in relation to the circumstances under which a court may exercise such discretion and begs the question as to whether an order can be made after the commencement of litigation.

(iv) That the *contra fiscum* principle applies in the event of an ambiguity in a tax statute. In other words, the ambiguous provision must be interpreted in favour of a taxpayer. Nevertheless, the true intention of the legislature is of

paramount importance and remains decisive. The scope and purpose of the legislation must be considered, together with the context in which the words and phrases are used.

(v) That the preamble to the TA Act does not shed light on how to deal with the subject, save to indicate that the TA Act provides authority to act in legal proceedings. Overall, the TA Act itself does not offer much insight into the manner in which section 11(4) ought to be interpreted and applied.

(vi) That, returning to the text itself, a narrow interpretation suggests that a court may issue directions only in circumstances where Ntayiya seeks to avoid the requirement of prior notice, in anticipation of the institution of legal proceedings. For example, an order would need to be obtained where Ntayiya intends to bring an urgent application against SARS. A wide interpretation suggests that directions may be issued by the court at any stage, even after legal proceedings have been instituted. The latter hinges on the meaning of 'otherwise directs.' The dictionary meaning of 'otherwise', used as an adverb, is '1 in different circumstances; or else. 2 in other respects. 3 in a different way. 'alternatively.' If the past tense of 'direct' had been used then a wide interpretation would be more difficult to justify, *ie* 'unless the court has otherwise directed' would support a narrow interpretation, requiring an application to court prior to the institution of legal proceedings. However, the use of the term in its present tense permits the wider interpretation discussed.

(vii) That, mindful of the above and the relevance of the *contra fiscum* principle, this court was prepared to give a wide interpretation to the provisions of section 11(4). Directions may indeed be issued in the absence of prior notice and after the institution of legal proceedings.

(ix) That, notwithstanding the above, the court must still be satisfied that a proper basis exists upon which to condone non-compliance and to grant an appropriate order. The Constitutional Court has held that the standard for considering an application for condonation is the interests of justice and 'in general terms, the interests of justice play an important role in condonation

applications. An applicant for condonation is required to set out fully the explanation for the delay; the explanation must cover the entire period of the delay and must be reasonable.

(x) That in terms of section 11(5), an applicant must serve prior notice or process at the address specified by SARS in a public notice. The requirement is unambiguous and must be understood as having been inserted to encourage the parties to follow a dispute resolution process. It permits SARS an opportunity to investigate, consider, and decide how to deal with any claim brought against it by ensuring that the claim is brought to the attention of a provincial or regional office, which, presumably, would be in a better position to contact Ntayiya and propose an alternative to litigation. *Ex facie* the text, there is no express authority for the court to exercise any discretion where an applicant had failed to serve notice or process at the address specified by SARS. At the least, it would be expected of an applicant that a condonation application be brought in the event of non-compliance.

(xi) That, returning to the facts of the present matter, it was common cause that Ntayiya had failed to comply with either section 11(4) or (5) and the explanation for his default was remarkably scant. He baldly stated that no prejudice would be suffered by SARS as a result of his failure to have given prior notice and he had interpreted the contents of a letter received from SARS to mean that SARS had consented to his proceeding with litigation, without further ado.

(xii) That, not by any stretch of imagination could the aforementioned letter be interpreted in the manner contended for by Ntayiya. SARS' letter merely urges Ntayiya to obtain legal advice on the options available to him, which may (or may not) include review proceedings, nothing more. In no way could it be construed as a waiver of Ntayiya's obligation to give prior notice, nor that SARS was authorised to do so in any event. Ntayiya's explanation was simply not adequate.

(xiii) That before instituting legal proceedings against SARS, it was incumbent

upon Ntayiya to have consulted the applicable legislative framework and to have satisfied himself that he had met any procedural requirements that were stipulated. That Ntayiya, as an attorney, failed to do so is surprising. A prescribed procedure cannot be ignored or wished away. It is there for a reason and if a litigant so wishes then he or she is entitled to challenge it and until it is declared unlawful or repealed, the procedure must be given effect.

(xiv) That in relation to Ntayiya's averment to the effect that SARS would have suffered no prejudice as a result of non-compliance, the court was unable to agree. Prior notice to SARS would have permitted SARS an opportunity to have investigated and considered the matter further and to have decided how best to resolve the dispute. This never happened and SARS finds itself embroiled, at the expense of the public, in litigation that may have been possible to avoid and the prejudice caused is plain to see.

(xv) That, as to SARS' second point *in limine*, Ntayiya again alleged that no prejudice was suffered by SARS but, again, the court was unable to agree. To imply that it was immaterial whether SARS received the application in Pretoria or at its provincial office in Port Elizabeth was to miss the point entirely. The procedural requirement was there to permit SARS a proper opportunity to deal with the matter and to allow the possibility of a dispute resolution process to be explored, thereby mitigating against the delay and expense of litigation. Service on SARS' provincial office, where its officials are more conveniently placed to deal with an applicant located within their jurisdiction, would have facilitated such a scenario and the failure on the part of Ntayiya to have done so can only be to the prejudice of SARS.

(xvi) That the court was inclined to agree that Ntayiya had not made application for condonation of his non-compliance with ss 11(4) and (5) of the TA Act and, certainly, Ntayiya had not filed a formal application, accompanied by a substantive explanation for his default.

(xvii) That, assuming that Ntayiya had indeed made proper application for condonation, about which the court was not persuaded, Ntayiya would need

to demonstrate that there were prospects of success in the application and this required further comment.

As to the prospects of success in the review proceedings

(xviii) That Ntayiya had sought the review and setting aside of the assessment made by SARS and this had been done in terms of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). However, Ntayiya had not explicitly stated the grounds of review upon which he sought to rely, as listed in section 6(2) of PAJA and it was not for the court to sift Ntayiya's submissions and make a determination on which of the review grounds Ntayiya seemed to rely as these must be stated clearly and must be supported by the facts.

(xix) That, from the papers, it appeared to the court that Ntayiya had alleged that SARS' assessment was flawed as a result of errors in the manner in which MNG Business Consultants had prepared the annual financial statements, upon which documents SARS had based its assessment. However, the fundamental difficulty that the court had with the application was that the errors upon which SARS' assessment was allegedly based were far from clear. Ntayiya had averred that certain income received in his bank accounts should not have been treated as such but the precise details of such income, including the dates upon which it was received and how much it comprised, are not explained. The details of what accounting or legal principles were applicable in the determination of the assessment and how SARS allegedly infringed these were also not explained.

(xx) That, in the circumstances, Ntayiya has failed to provide a factual and legal basis upon which to convince the court that there is a prospect of success with regard to his application for the review and setting aside of SARS' assessment.

(xxi) That, further, the weaknesses that undermine the application for review and setting aside of SARS' assessment extend to the remainder of the application and Ntayiya has failed to establish a factual and legal basis

upon which to assert that the annual financial statements are a true and accurate indication of the assets and liabilities, income and expenses, and other factors commonly used to describe Ntayiya's financial situation for the tax years in question.

(xxii) That, accordingly, there was nothing to persuade the court that there is a prospect of success in relation to an application for an order that the annual financial statements in question be accepted as correct.

(xxiii) That, to the extent that Ntayiya had indeed made application for condonation of his non-compliance with ss 11(4) and 11(5) of the TA Act, he has failed to demonstrate a factual or legal basis for why an order to that effect should be granted. On the application of either the standard of interests of justice or the test of good cause, Ntayiya fell far short of what was required and, in the circumstances, SARS' points *in limine* must be upheld and Ntayiya was not entitled to the relief requested.

Application dismissed with costs.

4.2. ITC 1921 – Tax Administration

The taxpayer had been the Chief Executive Officer of XYZ (Pty) Ltd for just over sixteen years when his employment with XYZ came to an end in 2012.

A severance package was paid out to the taxpayer by his erstwhile employer on termination of his services in the 2012 year of assessment in the amount of R7 066 530 which was an amount equal to a severance package calculated in accordance with XYZ's retrenchment policies and it was described as a 'lump sum payment for separation package' in his 2012 income tax return.

SARS had issued an additional assessment on 31 January 2013 in which the taxpayer's claim that he had received a retrenchment benefit was disallowed on the basis that he had not satisfied the requirements of section 11(*a*) read with section 23(*g*) of the Income Tax Act.

SARS did not accept that the lump sum payment paid by XYZ to the taxpayer was

made as a result of a retrenchment and therefore was not taxable as a retrenchment benefit but was taxed rather as ‘other’ income.

The taxpayer objected to the additional assessment on 24 April 2013 and after his objections were disallowed he filed the present appeal against the abovementioned additional assessment.

The amount of R7 066 530 had been taxed as ‘other income’ under code 4214 in the additional assessment whereas a retrenchment benefit was subject to the rates of tax applicable to lump sum payments from retirement funds.

The taxpayer contended that the amount received was a lump sum payment and thus could not be taxed as normal taxable income as SARS had done.

The taxpayer submitted that the said amount ought to have been taxed according to the tax table for retirement and retrenchment lump sums and these questions raised the central issue to be determined in this appeal, namely, whether the taxpayer had been retrenched or not.

SARS had alleged in his statement of grounds of assessment (‘Rule 31 statement’) that he had conducted a personal income tax audit on the taxpayer during January 2013 and that his investigations had shown that the payment received by the taxpayer was incorrectly declared as a ‘lump sum payment’ for a ‘separation package’ in his 2012 income tax return.

SARS contended that it was not a severance benefit as contemplated in the Income Tax Act because the taxpayer had been relieved of his duties in terms of clause 14.2 of his employment contract with XYZ which dealt with severance payments pursuant to a dismissal and hence the sum paid out to him constituted taxable income in his tax return.

SARS, in addition, stated that the taxpayer had failed to provide sufficient proof of the retrenchment in the form of supporting documentation and an IRP5 form in particular.

SARS had requested on 6 May 2013 that the taxpayer furnish his IRP5 certificate but he had explained that he was unable to obtain an IRP 5 certificate from XYZ

since there had been a dispute regarding his retrenchment and he had advised SARS accordingly.

A further request for the IRP5 form was made by SARS on 17 July 2013 and thereafter SARS simply advised the taxpayer that his objection had been disallowed since no reply had been received to its queries and the present appeal was then lodged by the taxpayer.

The only question to be determined in this appeal was the one relating to the taxation of the lump sum payment paid by the taxpayer's employer upon the termination of the taxpayer's employment relationship with XYZ.

The taxpayer, before the Tax Court, had also raised a point *in limine*, namely whether the audit conducted prior to the issuing of the additional assessment was valid and whether the subsequent additional assessment was therefore valid. **If the additional assessment was found to be invalid, the matter would be disposed of on that basis alone.**

The taxpayer contended that he had not had notice of an audit prior to the issue being disclosed in the statement of grounds of assessment and the audit had been procedurally flawed because SARS had not complied with the requirements of section 42 of the TA Act.

Judge Revelas held the following:

As to the validity of the audit

(i) That SARS' reliance on a procedurally flawed audit conducted without the taxpayer's knowledge as a new ground of assessment in its Rule 31 statement is impermissible. In the unreported case of *Sasol Oil (Pty) Ltd* v *C:SARS* (GNP Case No *17583/2012*) the court precluded SARS from introducing a new ground of assessment in similar circumstances against the taxpayer, as being contrary to the principle of legality.

(ii) That an additional assessment is administrative action as contemplated in section 33 of the Constitution, which protects the right to administrative action that is lawful, reasonable and fair. The section also provides that everyone whose rights have been adversely affected by administrative

action has the right to be given written reasons. Therefore, an assessment, that is procedurally flawed for a lack or failure to give reasons, offends the principle of legality and set out in *Albutt* v *Centre for the Study of Violence and Reconciliation* and *Wessels* v *Minister of Justice and Constitutional Development*.

