TAX UPDATE **PREPARED BY: JOHAN KOTZE**

FOR PERIOD: 1 OCTOBER 2014 – 31 DECEMBER 2014

INDEX

1. INTRODUCTION

The purpose of this update is to summarise developments that occurred during the fourth quarter of 2014 (i.e. 1 October 2014 to 31 December 2014) specifically in relation to Income Tax and VAT. Johan Kotze, Bowman Gilfillan's Head of Tax Dispute Resolution, has compiled this summary.

The aim of this summary is for clients, colleagues and friends alike to be exposed to the latest developments and to consider areas that may be applicable to their circumstances. The reader is invited to contact any of the members of Bowman's tax team to discuss their specific concerns and, for that matter, any other tax concerns.

This update is dominated by tax cases. These cases can assist both taxpayer and SARS to give them a better understanding of their rights and obligations.

In Pretoria East Motors SARS was taught a valuable lesson and one can only hope that SARS has learned from this case.

The case of A Company deals with legal professional privilege in terms of invoices for legal services. The lesson is that invoices for legal services should use generic descriptions to avoid this kind of dispute.

The cases of GB Mining, Medox and Hathurani are cases that should never have gone to court or atleast, have gone sofar in the judicial process.

The case of Chittenden raised an interesting question regarding tax clearance certificates of a taxpayer under business resque; which may not have been fully taken into account.

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. It is however important to note that these publications are not law, but may bind SARS. Taxpayers should nonetheless consider these publications carefully to determine whether, and how, they are actually applicable to their own circumstances.

Enjoy reading on!

2. TAX CASES

2.1 GW van der Merwe & Others v C:SARS & Others

GW van der Merwe had been arraigned on eleven counts of fraud and several of the charges against him had alleged that he had contravened the provisions of the Income Tax Act or the Value-Added Tax Act.

GW van der Merwe and Second Applicants were also the First and Second Respondents respectively in a preservation order application brought in terms of s 163(4)(a) of the Tax Administration Act 28 of 2011.

Second Applicant had anticipated the return day of the aforementioned application and the parties were awaiting the decision of the court. (See further C: SARS v C-J Van der Merwe 76 SATC 138).

Section 163(1) of the Act provides that a senior SARS official may '*authorise an ex parte application to the High Court for an order for the preservation of any assets of a taxpayer or other person prohibiting any person . . . from dealing in any manner with the assets to which the order relates.*'

Section 163(4)(a) provides that the court to which an application for a preservation order is made may make a provisional preservation order having immediate effect and simultaneously grant a rule nisi calling upon the taxpayer or other person upon a business day mentioned in the rule to appear and to show cause why the preservation order should not be made final.

However, on 11 February 2014 Mr Justice Davis had, by means of a court order made on 11 December 2013, authorised an inquiry by virtue of the provisions of Part C of Chapter 5 of the Tax Administration Act 28 of 2011.

SARS had brought the aforementioned ex parte application and on the same day Davis J made an order that '*Adv PJJ Marais SC, a member of the Pretoria Bar, be designated to act as the presiding officer for the purpose of the inquiry in terms of Part C of Chapter 5 of the Tax*

Administration Act 28 of 2011 . . . which inquiry is identified and defined herein.'

The aforementioned court order then set out the purpose and ambit of the inquiry and also contained a paragraph providing that access to the court file in the application would be restricted in that the court file and its contents would be kept in a locked cabinet or safe.

Applicants then brought an application in the Western Cape High Court for a rule nisi / temporary interdict preventing the Second Respondent from commencing with the said inquiry pending the final outcome of an application to have the aforesaid order reviewed and set aside, alternatively, to declare the relevant provisions of the Tax Administration Act which may authorise such an inquiry notwithstanding the fact that civil and/or criminal proceedings had commenced, unconstitutional and invalid.

The said application also requested that Third Respondent allow the Applicants and other interested parties access to the court file to enable the aforesaid review application to be made.

Section 50 of the Act provided that a judge may, on application made ex parte by a senior SARS official grant an order in terms of which a specified person is designated to act as presiding officer at the inquiry referred to in the section.

Furthermore, a senior SARS official may authorise a person to conduct an inquiry for the purposes of the administration of a tax Act (section 50(3)).

A judge may grant the order referred to in section 50(2) if satisfied that there are reasonable grounds to believe that a person has failed to comply with an obligation imposed under a tax Act or has committed a tax offence and relevant material is likely to be revealed during the inquiry which may provide proof of the failure to comply or of the commission of the offence.

Applicants contended that Davis J did not have authority to order an inquiry in circumstances where civil and criminal proceedings relating to the subject-matter of the inquiry were underway and if that was not what was meant in the Act, it was unconstitutional to the extent that it permitted inquiries in such circumstances.

Section 58 provided that an inquiry is not suspended by pending or contemplated civil or criminal proceedings against or involving the person in the inquiry or another person whose affairs may be investigated in the course of the inquiry.

Judge Veldhuizen held the following:

(i) That the interim interdict was clearly sought to suspend the inquiry for the purpose of bringing an application to review and set aside the order of Davis J or to have the relevant provisions of the Tax Administration Act 28 of 2011 declared unconstitutional and the Applicants also sought access to the court file to enable the aforesaid application to be made.

(ii) That one could not view the word ‘pending’ in isolation and it should be given a meaning having regard to the section as a whole and hence the word ‘pending’ in section 58 of the Act meant that an inquiry must continue even during civil or criminal proceedings unless a court ordered otherwise.

(iii) That it followed that the fact that civil or criminal proceedings involving any one of the Applicants had commenced did not lead to the exclusion of such an Applicant from the ambit of section 58 of the Act and there was no reasonable prospect of the Applicants’ contention being upheld.

(iv) That it was common cause that Respondent had, subsequent to the granting of the inquiry application, refused to grant First Applicant access to the court file underlying the application and Applicants had sought an order giving them general access to the court file. However, it was true that it was contended that Applicants were not able to identify any documents while they did not know what the court file contained but they should, at least, attempt to do so even if it was in broad terms as the file may contain information regarding a person or persons whose information was protected by the provisions of the Income Tax Act.

(v) That Applicants' attack on the constitutionality of s 58 of the Act turns on the interpretation of the section and not on the contents of the court file. Moreover, the interpretation contended for by the Applicants had no prospect of being upheld and, in consequence, their application for access to the court file also could not succeed.

Application dismissed with costs.

2.2 C:SARS v Pretoria East Motors (Pty) Ltd

Pretoria East Motors was an authorised dealer on behalf of Toyota South Africa ('Toyota SA') and conducted business as a car dealership at Menlyn and Garsfontein in Pretoria selling new and used vehicles.

During June and July 2003, officials in the employ of SARS had conducted a detailed audit of the tax affairs of Pretoria East Motors for the period 2000 to 2004 and, at the conclusion of the audit, various additional Income Tax ('IT') and Value-added Tax ('VAT') assessments were raised by SARS.

Although the assessments themselves were omitted from the record, it appeared that there were additional assessments for income tax in respect of each of 2000, 2001 and 2002 and there were five additional VAT assessments, respectively for 2000, 2001, 2002, 2003 and 2004.

There was also an assessment to Secondary Tax for Companies ('STC') but that appeal had been dismissed by the Tax Court and was not persisted in in the Supreme Court of Appeal.

Pretoria East Motors had objected to the aforementioned assessments but the objections were disallowed by SARS.

Pretoria East Motors thereafter appealed to the Special Tax Court: Pretoria (per Goodey AJ sitting with assessors) that had upheld the SARS assessment in relation to 18 of the 21 items in dispute and found for Pretoria East Motors in respect of the remaining three items.

The Special Tax Court had also confirmed the penalties at the maximum rate of 200% that had been levied by SARS in respect of the additional assessments.

The court a quo had ordered SARS to pay the costs of the appeal on the basis that Pretoria East Motors had been 'substantively successful and is entitled to costs'.

SARS' appeal and the cross-appeal by Pretoria East Motors directly to the Supreme Court of Appeal and, in each instance, against the conclusions adverse to them, had been undertaken with the leave of the Tax Court.

In the court a quo Pretoria East Motors, in order to discharge the onus resting upon it, had called two witnesses, one being a chartered accountant who had prepared the letter of objection on behalf of Pretoria East Motors and later a report including annexures which had formed part of the record before the Tax Court on the strength of Pretoria East Motors' contemporaneous financial records and other documentation. The other witness was the financial director of Pretoria East Motors and one of its principal shareholders.

SARS had called Ms Jacqueline Victor who had been principally responsible for conducting the audit that gave rise to the assessments in issue and for the disallowance of the various objections.

Much of the evidence before the Tax Court took the form of documentary exhibits, primarily in the form of court dossiers prepared by Pretoria East Motors and those included documents obtained or prepared by Ms Victor during the course of the audit as well as the annexures to the letter of objection prepared by Dr Gouws and his summary.

SARS had raised the additional assessments on the basis of information in Pretoria East Motors' records and, in the case of the additional VAT assessments, the VAT 201 forms completed by Pretoria East Motors for each period of assessment.

The approach adopted by Ms Victor was to examine the accounts and, where she found a discrepancy that she did not understand and for which in her view no adequate explanation was furnished, she raised an assessment to additional tax – either income tax or VAT or, in some instances, both and then left it to Pretoria East Motors to prove in due course at the hearing before the Tax Court that she was wrong.

According to the unchallenged evidence of Dr Gouws, who represented Pretoria East Motors from about the end of 2003 or early 2004, he had prepared schedules from Pretoria East Motors' records and had offered to provide additional information to that already furnished, but his overtures had been rejected by Ms Victor and he stated that, in response to a suggestion that insufficient proof had been proffered by Pretoria East Motors, all the ledger accounts had been put in a van and taken to the SARS office and Ms Victor had been invited to take whatever she needed, but had declined to do so.

The SARS auditors had thus been given access to all the documents foundational to Pretoria East Motors' accounts but chose not to examine any of them. Moreover, prior to the hearing in the court a quo, Pretoria East Motors had pointed out to SARS that there was a mass of invoices and files covering the areas in dispute between the parties, but the SARS representative had advised that it was unnecessary to bring everything and was told to simply bring an example.

During the course of the hearing, documents were tendered by Pretoria East Motors for inspection but once again the SARS representatives did not take up these offers.

The substantive issues raised by SARS' appeal and Pretoria East Motors' cross-appeal were based on the various grounds of appeal.

In the case of the SARS' appeal, there were the following grounds:

- Input tax on the purchase of second hand vehicles – Pretoria East Motors had claimed input VAT deductions in respect of the purchase of second-hand vehicles for the period 2000 to 2003 in the total sum of R14 099 943 but those were disallowed by SARS on the basis that Pretoria East Motors had not kept the necessary records as required by the VAT Act.

- Fuel coupons – SARS had disallowed income tax deductions claimed by Pretoria East Motors in respect of the period 2000 to 2002 in the sum of R1 113 762 (involving tax of R334 129) and this pertained to the use of fuel coupons or vouchers to obtain fuel for demonstration vehicles, delivery of vehicles or for other internal purposes by Pretoria East Motors .
- Parking rentals – SARS had disallowed IT deductions and VAT input tax deductions in respect of payments allegedly made as rentals to a landlord in respect of an additional parking space leased by Pretoria East Motors .

In the case of Pretoria East Motors' cross-appeal, there were the following grounds:

- First ground

  The difference between the VAT reports and VAT 201 returns – liability R681 208;
- Second ground

  The difference between output and turnover liability – R4 912 808;
- Third ground

  The zero per cent VAT amounts – liability R1 407 279;
- Fourth ground

  Sales at no consideration – VAT liability – R856 141 and IT liability – R1 667 411;
- Fifth ground

  Incentive bonus liability – VAT – R470 172 and IT – R882 615;
- Sixth ground

  Discount and over – allowance liability – VAT – R605 725 and IT – R737 942;
- Seventh ground

  Journals at year end added back: IT liability – R195 742;

- Eighth ground

  Stock liability – IT – R576 642;

- Ninth ground

  Creditors – accrued expenses and provision account – Liability – R54 178;

- Tenth ground

  Expenses – liability – VAT – R280 363 and IT – R783 572;

- Eleventh ground

  Salaries and wages – IT – R103 041;

- Twelfth ground

  Penalties of 200% raised – VAT and IT.

Judge Ponnan held the following:

As to the powers of the Tax Court

(i) That it was important at the outset to emphasise, as Curlewis JA did in Bailey v CIR, that the Tax Court is not a court of appeal in the ordinary sense: it is a court of revision and that means, as Centlivres JA observed in Rand Ropes (Pty) Ltd v CIR: '... *that the Legislature intended that there should be a re-hearing of the whole matter by the Special Court and that that Court could substitute its own decision for that of the Commissioner'*.

As to the nature of income tax and value-added tax

(ii) That as the fate of this appeal depended upon an interpretation of certain provisions of the Income Tax Act and the Value-Added Tax Act, before passing to a closer consideration of the evidence and proceeding to narrate the issues that arose for decision, it was appropriate to first record, in broad outline, some general observations about income tax and value-added tax.

(iii) That taxable income is the basis upon which normal tax is levied and it is arrived at by first determining the taxpayer's gross income, consisting of all receipts and accruals, other than those of a capital nature, and certain other specified amounts and then deducting therefrom any amounts exempt from normal tax and one thereby arrives at the income of the taxpayer. The taxpayer's taxable income is then determined by deducting from its income the various amounts which the Income Tax Act allows by way of deduction, of which those covered by section 11(a) are of relevance to this matter. Section 23 prescribes what deductions may not be made in the determination of taxable income and subsections (f) and (g) of section 23 represent what has been described as the 'negative counterpart' of section 11(a) and, in determining whether a particular amount is deductible, it is generally appropriate to consider whether or not such deduction is permitted by section 11(a) and whether or not it is prohibited by s 23(f) and/or (g).

(iv) That the general deduction formula laid down in s 11(a) of the Income Tax Act permits the deduction from the taxpayer's income of '*expenditure and losses actually incurred in the production of the income, provided such expenditure and losses are not of a capital nature*', whilst sections 23(f) and (g) of the Act prohibit a deduction in respect of expenses incurred in respect of any amounts received or accrued which do not constitute income as defined in section one and any moneys, claimed as a deduction from income derived from trade, to the extent to which such moneys were not laid out or expended for the purposes of trade.

(v) That, as its name signifies, VAT is a tax on added value and the system was introduced by section 7(1) of the Value-Added Tax Act which provided that there shall be levied and paid ... a tax to be known as the value-added tax – on the supply by any vendor of goods ... supplied by him on or after the commencement date in the course or furtherance of any enterprise carried on by him calculated at the rate of 14% on the value of the supply concerned and VAT is calculated on the value of each successive step as goods move along the commercial chain.

As to the taxpayer's burden of proof

(vi) That in terms of section 82 of the Income Tax Act the burden of proof that any amount is exempt from or not liable to any tax chargeable under the Act '.... *shall be upon the person claiming such exemption, non-liability, deduction, abatement or set-off . . . and upon the hearing of any appeal from any decision of the Commissioner, the decision shall not be reversed or altered unless it is shown by the appellant that the decision is wrong*'. A similar provision is to be found in section 37 of the Value-Added Tax Act.

(vii) That the present appeal must therefore be approached on the basis that the onus was on the taxpayer to show on a preponderance of probability that the decisions of SARS against which it appealed were wrong but that, however, is not to suggest that SARS was free to simply adopt a supine attitude. It was bound before the appeal to set out the grounds for the disputed assessments and the taxpayer was obliged to respond with the grounds of appeal and these delineate the disputes between the parties.

