TAX UPDATE

For period: 1 January 2016 to 31 March 2016

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1. INTRODUCTION

The purpose of this update is to summarise developments that occurred during the first quarter of 2016, specifically in relation to Income Tax and VAT. Johan Kotze, who is a Tax Executive at Shepstone & Wylie Attorneys, 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 Johan Kotze to discuss their specific concerns and, for that matter, any other tax concerns.

The first quarter of a year is normally dominated by the Budget and this year was no exception. This year's Budget had some political wrangling prior thereto and a much large economic goal to achieve, which made it quite an important Budget. Nontheless, the Budget has a number of aspects which taxpayer should pay attention to. Go through the index and when an aspect may impact you, consider the implications.

This updated only has one tax case in it, i.e. of Candice van der Merwe; it is rather interesting, more for the sensation than anything else.

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. NATIONAL BUDGET

2.1. Personal income tax

To reduce the impact of inflation on lower- and middle-income earners, government proposes that the primary rebate and the bottom three income brackets be adjusted by 1.8 per cent and 3.4 per cent respectively. Table 4.6 provides an overview of the proposed personal income tax schedule for 2016/17.

2016 year of assessment		2017 year of assessment	
Taxable Income	**Rates of tax**	**Taxable Income**	**Rates of tax**
R0 – R181 900	18% of each R1	R0 – R188 000	18% of each R1
R181 901 – R284 100	R32 742 + 26% of the amount above R181 900	R188 001 – R293 600	R33 840 + 26% of the amount above R188 000
R284 101 – R393 200	R59 314 + 31% of the amount above R284 100	R293 601 – R406 400	R61 296 + 31% of the amount above R293 600
R393 201 – R550 100	R93 135 + 36% of the amount above R393 200	R406 401 – R550 100	R96 264 + 36% of the amount above R406 400
R550 101 – R701 300	R149 619 + 39% of the amount above R550 100	R550 101 – R701 300	R147 996 + 39% of the amount above R550 100
R701 301 and above	R208 587 + 41% of the amount	R701 301 and above	R206 964 + 41% of the amount

	above R701 300		above R701 300
Rebates		**Rebates**	
Primary	R13 257	Primary	R13 500
Secondary	R7 407	Secondary	R7 407
Third rebate	R2 466	Third rebate	R2 466
Tax threshold		**Tax threshold**	
Below age 65	R73 650	Below age 65	R75 000
Age 65 and over	R7 407	Age 65 and over	R116 150
Age 75 and over	R2 466	Age 75 and over	R129 850

2.2. Medical tax credits

Government proposes to increase monthly medical scheme contribution tax credits in line with inflation, maintaining the current level of relief in real terms. These tax credits will be increased from R270 to R286 from 1 March 2016 for the first two beneficiaries, and from R181 to R192 for additional beneficiaries.

2.3. Retirement savings

From 1 March 2016, an important change to the tax treatment of contributions to retirement savings and how they are withdrawn at retirement comes into effect. Further technical refinements to the legislation are necessary to provide clarity. After further consultation, government proposes to postpone the requirement for provident fund members to annuitise to 1 March 2018.

2.4. Voluntary disclosure

South Africa's voluntary disclosure programme gives non-compliant taxpayers the opportunity to correct their tax affairs. With a new OECD global standard for the automatic exchange of financial information between tax authorities coming into effect from 2017, time is running out for taxpayers who still have undisclosed assets abroad. The National Treasury, SARS and the Reserve Bank have received requests from parties with unauthorised foreign assets who wish to regularise their affairs. Accordingly, government proposes to relax voluntary disclosure rules for a period of six months, from 1 October 2016, to allow non-compliant individuals and firms to disclose assets held and income earned offshore.

2.5. Learnership and employment tax incentives

The learnership tax incentive, introduced in 2002, aims to encourage education and work-based training. The employment tax incentive, introduced in 2014, was designed to promote the employment of young workers. Both incentives will expire towards the end of 2016. SARS has made data on the employment tax incentive available and a review is under way. It is envisaged that results from the review of both incentives will be published and presented to Parliament by the third quarter of 2016. If there are delays in completing these reviews, government may consider extending the incentives by one year.