(iii) That sections 40 and 42 of the Tax Administration Act clearly give effect to and echo the administrative justice provisions set out in section 33 of the Constitution. Section 42 requires that the taxpayer be kept informed of the audit and a SARS official involved in or responsible for an audit must, in the form and in the manner as may be prescribed by the Commissioner by public notice, provide the taxpayer with a report indicating the stage of completion of the audit and upon conclusion of the audit and where the audit identified potential adjustments of a material nature, SARS must within 21 business days, or the further period that may be required based on the complexities of the audit, provide the taxpayer with a document containing the outcome of the audit, including the grounds for the proposed assessment or decision referred to in section 104(2) and afford the taxpayer the opportunity to respond to any matters raised by SARS.

(iv) That SARS' breach of the legality principle is further compounded by its failure to comply with section 42(1) of the TA Act which requires the SARS official responsible for the audit to provide the taxpayer with a report indicating the stage of completion of the audit. The taxpayer was not kept informed regarding the status of the audit and, in addition, the papers do not reveal any written conclusions or findings as would be required at the end of an audit. It was also pointed out that SARS did not discover any audit file for 2012 and it was also required that a financial inspection had to precede any additional assessment and none of this had occurred.

(iv) That the outcome of the audit had not been conveyed to the taxpayer either and, in this regard, section 42(2)(*b*) of the TA Act was flouted by SARS. Accordingly, the taxpayer was deprived of the opportunity to respond to any of the issues raised, particularly the question of the circumstances

surrounding his resignation and the nature of the lump sum paid to him.

As to the lump sum 'severance benefit'

(v) That SARS had submitted that the taxpayer was not retrenched but that his services were terminated through a dismissal in terms of clause 14.1 of the employment contract with XYZ and in this regard SARS had relied on a letter by XYZ to the taxpayer. However, SARS' reliance on the letter was rather selective. The letter together with the type of severance or 'separation package' in actual fact paid to the taxpayer, indicated that the taxpayer's services were terminated as part of a retrenchment exercise or it was at least treated as such by XYZ, in that the package paid to the taxpayer was equal to a package calculated in the course of a retrenchment, and in accordance with clause 14.2 of the relevant contract of employment. If the audit by SARS had been conducted with due regard to sections 40, 41 and 42 of the TA Act, the outcome of the audit may have been very different.

(vi) That the same considerations apply to the farming expenses (the subject of a further additional assessment) that were disallowed. A properly conducted audit would almost certainly have produced a different result. Since the issue of the farming expenses claim stood over by agreement and was not argued, the merits of that claim requires no further consideration. The invalid audit renders such a discrimination moot in any event.

(vii) That SARS' non-compliance with sections 40 and 42 of the TA Act clearly offended both the Constitution and the principle of legality. Accordingly, SARS' decision to conduct an additional assessment without notice, must be set aside as it does not comply with the peremptory prescripts of the applicable legislation and it was also constitutionally unsound and, in the circumstances, the assessment in issue was found to be invalid and the taxpayer's entire 2012 additional assessment must therefore be set aside.

Appeal upheld with costs.

4.3. *Reed v Minister of Finance and others*

Applicant and taxpayer, Mr Reed, had applied for relief from SARS in terms of the Voluntary Disclosure Programme that had been introduced into the Tax Administration Act.

In order for the applicant to qualify for the relief, his disclosure had to be voluntary but SARS had investigated the facts surrounding the disclosure and had determined that it was not voluntary.

The applicant took SARS' decision on review on the ground that it was irrational and he focussed on the merits of the decision in his founding papers. His counsel, in his heads of argument, had added another ground for review, namely, that the process that SARS followed in investigating the matter was flawed, because the audi alteram partem principle had not been applied.

Second Respondent, being SARS, had objected to the audi argument being included in the issues for decision because it was a late addition to the issues that had not been fleshed out in the affidavits.

The court hearing the review had upheld SARS' objection and had determined that the procedural or audi ground of review was not available to the applicant and the court also found against him on his merits challenge and ultimately had dismissed his application with costs.

The audi ground of review was based on the principle of natural justice that the applicant should have been afforded a proper hearing and be given the opportunity of producing his evidence and of correcting or contradicting any prejudicial statement or allegation made against him by SARS. In other words, SARS was required to listen fairly to both sides and to observe 'the principles of fair play.'

The applicant then sought leave to appeal in the present court hearing basing his case on twenty-five overlapping grounds but during argument his counsel had reduced the grounds to three main considerations.

The first was that as a matter of procedural principle a party to application proceedings was at large to make any argument that could be based on the facts

contained in the affidavits and an applicant was particularly not limited by the arguments indicated in the founding affidavit and it was further contended on the facts that the audi argument could be distilled from the founding affidavit and could thus be raised.

The second consideration was the principle that if an error was indicated in an administrative process that led to an administrative decision, then the decision had to be set aside and sent back to the decision maker for reconsideration, no matter how inconsequential the error may be and notwithstanding that reconsideration would probably deliver the same result and that, on the facts, the decision in issue ought consequently to be set aside and sent back to the functionary.

The third consideration was that there were reasonable prospects that another court may reach a different conclusion from the court hearing the review on the merits and the applicant argued that the court a quo's interpretation of the relevant legislation was flawed.

Sections 225 to 233 of the Tax Administration Act introduced the Voluntary Disclosure Programme and in section 226(1) it is provided that a person may apply, whether in a personal, representative, withholding or other capacity, for voluntary disclosure relief.

Section 226(2) provided that if the person seeking relief has been given notice of the commencement of an audit or criminal investigation into the affairs of the person, which has not been concluded and is related to the disclosed 'default', the disclosure of the 'default' is regarded as not being voluntary for purposes of section 227, unless a senior SARS official is of the view….'

Section 227 provides that the requirements for a valid voluntary disclosure are that the disclosure must be (a) voluntary (b) involve a 'default' which has not occurred within five years of the disclosure of a similar 'default' by the applicant (c) be full and complete in all material respects (e) not result in a refund due by SARS and (f) be made in the prescribed form and manner.

Judge Louw held the following:

(i) That whilst review proceedings are normally aimed at the processes and

procedures of administrative decision making, the constitutional and substantive cogency or legality of the exercise of discretions or the making of decisions are equally considered in review proceedings and this is what was meant by 'merits.' The procedural enquiry concerns the question: How was the decision made? The merits enquiry concerns the question: Is the decision a properly made decision? 'Merits' in this sense still deals with the administrative process and must not be confused with the merits of a judicial decision that is subject to an appeal.

(ii) That the distinction between reviews and appeals or procedures of decision-making and the merits of a decision made, is complicated where the decision is dependent upon the finding of a fact and the present case is an example of such a complication in that SARS had to determine, as a matter of fact, whether the disclosure in issue was voluntary and this had nothing to do with the exercise of a discretion or any other administrative act that required judicial deference.

(iii) That if this were an administrative decision then it would be formally reviewable but it would stand judicial scrutiny if the process was good even though the decision as such is open to doubt. Given the established divide in our law between reviews and appeal, judicial acceptance that courts may review the factual findings of administrators was slow in coming. In the judgment of Cloete JA in Pepkor Retirement Fund v Financial Services Board 2003 (6) SA 38 (SCA) at par. [47] he explained its application as follows in par [48]:

> 'Recognition of material mistake of fact as a potential ground of review obviously has its dangers. It should not be permitted to be misused in such a way as to blur, far less eliminate, the fundamental distinction in our law between two distinct forms of relief: appeal and review.'

The Pepkor approach was retained in the era after the advent of the Promotion of Administrative Justice Act 3 of 2000.

(iv) That in the present case the underlying problem was that Ms du Plooy of SARS had to determine a fact, namely, whether the disclosure was voluntary or not. Her determination of the fact would ordinarily be immune from a review unless it was a jurisdictional fact and the problem was compounded by the absence of any prescribed procedures that she had to follow in determining the said fact. She did not determine a dispute in accusatorial proceedings but had inquisitorially to find a fact.

(iv) That the court then returned to the first consideration identified above and noted that the audi point raised in argument and not in the founding papers was not a legal argument but a fresh ground of review as it sought to introduce a further issue that required further evidence and would have amounted to an amendment of the pleadings component of the founding and supplementary affidavits if allowed.

(v) That, moreover, it would be unfair and unjust to SARS to allow the case to migrate there and the court saw no reasonable prospect that another court may come to a different conclusion.

(vi) That the court further referred to the judgment of Zondo J in Links v Department of Health, Northern Province 2016 (4) SA 414 (CC) where he refused to entertain a clever argument on statutory interpretation that had not been foreshadowed in the litigant's affidavit.

(vii) That the finding of the court in regard to the audi point in the present case brought an end not only to the applicant's first consideration but also to the second one because in the absence of the audi point the obiter remarks made by the court about immaterial irregularities were of no consequence.

(ix) That, however, the applicant had based his argument on par. [28] of the judgment of Froneman J in Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer South African Social Security Agency 2014 (1) SA 604 (CC) where he had held that a determination that an administrative act was not in compliance with a statutory provision required that the act must be declared constitutionally invalid.

(x) That, however, the court in the present case was of the view that the Allpay rule did not apply because there had not been a finding of a flaw in a prescribed statutory process, i.e. that the process followed by Ms du Plooy was flawed and, accordingly, no flaw had been found to exist and the Allpay case did not apply.

(xi) That, in regard to the applicant's third consideration, Ms du Plooy could only be blamed for irrationality if she had erred in her interpretation of the legislation in question and it was thus necessary to consider the key provisions of the voluntary disclosure programme to set a yardstick against which Ms du Plooy's decision could be measured.

(xii) That the court had reconsidered its interpretation of the provisions in the Tax Administration Act 28 of 2011 in issue and did not believe that there were reasonable prospects that another court may reach different interpretations.

(xiii) That one of the pivotal issues was whether the term 'investigation' connotes only criminal investigations or also other investigations. [Counsel for SARS] presented an analysis of the Tax Administration Act and six provisions not touched on in [the court's] judgment that indicated that the 'investigation' contemplated under section 226 includes non-criminal investigations. She referred [the court] to sections 31, 32, 69(4), 70(7), 71 and 170 in this regard and in the court's view there was no reasonable prospect that another court may reach a different interpretation.

(xiv) That, in the result, the application for leave to appeal was dismissed with costs, including the costs consequent upon the employment of two counsel.

4.4. ITC 1922 – Section 8(15) of the VAT Act

The taxpayer, being a South African VAT vendor, manufactured and distributed drinking beverages in South Africa under a variety of brands – not as owner of the brands, but in terms of an exclusive rights distribution agreement entered into with

foreign offshore entities, i.e. the ‘brand owners.’

The taxpayer, in so doing, had used the brand owners’ trademarks and intellectual property. The brand owners invest in the advertising and promotion (‘A & P’) of the brands to build and maintain brand recognition and perception, with the aim of generating sales and sustainable long-term cash flow by way of enhanced brand equity.

The taxpayer had provided a single supply of an A & P service to the foreign brand owners, using its subsidiary and joint venture partner, X Entity, having outsourced its sales, marketing and distribution operations to X Entity.

The taxpyer, for the A & P service provided, had invoiced the foreign brand owners a fee and this was calculated with reference to the annual amount spent (through the payment of a fee to X Entity) on A & P expenditure, without differentiating on the tax invoice between services rendered to the brand owners and goods consumed within South Africa.

The brand owners and the taxpayer had split the funding of A & P expenditure on a 50:50 basis up to 15% of net sales value for the brand in question, above which the brand owner funds the balance.

The taxpayer’s costs included advertising and promotional costs, including expenditure incurred in relation to goods which take the form of promotional products distributed locally such as gifts, competitions, display materials, personality promotions, promotional items such as lanyards and t-shirts, product tastings and local product giveaways.