As to the taxpayer's ipse dixit

(viii) That it is so that the taxpayer's ipse dixit will not lightly be regarded as decisive but it must be considered together with all of the other evidence in the case. And, given the unfavourable position of having the onus resting upon it – a 'formidable and difficult' one to discharge (per Trollip JA in Barnato Holdings Ltd v SIR) – the interests of justice require that the taxpayer's evidence and questions of its credibility be considered with great care. Indeed, the taxpayer's evidence under oath and that of its witnesses must necessarily be given full consideration by the court, and the credibility of the witnesses must be assessed as in any other case that comes before that court. It thus remains the function of the court to make a determination of the issues that arise for decision on an objective review of all of the relevant facts and circumstances.

(ix) That not the least important of the facts, according to Miller J in ITC 1185 '*will be the course of conduct of the taxpayer in relation to the transactions in issue, the nature of his business or occupation and the frequency or otherwise of his past involvement or participation in similar transactions. The facts in regard to those matters will form an important part of the material from which the court will draw its own inferences against the background of the general human and business probabilities*'.

As to the raising of additional assessments and audit

(x) That SARS had raised the additional assessments on the basis of information in the taxpayer's records and, in the case of the additional VAT assessments, the VAT 201 forms completed by the taxpayer for each period of assessment. The approach adopted by Ms Jacqueline Victor of SARS was to examine the accounts and, where she found a discrepancy that she did not understand and for which in her view no adequate explanation was furnished, she raised an assessment to additional tax – either income tax or VAT or, in some instances, both. It did not appear that Ms Victor sought to familiarise herself with the workings of the accounting system utilised by the taxpayer, even though the information available to her, confirmed by the evidence in the appeal, was that it was a customised system installed not by the taxpayer but by Toyota SA. Thus she treated as taxable supplies: the transfer of vehicles from sales stock to demonstration purposes; sales clearly reflected in the accounts as internal transactions; and, the transfer of sales stock (swaps) between the two branches of the business. This was incorrect, as it ignored the fact that under s 7(1)(a) of the Value-Added Tax Act, read with the definition of 'supply' in s 1, output tax is to be raised only on taxable supplies by a vendor and these internal activities did not constitute supplies to anyone.

(xi) That, as best as can be discerned, Ms Victor's approach was that if she did not understand something she was free to raise an additional assessment and leave it to the taxpayer to prove in due course at the hearing before the Tax Court that she was wrong. Her approach was fallacious. The raising of an additional assessment must be based on proper grounds for believing that, in the case of VAT, that there has been an under declaration of supplies and hence of output tax, or an unjustified deduction of input tax. In the case of income tax it must be based on proper grounds for believing that there is undeclared income or a claim for a deduction or allowance that is unjustified. It is only in this way that SARS can engage the taxpayer in an administratively fair manner, as it is obliged to do. It is also the only basis upon which it can, as it must, provide grounds for raising the assessment to which the taxpayer must then respond by demonstrating that the assessment is wrong.

(xii) That the aforementioned erroneous approach led to an inability on Ms Victor's part to explain the basis for some of the additional assessments and an inability in some instances to produce the source of some of the figures she had used in making the assessments. In addition, as a matter of routine, all the additional assessments raised by her were subject to penalties at the maximum rate of 200%, absent any explanation as to why the taxpayer's conduct was said to be dishonest or directed at the evasion of tax.

(xiii) That, according to the unchallenged evidence of the taxpayer, it had prepared schedules from its records and had offered to provide additional information to that already furnished, but its overtures had been rejected by Ms Victor and hence the SARS auditors had been given access to all the documents foundational to the taxpayer's accounts but chose not to examine any of them and this disturbing approach persisted in the Tax Court and ... it appeared as if [counsel for SARS] thought that it was necessary for the taxpayer to reconstruct its accounts in order to discharge the onus resting on it. That approach was untenable, for, it left the taxpayer none the wiser as to what was truly in issue and what needed to be produced in order for it to discharge the burden of proof that rested upon it.

(xiv) That the taxpayer thus adopted the general approach that as Ms Victor had misunderstood the accounts and ignored the provisions in particular of the Value-Added Tax Act, it sufficed for it to demonstrate that through the evidence of its expert witness, Dr Gouws. That was a perfectly proper approach in respect of most, but not all, items, particularly in the light of Ms Victor having informed the taxpayer that all sales had been properly entered in the company's accounts and that she had relied for the assessments on the trial balances prepared by the company's auditors. The taxpayer was not alerted to any other issue and was certainly not called upon to produce every underlying voucher or invoice or to reconstruct its accounts from scratch for the Tax Court.

(xv) That, in these circumstances, the submissions made to the Tax Court and repeated on appeal in relation to many of the disputed items, namely that the original vouchers had not been produced or that Dr Gouw's [the expert witness] explanations were to be ignored because they were based on hearsay, cannot be sustained. Whilst there are disputes in tax appeals, such as the entertainment expenditure in the present appeal, where the production of invoices or vouchers is called for if the taxpayer is to discharge the onus of proof resting on it, that is not always the case.

As to the nature of the dispute between the parties

(xvi) That everything will depend upon the nature of the dispute between the parties as defined by the grounds of assessment and the grounds of appeal. Where, for example, the SARS auditor has based an assessment upon the taxpayer's accounts and records, but has misconstrued them, then it is sufficient for the taxpayer to explain the nature of the misconception, point out the flaws in the analysis and explain how those records and accounts should be properly understood and that can be done by a witness such as a qualified chartered accountant, who is capable of giving such an explanation after a full and proper consideration of the accounts. If there are underlying facts in support of that explanation that SARS wishes to place in dispute, then it should indicate clearly what those facts are so that the taxpayer is alerted to the need to call direct evidence on those matters.

(xvii) That any other approach would make litigation in the Tax Court unmanageable, as the taxpayer would be left in the dark as to the level of detail required of it in the presentation of its case and it must be stressed that SARS is under an obligation throughout the assessment process leading up to the appeal and the appeal itself to indicate clearly what matters and which documents are in dispute so that the taxpayer knows what is needed to present its case.

As to the substantive issues in the appeal and cross-appeal

(xviii) That in relation to SARS' first (input tax on the purchase of second hand vehicles) and second (fuel coupons) grounds of appeal, the appeal fails and it is accordingly dismissed.

(xix) That in relation to SARS' third (parking rentals) ground of appeal, the appeal succeeded and the cash component of the parking rentals allegedly paid by Pretoria East Motors in the sum of R134 625,99 is remitted in terms of section 83(13)(a)(iii) of the Income Tax Act to SARS for further investigation and assessment.

(xx) That in regard to Pretoria East Motors' cross-appeal, it succeeded in respect of grounds 3,4, 6, 8 and 12 and failed in respect of grounds 7, 9, 10 and 11. That in respect of grounds 1 and 2, the cross-appeal succeeded in respect of the 2001, 2002 and 2003 years and in relation to the 2000 year it succeeded to the extent that the assessment in respect of additional tax fell to be reduced to R1 095 560,87. In respect of ground 5, save for the amount of R2 258 897, which fell to be excluded from any assessment, the appeal failed.

As to the penalties of 200% raised (VAT and IT)

(xxi) That SARS had imposed and the Tax Court confirmed that penalties of 200% in respect of various amounts of tax (both IT and VAT) were held to be payable by Pretoria East Motors. The additional tax imposed was in terms of s 76 of the Income Tax Act and s 60(1) of the Value-Added Tax Act. As the Tax Court, on appeal to it, was called upon to exercise its own, original discretion, this court will interfere with that determination only on the limited grounds on which a value judgment of a court of first instance may be set aside or varied on appeal (CIR v Da Costa 47 SATC 87) and it bears noting, however, that in this instance the Tax Court simply rubber-stamped the SARS decision and its failure to even engage with the issue means that the court is at large.

(xxii) That section 76(1)(b) of the Income Tax Act provides that, if a taxpayer omits from his return any amount which ought to have been included therein, he shall be required to pay, in addition to the tax chargeable in respect of his taxable income, '*an amount equal to twice the difference between the tax as calculated in respect of the taxable income returned by him and the tax properly chargeable in respect of his taxable income as determined after including the amount omitted*'.

(xxiii) That section 83(13)(b) of the Income Tax Act provides that, subject to the provisions of the Act, in the case of any appeal against the amount of the additional charge (the penalty) imposed under section 76(1) , the Special Court may reduce, confirm or increase the amount of the penalty. Moreover, the key words of section 76(2)(a) are '*any act or omission of the taxpayer . . . done with the intent to evade taxation*'. Like its counterpart in the Income Tax Act, section 60 of the Value-Added Tax Act also required a finding that the taxpayer had conducted itself '*with intent . . . to evade the payment of any amount of tax payable by him*'. It was also the case that the presumption in section 59(2) of the Value-Added Tax Act did not avail the Appellant as that presumption only found application to proceedings under it, namely '*offences and penalties in regard to tax evasion*'.

(xxiv) That it followed that the additional tax and penalties imposed by SARS could not stand and accordingly on this ground the cross-appeal had to succeed.

As to the legal costs

(xxv) That the Tax Court ordered SARS to pay Pretoria East Motors' costs because it had been '*substantively successful*' and, given the wide ranging disputes between the parties and the manner in which the matter unfolded before the Tax Court, there appeared to have been no warrant for that order. Before the Supreme Court of Appeal it was accepted that that order should be substituted with one that each party pay their own costs. Turning to the costs of the appeal and cross-appeal: In the light of the substantial success that Pretoria East Motors has had in this court, the SARS must be ordered to pay Pretoria East Motors' costs, such costs to include those of two counsel.

The appeal and cross-appeal were each upheld in part, with the costs, including those consequent upon the employment of two counsel, to be paid in each instance by the Commissioner for the South African Revenue Service.

The additional income tax assessments in respect of the 2000, 2001 and 2002 tax years and the additional VAT assessments for the tax years 2000, 2001, 2002, 2003 and 2004 are set aside and referred back to the Commissioner for re-assessment in the light of this judgment.

2.3 A Company and others v C:SARS

Applicants, who were three companies in a well-known group of companies, had applied for a declaratory order that certain content of two fee notes rendered by their attorneys to the First Applicant was properly subject to the claim of legal advice privilege that they had sought to assert as the basis of their refusal to disclose portions of the invoices, when complying with a request by the SARS in the case, in terms of s 46 of the Tax Administration Act 28 of 2011.

Copies of the aforementioned invoices had been supplied to SARS but the Applicants had redacted the content thereof that was subject to the claim of privilege.

The application by the companies for declaratory relief had been brought in the context of SARS' insistence on being provided with unexpurgated copies of the documents concerned and it had not been suggested by SARS that the provisions of the Tax Administration Act or any other applicable statutory instrument overrode a taxpayer's right to claim legal professional privilege, but the issue to be determined was simply whether the privilege that had been claimed actually subsisted.

The relevant facts were that in the course of an audit of the Applicants' tax affairs SARS had indicated his requirement that Applicants provide SARS with copies of certain documentation and the requirement included a request for a breakdown of an identified trial balance account in respect of professional fees in the books of one of the applicant companies pertaining to the 2009 year of assessment.

In the response given to SARS, the senior tax manager of the Second Applicant, which was dealing with SARS' requirements on behalf of the other two applicants, gave a breakdown of the fees involved, together with certain '*supporting invoices*' and two tax invoices were in fact involved.

In regard to the fee notes, the applicants noted that they had been addressed to the First Applicant; that the fees concerned had been raised in respect of legal professional services rendered by the attorneys to the First and Third Applicants and that '*the invoices set out the nature of the advice sought by the first and third applicants*'. Privilege was claimed on the basis that '*the nature of the advice sought by the first and third applicants is discernable from the invoices*'. The Applicants therefore refused to hand over copies of the fee notes on the grounds that all communications between attorneys and their clients are legally privileged, including legal invoices but redacted copies of the fee notes were later provided to SARS '*in a spirit of co-operation*' and purportedly '*without prejudice*' to the Applicants' right to assert privilege in respect of the whole documents.

SARS responded to the Applicants' claim of privilege by stating his inability to accept that the invoices in question (or indeed any lawyer's fee note for that matter) were legally privileged.

The Commissioner refused to accept the redacted fee notes as adequately complying with his demand for information and he required the unexpurgated invoices to be furnished to him within 24 hours.

Applicants, in their replying affidavit, argued that it was not the character of the documents as attorneys' fee notes that was determinative of the validity of the Applicants' claim to privilege, but whether '*certain of the contents of the disputed invoices are privileged, to the extent that they set out the nature of the advice sought by the Applicants from their attorneys and/or the advice given by those attorneys*'. The applicants thus abandoned any claim that had been discerned in their founding papers that the documents were privileged per se, and stated their case actually to be that the advice sought by them from their attorneys (which they averred was reflected in the content of the invoices) was privileged by reason of having been sought in confidence from their legal advisers acting in their capacity as such.

Applicants also indicated their intention to make uncensored copies of the invoices available for inspection by the court at the hearing for purposes of a so-called '*judicial peek*'.

SARS explained that he had been engaged in an investigation of the tax affairs of the Applicant companies for some time and the investigation encompassed a number of aspects including structured finance arrangements and a joint venture with an offshore consortium which he suspected may involve tax base erosion by shifting profits offshore. SARS' investigations in this regard were said to encompass risks relating to employees' tax and aspects pertaining to section 8C of the Income Tax Act regulating the taxation of directors and employees on the vesting of equity instruments and insight into the invoices was also required because it was foreseen that they might provide relevant factual information pertinent to the wide-ranging investigation by SARS into the group of companies' tax affairs.

The Commissioner's refusal to accept the validity of the Applicants' claim to privilege was based on the following grounds, inter alia, it was contended that:

- Invoices are not ordinarily issued in confidence and that the attorneys must have appreciated when they rendered the fee notes that they would be subject to disclosure by the client to the tax authorities because of income and value-added tax implications;
- The invoices were not issued for the purposes of obtaining or providing legal advice but their purpose was to state the services provided to the Applicants and the remuneration demanded therefor by the attorneys;
- It appeared that the redacted information comprised predominantly of the names or descriptions of certain agreements, transactions and documents and the mere identification of such matters in the invoices would not, by itself, convey the nature or substance of any advice that might have been sought or received.

SARS also contended that, by having unconditionally undertaken to furnish the invoices when they were located, the Applicants had waived any privilege that they might have been able to assert in the documents.

There was no dispute between the parties as to the import of the substantive right to legal advice privilege, broadly stated, but they took issue on its ambit.

Judge Binns-Ward held the following:

As to the Applicants' claim to legal professional privilege

(i) That this case concerned a claim by the Applicants to legal professional privilege and legal advice privilege in particular. Legal advice privilege covers communications between lawyers and their clients whereby legal advice is sought or given and, as confirmed by the Constitutional Court in Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and another v National Director of Public Prosecutions and others 2008 (12) BCLR 1197 (CC) '*the right* *to legal professional privilege is a general rule of our common law which states that communications between a legal advisor and his or her client are protected from disclosure, provided that certain requirements are met*'.

(ii) That the requirements are (i) the legal advisor must have been acting in a professional capacity at the time; (ii) the advisor must have been consulted in confidence; (iii) the communication must have been made for the purpose of obtaining legal advice; (iv) the advice must not facilitate the commission of a crime or fraud; and (v) the privilege must be claimed.

(iii) That the rationale for the privilege has been expressed in various ways and has evolved over the centuries and thus at one stage the privilege was even considered to be that of the lawyer rather than of the client and, until well into the nineteenth century it applied only in respect of communications in relation to pending or contemplated litigation.

(iv) That the application papers in this matter did not give any greater detail as to the basis upon which the alleged privilege was claimed other than that which is apparent from the extracts from the correspondence between the applicants and SARS that have been quoted in the judgment and the applicants did not even attach copies of the redacted invoices to their founding affidavit and it followed that on the founding papers read on their own the court was provided with no basis to examine the assertion of legal advice privilege other than the applicants' say so.