2.6. Increasing the incentive for employers to provide bursaries

To support skills development, government proposes to increase the fringe benefit tax exemption thresholds for bursaries provided to employees or their relatives. The income eligibility threshold for employees to access the relief will be increased from R250 000 to R400 000. The value of qualifying bursaries will be increased from R10 000 to R15 000 for National Qualifications Framework levels 1 to 4, and from R30 000 to R40 000 for levels 5 to 10.

2.7. Education and training-based public benefit activities

Government is considering expanding the list of public-benefit education and training activities to accommodate industry-based training organisations, which would exempt them from tax.

2.8. Research and development

A task team established by the Minister of Science and Technology is investigating the challenges faced by businesses in trying to access the R&D tax incentive. Its work should be completed in April 2016, after which proposals will be considered to enhance this incentive.

2.9. Infrastructure investment in mining communities

The Mining Charter requires companies to invest in communities where they operate. It is typically agreed that a company will build housing, hospitals, schools and recreational facilities to benefit workers and communities. Companies can only deduct such capital expenditure if it relates directly to employees. Government proposes that the same relief be provided for community-related expenditure agreed to in a community-endorsed social and labour plan. The Department of Mineral Resources will improve monitoring and oversight of such plans.

2.10. Hybrid debt instruments

Government will implement measures, effective 24 February 2016, to eliminate mismatches associated with hybrid debt instruments where the issuer is not a South African resident taxpayer. Such situations potentially result in double non-taxation. Interest payments on debt and dividend payments on equity are treated differently for tax purposes. Hybrid financial instruments, which exhibit both debt and equity features, have become commonplace. This can result in one party to a transaction deducting the payment while the counterparty receives exempt income. Existing rules reclassify an interest payment as a dividend payment for tax purposes. However, it is only possible to deny interest deductions for a South African resident that issues a debt instrument. This results in a mismatch in tax treatment between two countries, as the South African rules apply a low or zero tax rate to the reclassified dividend payment.

2.11. Tax treatment of trusts

An important role of the tax system is to reduce inequality. Some taxpayers use trusts to avoid paying estate duty and donations tax. For example, if the founder of a trust sells his or her assets to the trust, and grants the trust an interest-free loan as payment, donations tax is not triggered and the assets are not included in his or her estate at death. To limit taxpayers' ability to transfer wealth without being taxed, government proposes to ensure that the assets transferred through a loan to a trust are included in the estate of the founder at death, and to categorise interest-free loans to trusts as donations. Further measures to limit the use of discretionary trusts for income-splitting and other tax benefits will also be considered.

2.12. Capital gains tax

Government proposes to increase the inclusion rate for capital gains for individuals from 33.3 per cent to 40 per cent, and for companies from 66.6 per cent to 80 per cent. This will raise the maximum effective capital gains tax rate for individuals from 13.7 per cent to 16.4 per cent, and for companies from 18.6 per cent to 22.4 per cent. The annual amount above which capital gains become taxable for individuals will increase from R30 000 to R40 000. The effective rate applicable to trusts will increase from 27.3 per cent to 32.8 per cent. These new rates will become effective for years of assessment beginning on or after 1 March 2016.

2.13. Transfer duty

Government proposes to increase the transfer duty rate on property sales above R10 million from 11 percent to 13 per cent. This new rate will become effective for property acquired on or after 1 March 2016.