SARS had raised additional VAT assessments against the taxpayer for its 2009, 2010 and 2011 VAT periods in terms of which VAT was levied at the rate of 14% in terms of section 7(1)(a) of the VAT Act on the goods part of the supply of the A & P service provided by the taxpayer to the brand owners.

SARS had accepted the remainder of the A & P service supplied as having been properly zero-rated by the taxpayer in terms of section 11(2)(l) of the Act.

SARS' basis for the additional VAT assessments raised was that the supply of

promotional products was deemed a separate supply of goods in terms of section 8(15) and having been deemed in terms of section 8(15) to be a separate supply of goods, such supply was assessed not to qualify for zero-rating in terms of section 11(2)(l) but to constitute a standard-rated supply in terms of section 7(1)(a) of the Act.

The taxpayer noted an appeal against the aforementioned additional VAT assessments raised by SARS against it in respect of the relevant VAT periods together with interest.

The Tax Court was therefore concerned with the interpretation and application of section 8(15).

Section 8(15) of the Act provided, in relevant part:

> '(15) For the purposes of this Act, where a single supply of goods or services or of goods and services would, if separate considerations had been payable, have been charged with tax in part at the rate applicable under section 7(1)(*a*) and in part at the rate applicable under section 11, each part of the supply concerned shall be deemed to be a separate supply.'

The taxpayer contended that section 8(15) could only apply to different, independently cognisable services supplied together, when such supplies could sensibly have been supplied separately for their own sake. The section, it was submitted, did not permit an artificial dissection of a single non-dissociable service supplied into separate components or supplies, each carrying its own VAT treatment.

The taxpayer contended that its contractual obligation to foreign brand owners was to provide an A & P service to build and maintain brand recognition and growth for brand owners. In providing this service, X Entity distributed the tasting stock and promotional materials directly to members of the public not as an aim in itself but to preserve and enhance brand equity for foreign brand owners. The distribution of these goods was merely a facet of the A & P service supplied and not a distinct supply. In this regard, it was functionally no different from the distribution of other

promotional or advertising material such as flyers or pamphlets and therefore the supply in its entirety should therefore be zero-rated in terms of section 11(2)(l) of the Act in that it constituted the provision of services and to separate the supply of goods from the provision of the A & P service would distort the functioning of the VAT system and this would require an impractical or unbusinesslike interpretation of section 8(15), one which was commercially unrealistic, artificial and narrow.

The taxpayer submitted further that an interpretation and application of section 8(15) should not lead to an absurd result that the supply of the same goods would carry two independent VAT consequences: as a supply for no consideration; and as a taxable supply for consideration and an analysis of the economic nature of the transaction was required so as to determine its commercial reality.

SARS contended that the proper interpretation of section 8(15) allowed for separately cognisable supplies of services and goods, supplied as a single supply, to receive separate VAT treatment where the jurisdictional requirements are present and in this matter a single supply had been rendered by the taxpayer to foreign brand owners of both goods and services and only one consideration is payable. However, if the supply of the goods or services or of the goods and services had been charged for separately, part of the supply would have been standard-rated and part zero-rated and once an apportionment was capable of being made, that was the end of the enquiry.

Although the taxpayer invoiced the brand owners for the supply of an A & P service and not for goods, the single supply provided by the taxpayer to the brand owners consisted of both goods and services which were clearly identifiable and, with the expenditure incurred for both goods and services.

Judge Savage held the following:

(i) That section 8(15) applies where there is a single supply of

- goods or services, or
- goods and services

by one vendor. It contains a deeming provision in terms of which the

composite parts of a single supply are deemed to be separate supplies where, if the goods or services or goods and services had been supplied separately, each separate supply would have attracted a different VAT rate, one zero-rated and the other standard rated at 14%. In the current matter a single A & P service was supplied by the taxpayer to brand owners for which it was paid a fee, one consideration.

(ii) That in considering whether a notional separation of parts of the single supply made by the taxpayer was possible, regard must be had to the nature of the commercial transaction which makes up the single supply to determine if the payment of separate considerations would have been possible. Where it is not possible to separate the single supply into component parts to consider if separate considerations notionally could have been payable and, if so, what tax implications would arise, section 8(15) would not apply.

(iii) That section 8(15) was concerned with a notional separation of supplies 'if separate considerations had been payable' and not with, what was the fundamental question in the European jurisprudence, whether a transaction consists for VAT purposes of a single composite supply or multiple supplies in the absence of a deeming provision. Determining for purposes of section 8(15), if separate considerations are notionally payable, does require the economic nature and commercial reality of the transaction to be considered. However, there is no requirement that any notional separation avoid what may be considered to be an artificial dissection of a transaction. What is required is the identification of a cognisable supply of goods or services sufficient to determine what the tax treatment of the notionally separated supplies would have been if separate considerations had been payable.

(iv) That the purpose of the supply of promotional goods was to increase brand equity and sales for the brand owners. This fell squarely within the ambit of the provision of the single A & P service by the taxpayer to brand owners. The goods supplied locally were not an unrelated supply by X Entity to local

customers for no consideration at nil value. From the evidence given it was therefore apparent that it was possible to consider 'if separate considerations had been payable' whether the supply of promotional goods would have attracted different VAT consequences and could be deemed to be a separate supply for purposes of section 8(15).

(iv) That the A & P service supplied was not of such a nature that it made the notional separation of such supply into separate supplies of services and promotional goods impossible. The total A & P service supplied is not the only cognisable supply made to brand owners. The fact that the supply of promotional goods locally may have been a facet of the total A & P service provided does not mean that it is not capable of notional separation for purposes of section 8(15), nor was it so that the supply of goods will, if deemed a separate supply, result in their double VAT treatment.

(v) That a deeming provision lays down a hypothesis to be 'carried as far as necessary to achieve the legislative purpose, but no further. It must always be construed contextually and in relation to the legislative process. Such a provision may deem something to be when it is in fact not so by indicating 'a state of affairs which does not in fact exist but is to be taken to exist.'

(vi) That the supply of promotional goods, as a portion of the single A & P service is, by virtue of section 8(15), a cognisable supply capable of notional separation from the total A & P service supplied to brand owners and since it is deemed a separate supply with the goods liable to be subjected to different tax treatment, such supply does not receive double VAT treatment.

(vii) That the local supply of goods constitutes a supply of goods, not exported but consumed in South Africa, such supply is subject to VAT at the standard rate in terms of section 7(1)(*a*) of the Value-Added Tax Act 89 of 1991. Section 11(2)(*l*) does not apply given that it is concerned with the zero-rating of the supply of services.

(viii) That it followed that the taxpayer was accordingly liable for the VAT output

tax adjustment under section 8(15) in respect of advertising and promotional costs incurred by it constituting goods, not exported but consumed in South Africa and it mattered not that the foreign brand owners did not receive or consume the promotional goods and that the local customer did. The supply was made as part of the A & P service, to achieve the benefit of enhanced brand equity and sales for the foreign brand owners, with the cost of such goods included in the fee charged by the Appellant and paid by foreign brand owners.

Appeal dismissed.

Additional assessments for the VAT periods 2009, 2010 and 2011 raised against the taxpayer by SARS were confirmed.

5. INTERPRETATION NOTES

5.1. Unclaimed Benefits – No. 99 (Issue 2)

This Note explains the treatment of lump sum benefits classified as unclaimed benefits that accrued to members (both before and from 1 March 2009) for income tax purposes.

Historically some members of a fund did not, after exiting the fund, claim the lump sum benefit to which they became entitled in terms of the rules of the fund. These lump sum benefits were classified as an 'unclaimed benefit' if it was not claimed after a reasonable period of time. The legislation did not regulate when and how a lump sum benefit should be classified as an 'unclaimed benefit'. Fund administrators, as a result, applied different rules to determine when a lump sum benefit was classified as an 'unclaimed benefit'

In many instances, fund administrators only applied for a tax directive for an unclaimed benefit when the member or the member's beneficiaries claimed the unclaimed benefit, as opposed to when the lump sum benefit accrued.

The tax treatment of a lump sum benefit, classified as an 'unclaimed benefit', depends on the date on which the benefit accrued to the member.

6. DRAFT INTERPRETATION NOTES

6.1. Rebates and deduction for foreign taxes on income – No. 18 (Issue 4)

This Note has been updated with amendments in the 2015, 2016, 2017 and 2018 Amendment Acts. Attention is drawn to the following main amendments suggested:

- Section 6quat(1B)(a)
- Section 6quat(1C) and (1D) – Section 6quat(1C) was amended at the same time section 6quin was deleted
- Section 6quat(4)

This Note explains the scope, interpretation and application of section 6quat which provides for a rebate or deduction for foreign taxes on income.

Section 6quin previously provided for a rebate for foreign taxes paid on South African-source service income included in South African taxable income. Section 6quin(1) to (4) were deleted with effect from years of assessment commencing on or after 1 January 2016. Section 6quin is not discussed in this Note, but a detailed discussion of the section is contained in Issue 3 of this Note which is available on the website under 'Legal Counsel > Legal Advisory > Interpretation Notes'.

Section 64N, which provides for a rebate for foreign taxes on dividends against dividends tax payable, is not discussed in this Note. The Comprehensive Guide to Dividends Tax contains a detailed discussion in this regard.

This Note reflects the income tax and tax administration legislation (as amended) at the time of publication and includes the following:

- The Taxation Laws Amendment Act 23 of 2018 which was promulgated on 17 January 2019 (as per Government Gazette 42172).

- The Tax Administration Laws Amendment Act 22 of 2018 which was promulgated on 17 January 2019 (as per Government Gazette 42169).
- The Rates and Monetary Amounts and Amendment of Revenue Laws Act 21 of 2018 which was promulgated on 17 January 2019 (as per Government Gazette 42171).

Residents are subject to income tax on their worldwide taxable income regardless of the source of the income. Foreign-source amounts derived by a resident may under specific circumstances be taxed by the country of source and by South Africa, resulting in international juridical double taxation. International juridical double taxation refers to the imposition of similar taxes by two or more sovereign countries on the same item of income (including capital gains) of the same person.

Relief from double taxation resulting from the imposition of tax by a residence country and a source country on the same amount is normally granted by the residence country. Thus, the source country's right to tax generally has priority over the residence country's right to tax. In many instances, countries provide for relief from international juridical double taxation under a tax treaty, although many countries (including South Africa) also provide unilateral tax relief in their domestic law.

South Africa provides relief from double taxation to its residents in its domestic law mainly by rebate methods4 or by a deduction for foreign taxes payable on income that is subject to South African normal tax. The rebate and deduction methods are supplemented by certain exemptions for foreign-source amounts received by or accrued to residents.

Section 6quat(1) provides for a rebate of foreign taxes on income to be deducted from normal tax payable by a resident. The amount of the rebate is determined under section 6quat(1A).

A resident is entitled to claim such a rebate only to the extent that the amount of the foreign tax is proved to be payable to a sphere of government of a foreign country without a right of recovery by any person, other than a right of recovery under any entitlement to carry back losses arising during any year of assessment

to any year of assessment before such year of assessment.

A resident will not qualify for a rebate under section 6quat(1) for foreign tax proved to be payable to a foreign country on a South African-source amount.

To the extent that the amount of qualifying foreign taxes proved to be payable exceeds the amount of the rebate determined under section 6quat(1A) and (1B), the excess amount is carried forward to the immediately succeeding year of assessment. The amount so carried forward will potentially qualify for set-off against the normal tax payable on taxable income derived from foreign sources in the immediately succeeding year of assessment [paragraph (ii) of the proviso to section 6quat(1B)(a)].

Any balance of excess foreign taxes may not be carried forward for more than seven years, calculated from the year of assessment in which the balance was carried forward for the first time [paragraph (iii) of the proviso to section 6quat(1B)(a)].