(v) That leaving aside the possible effect of their partial disclosure of the documents, the only basis upon which the applicants could have succeeded in obtaining declaratory relief on that approach would be an acceptance by this court of a line of English authority which extends legal professional privilege to the content of solicitors' fee notes as a blanket rule and whether that authority still holds good, and, if it does, whether this court should apply it, are among the questions to which attention will be given in this judgment. The point to be made, however, is that in general it is not possible to judge whether privilege is validly claimed or not if the context is not provided.

(vi) That the Commissioner's answering papers explained the context in which SARS' insistence on being furnished with uncensored copies of the fee notes was being pursued and suffice it to say that the Commissioner considered that the content of the invoices might go to confirm that the applicants, or fellow entities in the group of companies of which they were part, had knowledge of the flow of funds involved in certain '*structured finance arrangements*' in respect of which SARS had decided to reassess the Third Applicant's liability for payment of income tax and secondary tax on companies.

(vii) That, having regard to the tenor of the correspondence exchanged between the parties, which was annexed to the founding papers, and in which the Applicants' right to contend that the information sought was irrelevant was reserved, the court was of the view that the Commissioner's apprehension of the Applicants' position in this respect was reasonably formed and the answering papers were handled sensitively to prevent any unwarranted invasion of the Applicants' privacy and, by agreement between the parties, the court was requested to hear the application in camera, which duly happened.

(viii) That there was no merit in SARS' contention that, by having unconditionally undertaken to furnish the invoices when they were located, the Applicants had waived any privilege that they might have been able to assert in the documents. The nature of the alleged waiver on which SARS sought to rely is known as implied or imputed waiver and the test for identifying such waiver was objective, meaning that it must be judged by its outward manifestations; in other words from the perspective of how a reasonable person would view it and in the circumstances SARS could not reasonably have construed the giving of the undertaking as a waiver of the Applicants' right to assert privilege in respect of any part of the content of the fee notes when they were found and that is certainly the case if it is assumed, as SARS argued, and as the court would hold, that attorneys' fee notes are not per se privileged documents.

As to whether attorneys' fee notes are per se privileged documents

(ix) That broad agreement as to the conceptual character of legal advice privilege did not exclude scope for quite fundamental differences as to the ambit of attorney-client communications that are included or excluded is illustrated by the jurisprudence. The most relevant cases are all foreign and, indeed, counsel were not able to find any South African judgment that deals in any particularity with the question that presents in the current matter.

(x) That the authorities discussed in the judgment go to the identification of documents that are susceptible to legal professional privilege, and not directly to the question that presents in the current case, which concerns the assertion of privilege in respect of covered up parts of an otherwise unprivileged document that has been disclosed. If a document is privileged disclosure of part of it may constitute an implied or imputed waiver of the whole and it is therefore appropriate to consider whether a lawyers' fee note qualifies by its nature and as a general rule as a privileged document.

(xi) That there is a line of English authority that holds that solicitors' fee notes are privileged but as our law in point has historically been premised on the English law, it seemed to the court that applying the reasoning in the three English judgments referred to in a principled manner in the local context would impel the conclusion that attorneys' fee notes are not amenable to any blanket rule that would characterise them as privileged communications per se.

(xii) That fee notes are not created for the purpose of the giving of advice and are not ordinarily of a character that would justify it being said of them that they were directly related to the performance of the attorney's professional duties as legal adviser to the client. They are rather communications by a lawyer to his or her client for the purpose of obtaining payment for professional services rendered; they relate to recoupment for the performance of professional mandates already completed, rather than to the execution of the mandates themselves and they thus do not form part of the '*continuum of communications*' postulated in Taylor LJ's judgment in Balabel and Another v Air India [1988] 2 All ER 246 (CA) and for that reason the English judgments that appear to clothe lawyers' fee notes with privilege as a blanket rule should not be followed in my view.

(xiii) That the abandonment by the Applicants of their initial claim of blanket rule privilege in respect of the invoices as lawyers' fee notes was therefore well advised.

Whether legal professional privilege extended to the content of fee notes

(xiv) That it is readily conceivable, if not probable in fact, that attorneys' fee notes might contain references to legal advice sought and given in the course of a narration of the services in respect of which the fees have been raised and it is indeed references of that sort that are in issue in the current matter. In the court's judgment, mere reference to advice sought or given did not equate to disclosure of the substance of the advice. Disclosure by reference in a document which is not itself privileged of the mere fact that advice has been sought on a question or that it has been given therefore did not give rise to any privilege. It is the actual communications between the client and the lawyer involved in the seeking and giving of the advice – identifiable as such within the broad and generous parameters referred to in cases like Balabel, supra and Three Rivers District Council & Ors v Bank of England (No 6) [2004] 3 WLR 1274 – or references in other documents that would disclose their content or from which their content might be inferred that are the matter in respect of which legal advice privilege may be claimed. That does not include the content of a document which merely records, without disclosing their substance, that such communications have occurred. Thus, if the fee note refers to the advice only in terms that describe that it was given, without disclosing its substance, the mere reference would not be sufficient to invest the relevant content of an otherwise unprivileged document or communication with legal advice privilege.

(xv) That, therefore, in a case in which parts of a fee note set out the substance of the privileged communications in respect of the seeking or giving of legal advice, or contain sufficient particularity of their substance to constitute secondary evidence thereof, those parts, but not the document as a whole, would be amenable to the privilege and the privilege should be asserted in such cases in precisely the manner that the Applicants have sought to do in the current matter – that is by redacting the information so as to disclose those parts of the document that are not subject to the privilege and covering up those that are and the test was whether, upon an objective assessment the references disclose the content, and not just the existence, of the privileged material and, approached in that manner, the scope for difficulty was not so evident.

As to the manner of asserting the privilege

(xvi) That there was virtually no detail provided in the founding papers substantiating why the covered up portions of the invoices should be declared to be amenable to the assertion of legal advice privilege and the basis upon which the court was invited to determine the question was by taking what is sometimes called a 'judicial peek' at the covered up portions; that is by looking privately at the redacted parts of the invoices and it is a practice that has on occasion been adopted in our courts in circumstances in which the judge considers it necessary to privately inspect allegedly privileged documents to make a just decision of a matter in dispute.

(xvii) That the aforementioned procedure entailed the judge looking at material that was not available to the party against whom the alleged right of non-disclosure is asserted and that self-evidently puts the party that is kept in the dark, as it were, at a disadvantage and it limited the assistance that a court was ordinarily able to derive for the purposes of deciding contentious questions from argument addressed to it by parties who were equally equipped.

(xviii) That statutory provision is made for the practice in s 80(1) of the Promotion of Access to Information Act 2 of 2000 and that provision has enjoyed attention in quite recent litigation where the Appeal Court commented generally on the concept of taking a judicial peek and noted that while the practice might properly be availed of in appropriate circumstances, it was nevertheless important to consider that courts '*earn the trust of the public by conducting their business openly and with reasons for their decisions*' and that therefore '*a court should be hesitant to become a party to secrecy with its potential to dissipate that accumulated store of trust*'.

(xix) That a party in the position of the Applicant in the current case should be astute to present its case in a manner directed as far as possible to avoid the necessity of the matter having to be decided on the basis of a secret inspection, or at the very least to minimise the one-sided effect of any private judicial inspection that might nevertheless remain necessary and in the present case that could have been done by providing a far more detailed contextual explanation in its founding papers of the bases for the non-disclosure of the allegedly privileged information.

(xx) That a party that asserts legal professional privilege should generally be able to provide a rational justification for its claim without needing to disclose the content or substance of the matter in respect of which the privilege is claimed and, failing such justification, there is nothing before court but the claim to privilege itself; the means for testing its validity is absent if resort is not had to the mechanism of judicial peeking, which, as has been noted, a court should generally be hesitant to undertake.

(xxi) That, resulting from an invitation to privately inspect the redacted material, the covered-up portions, as expected, contained numerous references to documents, including documents in the course of being drafted, and to a certain entity. The mere references did not, however, set out the substance of any request for legal advice or the content of any advice given. They also did not, either on their own, or when read in the context of the documents as a whole, afford any material that could be identified as providing secondary evidence by which the content of the privileged communications that occurred in the course of the work being billed for could be inferred.

(xxii) That the Applicants have either misconceived the nature and ambit of their legal advice privilege, or their failure to provide the context in which they contend for it has made its basis impossible to recognise in most of the redacted material.

(xxiii) That in the result the court found itself unable to grant the declaratory relief sought by the Applicant in respect of any redaction where it has not been sufficiently clear on a reading of the invoices as a whole that it discloses – either directly, or inferentially – the substance, as distinct from the mere occurrence, of a communication in the continuum of communications entailed between the Applicants and their attorneys in the seeking or giving of advice.

(xxiv) That the court had been able to identify only three of the redacted passages as qualifying for the assertion of legal advice privilege and all three passages appear in tax invoice no 6047890, dated 31 July 2008 and in each of those instances the court considered that the information contained in the fee note was such that the character of the advice sought by the client may be inferred, in the sense of conveying not only that advice was sought, but also the substance of the client's evident concern in an identifiable legal context.

(xxv) That, accordingly, it was declared that the specified portions of the Applicants' attorneys' tax invoice no 6047890, dated 31 July 2008, were protected from disclosure by reason of legal advice privilege.

(xxvi) That the Applicants had enjoyed a measure of success, albeit that relief is not being afforded in respect of the vast majority of the redactions in respect of which they purported to assert privilege. By the same token, however, the Commissioner could also be said to have been substantively successful because SARS' contentions on the ambit of the privilege have essentially been upheld and applied in the determination of the case and in the circumstances the court considered that it would be just that each party bear its own costs.

2.4 GB Mining and Exploration SA (Pty) Ltd v C:SARS

GB Mining had been a shelf company that had been acquired in order to develop a unique process for the extraction of platinum from chrome mining tailings and in order to exploit this concept it was necessary to find a source of chrome tailings as well as finance to construct a plant to process the tailings.

GB Mining, having been formed as the vehicle to develop the aforesaid project (known as 'RK1'), a source of chrome tailings had been identified on the farm Kroondal 34 and, as regards finance, capital was to be raised from the public via OTR Mining Ltd (OTR) being a company which was listed on the Johannesburg Stock Exchange (JSE) and the intention was that GB Mining would transfer its business to and would become the principal shareholder in OTR and thereby secure for itself the advantages of access to the JSE.

However, OTR was in dire financial straits and in order to prevent its demise and its delisting GB Mining mounted a rescue operation. In terms of a formal rescue offer, subject to approval by the JSE and Securities Regulation Panel (SRP), GB Mining would provide loan capital for payment of creditors and employees in return for shares in proportion to the amount of the loan.

The listing of OTR's options shares on the JSE was terminated on 22 August 2003 and which effectively brought an end to the rescue operation.

GB Mining, in the interim, had expended funds in the amount of R2 638 070 on the payment of salaries for staff and office expenses.

GB Mining had contended that the aforementioned employees had been employed by it and that this expenditure had been incurred in the production of income and had qualified as a deduction in terms of s 11(a) read with s 23(g) of the Income Tax Act.

SARS, had, however, determined that the amount in issue had been advanced by Appellant to OTR as a loan and its deduction had been disallowed as being capital in nature. This determination had been upheld by the court a quo, being the Pretoria Tax Court (see ITC 1863 (2012) 75 SATC 125 per Mokgoatlheng J) and was challenged by GB Mining in this appeal.

GB Mining had also required further capital while the OTR rescue offer was being considered and had approached Aquarius Platinum (South Africa) (Pty) Ltd as a source of capital and to be a suitable partner in exploiting the RK1 concept. According to the evidence before the court it was agreed that GB Mining and Aquarius would jointly exploit the Kroondal dump on a 50:50 basis and would use the plant of Kroondal Platinum Mines Ltd, a wholly owned subsidiary of Aquarius, to process the material. Aquarius was to contribute R14 million for its 50% share, GB Mining would receive a 25% share in the consortium and 'another 25% for cash at the cost of the plant' and GB Mining would be paid R3,5 million.

The aforesaid amount of R3,5 million was paid to GB Mining and it was this payment that gave rise to the next area of dispute between GB Mining and SARS who contended that in return for payment of this amount Aquarius had acquired 50% of the mineral rights in the Kroondal dump.

GB Mining, however, contended that it did not dispose of these rights to Aquarius, as they remained ceded to GB Mining, which in turn had made them available to the joint venture as its capital contribution.

SARS, on the other hand, determined that GB Mining had disposed of an asset comprising a Kroondal right/interest to Aquarius for R3,5 million and this determination had been upheld by the court a quo and was also challenged by GB Mining in this appeal.

In or about 2003 GB Mining, Aquarius and Victoria Global Holdings Ltd concluded a Notarial Consortium Agreement in terms of which they would jointly produce platinum group metal concentrate at a consortium plant to be erected in the Xstrata mining area and a joint venture styled RK1JV was set up and profits from the joint venture would be shared in the same ratio as the respective shareholding. GB Mining would contribute the difference between the Rand equivalent of the Victoria contribution and R8 million. It was recorded that GB Mining had 'contributed to the consortium certain mineral rights and intellectual property.'

SARS determined that GB Mining had thereby disposed of an asset to RK1JV, the proceeds of which were R8 million. The base cost was nil and the disposal consequently resulted in a 'capital gain' of R8 million for GB Mining.

GB Mining contended, however, that there was no disposal of an asset as it had acquired the Xstrata and Bayer minerals for and on behalf of the RK1JV. The court a quo had upheld SARS' determination which was challenged by GB Mining in this appeal.

The objections raised by GB Mining to the determinations made by SARS concerning the OTR payments, the disposal of the Kroondal dump and the disposal of an asset to the RK1 joint venture, were based upon what GB Mining had contended was incorrect information supplied to SARS in GB Mining's tax returns and the question was whether it was permissible for GB Mining to do this by way of objection and appeal rather than by asking for a reduction in the assessments.

Another issue raised before the court was the question of the deductibility of overseas travel expenditure incurred by GB Mining's representatives in terms of s 11(a) of the Income Tax Act on the ground that they were incurred in the production of income.

SARS contended that 50% of the travel expenditure was of a 'capital nature' in terms of s 11(a) of the Act and was not deductible.

The court a quo had upheld SARS' determination which was the subject of a further challenge by GB Mining in this appeal.

As a result of certain changes in shareholding between the different entities and joint ventures, it was agreed that GB Mining, which had held the interest in the RK1 project, would hold 38% of that stake on behalf of an entity RKMSA and would pay over that proportion of net income to RKMSA.

SARS determined that the 38% interest which GB Mining had held in terms of this arrangement on behalf of RKMSA, was an asset which it had disposed of during the 2005 tax year and contended on appeal that the capital gain of GB Mining should be increased from R14 993 024 to R19 648 530 to account for the reduction in the base cost.

SARS had assessed GB Mining for additional tax in terms of s 76(1) of the Income Tax Act in respect of the tax assessed under each of the disputed items and he had submitted that the penalties assessed were appropriate.

GB Mining contended that the grounds for imposing penalties were not present and no penalties should have been imposed. The court a quo had upheld SARS' determination of the penalties which was challenged by GB Mining in this appeal.

GB Mining had been the subject of revised assessments for the tax years 2003–2006 issued by SARS and GB Mining had objected to the assessments in issue.

SARS disallowed the objection in respect of the 2003 tax year and partially disallowed the objection in respect of the remaining tax years.

GB Mining had appealed to the Pretoria Tax Court (see ITC 1863 (2012) 75 SATC 125) which dismissed the appeal save in respect of the issue of management fees, which did not form part of the appeal to the Supreme Court of Appeal and the present appeal was with the leave of the President of the Tax Court.