2016 year of assessment		**2017 year of assessment**	
Property value	**Rates of tax**	**Property value**	**Rates of tax**
R0 – R750 000	0% of property value	R0 – R750 000	0% of property value
R750 001 – R1 250 000	3% of the property value above R750 000	R750 001 – R1 250 000	3% of the property value above R750 000
R1 250 001 – R1 750 000	R15 000 + 6% of the property value above R1 250 000	R1 250 001 – R1 750 000	R15 000 + 6% of the property value above R1 250 000
R1 750 001 – R2 250 000	R45 000 + 8% of the property value above R1 750 000	R1 750 001 – R2 250 000	R45 000 + 8% of the property value above R1 750 000
R2 250 001 and above	R85 000 + 11% of property value above R2 250 000	R2 250 001 – R10 000 000	R85 000 + 11% of property value above R2 250 000
		R10 000 000 and above	R937 500 + 13% of property value above R10 000 000

2.14. Encouraging the manufacture of clean fuels

Compliance with new fuel specifications will require an estimated R40 billion in capital expenditure by South African oil refineries. To facilitate the necessary upgrades, government proposes to provide an accelerated depreciation allowance for a limited time. This would allow qualifying capital expenditure to be deducted over a three-year period, instead of the normal five years.

2.15. Renewable energy incentives

Over the past several years, government has provided incentives to encourage investment in renewable energy through targeted accelerated depreciation allowances. However, capital expenditure that indirectly supports renewable electricity production, such as the construction of fences and roads, does not qualify for such deductions. To encourage investment in renewable energy, government will consider enhancing existing provisions to include some necessary indirect infrastructure costs.

2.16. Retirement reforms – Allowable deduction for fringe benefit of employer contributions to defined pension funds

Section 11(k)(iii) of the Income Tax Act inadvertently limited the allowable deduction for the fringe benefit of employer contributions to retirement funds to the actual value of the employer contribution. However, the fringe benefit value for defined benefit pension funds is determined by a formula provided in paragraph 12D of the act’s Seventh Schedule and may be larger than the actual value of the employer contribution (because the fringe benefit is dependent on the value of benefits and not the funding position of the defined benefit pension fund). In this case, the available deduction would not be aligned with the employer contribution’s fringe benefit value and any excess amount would become taxable. This was not the original intention and the legislation will be adjusted to allow a deduction up to the full value of the employer contribution fringe benefit, if valued according to paragraph 12D of the Seventh Schedule. The amendment will take effect from 1 March 2016.

2.17. Retirement reforms – Passive income deduction

Before 1 March 2016, taxpayers were able to deduct retirement annuity contributions against their passive or non-trading income up to a certain limit. The current wording of section 11(k) of the Income Tax Act, which introduces the harmonised tax regime for retirement contributions from 1 March 2016, does not allow for contributions to any retirement fund to be set off against passive income. It is proposed that section 11(k) of the act be amended to allow for retirement contributions to be deducted against passive income, subject to the available limits.

2.18. Retirement reforms – Rollover of excess contributions prior to 1 March 2016

It is proposed that section 11(k) of the Income Tax Act be amended to allow for the rollover of excess contributions to retirement annuity funds and pension funds accumulated up to 29 February 2016.

2.19. Retirement reforms – Order of allowable deductions

To correct the ordering rule for calculating allowable deductions in the determination of taxable income, it is proposed that the allowable deduction under section 11(k) of the Income Tax Act be determined before the allowable deduction under section 18A.

2.20. Retirement reforms – Removal of the requirement for a tax directive to effect tax-free transfers from pension funds to provident funds

The 2015 retirement reforms made provision for tax-free transfers from pension funds to provident funds. Before this amendment, tax-free transfers from pension funds to provident funds required a tax directive from SARS. It is proposed that this requirement for a tax directive be removed because it is no longer applicable to these transfers

2.21. Retirement reforms – Valuation of contributions made to defined benefit pension funds

Paragraph 12D of the Seventh Schedule of the Income Tax Act only makes provision for contributions actually made by the employer or employee to certain retirement funds, and excludes contributions made on behalf of the employer or employee (for example, by the retirement fund). It is proposed that paragraph 12D of the Seventh Schedule be amended to include all contributions made for the member's benefit. Other technical amendments to paragraph 12D include clarifying that retirement fund income is the full amount used to determine the employer's contribution, not only remuneration as defined in paragraph 1 of the Fourth Schedule. A potential issue of double counting for retirement funds with a hybrid structure (having both defined benefit and defined contribution elements) will be removed. It will also be made clear when actuaries can provide an updated contribution certificate.