Section 6quat(1C)(a) provides for the deduction of foreign taxes from the income of a resident taxpayer (as opposed to the claiming of a tax rebate). Its application is limited to foreign taxes other than taxes contemplated in section 6quat(1A). Section 6quat(1) considers income and capital gains from a foreign source and the deduction under section 6quat(1C)(a) is limited to foreign taxes levied on South African-source income derived from trade operations.

Taxes must, for purposes of section 6quat(1C)(a), be paid or proved to be payable by the resident to any sphere of government of any country other than South Africa, without any right of recovery by any person other than under a mutual agreement procedure in terms of an international tax agreement or a right of recovery under any entitlement to carry back losses arising during any year of assessment to any previous year of assessment.

Section 6quat(1C)(b) provides that when, during any year of assessment, any amount was deducted under section 6quat(1C)(a) and the person receives a refund for the amount so deducted or is discharged from any liability for that amount in any subsequent year of assessment, so much of the amount received or

so much of the amount of that discharge as does not exceed the amount of the deduction, must be included in the person’s income in that subsequent year.

Any foreign taxes proved to be payable for purposes of section 6quat(1) or any foreign taxes paid or proved to be payable for purposes of section 6quat(1C) must be translated to rand on the last day of the year of assessment in which the amount is required to be included in a person’s taxable income by applying the average exchange rate for the year of assessment. The average exchange rate which must be used in translating the foreign tax liability is the average exchange rate for the year of assessment in which the amount received or accrued is included in the taxpayer’s taxable income.

Section 6quat(5) provides that notwithstanding sections 99(1) or 100 of the TA Act, an additional or reduced assessment may be made within six years from the date of the original assessment under which the taxpayer was entitled to the rebate under section 6quat(1) to give effect to an increased or reduced foreign tax credit for the year.

7. BINDING PRIVATE RULINGS

7.1. BPR 330 – Distributions of dividends and other amounts from a trust to beneficiaries on termination of their employment

This ruling determines the tax consequences of the distributions of dividends and other amounts on the termination of employment of trust beneficiaries.

In this ruling references to sections and paragraphs are to sections of the Income Tax Act and paragraphs of the Fourth Schedule to the Act applicable as at 10 June 2019.

Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the Act.

This is a ruling on the interpretation and application of:

- section 1(1) – paragraph (d)(i) of the definition of 'gross income';
- section 8C;
- section 10(1)(k)(i); and
- paragraph 1 of the Fourth Schedule to the Act – definition of 'remuneration'.

Parties to the proposed transaction

The applicant: A resident trust

Company A: A resident company

Employees: Beneficiaries of the applicant

Description of the proposed transaction

The beneficiaries of the applicant are black permanent employees of company A.

The object of the applicant is to invest funds from time to time and to use the fruits of these investments for the economic, health, educational and emergency benefits of the employees.

The object is also to hold and administer the trust funds, which comprise the following:

- a donation of R100;
- such other donations as may from time to time be made to the applicant;
- other assets, shareholdings or investments – movable or immovable, corporeal or incorporeal – which the trustees may acquire, but not limited to the shares;
- net revenue, not immediately required for purposes of achieving the objectives of the applicant, which may be capitalised by the trustees in their sole and unfettered discretion; and
- interest, dividends or accruals in favour of the applicant of whatsoever nature.

The trustees are empowered to apply and allocate those trust funds in their

discretion for the benefit of the beneficiaries to the applicant to achieve the 'objects of the applicant', being:

- the economic empowerment of the employees;
- the improvement of the lives and standard of living of the employees;
- the educational needs of the employees and their immediate family or other dependents, as identified by the trustees from time to time;
- the initiation and development of projects to promote the employment, health, recreation, mental and spiritual welfare and general well-being of the employees;
- the provision of urgent relief and medical care to employees in times of unforeseen hardship; and
- such further purposes as the trustees in their sole and unfettered discretion may deem ancillary and supplementary to the objects detailed.

The business affairs of the applicant are managed and controlled by the trustees, who have the power to carry out the objects of the applicant and who must hold the trust funds in trust and allocate the net revenue.

The trustees are entitled to select one or more or all the employees to allocate or distribute all or a portion of the monies or assets comprising the net revenue as they, in their sole and unfettered discretion, may determine.

No employee is entitled to transfer, cede, pledge or otherwise deal with the trust funds or any interest in the applicant before the date of vesting and no employees have any claim against the applicant before the date of vesting.

The trust deed provides for the allocation of beneficial units. An employee holding beneficial units is required to dispose of them to the applicant in the manner set out in the trust deed and is not entitled to dispose of or trade in them in any other way.

The trust deed provides for the repurchase of beneficial units. The beneficial units must promptly be repurchased by the applicant after the last day of the applicant’s financial year in which the employee ceases to be an employee.

The purchase prices at which the beneficial units will be repurchased are determined by the trustees in their sole and absolute discretion, taking into account the net revenue available to repurchase the beneficial units on the relevant repurchase date.

The proposed transaction is that the applicant will, on the termination of employment of a beneficial unit holder, repurchase the unit at the date the employee ceases to be an employee. The repurchase of the beneficial units will be funded by existing funds held by the applicant and not by a specific dividend received.

In the course of the relationship between the applicant and its beneficiaries, the trustees will periodically exercise their discretion to vest certain dividends in the Employees. The distributions will be funded directly by dividends received from company A. The dividends received by the applicant will, in future, be distributed almost immediately, but not later than 30 days after their receipt.

Conditions and assumptions

This binding private ruling is made subject to the following additional condition and assumption:

- The amounts to be distributed to the employees from dividend receipts will be distributed to them within the year of assessment in which they were paid.

Ruling

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

- The amount to be received by a beneficiary of the applicant, by reason of the termination of his or her employment, will be included in his or her gross income in terms of paragraph (d) of the definition of 'gross income' and be subject to employees' tax as provided for by the Fourth Schedule.
- All amounts to be distributed to the beneficiaries will constitute remuneration as defined and will be subject to employees' tax.

7.2. BPR 331 – De-grouping charge

The transferee company in the proposed intra-group transaction was the transferor company in an earlier intra-group transaction. This ruling determines the applicability of the de-grouping charge.

In this ruling references to sections are to sections of the Income Tax Act applicable as at 2 July 2019. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the Act.

This is a ruling on the interpretation and application of section 45(4)(b).

Parties to the proposed transaction

The applicant: A resident company and a wholly-owned subsidiary of company B

Company A: A resident company

Company B: A resident company and a wholly-owned subsidiary of company A

Company C: A resident company and a wholly-owned subsidiary of company D

Company D: A resident company and a wholly-owned subsidiary of company A

Description of the proposed transaction

Company A, a public company listed on the JSE, is the holding company of a group of companies (the group).

Before 1 June 2017 all the shares in the applicant and 57% of the shares in company C ("57% company C shares") were held by a third party. The remaining shares in company C was held by the applicant (43% company C shares).

Effective 1 June 2017 company D acquired the 57% company C shares for market value and the 43% company C shares from the applicant by way of an intra-group transaction (the first intra-group transaction), after which company D held all the company C shares.

The contemplated disposal of the shares in company D out of the group for market value cash consideration necessitates the proposed transaction.

The group does not want to dispose of company C as part of the aforementioned

transaction. To retain company C within the group, company D proposes to transfer all the shares in company C to the applicant in exchange for consideration of R1, which will result in the applicant ceasing to form part of the same group of companies as company D (Proposed Transaction).

Conditions and assumptions

This binding private ruling is not subject to any additional conditions and assumptions.

Ruling

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

- The proposed transaction will not result in section 45(4)(b) applying to the applicant in respect of the 43% portion of the shares in company C that will be re-acquired by the applicant from company D in terms of the second section 45 transaction.
- The proposed transaction will result in section 45(4)(b)(i) applying to the applicant in respect of the 57% portion of the shares in company C that will be acquired by the applicant from company D, to the extent to which the 57% portion of the shares in company C are assets of which their market value is greater than their base cost. Section 45(4)(b)(i) will not apply to the applicant to the extent to which the 57% portion of the shares in company C are assets of which their market value is less than their base cost.

7.3. BPR 332 – Unbundling and subsequent issue of listed shares by non-resident subsidiary of resident holding company

This ruling determines the income tax and securities transfer tax (STT) consequences of the transaction steps to achieve the primary listing of the offshore assets, held in a subsidiary company (Listco) of a multi-national group on a foreign stock exchange, with a secondary listing on the JSE.

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

This is a ruling on the interpretation and application of:

- the Income Tax Act:
  - section 1(1) – definition of "dividend";
  - section 46; and
  - paragraph 11.
- the STT Act:
  - section 1 – definitions of "security" and "transfer"; and
  - section 8(1)(a)(iv).

Parties to the proposed transaction

The applicant: A listed resident company

The co-applicant: A resident company that is a wholly-owned subsidiary of the applicant

Listco: A non-resident company incorporated outside South Africa that is a wholly-owned subsidiary of the co-applicant

Description of the proposed transaction

The applicant intends to list approximately 25% of an existing and wholly-owned indirect subsidiary company (Listco) housing the applicant's offshore assets on a foreign index and a secondary, inward, listing on the JSE. The remaining share capital of Listco (approximately 75%) will be retained by the applicant.

The applicant's issued share capital currently comprises listed X class shares (X shares) and unlisted Y Class shares (Y shares). The X shares and the Y shares are separate classes of ordinary shares. The Y shares have high voting rights attached to the shares, but they participate in a portion only of the dividend

entitlement of the X shares. The X shares entitle their holders to one vote per share. As the X shares carry unlimited rights to dividends and both classes carry unlimited rights to capital participation, these shares are “equity shares” as defined in section 1(1).

The applicant will create a third class of authorised but unissued share capital comprising of class Z shares (Z shares), the salient terms of which will be as follows:

- in aggregate, and as a class, they will carry an entitlement to up to 27% of the authorised A shares of Listco (as defined below) on a pre-determined basis;
- they will carry no voting rights, except as required by the Companies Act 71 of 2008 – i.e. if a resolution is proposed to amend any terms of the Z shares; and
- no right to any distributions.

In consequence of the fact that the Z shares do not carry any rights to distributions, they are not “equity shares” as defined in section 1(1).

The co-applicant, a South African incorporated and resident company, is a wholly owned subsidiary of the applicant with a single class of ordinary shares in issue.

Immediately prior to the proposed transaction, the co-applicant holds the entire issued share capital in Listco, comprised of two classes of shares – A shares and B shares. In the course of the proposed transaction, these shares will be unbundled to the applicant. The terms of Listco’s A- and B shares take into account the proposed organisational structure after this unbundling. It is intended that the applicant will hold approximately 75% of Listco’s A shares and 25% of the A shares will be widely held, primarily offshore. All of Listco’s B shares will be held by the applicant’s Y shareholders after the proposed transaction. Thus, the terms of Listco’s A- and B shares are identical to those of the Applicant's X and Y shares, save that Listco’s B shares:

- will have one vote until such time as the applicant's1 shareholding in

Listco's A shares falls below 50% plus (1) one share, whereafter the B shares in Listco will have 1,000 votes per share whilst the A shares continue to only have 1 vote per share; and

- will entitle the holder thereof to 20% of the dividends paid by Listco to its A shareholders, adjusted by a factor of the percentage of A shares held by the applicant at the time of the declaration of the dividend in question. Thus, the dividend rights of Listco B shareholders will be floating, based on the amount of Listco A Shares held by the applicant from time to time.

As the Listco A- and B shares carry unlimited rights to dividends and capital, these shares are "equity shares" as defined in section 1(1).