Judge Swain held the following:

As to the reduction of an assessment by the SARS

(i) That a taxpayer may seek a reduction in SARS' assessment in terms of section 79A of the Income Tax Act without objecting to the assessment in terms of section 81 of the Act. SARS' power to reduce the assessment exists '*notwithstanding the fact that no objection has been lodged or appeal noted*'. In addition, the power of SARS is not restricted to its mero motu exercise, because the error in the assessment has to be '*proved to the satisfaction of SARS*.' In order to discharge this burden of proof the taxpayer must place information before SARS to substantiate the error relied upon and in doing so it may rely upon an error that it made in its return.

(ii) That SARS may therefore act in terms of section 79A to reduce an assessment in the absence of an objection in terms of section 81 of the Act and may do so even where it flows from incorrect information provided in the taxpayer's return. Can the taxpayer who has been the cause of the incorrect assessment by SARS instead claim to be 'aggrieved' thereby and object to an assessment in terms of section 81 of the Act?

(iii) That the statement that the powers of SARS under section 79A can be exercised '*notwithstanding the fact that no objection has been made*', suggests that an alternative route for the taxpayer to follow is by way of objection and, if necessary, appeal and that was the conclusion of Hurt J in ITC 1785 and with which this court agreed notwithstanding the oddity of a taxpayer being aggrieved by an assessment based on the erroneous information it provided in its return and, accordingly, it was permissible for GB Mining to follow the course that it did.

(iv) That the court a quo in its judgment had placed reliance on the provisions of section 82 of the Act which provided that the burden of proof rested upon any person claiming an exception, non-liability, deduction, abatement, or set-off in terms of the Act but on appeal GB Mining had contended that the provisions of section 82 of the Act were unconstitutional and invalid but it was clearly undesirable for courts to make orders declaring statutory provisions to be invalid without providing the relevant organs of state with the opportunity to intervene in the proceedings as was provided for in Rule 10A of the Uniform Rules of Court and, in casu, the Minister of Finance had not been joined in these proceedings and had a direct interest in the challenge raised by GB Mining and GB Mining, when faced with this obstacle, abandoned the point.

As to the burden of proof

(v) That the taxpayer accordingly bore the onus of satisfying SARS that the information furnished was incorrect and that a reduction in the assessment was justified and in order to do this additional evidence would have to be placed before SARS. The nature of this evidence will depend upon the facts of each case and particularly the nature of the erroneous information supplied to SARS. So, for example, the fiscus might rightly ask how it can be expected to alter or reduce an assessment when information supplied by a taxpayer is not withdrawn or substituted so as to enable the reduction or alteration contended for and this problem arises in the present case.

(vi) That in terms of regulation A2 of the Regulations issued under section 107 of the Act any return must '*be accompanied by all such balance sheets, trading accounts, profit and loss accounts and other accounts of whatever nature, as are necessary to support the information contained in the return*.' The evidence to '*support*' the information in the return must accordingly '*corroborate*' it (Concise Oxford English Dictionary, 12ed).

(vii) That balance sheets and accounts perform a vital and formal role in corroborating the information in the return. SARS must be able to rely upon the veracity and accuracy of this evidence which forms the basis for the assessment. SARS is entirely dependent upon the taxpayer to furnish this evidence. In the event of incorrect information being included in the balance sheets or accounts, evidence would have to be furnished to explain the precise nature and extent of the incorrect information and how it was included. All relevant supporting documentation to verify the correct information would have to be submitted and an amended balance sheet or account may have to be submitted to SARS, together with a full explanatory note to clarify the amendment.

(viii) That each of the contested determinations made by SARS must be approached on the basis that GB Mining bore the onus of proving that SARS was wrong and, in addition, where GB Mining contends that the determination was based upon incorrect information supplied to SARS by itself, whether in the form of balance sheets and accounts or otherwise, GB Mining must show that it had provided credible and reliable evidence to explain the error and substantiate what it maintains is the true position. In any event, even if SARS had borne the onus of establishing the correctness of the determinations made, as will become apparent, the outcome of this appeal would have been the same.

As to the OTR payments

(ix) That GB Mining did not provide credible and reliable evidence to explain the alleged error in describing the amount in question as an '*OTR loan*' in its financial statements and why its auditors KPMG had done so. Indeed, all the information at hand pointed emphatically in the opposite direction and SARS' view, endorsed by the Tax Court, that this was a loan that was written off when the OTR rescue failed, was plainly correct.

(x) That, accordingly, the amount of R2 638 070 did not qualify as a deduction in terms of section 11(a) of the Act and the appeal against this determination by SARS had to fail.

As to the disposal of the Kroondal dump

(xi) That no credible and reliable evidence had been tendered by GB Mining to explain the alleged error in its tax return describing the transactions as a sale of the dump to Aquarius. The contradictions and inconsistencies in the evidence of Mr Gardner considered together with the conflict between his evidence and the financial statements, the tax return and other documents, pointed ineluctably to the conclusion that the amount in question should not be excluded in terms of the Eighth Schedule to the Income Tax Act.

(xii) That SARS had correctly determined that GB Mining had disposed of an asset comprising a Kroondal right or interest to Aquarius for '*proceeds*' of R3,5 million. The base cost of the asset, being the amount paid by GB Mining in acquiring the asset from the farmers was R1 780 771 and the capital gain for GB Mining in its 2003 tax year was therefore R1 719 229 and the appeal against this determination by SARS accordingly failed.

As to the travel expenditure claim

(xiii) That GB Mining in a schedule annexed to its tax return had set out details of overseas travel and the costs associated therewith, undertaken by its representatives, which it had claimed as a deduction in terms of section 11(a) of the Income Tax Act on the basis that the expenses had been incurred in the production of income and were consequently not capital in nature.

(xiv) That if the purpose of the overseas travel was partially to produce income for GB Mining and partially to improve the income-earning structure of GB Mining, an apportionment of the expenses incurred could be made on the basis of '*what would be fair and reasonable in all the circumstances of the case*.'

(xv) That the apportionment by SARS of the expenses claimed for overseas travel on a 50:50 basis, so that 50% was deemed to be of a capital nature and not deductible in terms of s 11(a) of the Act in the amount of R412 339, was fair and reasonable in all the circumstances and the appeal against this determination by SARS accordingly had to fail.

As to the disposal of an asset to the RK1 joint venture

(xvi) That GB Mining's ipse dixit in the form of the trial balance which was never withdrawn and never properly explained was fatal to its case and the probabilities were that GB Mining had disposed of an asset, being the Xstrata and Bayer rights to the other members of the consortium for a consideration of R8 million and, accordingly, the appeal against SARS' determination must fail.

As to the disposal of a 38% joint venture interest

(xvii) That SARS had determined that the 38% interest in 25% of the RK1 joint venture which GB Mining had held on behalf of RKMSA was an asset which it disposed of, thereby attracting capital gains tax whereas GB Mining had contended that there had been an exchange of assets of equal value, which did not result in any capital gain.

(xviii) That in terms of par. 38 of the Eighth Schedule to the Income Tax Act where a person disposes of an asset for a consideration not measurable in money, the person must be treated as having disposed of that asset for proceeds equal to the market value of the asset, as at the date of disposal. The finding of the court a quo that the value of the rights that were exchanged were similar, or according to GB Mining of equal value, did not alter the fact that the 38% share ceded by GB Mining to RKMSA, was disposed of for '*a consideration not measurable in money.*'

(xix) That SARS had originally determined that the base cost of the asset included donations tax of 20% on the amount of R23 277 530, producing an amount of R4 655 506. The court a quo, however, had decided that there was no donations tax payable and there was no appeal against that finding. The base cost accordingly fell to be reduced from R8 284 506 to R3 629 000 with a consequent increase in the capital gain from R14 993 024 to R19 648 530 for GB Mining in its 2005 tax year. The assessment was accordingly raised on a lower amount than could be justified by SARS and that could not be a cause for complaint by the taxpayer and accordingly the appeal against SARS' determination failed.

As to the additional tax in terms of section 76 of the Income Tax Act

(xx) That SARS submitted that in relation to each of the contested assessments there was an omission in terms of section 76(1)(b) of the Act, or an '*incorrect statement*' in terms of section 76(1)(c), in respect of the relevant tax return. These sections provide that the additional tax payable is an amount equal to twice the amount of the tax chargeable. SARS, however, has a discretion in terms of section 76(2)(a) to remit the additional tax '*or any part thereof as he may deem fit*'. Should SARS decide not to remit the whole of the tax imposed, this decision is subject to objection and appeal.

(xxi) That SARS had erred in imposing the additional tax that he did in respect of the travel expenditure and the OTR amount. There was no omission or incorrect statement in respect of the travel expenditure as the details of the trips were disclosed and GB Mining had then entered into negotiations with SARS. There had not been an omission or the furnishing of incorrect information and the imposition of the additional tax was not justified. In the case of the OTR amount no omission or incorrect statement was made in the tax return.

(xxii) That in regard to the remaining instances where additional tax was imposed, it had been correctly imposed at an appropriate rate and in each instance it was clear that there was an omission or incorrect statement concerning the relevant facts.

As to the question of costs

(xxiii) That the court a quo had ordered GB Mining to pay SARS' costs and it was only entitled to make this order if SARS applied for it in terms of section 83(17) of the Act.

(xxiv) That, however, when regard is had to the fact that GB Mining had in this appeal succeeded in having the additional tax in respect of the OTR amount and the travelling expenses entirely remitted, a suitable order was that SARS should be ordered to pay 10% of GB Mining's costs in this appeal.

2.5 Medox Ltd v C:SARS

Metodex had commenced trading in South Africa during 1976 until 1995 when it was compulsorily wound-up in terms of an order of court.

Metodex, at the time of winding-up, had been indebted to SARS, in the total amount of R7 779 214,90 being the total outstanding tax in respect of value-added tax (VAT) and the employees' taxes (PAYE) and it had incurred no liability for income tax.

Metodex's winding-up order was set aside following a scheme of arrangement made in terms of section 311 of the Companies Act and the scheme was sanctioned by the court on 7 June 1996.

In terms of the compromise arrangement, the creditors accepted payments in the amount of 10 cents in a rand for the debts due and SARS was paid an amount of R769 061,70 as a dividend in terms of the scheme of arrangement.

Metodex's 1996 return of income reflected an assessed loss of R46 622 063 and in the tax years of 2004, 2007, 2009 and 2010 Metodex had started to make profits and it sought to carry forward the assessed losses and set off same against the profits earned during the tax years 2004, 2007, 2009 and 2010.

Metodex had submitted its 1998 tax return before submitting its 1997 tax return and before SARS had issued Metodex's 1997 income tax assessment he had already issued income tax assessments to Metodex in respect of its 1998 to 2002 and 2004 to 2009 years of assessment and, in doing so, he had failed to set off the balance of assessed loss incurred in the 1996 year of assessment.

As a result Metodex had been assessed for income tax together with interest totalling R5 204 481 in respect of its 2004 year of assessment and this tax liability was carried forward to subsequent income tax assessments until 2009.

Metodex sought an order in the North Gauteng High Court declaring all income tax assessments that had been issued in respect of the years of assessment following its 1997 year of assessment, null and void.

Metodex contended that the aforementioned assessments were void SARS had acted ultra vires when he had issued them by disregarding the mandatory provisions of section 20(1)(a) of the Income Tax Act in that he had failed to set off the balance of the assessed loss incurred in the 1996 year of assessment as he had issued the income tax assessment to it in respect of the 1998 tax year of assessment onwards without issuing its income tax assessment for the 1997 tax year.

Metodex contended in particular that:

- The Tax Court is a creature of statute as it was established in terms of section 83 of the Act and the Rules promulgated in terms of section 107A of the Act and it was not a court of law and its ruling was not a decision of a competent court of law.
- The rules of stare decisis did not apply to the decisions of a Tax Court as its decisions were not binding.
- The Tax Court, unlike the High Court, did not have inherent jurisdiction and the Act did not provide powers to the Tax Court to make declaratory orders on the status of the income tax assessments.
- It conceded that its right to object to the assessment in terms of the Act had prescribed as it did not object to the 1998 income tax assessments and neither did it appeal that decision within the prescribed three year period and it was adamant that it had no internal remedies available to it and the only remedy available to it was to obtain an order on the validity of the administrative action via a review or a declaratory order and maintained that because the Tax Court had no powers to grant a declaratory order, it was entitled to bring this application in the High Court.

SARS contended that the High Court did not have jurisdiction to entertain the application as the dispute between the parties concerned the merits of the assessment.

SARS contended in particular that:

- Metodex was not entitled to approach the High Court to declare the assessments void where it had not exhausted the internal remedies, or remedies provided for in the Income Tax Act, namely the statutory objections and appeal processes as contemplated in section 81 read with section 107 of the Act.

- Metodex had never lodged an objection for the 1998 year of assessment and it had never stated that there had been an assessed loss as no return had been submitted for the 1997 tax year and no appeal had been brought in terms of the Act.
- SARS had issued the assessments more than three years ago and the three-year period within which to object had lapsed. Once the three-year period had lapsed in terms of section 79 of the Act the assessments become conclusive.
- The Income Tax Act made it clear that the lawfulness and correctness of disputed assessments had to be dealt with by the Tax Court and, in dealing with the declarator the High Court would inevitably deal with the merits of the assessment.

Section 81 of the Income Tax Act read with the rules promulgated in terms of section 107A of the Act provide that 'a taxpayer who is aggrieved by an assessment may object to such an assessment in the manner and under the terms and within the period prescribed by the Act and the rules promulgated in terms of section 107A.'

Section 81(2)(b) provides that the prescribed period within which the taxpayer ought to lodge an objection to an assessment and/or a revised assessment is a period of three years after which the period for objecting may not be extended.

Judge Teffo held the following:

(i) That in Van Zyl NO v The Master and Another Eksteen J stated that '*The only way in which these assessments can be questioned is in the manner provided for in the Act, viz, by objecting to the [Commissioner] in terms of section 81 of the [Income Tax] Act and then appealing to the Special Court [now the Tax Court] in terms of section 83 of the Act.*'

(ii) That the court in Metcash Trading Ltd v C:SARS and Another held that the Tax Court is a specialist tribunal specifically tooled to deal with disputed tax cases and the court further found that the High

Court had jurisdiction to adjudicate upon tax matters only in circumstances where the relief sought is of an interlocutory nature.

(iii) That it was the court's considered view that it cannot be correct to say that a party that had failed to invoke the remedies as provided for in the Income Tax Act or internal remedies because of its own making, can come to a different forum and claim to be heard on the basis that it has no internal remedies to exhaust.

(iv) That it was clear from the authorities referred to in the judgment that the lawfulness and correctness of disputed assessments must be dealt with by the Tax Court and it cannot be correct that the Legislature intended to create competing and concurrent fora for resolution of tax disputes with resulting confusion as to selection of fora.

(v) That the role of the High Court is to provide a judge as a member of the specialised Tax Court to hear appeals and not matters of first instance.

(vi) That the Metodex did not exhaust the internal remedies when time had still allowed it and now he wants to circumvent the provisions of the Act by coming to the High Court in terms of a declaratory order which it contended will have the same effect as a review of the SARS' decision under the Promotion of Administrative Justice Act 3 of 2000 where the administrative action is reviewed and set aside but our courts should discourage this kind of application as they are tantamount to forum shopping.

(vii) That this application cannot be entertained without getting into the merits of the assessments and the merits of the assessments fell within the competency of the Tax Court.

(viii) That, furthermore, once an assessment has been done, the parties are therefore locked into the jurisdiction of the Tax Court and they must exercise their rights in the Tax Court. Once they have failed in the Tax Court, they can go to the Supreme Court of Appeal (SCA) and the Constitutional Court (CC).