2.22. Retirement reforms – Vested rights for provident fund members: divorce order settlements

From 1 March 2016, provident fund members may be required to purchase an annuity using a portion of contributions made after that date. However, all contributions made before 1 March 2016 will not be subject to annuitisation (generally referred to as vested rights). To allocate this vested right fairly in the case of a divorce, it is proposed that the withdrawal of retirement benefits arising from divorce order settlements be proportionally attributed as a reduction against both the vested right and non-vested right portions of the retirement fund savings.

2.23. Retirement reforms – Vested rights for provident fund members: mandatory transfer

From 1 March 2016, provident fund members above the age of 55 will be able to continue contributing to that provident fund without being required to purchase an annuity upon retirement. However, if they transfer to another retirement fund, then any future contributions to that fund would not be exempt from annuitisation. It is proposed that forced transfers (through the closure of a retirement fund) will not affect the member's ability to make further contributions, which can be taken as a lump sum. Further technical corrections are required to ensure that all contributions to provident funds or pension funds with lump sum benefits made before 1 March 2016 are included in the vested rights provisions, in line with the policy intent. Specifically, the vested rights provision inadvertently excluded transfers made to retirement funds, as defined under paragraph (c) of the definition of pension funds in section 1 of the Income Tax Act, and to preservation provident funds.

2.24. Retirement reforms – Foreign pension contributions, annuities and payouts

When the residence-based taxation system was introduced in 2001, section 10(1)(gC) was added to the Income Tax Act to exempt foreign pensions derived from past employment in a foreign jurisdiction (i.e. from a source outside of South Africa). The question of how contributions to foreign pension funds and the taxation of payments from foreign funds should be dealt with raises a number of issues, which require a review. Sufficient time would be required to determine how to deal with contributions to foreign funds and the taxation of payments from foreign funds, taking into account the tax policy for South African retirement funds.

2.25. Fringe benefit – Clarification regarding raising an assessment fo re-calculating fringe benefit

Paragraph 3(2) of the Seventh Schedule of the Income Tax Act allows the SARS Commissioner under certain circumstances to re-determine the cash equivalent of a fringe benefit and assess either the employer or the employee. Uncertainty exists regarding under what circumstances this determination will be made. To provide clarity, it is proposed that the wording of paragraph 3(2) of the act's Seventh Schedule be aligned with the wording in paragraph 5(2) of the Fourth Schedule.

2.26. Fringe benefit – Alignment of the definition of private travel

The concept of private travel has been difficult for employers to apply in practice. The difference in the wording of the definition of private travel in section 8 and the Seventh Schedule of the Income Tax Act adds to the difficulties. To correct this, it is proposed that the wording of the two provisions be aligned.

2.27. Tax-free investment – Alignment of estate duty treatment

Tax-free investments were introduced from 1 March 2015 to encourage individuals to save and were not intended to serve as a vehicle to avoid estate duty. Government has become aware that the current law allows individuals who protect their investment portfolio through a long-term insurer to nominate a beneficiary on the endowment policy. As a result, the transfer of the proceeds from the tax-free investment asset to the named beneficiary would circumvent estate duty. It is proposed that the legislation be amended to prevent this.

2.28. Tax-free investment – Dividends tax returns in the context of tax-free investments

Investors receiving dividends from tax-free investments are required to submit an exempt dividends tax return to SARS following the receipt of every dividend payment. It is proposed that an amendment be made to remove this requirement.

2.29. Tax-free investments – Transfer between service providers

The implementation date to allow transfers of tax-free investments between service providers will be postponed from 1 March 2016 to 1 November 2016 to allow further time for service providers to finalise the administrative processes required for these transfers. Draft regulations outlining the transfer process will be published shortly.