The proposed transaction aims to achieve the Applicant's following objectives:

- to achieve sufficient liquidity of the shares in Listco, with a targeted free float of approximately 25%;
- to maximise support from the applicant's shareholders;
- to minimise execution risk, including aftermarket trading volatility; and
- to provide the applicant's shareholders with the choice whether or not to participate in the proposed transaction.

The proposed transaction steps are as follows:

Step 1

The applicant will offer Z shares to the X shareholders in accordance with their proportionate shareholding in the applicant (the Z capitalisation issue). In terms of the offer, the Z shares, once issued, will be contributed automatically to Listco in exchange for newly issued Listco A shares. Therefore, in consequence of step 1, Listco will acquire an entitlement to the Z shares.

X shareholders who do not want to participate in the Z capitalisation issue may opt out and will receive additional X shares (the X capitalisation issue), up to a specified maximum of authorised but unissued X shares, in aggregate.

Should the number of X shares to be issued under the X capitalisation issue

exceed the maximum, then the number of X shares to which an X shareholder that opted out would have been entitled, if sufficient X shares were available, will be scaled down pro rata to the balance of the X shareholder's entitlement being issued in the form of Z shares, (and ultimately Listco A shares).

According to the expected timeline, the election closes at 12:00 on record date (as defined in the circular issued to X shareholders).

Step 2

Listco will be listed on a foreign index (its primary listing) and the JSE (its secondary listing). This step is scheduled to occur two days prior to record date.

Step 3

The co-applicant will distribute all its shares in Listco to the applicant as a dividend in specie under section 46. The unbundling is anticipated to take place on the day following record date.

Step 4

Listco will distribute its entitlement to the Z shares to the applicant as a dividend in specie. It is anticipated that this step will take place on the day following record date. It should be noted that at the time of the antecedent disposal by way of a dividend in specie, the Z shares will not yet be issued.

Step 5

The applicant will undertake the Z capitalisation issue and the X capitalisation issue, with the Z shares simultaneously and automatically being exchanged for newly issued A shares in Listco. This step should result in capital gains for most of the resident X shareholders who participated in the Z capitalisation issue. Pursuant to the antecedent distribution in step 4, the Z shares will be returned to the applicant, resulting in their cancellation.

Implementation (ie the issue of the additional X shares, the Z shares and the Listco A shares) is anticipated to occur on the third day after record date. It is noted that the applicant's share register will reflect the issue of the Z shares to its participating X shareholders, as well as the cancellation of the Z shares in consequence of the

antecedent distribution of the entitlement to the Z shares by Listco to the applicant. Participating X shareholders, who are residents of South Africa, will hold their A shares in Listco under the secondary listing on the JSE.

Step 6

The applicant will undertake a capitalisation issue of up to a specified maximum of Y shares. The applicant's memorandum of incorporation requires that if there is a capitalisation issue of X shares, a proportionate number of Y shares must be issued to ensure that the voting ratio between X shares and Y shares is maintained. It is expected that this capitalisation issue will occur on the third day after record date.

Step 7

Listco B shares will be distributed by the applicant to the holders of Y shares in the applicant. This is expected to occur on the fourth day after record date.

Conditions and assumptions

This binding private ruling is subject to the additional condition and assumption that the transaction steps, as set out above, will occur in that stated order.

Ruling

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

- The distribution of the shares in Listco by the co-applicant to the applicant in step 3 will constitute an "unbundling transaction", as defined in paragraph (b) of the definition of that term in section 46(1). Consequently, the applicant and co-applicant will qualify for the tax roll-over relief contemplated under section 46.
- Under paragraph 11(2)(b) none of the capitalisation issues of the X-, Yand Z shares by the Applicant constitutes disposals as defined in paragraph 11. Consequently, no capital gains or losses will result from these capitalisation issues.
- None of the capitalisation issues of the X-, Y- and Z shares by the applicant

will constitute a "transfer" of a security as contemplated in section 1 of the STT Act. Accordingly, no STT will arise as a result of these capitalisation issues.

- None of the capitalisation issues of the X-, Y- and Z shares by the applicant will give rise to any dividends tax liability, as the issue of shares is specifically excluded from the definition of a "dividend" in section 1(1).
- STT at a rate of 0.25% of the market value of the Z shares will result in consequence of the cancellation of these shares in step 5. The STT is a cost for the applicant. There shall be no other charge of STT under Steps 1 to 5, other than that already mentioned. The STT charge will be levied at a rate of 0.25% on the market value of the Z shares, provided that the market value must be determined as if the Z shares were never cancelled.

General Note

The proposed transaction has not been considered in the context of company law, or any general or specific anti-avoidance provisions or doctrines. Accordingly, this ruling does not address the validity or efficacy of the proposed transaction and any of its constituent steps under company law or any general anti-avoidance measure

7.4. BPR 333 – Venture capital company – investment in farming operations

This ruling determines whether an operating company will be regarded as carrying on any impermissible trade in respect of immovable property as contemplated in paragraph (a) of the definition of that term in section 12J(1).

In this ruling references to sections are to sections of the Act applicable as at 30 July 2019. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the Act.

This is a ruling on the interpretation and application of paragraph (a) of the definition of "impermissible trade" in section 12J(1).

Parties to the proposed transaction

The applicant: A resident company which has been approved under section 12J(5) as a "venture capital company" as defined in section 12J(1)

Operating company: A resident company

Description of the proposed transaction

The applicant proposes to subscribe for shares in the operating company which will undertake farming operations consisting of planting, growing, harvesting, packing, transportation and distribution of blueberries. Vacant land required to undertake the farming operations will either be purchased or leased by the operating company. Upon securing the land, the farming operations will be established which will include fencing, netting, a drip irrigation system, cold rooms, equipment and the planting of the blueberry bushes.

Conditions and assumptions

This binding private ruling is not subject to any additional conditions and assumptions.

Ruling

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

- The farming of blueberries by the operating company will not constitute a trade in respect of immovable property for purposes of paragraph (a) of the definition of "impermissible trade" in section 12J(1).

7.5. BPR 334 – Waiver of loan claims by the settlor of a trust

This ruling determines the income tax and donations tax treatment of the waiver of loans owing to the settlor by a trust.

In this ruling references to sections and paragraphs are to sections of the Income Tax Act and paragraphs of the Eighth Schedule to the Act applicable as at 31 May 2019. Unless the context indicates otherwise any word or expression in this ruling

bears the meaning ascribed to it in the Act.

This is a ruling on the interpretation and application of:

- section 54;
- section 55;
- section 64(1)(a);
- paragraph 12A;
- paragraph 20(3)(b);
- paragraph 39; and
- paragraph 56.

Parties to the proposed transaction

The applicant: A resident individual who is the settlor and beneficiary of the trust

The trust: A trust formed and registered in South Africa

Description of the proposed transaction

The applicant is the settlor and beneficiary of the trust and has made loans to the trust in excess of R30 million.

The trust used the proceeds of the loans to acquire an equity interest in a South African private company.

The loans are unsecured, interest-free and have no terms of repayment.

The loans are loans contemplated by section 7C and to date the interest that the applicant should have received has been calculated and donations tax has been paid as prescribed by that section, read with Part V of Chapter II of the Act.

The applicant will waive some of the loans to the trust on or after 31 July 2019.

Conditions and assumptions

This binding private ruling is subject to the additional condition and assumption that all donations made on or after 1 March 2018 must be taken into account in calculating the aggregate value of the donation for purposes of section 64(1)(a) to

determine the applicable donations tax rate.

Ruling

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

The applicant

- The waiver of the loan claims will be a donation as contemplated in section 55.
- Under section 64(1)(a), to the extent that the aggregate value of the donations do not exceed R30 million, donations tax will be levied at 20% and to the extent that the aggregate value of the donation exceeds R30 million, donations tax will be levied at 25%.
- Since the applicant will be disposing of a debt owed by the trust, which is a connected person in relation to the applicant, the applicant must under paragraph 56(1) disregard any capital loss determined in consequence of that disposal. To the extent that the R100 000 exemption under section 56(2)(b) is taken into account in calculating the amount of donations tax payable, and the trust reduced its expenditure in respect of the shares acquired in the private company under paragraph 12A, then the capital loss of a R100 000 will not be disregarded under paragraph 56(2)(b). This loss will, however, be subject to paragraph 39.

The trust

- Paragraph 12A will not apply to the debt benefit received when the applicant waives the loan claims, as paragraph 12A(6)(b) excludes the application of paragraph 12A to the extent that the debt is reduced by way of a donation as defined in section 55(1) in respect of which donations tax is payable.
- To the extent that the R100 000 exemption under section 56(2)(b) is taken into account in calculating the amount of donations tax payable, paragraph 12A will apply and the amount of expenditure so incurred in respect of the shares acquired in the private company must for the purposes of paragraph

20 be reduced by the debt benefit (R100 000) in respect of that debt.

- Paragraph 20(3)(b) will not apply to reduce the amount of expenditure so incurred in respect of the shares acquired in the private company.

7.6. BPR 335 – STT exemption for foreign governments

This ruling determines whether the STT exemption for any sphere of a foreign government is available in situations where a foreign central bank acts as investment manager for a sovereign wealth fund (the fund).

In this ruling references to sections are to sections of the STT Act applicable as at 14 August 2019. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the STT Act.

This is a ruling on the interpretation and application of section 8(1)(k).

Parties to the proposed transaction

The applicant: The central bank of a foreign country which is a separate legal entity that is wholly owned by the foreign government

Description of the proposed transaction

The applicant and its activities are regulated by acts of parliament of the country concerned, specifically relating to the applicant and the monetary system of that country. The applicant plays an independent role in that country's government administration and has a direct link to its parliament, which supervises the monetary affairs of that country via the Ministry of Finance.

In addition to its role as the central bank of the foreign country, the applicant has been entrusted with the role of managing that country's sovereign wealth fund (the fund). The fund does not have any separate legal personality but rather constitutes a pool of segregated financial assets, owned beneficially by the foreign government.

The applicant neither invests nor manages any funds or financial assets on behalf of third parties, other than the foreign government and is subject to a series of

measures designed to ensure the utmost level of transparency regarding its investments, including an obligation to regularly publish the fund's investments and annual results and scrutiny by different statutory bodies.

The applicant manages the fund by investing in a portfolio of financial instruments, real estate, cash deposits and other assets and financial liabilities. The applicant is responsible for making investments in accordance with the fundamental rules laid down by its country's law and the more detailed rules laid down by that country's ministry of finance.

The applicant is not remunerated for carrying out the management function. Rather, the applicant is entitled to a reimbursement of the costs that it incurs in managing the fund. The management costs are strictly controlled by the foreign government via the ministry of finance.

The proposed transaction is the acquisition of JSE-listed securities during the course of the performance of the applicant's mandate to manage the fund for the benefit of the foreign government and that country's people.

The applicant uses both its own employees as well as certain third party external investment managers for making investments in publicly listed SA equities through the fund's account. In the case of the former, the applicant, in its capacity as investment manager of the fund, and in the case of the latter, the third party external investment manager, acting on behalf of the applicant, makes the decision to purchase a security and instructs a broker or uses Direct Market Access through one of its counterparties to acquire the security. The acquisition of SA JSE-listed securities occurs via an agency chain of brokers that link the ultimate seller with the foreign government, as ultimate purchaser. These brokers may act as agents or socalled "riskless principals" in conducting the service they are mandated to render to the applicant (or external investment manager on behalf of the applicant). A broker could also fulfil the role of seller in a principal capacity if they held the SA equities in question and wished to fulfil the purchase order. The broker acts in terms of a purchase order (or mandate) and not as a nominee for the ultimate purchaser (the foreign government). The STRATE system used by the JSE recognizes transactions between beneficial holders of securities only, and does not

record the parties in the agency chain.

Conditions and assumptions

This binding private ruling is not subject to any additional conditions and assumptions.