(ix) That, accordingly, the High Court did not have jurisdiction to entertain this dispute and the dispute should have been pursued by way of an objection lodged with SARS and thereafter appealed to the Special Tax Court which is the appropriate forum to deal with matters of this kind.

2.6 Hathurani v C:SARS

SARS had issued, in respect of Hathurani, a tax assessment in terms whereof Hathurani was to pay R580 247 789,15 in respect of income tax, penalties and interest and against which Hathurani had lodged an appeal to the Tax Court.

In terms of section 88(1) of the Income Tax Act the noting of the appeal by Hathurani did not suspend Hathurani's obligation to pay the tax in accordance with the assessment, on the basis of the '*pay-now-argue-later*' principle.

Thereafter, Hathurani, in terms of section 88(1) of the Act, had applied to SARS for the obligation to pay the assessed tax to be suspended pending the appeal but the application had been refused by SARS and, thereafter, SARS filed a statement in terms of section 91(1)(b) of the Act and, without notice to the Hathurani, had obtained the equivalent of a judgment in the Magistrates' Court for payment of the full amount of R580 247 789,15.

Hathurani then launched an application to rescind the aforementioned judgment in the Magistrates' Court and the magistrate concerned had reserved judgment and the rescission application was still pending in that court.

Before the High Court now was an urgent application brought by Hathurani for interim relief aimed at restraining SARS from executing the default judgment taken against him and restraining SARS from enforcing or recovering the tax assessment in issue until the court had decided on certain final relief that Hathurani had intended seeking before it.

The final relief that Hathurani had proposed obtaining comprised, firstly, the review and setting aside of SARS' refusal of his application to suspend his obligation to pay tax pending the appeal in terms of section 88(1) of the Act, and secondly, the intended final relief sought to enforce an alleged agreement that, according to Hathurani, had settled his relevant tax liability and precluded SARS from issuing the aforementioned assessment.

Furthermore, the interim relief that Hathurani sought was also sought pending the finalisation of the rescission application pending in the Magistrates' Court.

It was apparent that the aforementioned settlement agreement that Hathurani had allegedly reached with SARS was pivotal to his entire case.

Hathurani's appeal to the Tax Court was also premised on the enforceability of the alleged settlement agreement and when considering Hathurani's application under section 88(1) of the Act, the committee delegated to deal therewith concluded, inter alia, that Hathurani had no prospects of success on appeal and it is that finding that Hathurani sought to attack on review.

Moreover, if Hathurani failed to prove an enforceable settlement agreement he had indeed a poor prospect of success on appeal to the Tax Court.

Thus, if Hathurani has in these proceedings failed to prove the settlement agreement, he has by the same token failed to show that he had a prima facie right to have the decision under section 88(1) reviewed and set aside.

The evidence before the court revealed that Hathurani had failed to disclose for tax purposes funds that had accrued to him from Surus Cash and Carry CC, a close corporation that traded under the name Jumbo Cash and Carry and by 2006 the tax affairs of the Hathurani and those of Africa Cash and Carry (Pty) Ltd had for some time been the subject of investigation by SARS.

It was in the context of that investigation and of litigation in respect thereof that Hathurani had conveyed to SARS' representatives that he wished to settle his tax affairs and he also offered to disclose irregularities relating to the members of Jumbo Cash and Carry.

Hathurani's case was that he had made the offer on condition that he be given the same benefit as those who had applied for and had received exchange control and tax amnesty in terms of the Exchange Control Amnesty and Amendment of Taxation Laws Act 12 of 2003.

Hathurani stated that SARS stood to benefit from his offer as his disclosures would have enabled SARS to recover taxes from other members of Jumbo Cash and Carry who also did not disclose income to SARS.

In the circumstances, the settlement agreement that Hathurani had relied upon was allegedly entered into in writing on 12 April 2007 and it was his case that in terms thereof he was to make full and proper disclosure to the best of his '*knowledge and memory*' of the tax irregularities of members of Jumbo Cash and Carry with particular reference to those funds, including his own, that were undeclared and expatriated.

Hathurani further contended that the agreement provided that, in return for his disclosure, his tax affairs were to be settled on the same terms as those who benefited from the Amnesty Act and, in addition, the settlement agreement provided that he would not be the subject of criminal prosecution on account of undisclosed income for the relevant period.

Hathurani finally contended that he would, in terms of the said agreement, be obliged to pay in settlement of his tax obligations for the relevant period an agreed 2% which was to be calculated on the previously undisclosed income that he was to disclose under the agreement.

Hathurani annexed to his founding affidavit the written agreement of 12 April 2007 which primarily recorded an agreement between Africa Cash and Carry and SARS but Hathurani was not recorded as a party thereto.

The aforesaid agreement recorded that it had been entered into so as to settle a dispute between the parties thereto and in order to achieve '*a mutually facilitative and transparent relationship*' and to '*achieve a significantly positive shift in that direction*.' Against that backdrop the parties then agreed on practical steps in order to resolve outstanding tax matters regarding '*the taxpayers*' including Africa Cash and Carry. The taxpayers were then defined and Hathurani was recorded as one of them.

It was Hathurani's case that the settlement agreement as described was contained in clauses 5 and 6 of the April agreement.

Judge du Plessis held the following:

As to the interim relief pending the rescission application

(i) That in regard to the interim relief sought by Hathurani pending his rescission application (ie restraining SARS from executing the default judgment and from enforcing or recovering the relevant tax assessment), as long as SARS' decision not to suspend the obligation to pay (the section 88(1) decision) stands, Hathurani is in law obliged to pay the assessed amount and that is so whether the default judgment is rescinded or not. To grant a restraining interdict pending the outcome of the rescission application would ignore SARS' underlying right to enforce the obligation.

As to the purported settlement agreement

(ii) That it was apparent that the settlement agreement that Hathurani had allegedly reached with SARS was pivotal to his entire case and it was pivotal even to Hathurani's intended application to review and set aside SARS' refusal to suspend Hathurani's obligation to pay. If Hathurani fails to prove an enforceable settlement agreement, he has indeed a poor prospect of success on appeal to the Tax Court. Thus, if Hathurani has in these proceedings failed to prove the settlement agreement, he has by the same token failed to show that he has a prima facie right to have the decision under section 88(1) reviewed and set aside.

(iii) That what was apparent from clauses 5 and 6 of the settlement agreement was that they dealt with two distinct aspects: From clause 5 it was apparent that taxpayers had been subpoenaed to attend an inquiry under section 74C of the Act. SARS had agreed to withdraw the subpoenas on condition that the taxpayers made full and proper disclosure as required by law. Apart from the undertaking to make disclosure, this clause did not remotely resemble the agreement that Hathurani sought to prove in this case. Moreover, it was apparent from clause 6 that some taxpayers, including Hathurani, had by way of a letter indicated their willingness to make disclosures but the clause did not record consensus as to whether the taxpayers would be entitled to treatment akin to amnesty and the clause simply did not record a firm agreement in this regard.

(iv) That not only was no agreement apparent from clause 6 of the document, but, read as a whole, the document definitely does not record an agreement as contended for by Hathurani. Moreover, the document does not record that, in return for his disclosure, Hathurani's tax affairs were to be settled on the same terms as those who benefited from the Amnesty Act and there was no mention in the document of a percentage, be it 2% or otherwise that Hathurani's was to pay once he had made disclosure.

(v) That, on this basis alone, it had to be concluded that Hathurani did not, on his own showing, adduce prima facie evidence of the agreement that he contended for and insofar as it related to Hathurani, the tenure of the April agreement was rather that contended for by SARS in that the parties had reached an agreement as to a process that, if adhered to, may have resulted in a settlement agreement.

(vi) That Hathurani's contention that the April agreement fell to be rectified was not supported by any facts that showed that the requirements for rectification were present and he also did not clearly state how the rectified document was to read.

(vii) That the court's conclusion that the April agreement did not evince the agreement contended for by Hathurani was fortified by Hathurani's own evidence as to events that followed after the date of the April agreement. In regard to the putting in place of a more detailed written framework for the disclosure that was to be made under the agreement, the document in question did not indicate that an agreement had been reached as to how Hathurani was to be assessed for tax purposes once he had made disclosure but, on the contrary, the document explored possible ways in which agreement could be reached on the assessment after disclosure had been made.

(viii) That in regard to the further minute of a '*without prejudice*' meeting between Hathurani, his advisors and representatives of SARS, it was clear from the document that proposals were made but that no final and binding agreement was reached. In addition, the percentage mooted during these discussions was 10% '*of the amount involved*' and it was clear that the 2% that Hathurani contended had been agreed to in April was not even a possibility in October.

(ix) That, in a nutshell, Hathurani had failed to adduce evidence that proved even on a prima facie basis that he had reached a settlement agreement with SARS and in view of the aforesaid finding that there was no agreement, it was unnecessary to deal with the issue as to whether the agreement was void as neither SARS nor his representatives were empowered to enter into such an agreement without complying with the relevant provisions of the Income Tax Act and regulations promulgated under it.

(x) That in regard to whether SARS' conduct in the case constituted a breach of Hathurani's fundamental rights under section 33(1) of the Constitution of South Africa 108 of 1996, ie his right to lawful and reasonable administrative action, the court was of the view that having found that there was no agreement that precluded the assessment from being made as it was made, the attack based on section 33(1) of the Constitution could not succeed.

(xi) That it followed that Hathurani had failed to show that he had a prima facie right to the final relief that he had intended seeking and the interim relief could not be granted.

2.7 Chittenden NO & another v C:SARS & another

Second Applicant, being the taxpayer, had been placed under supervision in terms of the business rescue provisions of the Companies Act 71 of 2008, which proceedings commenced on 27 May 2013 and for which First Applicant was appointed as business rescue practitioner on 30 May 2013.

SARS was a creditor of Second Applicant who had an outstanding tax debt of just under R12 million, which was not a debt as contemplated by sections 167 and 204 of the Tax Administration Act and had not been suspended in terms of section 164 of that Act.

SARS had at a subsequent creditors' meeting and in his capacity as a creditor voted against the business rescue plan that had been prepared and submitted by First Applicant.

First Applicant then launched an application to court in terms of the provisions of section 153(1)(a)(ii) read with section 153(7) of the Companies Act 71 of 2008 to have SARS' vote set aside on the basis that the vote was inappropriate and that application is currently still pending.

In the meanwhile, the Department of Defence had sent a letter to Second Applicant informing it that its tax clearance certificate was due to expire on 22 February 2014 and in response thereto the Applicants lodged a formal application for a new tax clearance certificate which was then refused by SARS.

Thereafter the Applicants lodged the formal application that was now before the court to compel SARS to provide Second Applicant with a renewed tax clearance certificate.

SARS contended that the issuing of a tax clearance certificate was governed by the provisions of the Tax Administration Act and that neither himself nor the court ought to order the issuance of a tax clearance certificate in these circumstances.

Section 256(3) of the Tax Administration Act provided at the relevant time:

‘A senior SARS official may provide a taxpayer with a tax clearance certificate only if satisfied that the taxpayer is registered for tax and does not have any–

(a) tax debt outstanding, excluding a tax debt contemplated in section 167 or 204 or a tax debt that has been suspended under section 164 or does not exceed the amount referred to in section 169(4); or

(b) outstanding return unless an arrangement acceptable to SARS has been made for the submission of the return.’

It was evident from section 256(3)(a) that if the taxpayer has a tax debt outstanding SARS cannot provide that taxpayer with a tax clearance certificate unless it has suspended the obligation to pay in terms of that section.

Judge Bagwa held the following:

(i) That a decision on the issuance of a tax clearance certificate constitutes administrative action as contemplated by the Promotion of Administrative Justice Act (‘PAJA’). Should the Applicants be dissatisfied with SARS’ decision and wish to challenge the same, they should launch review proceedings as provided by section 8 of PAJA and, absent the institution of such proceedings, and pending the finalisation thereof, the decision remains in place and is of full force and effect.

(ii) That the issuing of a tax clearance certificate is governed by the provisions of the Tax Administration Act (‘TAA’). Second Applicant had an outstanding tax debt of just under R12 million which, according to SARS was not a debt as contemplated by sections 167 and 204 of the TAA and had not been suspended in terms of section 164 thereof.

(iii) That it had to be borne in mind that the relief sought by the Applicants was not interim but final as section 256(3) of the TAA did not provide for the issuance of an interim or provisional tax certificate.

(iv) That the two matters, namely the issuance of a tax certificate and SARS' vote against First Applicant's revised business plan should be treated as two separate matters to be determined by different factual and legal considerations.

(v) That the consequence of granting the relief sought by the Applicants would set a precedent that would negatively impact on SARS' tax administration and henceforth every taxpayer whose application for a clearance certificate had been refused would simply be entitled to approach the court and without having to address the merits of the refusal be able to obtain an order compelling SARS to issue him or her with the certificate.

(vi) That the provisions of section 256(3) of the TAA are peremptory in that they allow SARS to issue a tax certificate '*only if satisfied*' that the requirements of the section are met and the fact that a refusal of a tax clearance certificate is likely to cause the taxpayer involved actual or impending harm did not entitle them to a mandamus compelling the court or SARS to issue such a certificate.

(vii) That in the circumstances the Applicants had failed to make out a case and had equally failed to make out a case for the relief sought.

3. INTERPRETATION NOTES

3.1 Income Tax – Instalment credit agreements and debtors' allowance – No. 48(2)

This Note provides guidance on the application and determination of the debtors' allowance granted under section 24(2), as it applies to instalment credit agreements.

Section 24 has two main purposes.

First, in the context of a disposal by a taxpayer of trading stock under an instalment credit agreement, section 24(1) provides that the whole amount, excluding finance charges, is deemed to be included in the taxpayer's gross income at the time of entering into the agreement. This deemed inclusion prevents any argument that the proceeds under an instalment credit agreement do not accrue because of a delay in transfer of ownership.

Secondly, section 24(2) provides the Commissioner with the discretion to grant a debtors' allowance to the taxpayer, the object of which in essence is to subject the profit under the instalment credit agreement to tax on a cash-flow basis.

Finance charges must be recognised on a day-to-day basis over the period of an instalment credit agreement with reference to the outstanding balance under section 24J.

This Note does not apply to the allowances granted to township developers under section 24(2), namely, the debtors' allowance and the allowance for contingent development expenditure.

The debtors' allowance does not apply to:

- sales on extended credit in the absence of a condition suspending the passing of ownership;
- sales subject to a resolutive condition, for example, when it is agreed that a sale shall be regarded as cancelled if the purchase price is not paid by a certain date; and
- leases in terms of which the lessee has an option to acquire the goods at the end of the lease. Such an option is not an agreement of sale, but merely confers on the holder the right to enter into such an agreement at an agreed price at a future date.

Section 24 also applies to lay-by agreements of not less than 12 months. Under a lay-by the buyer pays the purchase price over a period while the seller retains possession of the goods until the purchase price is paid in full. Ownership passes to the buyer on the date on which the purchase price is paid in full and the goods are delivered to the buyer.

The sale of trading stock under an instalment credit agreement could be subject to section 24(1) which determines that the whole amount should be deemed to be included in gross income at the time that the agreement is entered into. For purposes of section 24, the expression 'the whole of that amount' must exclude finance charges and VAT and will therefore be the sum total of capital instalments.

Taxpayers entering into an instalment credit agreement that are subject to section 24(1) may claim a debtors' allowance if the requirements under section 24(2) are met. The granting of the debtors' allowance is at the discretion of the Commissioner. Taxpayers must use one of the methods detailed in this Note to calculate the gross profit percentage that should be used to determine the debtors' allowance. The method chosen must be consistently applied since SARS will not accept a taxpayer switching between methods in an attempt to exploit the allowance.