2.30. Employee share-based incentive schemes – Removal of possible double taxation

If a taxpayer receives a restricted equity instrument having a value, section 1 of the Income Tax Act requires that it be included in gross income in year one, despite the restrictions. Upon vesting, the gain on the instrument needs to be included in gross income in the year of vesting, according to paragraph (n) of the definition of gross income in section 1 when read with section 8C. This could result in the same amount being taxed twice. To avoid this, it is proposed that the acquisition of shares subject to the provisions of section 8C of the act be specifically excluded from paragraph (c) of the definition of gross income in section 1.

2.31. Employee share-based incentive schemes – Addressing circumvention of section 8C rules

The main purpose of section 8C is to prevent taxpayers from disguising high salaries through the use of restricted shares or share-based incentive schemes, which would trigger lower or no taxable income or capital gains. Specific anti-avoidance rules have been added to the tax legislation to counteract avoidance schemes where benefits derived from restricted shares or share-based incentive schemes consist of dividends. The rules exclude such dividends from the exemption in section 10(1)(k) and tax them as ordinary income. However, the current rules do not deal adequately with some schemes where restricted shares held by employees are liquidated in return for an amount qualifying as a dividend. It is proposed that the current rules be reviewed to deal with this.

2.32. Employee share-based incentive schemes – Inclusion of certain dividends in the definition of remuneration

Certain dividends received from restricted equity instruments do not qualify for an income tax exemption and are taxable on assessment of the directors and employees. It is proposed that these taxable dividends be specifically included in the definition of remuneration for PAYE in paragraph 1 of the Fourth Schedule to the Income Tax Act.

2.33. *Employee of foreing employers in South Africa designated as provisional taxpayers*

If foreign employers in South Africa do not deduct PAYE, local employees should pay provisional tax in terms of the Fourth Schedule of the Income Tax Act. Rather than alert this class of taxpayers of their status through individual notices, as is currently required, it is proposed that the commissioner notify them of their status through a public notice.

2.34. *Directives to be sought for all employment lump sums*

There are exceptions to the rule that employers must ascertain from the commissioner the correct amount in employees' tax to be withheld from lump-sum payments before payment is made. It is proposed that the provision for exceptions be removed.

2.35. *Removale of exclusion from penalty calculation*

The penalty for underpaying provisional tax is based on a percentage of normal tax payable after taking into account rebates and tax already paid. Certain once-off amounts, such as retirement lump-sum and severance-benefit payments, are excluded from the calculation of the penalty because they are taxed separately in terms of special tables and the tax owed is withheld before payment is made. Taxpayers are required to pay provisional tax on the other amounts listed in paragraph (d) of the definition of gross income in section 1 of the Income Tax Act, because these amounts are not taxed under the lump-sum tax tables. However, because these amounts are excluded from the penalty calculation, taxpayers are not penalised if they fail to pay the required provisional tax. To correct this, it is proposed that the penalty calculation's exclusion of the amounts in paragraph (d) not taxed in terms of the special tables be removed.

2.36. Date on which estimate for second provisional tax payment must be submitted

A provisional taxpayer is not subject to the underpayment penalty if an estimate for the second provisional tax period is submitted before the due date of the subsequent provisional tax payment. It is proposed that this window period be closed on the date of assessment of the relevant year.

2.37. Hybrid debt instruments – Debt instrument subject to subordination agreement

An instrument may be regarded as a hybrid debt instrument in terms of section 8F of the Income Tax Act, subsequent to its issue, if that instrument becomes subject to a subordination agreement as a result of the issuer being in financial distress. This is because a subordination agreement suspends repayments until such a time as the borrower's financial situation improves. It is proposed that a concession be made to exclude debt instruments subject to a subordination agreement from being regarded as section 8F hybrid debt instruments.

2.38. Asset-for-share transactions for natural persons employed by a company

Asset-for-share transactions do not trigger a capital-gains event when the transaction is between a person and a company, and the person either holds a qualifying interest in the company or is a natural person working full time for the company. In such transactions, the base cost of the asset rolls over from the person to the company. The qualifying conditions for such transfers were put in place to ensure that only substantial and long-term transfers of assets for shares benefit from the exemption, and to support the incorporation of professional service firms. However, because some taxpayers have indicated that the limits to the conditions are unclear, it is proposed that section 42 of the

Income Tax Act be amended to set them out more clearly.