Ruling

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

- The foreign government is a "sphere of the government of any other country" as contemplated in section 8(1)(k).
- Subject to section 8(3), the exemption contained in section 8(1)(k) applies to securities transfers to the foreign government itself, as well as to securities beneficially transferred to the foreign government, but registered in the name of the applicant, where the applicant carries out investments in its role as investment manager of the fund for the foreign government.

7.7. BPR 336 – Liquidation distribution

This ruling determines the income tax and securities transfer tax consequences of a liquidation distribution.

In this ruling, unless stated otherwise, references to sections are to sections of the Income Tax Act and references to paragraphs are to paragraphs of the Eighth Schedule to the Act applicable as at 22 July 2019. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the relevant Act.

This is a ruling on the interpretation and application of:

- the Income Tax Act:
  - section 1(1) – paragraph (k) of the definition of "gross income";
  - section 10(1)(k)(i);
  - section 47(1) – paragraph (a) of the definition of "liquidation

distribution";

  - section 47(5);
  - section 64G(2)(b);
  - paragraph 11(2)(b)(i);
  - paragraph 12A(6)(e);
  - paragraph 43A; and
  - paragraph 77.
- the STT Act:
  - section 8(1)(a)(v).

Parties to the proposed transaction

The applicant: A listed resident company

The co-applicant: A resident company that is a wholly-owned subsidiary of the applicant

Description of the proposed transaction

The co-applicant will make a liquidation distribution to the applicant by way of the following steps:

- The co-applicant will pass a resolution to distribute its assets, all the shares it holds in the applicant, as a dividend in specie to the applicant, in anticipation of the deregistration of the co-applicant.
- The distribution will be made as a liquidation distribution as contemplated in section 47.
- A loan the applicant granted to the co-applicant to facilitate the purchase of shares in the applicant by the co-applicant will be waived. The applicant will pass a resolution to waive the loan in anticipation of the deregistration of the co-applicant.
- The shares in the applicant distributed to the applicant will be cancelled and

the co-applicant will be deregistered.

Conditions and assumptions

This binding private ruling is subject to the additional condition and assumption that the co-applicant must within a period of three years, or such longer period as the Commissioner may allow, take the steps contemplated in section 41(4) of the Act to liquidate, wind up or deregister and it may not at any stage withdraw any step taken to liquidate, wind up or deregister that company or do anything to invalidate any step already taken, with the result that the company will not be liquidated, wound up or deregistered.

Ruling

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

- The distribution of shares by the co-applicant to the applicant will constitute a "liquidation distribution" as defined in paragraph (a) of the definition in section 47(1).
- The co-applicant will be deemed to have disposed of the shares at their base cost and the applicant will be deemed to have acquired them at the same base cost and no capital gains tax consequences will result for the applicant and the co-applicant from the transfer of the equity shares.
- Section 47(5) will apply to the proposed transaction. The applicant must disregard the disposal or any return of capital for purposes of determining its taxable income, assessed loss, aggregate capital gain or aggregate capital loss.
- The liquidation distribution will constitute a dividend and must be included in the gross income of the applicant.
- The dividend will be exempt under the provisions of section 10(1)(k)(i).
- Section 64G(2)(b) will apply to the dividend. The co-applicant must not withhold any dividends tax.
- Paragraphs 77 and 43A will not apply to the proposed transaction.

- Paragraph 11(2)(b)(i) will apply. The cancellation of the shares received by the applicant will not constitute a disposal.
- Section 8(1)(a)(v) of the STT Act will apply. No securities transfer tax will arise on the transfer of shares from the co-applicant to the applicant.
- Paragraph 12A(6)(e) will apply to the loan which will be waived by the applicant.

8. BINDING CLASS RULINGS

8.1. BCR 69 – Employee share ownership plan

This ruling determines the income tax consequences for the applicant, employer companies, employees of the employer companies and the trusts through which employee share schemes will be implemented.

In this ruling references to sections and paragraphs are to sections of the Incoome Tax Act and paragraphs of the Eighth Schedule to the Act applicable as at 16 April 2019.

Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the Act.

This is a ruling on the interpretation and application of:

- section 1(1) – definition of "dividend";
- section 8C;
- section 10(1)(k)(i);
- section 11(a);
- section 23(g);
- section 23H;
- paragraph 13(1)(a)(iiB); and

- paragraph 38.

Class

The class members to whom this ruling will apply are:

- the employee share ownership trusts listed in 4;
- the employer companies; and
- the employees of the applicant and the employees of the employer companies who are participants in share incentive schemes administered by the employee share ownership trusts.

Parties to the proposed transaction

The applicant: A listed resident company

The trusts: Two resident employee share ownership trusts

Employer companies: Companies in the same group of companies as the applicant

Participants: The employees of the applicant and the employees of the employer companies who are participants in share incentive schemes administered by the trusts

Description of the proposed transaction

The applicant intends to implement new share incentive schemes which will be administered by the trusts. The participants of the employee share schemes are the employees of the applicant and of the other employer companies.

The objects of the trusts are to acquire, subscribe for, and be registered in the securities registers as the legal owners of, and to dispose and deal with, the shares (plan shares), in terms of the share incentive schemes (the plans). The trusts will operate primarily as conduits for the acquisition of the shares by participants who will eventually be entitled to these shares in terms of the rules. These rules are the employee share option plan (ESOP) and the long-term incentive plan (LTIP) which will apply to both trusts.

The plan shares will be the ordinary shares of the applicant or another class of

shares which may be designated as such by the rules. The shares will not be limited to specified amounts as respects their rights to receive either dividends or returns of capital.

The trusts will be funded by the applicant or another employer company in the same group of companies as the applicant with grants made to the trusts in order for the trustees to:

- administer the plans in terms of the rules;
- acquire or subscribe for the plan shares in relation to awards granted to the participants as prescribed by the rules;
- defray the costs and expenses arising out of and in connection with the administration of the trusts, the execution of their duties and powers in terms of the trust deeds of the trusts and the giving effect to of the objects of the trusts; and
- otherwise give effect to the plans, the trust deed and objects of the trusts.

The trustees will have the authority to acquire or subscribe for shares in terms of or for the purposes of any plans and to pay distributions received on any shares acquired for purposes of the plans to the participants who are unconditionally entitled to the amounts in terms of the rules. The trustees will also be obliged to deliver the shares to the participants in terms of the rules.

The rules will provide for awards to be granted to eligible participants, being conditional share awards and forfeitable share awards. A participant granted a conditional share award will not have any rights, conditional or otherwise, to the shares prior to settlement (when registering the participant as owner of the shares in the securities register on vesting of the shares).

The conditional share award will lapse immediately if the participant ceases to be an eligible employee prior to settlement due to a reason listed as an “ineligible termination” reason. These are terminations due to resignation, dismissal for misconduct, proven poor performance, dishonest or fraudulent conduct, or abscondment.

However, the portion of the conditional share award which has not vested will vest (unless the trustees determine otherwise) if the termination is due to a reason listed as an "eligible termination" reason. These are terminations due to death, retirement, retrenchment, ill-health, injury or disability, or a participant's employer company ceasing to be part of the same group of companies as the applicant. In case of such terminations, the unvested portion of the award will vest on the date the employment terminated.

The remuneration committee will be entitled, but not obliged, to require that a trust holds a share in respect of any conditional share award that has been granted. Any such shares held by a trust shall be beneficially owned by the trust until disposed of by the trust. However, it is understood that this will only happen in exceptional cases. In most instances the trusts will only acquire the shares on settlement date.

The remuneration committee may direct upon vesting that a payment be made by an employer company for the payment of a dividend equivalent in cash following each vesting date. Vesting in relation to an award will be defined in the rules to mean that the participant is entitled to registration of a share in his / her name in the securities register or payment of cash. Should vesting take place, the award will also become unrestricted in terms of section 8C.

On vesting, the relevant employer company must procure the settlement of the shares on the participant through the trust, free of any further restrictions. Each trust will be entitled on vesting to dispose of enough shares to enable it to pay the employees' tax and to satisfy any other withholding obligation then due. No consideration will be payable by a participant on the vesting of the conditional share award.

The participant of a forfeitable share award will become the beneficial owner of each share from the acceptance date until the share is settled. There are two types of forfeitable share awards, namely annual discretionary forfeitable share awards and on-appointment forfeitable share awards. Both of these types of awards will be subject to the same rules. The difference between these two types of awards is the date on which the shares are awarded and the section 8C vesting date.

On-appointment share awards may be made to new external or internal appointments at specified grade level or "role size". These awards can vest in tranches or at a certain point, depending on the type of appointment.

Annual discretionary share awards may be made on special nomination and based on specific criteria. These share awards vest in full on the third anniversary. These awards are part of the LTIP. The shares forming the subject matter of a forfeitable share award must be registered in the name of the relevant trust up to settlement.

Settlement or vesting of shares will occur on the later date on which the:

- participant has fulfilled the employment conditions as specified in the award letter; and
- the trustees determine that the relevant performance condition has been fulfilled.

The forfeitable share award is designed to ensure that the participants become the beneficial owners of the shares from acceptance date. The rules to the scheme state that beneficial ownership transfers to the participant on acceptance date and the participants will be entitled to the ordinary distributions in terms of the forfeitable share awards. In terms of the rules, the participants do not have the right to participate in special distributions and certain repurchases in terms of section 48 of the Companies Act 71 of 2008. However, trustees may in their discretion make special distributions, which could be distributions in specie or special dividends in cash, or returns of capital excluding issues of shares. The shares can also lapse where the performance condition relating to an award has not been fulfilled in whole or in part.

Even though participants will be the beneficial owners of shares after the award date, they are prohibited from disposing of the shares until settlement date. The benefits terminate if the conditions are not met during the vesting period. Thus, by the nature of a forfeitable share award, the beneficial ownership will pass on the acceptance date and the participant will enjoy the dividends and voting rights in respect of the shares from that date, and the right to dispose of the shares and the right to participate in special distributions will be restricted from acceptance to

vesting date.

The participant will, however, forfeit the award (prior to settlement date) in the event of ineligible termination. Ineligible terminations are terminations due to resignation, dismissal for misconduct, proven poor performance, dishonest or fraudulent conduct, or abscondment.

On the section 8C vesting date, those shares held by the trust on behalf of a participant will be registered in the name of the participant, except for the shares that must be sold to pay employees' tax and to satisfy other withholding obligations. No consideration will be payable by the participant on the vesting of the forfeitable share award.

Once the share has vested, the risk of forfeiture will terminate.

Conditions and assumptions

This binding class ruling is not subject to any additional conditions and assumptions.

Ruling

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

- The contributions made by the applicant or an employer company to the trusts to acquire or subscribe for shares in the applicant and to pay for scheme administration costs incurred by the trusts, will be deductible under section 11(a) read with section 23(g), provided that only contributions made by an employer company in respect of persons directly employed by it will be so deductible.
- Section 23H will apply to those contributions made by the applicant or employer company to the trust in respect of the forfeitable share awards. The years prior to the allocation of the share award must not be taken into account in determining the apportionment method provided for under section 23H(1).
- Section 23H will not apply to expenditure in respect of any share that forms the subject-matter of a conditional share award, on condition that the share

is acquired by a trust and vested in a participant in the same year of assessment or awarded within six months after the end of the year of assessment during which the expenditure was incurred (see paragraph (aa) of the proviso to section 23H(1)(b)).