3.2 Exercise of discretion in case of late objection or appeal – No 15(4)

This Note provides guidance on the factors that a senior SARS official will take into account when deciding whether to extend the period for lodging an objection under section 104(4) or an appeal under section 107(2). It also serves to highlight that the period during which an objection or appeal may be lodged is limited.

A taxpayer who is aggrieved:

- by an assessment made on the taxpayer; or
- by certain decisions made under the TA Act or tax Acts,

may object to and appeal against those assessments or decisions under the TA Act.

An objection against an assessment or decision must be lodged in the manner, under the terms and within the period prescribed in the rules.

A person whose objection has been disallowed may appeal to the tax board or tax court against that outcome and in such event the appeal must be lodged in the manner, under the terms and within the periods prescribed in the TA Act and the rules. A senior SARS official may, within prescribed limits, extend the period prescribed in the rules within which an objection or appeal must be lodged.

The objection and appeal procedures, which are contained in the TA Act and the rules, apply to any dispute under, amongst others, the following tax Acts administered by the Commissioner:

- Diamond Export Levy Act
- Diamond Export Levy (Administration) Act
- Employment Tax Incentive Act
- Estate Duty Act
- Income Tax Act
- Mineral and Petroleum Resources Royalty Act
- Mineral and Petroleum Resources Royalty (Administration) Act
- Securities Transfer Tax Act
- Securities Transfer Tax Administration Act
- Skills Development Levies Act
- Tax Administration Act
- Transfer Duty Act
- Unemployment Insurance Contributions Act
- Value-Added Tax Act

The Customs and Excise Act contains its own provisions relating to dispute resolution.

An objection against an assessment or decision must be lodged within 30 business days of the date of assessment or decision. Similarly, an appeal against the disallowance of an objection must be lodged within 30 business days of the date of disallowance of the objection.

A senior SARS official may extend the date for lodging an objection by:

- 21 business days if satisfied that reasonable grounds exist for the delay in lodging the objection; and
- between 22 business days and three years if satisfied that exceptional circumstances exist which gave rise to the delay in lodging the objection.

No extension can be granted for:

- a delay of more than three years from the date of assessment or decision; or
- an objection that relates to a change in the practice generally prevailing at the date of assessment or decision.

A senior SARS official may extend the date for lodging an appeal by:

- 21 business days, if satisfied that reasonable grounds exist for the delay; or
- up to 45 business days, if exceptional circumstances exist that justify an extension beyond 21 business days.

3.3 Produce held by nursery operators – No. 79

This Note provides guidance on the valuation of produce held and not disposed of by nursery operators at the beginning and at the end of each year of assessment. It also examines the capital gains tax consequences of the disposal of produce.

Section 26(1) stipulates that the taxable income of any person carrying on pastoral, agricultural or other farming operations shall, in so far as the income is derived from such operations, be determined in accordance with the Act but subject to the First Schedule. The First Schedule deals with the computation of taxable income derived from pastoral, agricultural or other farming operations.

The taxable income from farming operations is combined with the taxable income from other sources to arrive at the taxpayer's taxable income for the year of assessment.

The First Schedule applies regardless of whether a taxpayer derives an assessed loss or a taxable income from farming operations. The Schedule may further apply even after farming operations have been discontinued [section 26(2)].

Both section 26 and the First Schedule apply to farming operations conducted by a nursery operator. Some nursery operators have in the past, however, failed to comply with paragraph 2 of the First Schedule to the Act. Paragraph 2 requires a nursery operator carrying on farming operations to include in that operator’s return of income the value of all produce held and not disposed of at the beginning and at the end of each year of assessment.

Persons conducting the business of a nursery in the course of which plants or trees are grown for sale are regarded as carrying on farming operations. Persons in this category are taxed in accordance with section 26 subject to the First Schedule. The same tests used to determine whether a person carries on farming operations apply to these nursery operators. The produce held at the beginning and at the end of the year of assessment of a nursery operator carrying on farming operations is specifically excluded from section 22 and must be dealt with under the First Schedule. The value of the produce held and not disposed of must be brought into account at the beginning and end of the year of assessment. The value to be placed upon the produce on hand is the fair and reasonable value as the Commissioner may fix in accordance with paragraph 9. The plants or trees grown by a nursery, which are not ready for sale, will fall into the category of growing crops and must not be brought into account when the taxable income from farming operations is determined.

Any trading stock purchased from outside sources and offered for sale is not attributable to farming operations and must be dealt with under section 22.

3.4 The income tax treatment of stolen money – No. 80

This Note provides guidance on:

- the deductibility of expenditure and losses incurred in a taxpayer's trade when money is stolen through embezzlement, fraud or theft, including expenditure incurred on legal and forensic services to investigate such losses;
- the inclusion in income of amounts recovered or recouped in respect of such expenditure and losses previously allowed as a deduction; and
- the taxation of stolen money in the hands of the thief and the non-deductibility of such amounts when repaid.

Taxpayers may incur expenditure and losses during the course of their business activities as a result of money stolen through embezzlement, fraud or theft by, for example, employees, directors, independent contractors, shareholders, partners, burglars or armed robbers. As a consequence, these taxpayers may also incur expenditure pertaining to legal and forensic services to investigate such losses.

The manner in which the embezzlement, fraud or theft is perpetrated will vary from case to case, for example, it could result from a physical break-in to the taxpayer's premises, cheques could be manually altered or there could be an unauthorised use of electronic systems to make payments. The identity of the person perpetrating the embezzlement, fraud or theft may be known or unknown to the taxpayer.

The stealing of money through embezzlement, fraud or theft has income tax implications for both the victim and the thief.

4. BINDING PRIVATE RULINGS

4.1 BPR 180 – Improvements effected on land not owned by taxpayer

This ruling deals with the question as to whether a taxpayer, who is a party to a public private partnership, will qualify for a deduction under any of the provisions referred to in section 12N in respect of improvements effected on land not owned by the taxpayer.

In this ruling references to sections are to sections of the Act applicable as at 28 March 2013 and unless the context indicates otherwise, any word or expression in this ruling bears the meaning ascribed to it in the Income Tax Act.

This is a ruling on the interpretation and application of the provisions of section 12N.

<u>Parties to the proposed transaction</u>

The Applicant: A company incorporated in and a resident of South Africa

The Department: A department of the national government

<u>Description of the proposed transaction</u>

The Applicant and the Department entered into a public-private partnership (PPP), a commercial agreement, as more fully defined in Regulation 16.1 of the Treasury Regulations (GNR.225 of 15 March 2005) issued in terms of section 76 of the Public Finance Management Act No. 1 of 1999.

In terms of the PPP the Applicant will:

- finance, design, construct, operate and maintain a new serviced head office building (the new building) for the Department that is to be constructed on land owned by the national government; and
- assume the financial, technical and operational risk for the project.

The Applicant may use subcontractors to carry out its obligations for both theconstruction and the operational phases of the PPP.

The PPP provides for a unitary payment to be made by the Department to the Applicant of the capital amount owed to the Applicant, together with interest and service fees.

During the construction phase the Applicant will be granted possession of and access to the project site to construct the new building. Thereafter the operational phase will commence. The Applicant will be given access to the new building exclusively for purposes of providing the services as described in the PPP.

The Applicant does not hold any right of use or occupation of the land or the new building by virtue of any term of the PPP.

<u>Conditions and assumptions</u>

This ruling is not subject to any additional conditions or assumptions.

<u>Ruling</u>

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

- The Applicant does not comply with the requirements of paragraphs (a) and (e) of section 12N(1) and will therefore not qualify for any deduction under any provision referred to in section 12N(1).

4.2 BPR 181 – Withholding tax on interest in relation to a foreign government

This ruling deals with the withholding tax on interest arising from loans made by a funding scheme related to a foreign government, to a resident of South Africa.

In this ruling references to sections and Articles are to sections of the Act and Articles of the South Africa/Denmark Treaty applicable as at 17 September 2014 and 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 the provisions of:

- section 1(1) definition of ‘resident’;

- section 9(2)(b);
- section 24J(1) definition of ‘interest’;
- section 50A(1) definition of ‘foreign person’;
- section 50B; and
- section 50E of the Act; and
- Articles 1, 4 and 11 of the South Africa/Denmark Treaty.

Parties to the proposed transaction

The Applicant: A private company incorporated in and a resident of South Africa

The Co-Applicants: Two private companies incorporated in and residents of South Africa

Funding Scheme: A foreign funding scheme established and owned by the Danish State under Denmark’s official credit agency and a resident of the Kingdom of Denmark whose place of effective management is not situated in South Africa

Domestic Banks: Bank A and Bank B both incorporated in and residents of South Africa

Description of the proposed transaction

The Applicant and Co-Applicants intend to construct renewable energy wind farms (the wind farms) in South Africa. Three wind farms will be constructed and housed in three separate entities, namely, the Applicant and the two Co-Applicants.

Currently, the intended funding for the plant and equipment for the wind farms has been underwritten by Bank A. Denmark’s official credit agency (the Agency) has provided guarantees (export credit guarantees) to Bank A in order to assist the Applicant and Co-Applicants in financing the purchase of the plant and equipment from a Danish company.

The Agency has also agreed to co-sign the lenders’ commitment letter as part of the pre-bid financial structure, and to the extent that the Applicant and Co-Applicants are successful in their bid to develop the wind power plants, to participate in funding the projects.

The projects are expected to end by April 2017. The funding facility will become available from the middle of October 2014.

Bank A will be released from its prior commitment and the Danish Government (via the Funding Scheme) will participate in any loans that are provided to the Applicant and Co-Applicants.

It is intended that Bank A will provide 10%, Bank B will provide 10% and the Funding Scheme will provide 80% of the required funding to the Applicant and Co- Applicants, which will be used to finance the costs in relation to, amongst others, the design, development, financing, construction, ownership, operation and maintenance of the wind farms which the Applicant and Co-Applicants will construct.

Once construction has been completed, interest on the loans will be paid semiannually to Bank A, Bank B and the Funding Scheme. The tenor of the facility will be 15 years.

The Funding Scheme has confirmed that it does not carry on business in South Africa through a permanent establishment situated in South Africa. The Funding Scheme has further confirmed that it is the beneficial owner of the interest.

Conditions and assumptions

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

Ruling

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

- Article 11(1) of the South Africa/Denmark Treaty is applicable and the interest that is to be paid to the Danish Government (via the Funding Scheme) will be subject to tax in South Africa at a reduced rate of zero, provided the Funding Scheme submits a declaration and written undertaking contemplated in section 50E(3) to the Applicant and the Co-Applicants.

4.3 BPR 182 – Waiver of debt that funded mining capital expenditure

This ruling deals with the waiver of debt used to fund mining capital expenditure and the tax treatment in respect of the amount that remains to be claimed as a deduction under section 15(a) read with section 36.

In this ruling references to sections and paragraphs are to sections of the Act and paragraphs of the Eighth Schedule thereto applicable as at 12 June 2014 and 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 the provisions of:

- section 15(a) read with section 36;
- section 19; and
- paragraph 12A of the Eighth Schedule.

Parties to the proposed transaction

The Applicant: A company incorporated in and a resident of South Africa

Company A: A company incorporated in and resident of a foreign Country that holds 100 per cent of the shares in Company B

Company B: A company incorporated in and a resident of South Africa that holds 50 per cent of the shares in the Applicant

Company C: A company incorporated in and a resident of South Africa that also holds 50 per cent of the shares in the Applicant

Finance House: A company incorporated in and a resident of South Africa that specialises in development finance through loan funding

Description of the proposed transaction

The Applicant operates a new mine and the development of the mine was partly financed by equity funding, partly by loan funding from its shareholders, from Company A's ultimate holding company and from the

Finance House. The majority of the development expenditure financed through the loan funding still remains to be claimed as a deduction under section 15(a) read with section 36 (unredeemed capital expenditure).

The group to which Company B belongs proposes to dispose of its 50 per cent interest in the Applicant to a foreign purchaser. As a condition to the purchase agreement the purchaser requires the reduction and waiving of certain debts owed by the Applicant to Companies A, B and C and the Finance House prior to the purchase:

- The loans currently owed by the Applicant to Companies A, B and C will be waived in full. The loans waived will comprise loan capital, capitalised interest and capitalised management fees.
- The loans owed to the Finance House will be reduced to an agreed amount and the remaining outstanding loan balances will be repayable once funds are available. The debt reduced will comprise capital and capitalised interest.

Conditions and assumptions

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

Ruling

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

- For purposes of claiming allowances under section 15(a) read with section 36, the Applicant must, in the year of assessment in which the loans are reduced or waived, reduce the balance of unredeemed capital expenditure carried forward and deemed to be an amount of capital expenditure incurred during the next year of assessment, as contemplated under section 36(7E), with the ‘reduction amount’ as defined in section 19 and paragraph 12A in respect of the loans waived or reduced. To the extent that the loans waived or reduced funded an ‘allowance asset’ or a ‘capital asset’ as defined in paragraph 12A, the base cost of that asset must be reduced by the ‘reduction amount’ as defined in paragraph 12A.

- No ruling is made on the balance of the unredeemed capital expenditure referred to in 4 above, or on the balance thereof after any adjustments made pursuant to this ruling.

4.4 BPR 183 – Employee Housing Scheme

This ruling considers whether a taxable benefit will arise for employees who will acquire properties from an associated institution of their employer in terms of a proposed employee housing scheme.

In this ruling references to sections and paragraphs are to sections of the Act and paragraphs of the Seventh Schedule thereto as at 28 March 2014 and 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 the provisions of:

- section 1(1), definition of 'gross income' paragraphs (c) and (i); and
- paragraphs 2(a) and 2(d) of the Seventh Schedule.

<u>Parties to the proposed transaction</u>

The Applicant: A private company incorporated in and a resident of South Africa

Co–Applicant A: A public company incorporated in and a resident of South Africa

Co–Applicant B: A private company incorporated in and a resident of South Africa

Co–Applicant C: A private company incorporated in and a resident of South Africa

<u>Description of the proposed transaction</u>

In terms of a wage agreement with a recognised trade union the Applicant agreed to investigate and find a feasible housing solution for certain current and future eligible employees (the employees) of the Applicant and/or the Co-Applicants.

In terms of a feasibility study done a suitable housing scheme has been developed which will provide access to affordable housing for the employees.

The housing scheme will entail the following:

- The acquisition of suitable land and the development of housing on that land.
- Co–Applicant B will enter into a sale of land agreement (the agreement) with each of the employees whereby those employees will acquire a property from Co-Applicant B at the prevailing market value on the date of signature of the agreement.
- The purchase price agreed upon is to be paid in specified monthly instalments over a period of time. In most cases the purchase price will be paid over a period of 208 months.
- The agreements will be subject to the provisions of the Alienation of Land Act No. 68 of 1981, and specific reference is made in the agreements to sections 17 and 27 of that Act in that:
  - the employee will be entitled to accelerate payment of the full outstanding purchase price, and other amounts due and owing under the agreement, at any time and demand transfer of the property into the employee's name; and
  - the employee can demand the transfer of the property at any time after at least 50% of the purchase price has been paid, on condition that a first mortgage bond is registered over the property by the employee in favour of Co-Applicant B to secure payment of the balance of the purchase price and other amounts owing under the agreement.
- Occupation and possession of the property is to be given to the employee on the date on which the agreement is signed. Registration in the name of the employee will be delayed until the employee has paid the full consideration, or at least 50% thereof, as the case may be, to Co-Applicant B.