- The vesting of the shares on the award date in terms of the forfeitable share award will be regarded as a disposal under paragraph 11(1)(d). However, under section 8C vesting will only take place after the restrictions have been lifted. Under paragraph 13(1)(a)(iiB), the time of disposal will be deferred until the date that the shares vest for purposes of section 8C.
- The participants and the trustees of the trusts will be acting at arm's length and the Rnil consideration paid by the participants for the transfer of the shares under the forfeitable share award will be an arm's length price. Paragraph 38 will thus not apply.
- The vesting of the shares in terms of the conditional share awards, whether the trust acquires the shares prior to vesting date or not, will result in a disposal under paragraph 11(1)(d). The time of disposal will remain subject to paragraph 13(1)(a)(iiB).
- The participants and the trusts will be acting at arm's length and the Rnil consideration paid by the participants for the transfer of the shares in terms of the conditional share awards will be an arm's length price. Paragraph 38 will thus not apply.
- Ordinary distributions which are dividends, as defined in section 1(1), received by the participants who are beneficially interested in the shares, as contemplated in section 1 of the Companies Act 71 of 2008, will be exempt from normal tax under section 10(1)(k)(i), subject to paragraph (jj) of the proviso to section 10(1)(k)(i). The dividends will be subject to dividends tax.

9. GUIDES

9.1. Guide on the Determination of Medical Tax Credits (Issue 10)

This guide provides general guidelines regarding the medical scheme fees tax credit and additional medical expenses tax credit for income tax purposes.

It does not delve into the precise technical and legal detail that is often associated with tax, and should, therefore, not be used as a legal reference.

Expenditure of a personal nature is generally not taken into account in determining a taxpayer's income tax liability, under South Africa's tax system.

One of the notable exceptions relates to medical expenditure.

South Africa is aligned with the practice in many other countries of granting tax relief for medical expenditure.

There are a number of reasons that tax systems provide such relief. One of the reasons is that serious injury or illness can present taxpayers with disproportionately high medical bills in relation to income, which can be difficult to meet. The resulting hardship affects a number of economic areas for taxpayers, including the ability to settle obligations to the fiscus, such as a tax bill. Historically, South Africa utilised a deduction system to facilitate tax relief for medical expenditure. Allowances, subject to certain limits, were permitted to be deducted from income for contributions to medical schemes, as well as for out-of-pocket medical expenditure. In 2012, tax relief for medical expenditure began a phased-in conversion from a deduction system to a tax credit system. The reason for the change was to eliminate vertical inequity relating to medical contributions: those at higher marginal tax rates received a larger reduction of tax payable than those on lower marginal rates, in respect of the same amount of medical expenditure. The purpose of the change was to spread tax relief more equally across income groups, thus bringing about horizontal equity – those who pay equal values for medical expenditure receive absolute equal tax relief.

A tax credit system differs from a deduction system in that, instead of permitting a deduction of the medical allowance against a taxpayer's income, the relief is

granted as a reduction in tax payable. It therefore operates as a tax rebate.

The new dispensation consists of a two-tier credit system:

- A medical scheme fees tax credit (MTC) that applies in respect of qualifying contributions to a medical scheme.
- An additional medical expenses tax credit (AMTC) that applies in respect of other qualifying medical expenses. The application of the AMTC system falls into three categories:
    - Taxpayers aged 65 years and older.
    - Taxpayer, his or her spouse or his or her child is a person with a disability.
    - All other taxpayers. In order to qualify for the AMTC in the '65 years and older' category, the taxpayer must be 65 years or older on the last day of the relevant year of assessment or, had he or she lived, would have been 65 years or older on the last day of the relevant year of assessment.

The two types of credits are dealt with separately in this guide, namely:

- Part A – the MTC, dealing with contributions to a medical scheme; and
- Part B – the AMTC (which replaced the deduction of the medical allowance) dealing with other qualifying medical expenses, including out-of-pocket expenses

9.2. Frequently asked questions: Foreign Employment Income Exemption

An amendment to section 10(1)(o)(ii) of the Income Tax Act 1962 has been promulgated and will come into effect on 1 March 2020.

The Frequently Asked Questions (FAQs) have been compiled by SARS on the basis of questions that employees, employers and the public at large have about the implications of the amendment.

Question		Answer
Section 10(1)(o)(ii)		
1	What does the foreign employment income exemption mean?	Section 10(1)(o)(ii) provides for an exemption for foreign employment income received for services rendered outside South Africa, provided the requirements are met. Before 1 March 2020, if the requirements regarding the exemption are met, all remuneration for services rendered outside South Africa is exempt. From 1 March 2020, if the requirements are met, the exemption is limited to R1 million. Any remuneration received in excess of R1 million will be subject to normal tax in South Africa, irrespective of whether tax is paid in another country. The provisions of a tax treaty (if applicable) will apply to the portion of the remuneration over and above R1 million. Generally, under the provisions of a tax treaty, if an employee renders services in a foreign country for a period or periods exceeding 183 full days, both countries enjoy the right to tax the income. The country of source enjoys the first right to tax the employment income and the country of residence, in our case South Africa, will provide double tax relief in the form of a foreign tax credit to the extent that tax was paid in both countries, subject to limitations.
2	What are the	In order to qualify for the exemption, a taxpayer must:

	requirements to qualify for the exemption?	• be a tax resident of South Africa (refer to Question 3); • earn certain types of remuneration (refer to Question 4); • in respect of services rendered by way of employment; • outside South Africa; • during specified qualifying periods (refer to Question 5); and • not be subject to an exclusion (refer to Question 7). Refer to Interpretation Note 16.
3	Who does the exemption apply to?	The exemption only applies to a tax resident of South Africa who is an employee and renders employment services outside South Africa and is subject to tax on his or her worldwide income. For more on tax residence refer to Questions 15 to 21. The exemption does not apply to an individual who is a nonresident for tax purposes as foreign sourced income in relation to foreign services is not from a South African source and therefore not subject to tax in the hands of a non-resident in South Africa.
4	What type of income qualifies for the exemption under section 10(1)(o)(ii)?	The following amounts fall within the scope of the exemption: • Salary • Taxable benefits • Leave pay • Wage

		• Overtime pay • Bonus • Gratuity • Commission • Fee • Emolument • Allowance (including travel allowances, advances and reimbursements) • Amounts derived from broad-based employee share plans • Amounts received in respect of a share vesting
5	What are the qualifying periods (that is, the 'days test') that need to be met for purposes of section 10(1)(o)(ii)?	An employee who is a tax resident in South Africa must be outside South Africa for a period or periods exceeding 183 full days (in aggregate) during any 12-month period, and a continuous period exceeding 60 full days during that 12-month period.
6	Does any of the requirements that applied before 1 March 2020 change going forward?	No, the requirements to qualify for the exemption remain the same. The only change that is effective from 1 March 2020 is that the exemption is now limited to a maximum of R1 million. The full amount of your remuneration is no longer exempt if it exceeds R1 million.
7	Who is excluded from the application of section 10(1)(o)(ii)?	The following categories of individuals are excluded from the exemption: • A public office holder appointed or deemed to be appointed under an Act of Parliament

		• Employees who are employed in the national, provincial or local sphere of government, certain constitutional institutions, national and provincial public entities and municipal entities • Independent contractors and individuals who are selfemployed also do not qualify for the exemption as such persons are not in an employment relationship
8	If I meet all the requirements for section 10(1)(o)(ii), is all my foreign employment income exempt?	The answer depends on the amount of remuneration you earn for the services rendered outside South Africa. If the amount of your remuneration is R1 million or less, the full amount will be exempt from normal tax in South Africa. If the amount of your remuneration is more than R1 million, only R1 million will be exempt and any excess above R1 million will be subject to normal tax in South Africa. Also refer to Question 14.
9	How should the taxable benefits received while rendering services outside South Africa be valued?	The provisions of the Seventh Schedule are applicable to the relevant taxable benefit provided. The cash equivalent of the value of the taxable benefit as calculated under the Seventh Schedule will be applicable. If paid in a foreign currency, the amount should be converted using the average exchange rate. Refer to Question 38.
10	If I receive a travel allowance that falls within the R1 million exemption, can my taxable income be reduced in respect of	No, if the amount earned was exempt, the amount is not included in 'taxable income'. As there is no inclusion in taxable income there is nothing that can be reduced as a result of the business kilometres travelled that relates to the exempt amount. Also refer to Question 11.

	my business kilometres travelled?	
11	If I receive a travel allowance and a portion of the allowance is exempt under section 10(1)(o)(ii), can my taxable income be reduced in respect of all my business kilometres travelled?	Your taxable income can only be reduced in respect of business kilometres travelled during the period when the allowance was included in taxable income.
12	If I received remuneration in excess of R1 million, which includes a travel allowance, how will the R1 million exemption be attributed on assessment in respect of the travel allowance?	The R1 million exemption must be apportioned on a pro rata basis between the travel allowance and the total remuneration. For example, an employee receives total remuneration of R1,5 million which includes a travel allowance of R300 000. The exempt portion of the travel allowance is calculated as follows: Travel allowance/Total remuneration × R1 000 000 R300 000/R1 500 000 × R1 000 000 = R200 000 of the travel allowance will be exempt from normal tax on assessment. Thus, R100 000 will be included in taxable income.
13	Is the R1 million exemption allowed in respect of each year of assessment or should it be apportioned if I did not work a full year of	The R1 million exemption is available in respect of each year of assessment. This will apply even if you rendered services for only part of the year of assessment, provided the 'days' requirements are met. Refer to Question 5 on the 'days' requirements applicable under section 10(1)(o)(ii).

	assessment outside South Africa?	
14	Should my income be apportioned?	Yes, if you rendered services inside and outside of South Africa, the income received should be apportioned and only the income received in respect of work days outside South Africa during which services were rendered, will be exempt. From 1 March 2020, the exemption is limited to R1 million.
15	Does the change to section 10(1)(o)(ii) result in a new 'expat tax' being levied?	No, there is no new 'expat tax' introduced. The only effect of the change relating to section 10(1)(o)(ii) is that the exemption is limited to R1 million. If the R1 million is exceeded, such excess is subject to normal tax according to a taxpayer's marginal rate of tax.
Tax residence		
16	Who is a tax resident in South Africa?	A person is a tax resident if he or she is ordinarily resident or becomes a resident by way of physical presence. For more details on the different tests to become a tax resident in South Africa, refer to the following Interpretation Notes: • Interpretation Note 3: Resident: Definition in relation to a natural person – ordinarily resident (IN 3) • Interpretation Note 4: Resident: Definition in relation to a natural person - physical presence test
17	Is tax residency based on citizenship?	No, citizenship is one of the indicators that may point to someone being ordinarily resident, but that is not conclusive. Various factors may play a role and must be taken into account to determine whether a person is ordinarily resident in South Africa. Refer to IN 3 for more detail in this regard.

18	How does financial emigration impact my tax residence?	Acquiring approval from the South African Reserve Bank to emigrate from a financial perspective is not connected to an individual's tax residence. Financial emigration is merely one factor that may be taken into account to determine whether or not an individual broke his or her tax residence. An individual's tax residence is not automatically broken when he or she financially emigrates. The deciding factor remains whether or not an individual ceased to be ordinarily resident in the Republic.
19	Must I notify SARS if I cease to be a tax resident in South Africa?	Yes
20	How should I notify SARS if my tax residence status changes?	SARS can be informed of a taxpayer's intention to cease to be a resident through the wizard on the income tax return where the taxpayer is asked whether he or she 'ceased to be a tax resident'. When a taxpayer ceased to be a tax resident it should be indicated on the income tax return together with the date on which it occurred. Alternatively, SARS can be notified when an application is made for a tax clearance certificate via eFiling when emigrating from South Africa (that is, not on the income tax return).
21	What are the tax implications if I cease to be a tax resident in South Africa?	A deemed disposal for capital gains tax purposes takes place at the time when an individual ceases to be a tax resident. The individual will be deemed to have disposed of his or her worldwide assets, excluding immovable property situated in South Africa.

Double tax situation		
22	Will the change to section 10(1)(o)(ii) result in a double tax scenario?	If an individual earns employment income in excess of R1 million and the tax treaty between South Africa and the foreign country, if any, does not provide a sole taxing right to one country, both countries will have a right to tax the income. The portion of the income in excess of R1 million may end up being double taxed. Generally, under the provisions of the relevant tax treaty, if an employee renders services in a foreign country exceeding 183 days, both countries enjoy the right to tax the income. The country of source enjoys the first right to tax the employment income and the country of residence, in our case South Africa, will provide double tax relief in the form of a foreign tax credit to the extent that double tax arises, subject to limitations.
23	What remedies do I have to relieve the double taxation?	Section 6quat is the mechanism under South Africa's domestic law to claim relief from double tax where the amount received for services rendered outside South Africa is subject to tax in South Africa and in the foreign country. This credit may be claimed on assessment through an individual's income tax return, provided certain requirements are met. For more detailed information on the provisions of section 6quat, refer to Interpretation Note 18: Rebate or deduction for foreign taxes on income. An employer may at his or her discretion, under paragraph 10 of the Fourth Schedule, apply for a directive from SARS to take into account the potential foreign credit to determine the employees' tax (PAYE) liability on a monthly basis. The employer will

		be able to apply for such a directive through a dedicated channel that will be made available to the public by SARS. Refer to Questions 42 to 46. Even when a directive is issued to the employer that allows the employer to take into account a potential foreign tax credit on the payroll for PAYE purposes, the employee is still required to submit an income tax return in which the actual foreign tax credit under section 6quat has to be claimed.
24	If there is no tax treaty applicable between South Africa and the host country, what legislation will be applied?	The domestic tax legislation of each country will be applied independently of each other. The employee will be able to claim a section 6quat credit on assessment in respect of any double tax that arose, subject to certain requirements.
25	Should an employer that has a PAYE withholding obligation take the provisions of a tax treaty into account in relation to employees rendering services outside South Africa?	Yes, it is important to take the treaty into account to be able to determine which country has a right to tax the income. This will determine whether or not an employee has a normal tax liability in South Africa in which case the employer is obliged to withhold PAYE. Refer also to Questions 33 to 41 that deal with various payroll issues.
26	Will the tax treaty apply to the first R1 million of remuneration earned?	No, the tax treaty will not apply as there will be no double taxation due to the fact that the R1 million is exempt from normal tax in South Africa.
27	Will the tax treaty apply to the amount of remuneration	Yes, the tax treaty will apply as the portion of the remuneration in excess of R1 million may be subject to double taxation.

	exceeding R1 million?	
28	Is the exemption under section 10(1)(o)(ii) dependent on the provisions of a tax treaty?	No, the R1 million is exempt under domestic law and not under a tax treaty. The exemption is therefore not dependent on the application of a tax treaty and applies irrespective of whether there is a tax treaty or not.
Compliance matters		
29	If I qualify for the exemption, do I have to submit an income tax return in South Africa?	Yes, the Public Notice issued under section 25 of the Tax Administration Act, 2011 read with section 66 of the Act specifically provides that an individual working outside South Africa is required to submit an income tax return.
30	If I am employed, only get paid by one employer and earn less than R1 million, do I have a normal tax liability in South Africa?	No, provided you only receive employment income and no other income from a source inside or outside South Africa that may be subject to normal tax. As noted in Question 29, the individual is still obliged to submit a tax return.
31	If I am employed and I earn more than R1 million remuneration, do I have a normal tax liability in South Africa? If so, how should my liability be settled?	If you are employed by a local employer, PAYE will be deducted from your remuneration in excess of R1 million. If you are employed by a foreign employer that has no representative employer in South Africa, no PAYE will be withheld from your remuneration in excess of R1 million. You will have to settle your tax liability by way of provisional tax in respect of all your taxable income. Refer to Interpretation Note 1: Provisional Tax Estimates (IN 1) for more details on provisional tax.
32	What is the impact on me if I work in a tax	The exemption under section 10(1)(o)(ii) will apply in respect of remuneration earned up to R1 million. Any

	haven?	income in excess of R1 million will become subject to normal tax in South Africa. If remuneration in excess of R1 million is received there will not be a double tax situation as the foreign country (that is, the tax haven) does not tax your income. Since there will be no double taxation, no section 6quat credit can be claimed at the end of the year of assessment and therefore there will be no credit that can be applied for under paragraph 10 of the Fourth Schedule for payroll purposes.
Payroll related issues		
33	How should the R1 million exemption be calculated to determine the PAYE withholding obligation?	The R1 million should be accumulated on a monthly basis in respect of all qualifying remuneration items. As soon as the R1 million limit is reached, the income in excess of R1 million becomes subject to normal tax. The R1 million cannot be smoothed or averaged over the year of assessment. It must be calculated by adding up all remuneration items received from the beginning of the year of assessment or applicable start date of an assignment until the R1 million limitation is reached.
34	Does an employer have a choice to withhold PAYE from my foreign employment income?	The potential for an exemption under section 10(1)(o)(ii) does not automatically waive the obligation of an employer to deduct PAYE under the Fourth Schedule. An employer that is satisfied that the provisions of section 10(1)(o)(ii) will apply in a particular case may, however, elect not to deduct PAYE in such case. In the case where the exemption was not applicable, the employer will be liable for the employees' tax not deducted as well as the concomitant penalties and interest. An employer that has deducted or withheld PAYE where it subsequently transpires that the

		remuneration qualifies for exemption under section 10(1)(o)(ii) may not refund overdeducted PAYE to an employee. The employee must claim a refund on assessment. Supporting documentation in the form of, for example, a travel schedule, a passport and an employment contract, may be requested from the employee to substantiate the exemption claimed on assessment.
35	What is the impact of the exemption on SDL and UIF?	Any amount that is exempt under section 10(1)(o)(ii) no longer constitutes 'remuneration' as defined in paragraph 1 of the Fourth Schedule. The reason for this is that 'remuneration' is defined to mean '…any amount of income…'. 'Income' as defined in section 1(1) excludes exempt income. These exempt amounts are not subject to the deduction of UIF or SDL as they do not constitute 'remuneration'. Only the remuneration that remains taxable in South Africa will be subject to the deduction or withholding of levies or contributions under these statutes.
36	Under which income source codes should the income be disclosed?	For employees' tax certificate (IRP5 certificate) purposes, each remuneration item in respect of foreign service income must be disclosed under the relevant foreign income source code. For example, foreign sourced salary income must be disclosed under code 3651, bonus payments under code 3655 and medical aid contributions under code 3860. Code 3652 may not be used for any remuneration item that may qualify for exemption under section 10(1)(o)(ii) as there are specific foreign income source codes for each item that should be used. If an employer discloses

		any foreign sourced income under code 3652, the exemption under section 10(1)(o)(ii) will not be applied on assessment. An employer that is satisfied that the exemption under section 10(1)(o)(ii) applies, should disclose the salary income in the following way: To the extent that the remuneration is exempt, it must be disclosed under the foreign income source code indicating the amount from which no employees' tax was withheld and if the remuneration exceeds R1 million and becomes subject to normal tax, the excess remuneration should be disclosed as a separate line item under the same foreign source code indicating the amount from which PAYE was withheld. For example: • Code 3601 – Salary earned in South Africa (if applicable), subject to normal tax. • Code 3651 – Salary earned outside of South Africa that is less than R1 million and exempt under section 10(1)(o)(ii) with no PAYE. • Code 3651 – Salary earned outside of South Africa that exceeds R1 million, with PAYE. The above principle will apply in the same way to all relevant remuneration items.
37	If I have a South African employer and earn South African sourced income as well as foreign sourced	SARS prefers a single certificate, where possible, but where separate certificates are issued, the PAYE, SDL and UIF liabilities must be calculated on the total amount that is subject to PAYE, SDL and UIF. If one IRP5 certificate is used, the employer must

	income, should my income be disclosed on one or two IRP5 certificates?	ensure the correct IRP5 source codes are used in respect of the South African and foreign sourced income. If two IRP5 certificates are used, one related to the South African sourced income and one related to the foreign sourced income, the employer must ensure the correct amount of PAYE, SDL and UIF is calculated and withheld on the combined income from the two IRP5 certificates.
38	What foreign exchange rate should be used on a monthly basis if amounts paid from a foreign employer should be processed through the South African payroll?	The average exchange rate is catered for under section 25D(3). From a practical point of view it would mean the average exchange rate applicable from payroll date to payroll date.
39	Should the amounts paid by the foreign employer, that is not required to be paid or processed by the South African employer, be taken into account to calculate the R1 million exemption?	Yes, for the determination of the R1 million exemption, the remuneration items provided by both the local and foreign employer must be taken into account. The R1 million exemption has to be determined with reference to all income received by the employee for the services rendered abroad irrespective of which employer (local or foreign) is making the payment.
40	Does the foreign employer have a liability to withhold PAYE from the	The answer depends on whether or not the foreign employer has a representative employer in South Africa. If there is a representative employer in South Africa, such employer will have an obligation, subject to

	remuneration paid to a resident employee working outside South Africa?	the provisions of a tax treaty, to withhold PAYE in South Africa on the remuneration in excess of R1 million. The remuneration not qualifying for the exemption will also be subject to SDL and UIF. If there is no representative employer in South Africa, the foreign employer does not have any obligation to withhold PAYE. Such employee will be required to register as a provisional taxpayer and settle any tax liability in South Africa by way of provisional tax payments. Refer to IN 1 for more details on provisional tax.
41	Does the South African employer have a responsibility to withhold PAYE from an amount paid by the foreign employer?	The obligation to withhold PAYE is determined by who is 'liable' to pay the remuneration. The South African employer will only be liable to withhold PAYE if that employer pays or is liable to pay remuneration. If the South African employer acts as the representative employer of the foreign employer in South Africa, it will be required to withhold PAYE on behalf of the foreign employer.
Directive under paragraph 10 of the Fourth Schedule (hereinafter referred to as 'directive')		
42	If I am in a double tax position, is there any relief available through the payroll if my employer has a withholding obligation in South Africa?	Yes, an employer may apply for a directive to vary the basis on which PAYE is withheld monthly in South Africa. This is not the actual granting of the section 6quat credit. The potential foreign tax credit is taken into account to determine the PAYE that has to be withheld for payroll purposes. The section 6quat credit will only be granted on assessment, provided the necessary

		requirements are met.
43	Can my foreign employer, who does not have a withholding obligation in South Africa, apply for a directive to provide relief for my double tax situation when my income exceeds R1 million and I pay tax on that excess in South Africa as well as the foreign country I work in?	The application for a directive can only be made if the employer has an obligation to withhold PAYE. In the case of a foreign employer who has no PAYE withholding obligation, there would be no need to vary the basis on which PAYE is withheld as no PAYE is withheld in the first place. A section 6quat credit will have to be claimed on assessment.
44	Can an employer automatically apply a potential foreign tax credit through the South African payroll?	No, any possible relief should be applied for by the employer by way of a directive.
45	Are there any circumstances under which the directive will not be considered?	An application for a directive will not be considered if the following circumstances are applicable to an employee: • The employee is below the tax threshold • The employee's remuneration is exempt (less than R1 million) • The employee is not taxed in the foreign country
46	Which tax rate will apply to the income	The income in excess of R1 million will be taxed at the normal tax rate up to 45%, whichever is applicable to

	that is in excess of the R1 million exemption?	the excess portion of the income. For example, an individual (below 65 years of age) earns foreign employment income of R1,5 million. Based on the tax rates applicable to the 2020 year of assessment, the normal tax liability is calculated below. R1 000 000 will be exempt R500 000 is subject to normal tax and calculated as follows: = R100 263 + [(R500 000 - R423 300) × 36%] = R100 263 + R27 612 = R127 875 = less the primary rebate of R14 220 = R113 655

10. INDEMNITY

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