- Employees are required to settle the purchase price through paying monthly non-refundable instalments in the form of capital and interest, as stipulated in the agreement.
- If the employee fails to comply with the agreement, Co-Applicant B may demand specific performance from the employee, that is, either the employee rectifies the failure to perform and accordingly the sale agreement continues, or Co-Applicant B may cancel the agreement. If Co-Applicant B cancels the agreement, it may, inter alia, retain all payments made by the employee as 'rouwkoop', liquidated damages, or as compensation for the employee's occupation of the property for the period commencing from the signature date to the date of cancellation.
- In addition to the aforementioned instalments, the employees' current living out allowance (LOA) or home owners allowance (HOA) will be used toward the settlement of their outstanding purchase consideration. With effect from the date on which an employee takes occupation of the property, instead of paying the LOA or the HOA to the employee, the Applicant or Co-Applicants will pay an agreed contribution (the employer contribution) to a Housing Fund to be established for purposes of the housing scheme. These employer contributions will be paid each month by the Housing Fund to Co-Applicant B towards the reduction of the employee's indebtedness to Co-Applicant B. The monthly amount to be paid by the employee will be the difference between the 'instalment amount', as defined under each individual agreement, and the employer contribution in respect of the employee concerned.
- Employees currently pay employees' tax on the LOAs and HOAs received from their employer. The stated employer contributions, after occupation of the property has been taken by the employee, will continue to be subject to employees' tax regardless of the fact that they are to be applied towards the reduction of the employees indebtedness to Co-Applicant B under the agreement.

- The employee’s rights under the agreement will be restricted in some respects. For example, they will only be entitled to use the properties for private residential purposes and occupy the properties personally with their spouses and children. The sale, alienation, hypothecation, encumbrance, mortgage, lease or any disposal in any manner of the property by the employee is prohibited unless the prior written consent of Co-Applicant B is obtained, and the sale of the property to a third party is subject to a first right of refusal in favour of Co-Applicant B.

Conditions and assumptions

This 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 a taxable benefit by virtue of the provisions of paragraphs 2(a) and 2(d) of the Seventh Schedule.

- The employer contributions that are to be paid by the Applicant or Co-Applicants to the Housing Fund will be ‘gross income’ as defined in paragraph (c) of the relevant definition in section 1(1) and therefore still subject to employees’ tax.

4.5 BPR 184 – Asset-for-share transaction

This ruling deals with the disposal by a trust of its shareholding in a company to another company, also wholly owned by the trust, in exchange for an additional equity share to be issued by the transferee company.

In this ruling references to sections and paragraphs are to sections of the Act and paragraphs of the Eighth Schedule thereto applicable as at 5 September 2014 and 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 the provisions of:

- section 24BA;
- section 42;
- section 54;
- section 58; and
- paragraph 38.

Parties to the proposed transaction

The Applicant: A resident family trust

The Co-Applicant: A private company incorporated in and a resident of South Africa that is wholly owned by the Applicant

Company A: A private company incorporated in and a resident of South Africa that is wholly owned by the Applicant

Description of the proposed transaction

The Applicant holds all the issued shares in the Co-Applicant and Company A. The Co-Applicant and Company A hold the issued shares of various other subsidiary companies.

The Applicant proposes to dispose of its entire interest in Company A to the Co-Applicant in order to simplify the group of companies to which the Applicant and the Co-Applicant belong.

The Co-Applicant will issue an additional equity share to the Applicant in exchange for the disposal by the Applicant of its entire interest in Company A to the Co-Applicant. The current market value of the entire interest which the Applicant holds in Company A will exceed the base cost of such interest.

The additional equity share will be issued by the Co-Applicant to the Applicant solely in order to bring the proposed transaction within the ambit of section 42.

The effect of the proposed transaction will be that the Applicant will hold all the issued shares of the Co-Applicant, who will in turn hold all the issued shares of Company A.

Conditions and assumptions

This 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 fall within the ambit of section 42.
- Section 24BA will not be applicable to the proposed transaction.
- Section 24BA(4)(a)(ii) will apply.
- Sections 54 and 58 will not be applicable to the proposed transaction.
- Paragraph 38 will not be applicable to the proposed transaction.

4.6 BPR 185 – Corporate rules: Disposal of assets and liabilities as part of a group restructure

This ruling deals with the disposal of assets (including the equity shares held in various subsidiaries) and liabilities (including contingent liabilities) from one company to another company under section 42 of the Act.

In this ruling references to sections are to sections of the Act applicable as at 3 June 2013 and 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 the provisions of:

- section 11(a) read with sections 7B and 23(g);
- section 37A; and
- section 42.

Parties to the proposed transaction

The Applicant: A listed company incorporated in and a resident of South Africa

NewCo: A company incorporated in and a resident of South Africa and a wholly-owned subsidiary of the Applicant

SubCos: Various companies incorporated in and residents of South Africa and wholly-owned subsidiaries of the Applicant

<u>Description of the proposed transaction</u>

The Applicant currently owns 100% of the share capital in each of the SubCos and holds a major portion of the group's operating assets. In order to streamline the group operations, the Applicant has identified the need to restructure its South African operations with the objective that the Applicant becomes a true holding company.

In order to restructure the South African group, a newly incorporated company, NewCo, has been established as a wholly-owned subsidiary of the Applicant.

The proposed steps for implementing the restructure are as follows:

(a) The Applicant will transfer to NewCo:

 (i) All of its assets at book value (including the shares held in the SubCos but excluding a specified list of excluded assets) under sections 42 or 40CA, as the case may be, depending on the relative base cost and market value of each asset.

 (ii) All of its liabilities (other than a specified list of excluded liabilities). Included in the delegation of the liabilities are loans granted by financial institutions which are secured by specific assets that were acquired with the loans. The assets acquired are used in the Applicant's income-producing business and will also be transferred to NewCo. As a necessary consequence of the transfer of such assets, the financial institution loans will be assumed by NewCo.

 (iii) Contingent liabilities which include provision for the following:

  (aa) Leave pay

  (bb) Incentives/bonuses

  (cc) Environmental rehabilitation

  (dd) Share incentive scheme

(ee) Post-retirement medical aid benefits

(b) As consideration for the disposal of the assets by the Applicant to NewCo, NewCo will assume the liabilities (including contingent liabilities) and issue equity shares in the amount of the net asset value of the assets and liabilities transferred.

Conditions and assumptions

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

- The disposal of the assets by the Applicant to NewCo under section 42 will be at book value and will be structured in such a way that the only consideration given by NewCo in exchange for the assets will consist of the shares issued by NewCo and the assumption of the Applicant's liabilities, including the contingent liabilities.
- The Applicant will transfer to NewCo all the assets and liabilities (including contingent liabilities) that are attributable to and arose in the normal course of the business undertaking that is being disposed of to and acquired by NewCo, as a going concern.
- Section 197(2)(a) to (d) of the Labour Relations Act No. 66 of 1995 applies to the proposed transaction in which a business undertaking is transferred as a going concern and the parties have not agreed otherwise under section 197(6) of that Act. Furthermore, NewCo will not have recourse to the Applicant for the contingent liabilities assumed.

Ruling

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

- The disposal by the Applicant of its assets to NewCo at net book value will constitute an 'asset-for-share transaction' under section 42.
- Expenditure incurred in relation to the contingent liabilities transferred to NewCo from the Applicant (excluding the expenditure related to environmental rehabilitation to which section 37A may apply), will be deductible in the hands of NewCo provided that the requirements of

section 11(a) read with sections 7B and 23(g) are met at the time when the contingent liabilities materialise. In assessing whether or not the requirements of the above-mentioned sections are met, expenditure must be evaluated within the context of the nature of the going concern business as carried on by the Applicant prior to the transfer and by NewCo subsequent to the transfer, without regard to the fact that the assumption of that obligation by NewCo was part of the consideration for the acquisition of the assets. The circumstances under which the contingent liability arose in the hands of the Applicant are therefore relevant.

- In the context of the environmental rehabilitation provision assumed as part of the transactions conducted under section 42, the expenditure incurred by Newco in making future payments to the rehabilitation trust will be deductible, provided that the requirements of section 37A are met at the time of making the payments. In evaluating whether or not the requirements of section 37A are met, no regard must be had to the fact that the assumption of that obligation by NewCo was part of the consideration for the acquisition of the assets.

5. BINDING GENERAL RULING

5.1 BGR 25 – Exemption foreign pensions

This BGR provides clarity on the interpretation and application of the words 'from a source outside the Republic' in section 10(1)(gC)(ii) in relation to pension payments that are received by or accrue to a resident.

<u>Background</u>

Section 10(1)(gC)(ii) exempts from normal tax any pension received by or accrued to a resident from a source outside the Republic as consideration for past employment outside the Republic.

The term 'source outside the Republic' can be interpreted to mean either the originating cause which gave rise to that pension (foreign services rendered), or the location from which the pension is received (namely, where the fund is situated).

The term 'past employment outside the Republic' refers to services rendered outside the Republic. Only the portion of a pension that relates to services rendered outside the Republic is exempt from income tax.

Ruling

The term 'source outside the Republic', for purposes of section 10(1)(gC)(ii), refers to the originating cause which gives rise to the pension income, namely, where the services have been rendered.

This ruling constitutes a BGR issued under section 89 of the Tax Administration Act No. 28 of 2011.

Application

The following formula is used to calculate the portion of a pension that will be exempt due to services rendered outside the Republic:

Foreign services rendered / Total services rendered x Total pension received or accrued

6. DRAFT BINDING GENERAL RULING

6.1 Unbundling transactions: Meaning of 'as at the end of the day after that distribution'

This BGR addresses the interpretation of the words 'at the end of the day after that distribution' as used in section 46(3)(*a*)(v).

Background

Section 46 provides parties to an unbundling transaction with relief from various taxes that would otherwise become payable.

A shareholder who acquires unbundled shares through an unbundling transaction must allocate a portion of the expenditure and any market value on valuation date attributable to the unbundling shares to the unbundled shares under section 46(3)(*a*)(i)(*aa*).

In making this allocation, section 46(3)(*a*)(v) requires that the shareholder must use the ratio that the market value of the unbundled shares, *'as at the end of the day after that distribution'*, bears to the sum of the market values, as at the end of that day, of the unbundling shares and the unbundled shares.

<u>Application of the law</u>

In applying section 46(3)(*a*)(v) it must first be determined when the distribution of the unbundled shares occurs. Generally, a distribution will occur when the shareholder becomes unconditionally entitled to the distribution, that is, when the distribution accrues to the shareholder.

A holder of shares will become unconditionally entitled to a distribution under an unbundling transaction on the first day that the unbundling and the unbundled shares begin trading separately.

Section 59 of the Companies Act No. 71 of 2008 sets out what constitutes the record date for determining shareholder rights. Under section 59(1)(*e*) the board of a company may set a record date for determining which shareholders are entitled to receive a distribution. Under section 59(3) if the board does not set a record date, the record date will be the date of the action or event unless the memorandum of incorporation or rules of the company provide otherwise.

A holder of listed shares becomes unconditionally entitled to a distribution on the first business day[1] after the last day to trade, which is the first day on which the unbundling and unbundled shares begin trading independently of each other. The market value of the unbundling and unbundled shares as at the end of that first business day must be used when applying the ratio as specified in section 46(3)(*a*)(v). Thus if the last day to trade falls on a Friday, the first business day after the last day to trade will fall on the Monday of the next week and the closing price on the Monday must be used (assuming the Friday and Monday are both business days).

The date on which a holder of unlisted shares will become entitled to a distribution will depend on the facts and circumstances of the particular case. Generally the holder of such shares would become entitled to a distribution on the date on which the distribution is approved by the board of directors unless the board has determined that the distribution will be payable to shareholders registered in the company's share register on a specified date, in which case it will be on that date. Regard will therefore have to be had to the resolution approving the distribution. In the case of unlisted shares the market value of the unbundling and the unbundled shares as at the end of the day on which the shareholders become entitled to the distribution must be used when applying the ratio as specified in section 46(3)(*a*)(v).

<u>Ruling</u>

For purposes of section 46(3)(*a*)(v) and in relation to listed shares, 'as at the end of the day after that distribution' means as at the end of the first business day after the last day to trade.

For purposes of section 46(3)(*a*)(v) and in relation to unlisted shares, 'as at the end of the day after that distribution' means as at the end of the day on which shareholders become entitled to the distribution. This ruling constitutes a BGR issued under section 89 of the Tax Administration Act No. 28 of 2011.

7. GUIDES

7.1 What do you do if you dispute your tax assessment?

This guide deals with the New dispute resolution rules have been issued under the Tax Administration Act, 2011. It forms part of a review of the resolution of tax disputes to enhance service delivery. These rules apply from 11 July 2014.

The new rules impact on the following:

- Reasons for assessment
- Objection to an assessment
- Appeal against disallowance of an assessment
- Post-appeal stage
- Procedural applications relating to a dispute
  - • Pre-hearing formalities

7.2 Alternative Dispute Resolution: Quick Guide

This quick guide to the ADR deals with those who opt for the ADR process to resolve tax disputes with SARS.

ADR is a form of dispute resolution other than litigation, or adjudication through the courts. It is less formal, less cumbersome and less adversarial and a more cost-effective and speedier process of resolving a dispute with SARS.

7.3 Dispure Resolution Guide: Guide on the Rules promulgated in terms of section 103 of the Tax Administration Act

This document is a general guide dealing with the resolution of tax disputes in South Africa. It is an introductory guide and does not deal with all the legal detail associated with dispute resolution. It should therefore not be used as a legal reference. The guide is based on tax legislation as at the date of publication of this guide (28 October 2014).

Introduction to this guide:

<u>The right to object and appeal and finalisation within a reasonable time</u>

The importance of the ability of taxpayers to challenge the legality of actions and decisions within the tax system is internationally recognised.

The right to appeal is seen as fundamental to the fairness of the tax system.

International best practice further dictates that a tax review or appeal should be heard within a reasonable time. Although it is difficult to gauge what a reasonable time is as this is peculiar to each jurisdiction depending upon the review structure, its resources and capacity. It is important, however, to require that a tax review or appeal should be heard within a reasonable time, as there is otherwise a danger that the revenue authority or the taxpayer could unnecessarily delay the proceedings to prevent a hearing. It is in the public interest that disputes should come to an end and, if applicable, that tax that is payable by a taxpayer be collected and tax refundable to a taxpayer be refunded. It is therefore important that the right to review or appeal is subject to stipulated time periods. Unless these time periods are clearly set out, they become arbitrary.

Different tactics by different countries are used to ensure the resolution of disputes within a reasonable time.

For example, in the UK, the two key tactics by the HMRC are supporting their taxpayers to get their tax right the first time around and to resolve the disputes that do arise in a way that establishes the right tax due at the least cost to HMRC and the taxpayer. More progressively, the ATO is testing the introduction of preassessment

review and alternative dispute resolution, referred to as the Independent Review Function. This involves a review undertaken by a 'fresh set of eyes' to the dispute and are independent of the audit process.

It is offered at the 'paper stage' of a review which follows the release of the ATO statement of audit position and must be completed in 12 weeks.

Most countries also set clear bench marks for the finalisation of appeals. In Australia, it is set at one year after lodging the appeal and in Canada it is two years. Although it is difficult to determine the average turnaround time on objections or appeals in South Africa, for various reasons, it does appear that this period is substantially longer than that of most OECD member countries and developed countries.

For the new rules discussed to have any impact on the average turnaround time on objections or appeals, what would be required is stricter compliance with the new rules by both SARS and taxpayers.

Fair hearing of objection and appeal

The conduct of an objection or appeal should be subject to due process or a fair hearing. A fundamental requirement for a fair hearing is impartiality on the part of the SARS officials as well as the judicial officers involved.

The impartiality of decision-makers is founded in the rule against bias, i.e. *nemo iudex in sua causa*, which essentially means no one may be the judge in his or her own cause. This rule founded in the principles of good administration as decisions are more likely to be sound if the decision-maker is unbiased and the public has more faith in an administrative process if the decision-maker is unbiased.

In the context of disputes, this means in practice that the SARS official involved in the audit and assessment should not be extensively involved nor have any final say in the dispute of such assessment. This does not mean that such official is necessarily biased, but this approach recognises potential bias at an operational or structural level resulting from the enthusiasm of officials for the successful discharge of their functions and for the purpose at which those functions are directed. This is effected at operation level by what is referred to as ‘breaks in the system’. For example, a taxpayer would be identified by a risk analyst, who then refers the matter to an assurance auditor for verification where after the matter may be referred to an auditor who conducts an in-depth audit. The decision if an assessment should be issued, including if penalties should be imposed, requires the approval of a branch assessment and account maintenance committee.

In turn, an objection is decided at branch level by a committee the majority of which comprises officials not involved in the audit and assessment process. An appeal is generally referred to the SARS Legal and Policy Division (LAPD), which is a separate division from the business division where the disputed assessment originates. The dispute resolution subdivision of LAPD also comprises several committees from where appeals are assigned, conceded, settled or referred for litigation.

This is also international best practice. For example:

- In New Zealand, there are two business units within the NZ Inland Revenue (IR) that deal with dispute resolution; the Disputes Review Unit and the Adjudication Unit. The Disputes Review Unit takes a fresh look at a dispute, provides an independent and impartial decision on the issues in the dispute before any adjustment to an assessment is made. Adjudication carries out comprehensive research and analysis of the law. It considers the correctness of legal and factual arguments raised by the taxpayer and by IR in deciding whether an adjustment should be made.
- In Canada, the Appeals Branch is a separate section of the Canadian Revenue Authority. Importantly, it is *cognoscente* and retains impartiality by remaining an independent function.
- In the UK, a review is dealt with as a genuine second look at the case and cannot be linked to the Decision Maker. Review and appeal teams are geographically separate to case teams and management chains.

This separation benefits all parties involved by ensuring a fair and transparent interaction that maintains decisions with a sound legal basis In addition, the conduct of SARS officials in context of conflict of interest and bias is regulated by:

- The TA Act – section 7
- The Constitution, 1996 – section 195(1)
- The SARS Code of Conduct
- SARS Operational policies.

The TA Act prohibits officials from acting in a matter if:

- a certain relationship exists between the official and the taxpayer exists e.g. financial; professional etc.

- the relationship presents a conflict of interest
- the conflict can be reasonably regarded as giving rise to bias.

The Tax Administration Act and the new rules

The drafting of the initial Tax Administration Bill was first announced in the Budget Review 2005 as a project to incorporate into one piece of legislation certain generic administrative provisions, which are currently duplicated in the different tax Acts. The drafting of the Tax Administration Bill focused on reviewing the current administrative provisions of the tax Acts administered by SARS, excluding the Customs and Excise Act, 1964, and harmonising these provisions across taxes to the extent possible. The TA Act was enacted into law on 1 October 2012.

When taxpayers are aggrieved by an assessment or a decision that is subject to objection and appeal, they have a right to dispute it. Chapter 9 of the TA Act provides the legal framework for these disputes across all tax types found in the tax Acts and must be read in addition to the rules issued under section 103. These rules have now been published by public notice in the *Gazette* and apply with effect from 11 July 2014.

The new dispute resolution rules were issued to align them with the dispute resolution framework of the TA Act. These rules prescribe the procedures to be followed in lodging an objection and appeal against an assessment or a decision subject to objection and appeal under a tax Act, procedures for alternative dispute resolution, the conduct and hearing of appeals by the tax board or tax court and an application on notice before a tax court regarding a procedural matter arising under the rules. The tax board and tax court are tribunals created under the Tax Administration Act and their sittings are generally not public. A taxpayer may appeal the judgment of the tax court to the High Court or Supreme Court of Appeal, which are public courts.

The new rules also:

- fix certain shortcomings in the old rules
- simplify the rules to enhance the understanding of and compliance with the rules

- consolidate duplicate provisions, such as rules providing for the extension of time periods by agreement and other formalities
- shorten the procedural time periods in order to improve turnaround times for finalising disputes
- provide for more effective remedies to address failures to comply with time periods
- provide a better balance between taxpayer rights and remedies, and SARS' powers and duties, for example by aligning time periods and affording more effective remedies to taxpayers
- simplify alternative dispute resolution proceedings
- regulate new provisions of the TA Act such as the power of SARS to designate a test case and to stay similar objections or appeals
- afford the registrar of the tax court a wider discretion in the set down of appeals to ensure optimum utilisation of the allocated court sittings
- enable delivery of documents to an electronic address including an electronic filing page
- regulate the use of the SARS eFiling platform for disputes.

The shortening of the time periods is in line with the commitment by the then Commissioner to do so when the old rules were published in 2003. The strongest remedy afforded by the rules in the event of non-compliance with certain time periods is an application for default judgment under rule 56 in terms of which a party may give notice to the defaulting party to comply within 15 days and, if the defaulting party fails to do so, apply to the tax court for a final order in favour of the non-defaulting party.

<u>The 'old rules'</u>

Section 107A of the ITA provided for specific procedures in order to resolve a tax dispute. These rules also applied to various other tax Acts administered by SARS. The objection and appeal procedures and rules relating thereto and the settlement circumstances as contained in the ITA, applied to any dispute in terms of those Acts.

Section 107A of the ITA was repealed by the TA Act when that Act commenced. However, until the new rules were issued under the TA Act, the transitional provisions of the TA Act provided that the old rules issued under section 107A of the ITA applied to disputes that arose before the commencement date of the TA Actuntil such time that new rules under section 103 are published. In other words, for the period 1 October 2012 until 10 July 2013, disputes were regulated under Chapter 9 of the TA Act and the old rules.

The 'new rules'

Background

The draft new rules were reviewed by external counsel during November 2012, prior to their publication for public comment. The draft new rules underwent intensive internal and external consultation. Two rounds of public comments were held during 2013 with comments due by 22 March 2013 and 19 July 2013. Changes based on the written comments and further internal discussion and review were effected, and the third public version of the new rules was discussed during a workshop with various stakeholders on 31 January 2014.

Further written comments before 31 January 2014 from those who could not attend the workshop were also accepted.

Section 103 also provides that the Minister of Finance may only publish the rules after consultation with the Minister of Justice and Constitutional Development. Interaction with the Department of Justice and Constitutional Development started in September 2013 and written comments were received by them on two occasions, which were duly considered and the necessary changes effected. Final comments by them were discussed during a workshop in May 2014, the outcome of which was that all outstanding issues were resolved.

What do the new rules regulate?

Essentially, the new rules govern the following:

- The procedures to lodge an objection and appeal against an assessment or decision that is subject to objection and appeal under section 104(2)
- ADR procedures under which SARS and the person aggrieved by an assessment or decision may resolve a dispute in accordance with Part C of the rules
- The conduct and hearing of an appeal before a tax board or tax court.

Part G of the new rules contains transitional rules which provide that disputes not finalised at the commencement date of the new rules, i.e. 11 July 2014, will generally be dealt with and finalised under the new rules issued under the Act. For example, if a taxpayer has objected under the old rules and the objection has not been dealt with by SARS upon commencement of the new rules, the dispute must continue and the objection must be dealt with by SARS under the new rules 'as if taken or instituted under the new rules'. This means, for example, that an objection lodged under the old rules before commencement of the TA Act, must be dealt with by SARS within the time period prescribed in the TA Act or the old rules, as the case may be, but calculated from the date of the commencement of the new rules.

Example: A taxpayer objected on 1 May 2014. The objection was disallowed on 15 June 2014. The taxpayer now has 30 days within which to appeal i.e. until the end of July 2014. This period is not extended as a result of the commencement of the new rules on 11 July 2014. The taxpayer appeals on 15 July 2014. This is after the commencement of the new rules on 11 July 2014 meaning the taxpayer must now comply with rule 10 of the new rules in lodging the appeal.

<u>The relevant tax Acts</u>

Chapter 9 of the TA Act and the new rules regulate the dispute resolution of disputes arising under the following Acts:

- Transfer Duty Act, 40 of 1949
- Estate Duty Act, 45 of 1955

- Income Tax Act, 58 of 1962
- Value-Added Tax Act, 89 of 1991
- Skills Development Levies Act, 9 of 1999
- Unemployment Insurance Contributions Act, 4 of 2002
- Diamond Export Levy Act, 15 of 2007
- Diamond Export Levy (Administration) Act, 14 of 2007
- Mineral and Petroleum Royalty Resources Act, 28 of 2008
- Mineral and Petroleum Royalty Resources (Administration) Act, 29 of 2008
- Employment Tax Incentive Act, 26 of 2013
- Merchant Shipping (International Oil Pollution Compensation Fund) Administration Act, 35 of 2013
- Merchant Shipping (International Oil Pollution Compensation Fund) Contributions Act, 36 of 2013

It should be noted that the Customs and Excise Act, the Customs Duty Act and the Customs Control Act, contain their own provisions relating to dispute resolution. Chapter 9 of the TA Act and the new rules do not apply to disputes under any of these Acts.

7.4 Tax exemption guide for Public Benefit Organisations in South Africa (Issue 4)

This guide provides general guidance on the taxation of public benefit organisations in South Africa.

The guide is based on the legislation as at date of issue (12 December 2014).

Introduction and background according the guide:

This guide is intended to assist non-profit organisations (NPOs) in South Africa that qualify for approval as PBOs in understanding the implications of the following taxes that may affect them:

- Income tax
- Donations tax
- Estate duty
- Transfer duty
- Dividends tax
- Securities transfer tax
- Skills development levy
- CGT
- VAT
- Employees' tax

NPOs play a significant role in society by undertaking shared responsibility for the social and development needs of the country thus relieving the financial burden that would otherwise fall on the state. Tax benefits are designed to assist NPOs by augmenting their financial resources and providing them with an enabling environment in which to achieve their objectives.

The mere fact that an organisation has a non-profit motive or is established or registered as an NPO under the Nonprofit Organisations Act 71 of 1997 (NPO Act), or is established as a non-profit company under the Companies Act, does not mean that it automatically qualifies for preferential tax treatment or approval as a PBO. An organisation will only enjoy preferential tax treatment after it has applied for and been granted approval as a PBO by the TEU (see **3**) and continues to comply with the relevant requirements and conditions as set out in the Act.

Internationally, NPOs are granted some degree of preferential tax treatment including donor incentives, although the eligibility criteria and available benefits vary from country to country.

In South Africa, religious, charitable and educational institutions of a public character used to be fully exempt from income and other taxes. In the absence of comprehensive case law and statutory definitions, the Commissioner was burdened with the interpretation and implementation of the exemption provisions and often unable to accommodate worthy organisations because their activities did not fall within the letter of the Act.

Following recommendations by the Katz Commission, the Minister, in his 2000 Budget Speech, announced wide-ranging changes to the legislation regulating the income tax exemption of NPOs. The objective of the legislation was to group certain types of entities together, treat them uniformly and provide more certainty for both taxpayers and the Commissioner on the qualifying requirements for an exemption from income tax.

Section 10(1)(*c*N) and section 30 were introduced into the Act to deal with previously exempt entities.[2] These sections introduced the concept of a '*public benefit organisation*' conducting an approved '*public benefit activity*' determined by the Minister and set out in the Ninth Schedule. These provisions are more detailed and comprehensive resulting in improved consistency and certainty. Specific sanction measures have also been introduced to deal with situations where a PBO misuses its approval status or does not comply with the provisions of the Act.

Since the introduction of the revised tax system for PBOs in 2001, Government has continued to adjust the tax system and has amended the legislation to address needs and problems as they are identified. For example, the initial legislation contained strict provisions prohibiting PBOs from conducting trading or business activities outside certain narrowly defined permissible trading rules (see **17**). A PBO that did not comply with these trading rules could have had its tax exempt status terminated altogether. In 2006 legislation was introduced to allow for a system of partial taxation of PBOs under which the receipts and accruals from business undertakings or trading activities in excess of permissible tax-free limits became subject to normal tax without the PBO losing the exemption for its underlying PBAs.

The type of organisations permitted to issue section 18A receipts entitling donors to a tax deduction has also been considerably extended to include a much broader spectrum of PBAs. Under the repealed legislation this benefit was substantially limited to donations made to secondary and tertiary educational institutions. Over the years this list has been progressively broadened and currently a wide range of activities qualify for the purpose of making deductible donations. The maximum amount of such deductible donations during a year of assessment has also been increased from 5% to 10% for both individuals and companies. Recently legislation has been amended to allow the carry-forward of donations exceeding the 10% limit.

7.5 Guide to Income Tax and the Individual (2013 / 2014)

The purpose of this guide is to inform individuals who are South African residents of their income tax commitments under the Income Tax Act.

CONTENTS

- When is an individual liable for income tax?
- What is a year of assessment for an individual?
- What are some of the different kinds of income that an individual can be taxed on?
- Do all individuals have to register as taxpayers and submit income tax returns?
    - Registration
    - Submission of income tax returns
    - Filing an income tax return
- To whom is the income tax payable?

- When is income tax payable?
- What is employees' tax?
- What proof does an employee have of tax deducted from his or her earnings?
- What is provisional tax?
    - Who qualifies to be a provisional taxpayer?
    - When is provisional tax due?
    - How much provisional tax must be paid?
- What happens on assessment?
- Penalties
    - Administrative non-compliance penalties
    - Understatement penalties
- Interest
- Criminal offences

7.6 Guide on the determination of medical tax credits and allowances (issue 5)

This guide provides general guidelines regarding the medical scheme fees tax credit and the deductibility of medical and physical impairment or disability expenses for income tax purposes.

As a rule, expenditure of a domestic or private nature is not deductible for tax purposes. However, an individual's ability to pay tax may well be adversely affected by costs incurred as a result of illness or disability. For this reason, the Act provides a certain degree of relief for medical and physical impairment or disability expenditure paid by the taxpayer.

In an effort to achieve greater equality in the treatment of medical expenses across income groups, the previous allowance for medical scheme contributions (which was limited to a prescribed capped amount) was, for taxpayers below the age of 65, replaced by an MTC. This became effective on 1 March 2012, which is the commencement date of the 2013 year of assessment for individuals. The taxpayer is entitled to claim an MTC if contributions are paid to a medical scheme. The taxpayer may also claim an allowance for other qualifying medical expenses.

Medical expenses may therefore be divided into two distinct categories, namely:

- contributions paid to a medical scheme; and
- other qualifying medical expenses (including out-of-pocket expenses).

7.7 Guide to building allowances

This guide provides general guidance on building allowances available to owners and lessees of buildings.

The Act currently makes provision for the following building allowances:

- Section 13 – Buildings used in a process of manufacture, research and development or a similar process
- Section 13*bis* – Buildings used by hotel keepers
- Section 13*quin* – Commercial buildings
- Section 13*quat* – Buildings in urban development zones
- Section 13*sex* – Residential units
- Section 13*sept* – Deduction for loans to employees to acquire low-cost housing from employers
- Paragraph 12(1)(*f*) of the First Schedule – Buildings used in farming operations

A number of other building allowances discussed in this guide have been discontinued but will be relevant to taxpayers still claiming such allowances on buildings acquired before the relevant provisions were discontinued.

Some of the sections which make provision for building allowances or deductions contain their own recoupment provisions. The general recoupment provisions of section 8(4)(*a*) will also apply in most cases unless excluded, as in the case of farm buildings.

Since building allowances tend to be claimed over extended periods of up to 50 years taxpayers must retain proper records of the cost of buildings and the allowances claimed.

8. INDEMNITY

Whilst every reasonable care has been taken in the production of this update we cannot accept responsibility for the consequences of any inaccuracies contained herein or for any action undertaken or refrained from taken as a consequence of this update.