2.39. Avoidance schemes in respect of share disposals

One of the schemes used to avoid the tax consequences of share disposals involves the company buying back the shares from the seller and issuing new shares to the buyer. The seller receives payment in the form of dividends, which may be exempt from normal tax and dividends tax, and the amount paid by the buyer may qualify as contributed tax capital. Such a transaction is, in substance, a share sale that should be subject to tax. The wide-spread use of these arrangements merits a review to determine if additional countermeasures are required.

2.40. Tax implications of securities lending arrangements

In 2015, changes were made to the legislation to provide tax relief on the transfer of collateral in securities lending arrangements. As a result, there are no income tax and securities transfer tax implications if a listed share is transferred as collateral in a lending arrangement for a limited period of 12 months. Although the tax relief is welcomed, concerns have been raised that the 12-month limitation rule is too restrictive. It is proposed that a gradual approach to address these concerns be followed. In addition, the tax treatment of securities lending arrangements will be reviewed to take into account corporate actions during the term of the lending arrangement.

2.41. Refinement of third-party-backed share provisions – Pre-2012 legitimate transactions

In 2012, government introduced new rules to deal with avoidance concerns regarding transactions and arrangements that involve preference shares with dividend yields backed by third parties. These dividend yields, under the new rules, are treated as ordinary revenue. Because the rules may affect some legitimate transactions and arrangements, government will consider relaxing them in relation only to those entered into before 2012.

2.42. Refinement of third-party-backed share provisions – Addressing circumvention of anti-avoidacne measures

Several schemes have been identified where investors structure their transactions to circumvent third-party anti-avoidance rules. These schemes include, for example, the formation of trust-holding mechanisms whereby investors acquire participation rights in trusts and the underlying investments of those trusts are preference shares. It is proposed that additional measures be considered to stop the circumvention of these anti-avoidance measures.

2.43. Transitional tax issues resulting from regulation of hedge funds

There are certain scenarios where the tax relief provided in the Taxation Laws Amendment Act (2015) to assist the hedge fund industry's transition to a new regulated tax regime is limited and inapplicable to certain hedge fund's trust structures. This is the case with the tax relief for asset-for-share and amalgamation transactions. It is proposed that provision be made to address these scenarios.

2.44. Taxation of real estate investment funds – Qualifying distribution rule

Because recoupments such as building allowances previously claimed are included in the definition of gross income in section 1 of the Income Tax Act, they could affect the 75 per cent rental-income analysis used to determine qualifying distribution applicable to real estate investment trusts (REITs). It is proposed that the provisions relating to the qualifying distribution rule in section

25BB of the act be reviewed to remove this anomaly.

2.45. Taxation of real estate investment funds – Interaction between REITs and section 9C

The current provisions of section 9C of the Income Tax Act are inappropriate for REITs. Dividends received from REITs are taxable, but expenditure incurred to produce these taxable dividends is effectively not deductible. To resolve this anomaly, it is proposed that a provision be added to the act that section 9C(5) does not apply to shares in REITs.

2.46. Urban development zones

The urban development zone (UDZ) tax incentive stimulates investment in the construction and renovation of commercial and low-cost residential buildings in the inner city. In conjunction with other development tools, the incentive has helped municipalities promote urban renewal. To assist the many inner cities that remain derelict, it is proposed that the UDZ tax incentive be made available to more municipalities, subject to the application of a set of strict criteria and an adjudication process.

2.47. Small business corporations in special economic zones

When the special economic zones tax incentive was introduced in 2013, no clarity was provided regarding the tax treatment of small business corporations located in special economic zones. It is proposed that the legislation be amended to make it clear that small business corporations in special economic zones are subject to corporate income tax at either the applicable graduated rate or 15 per cent, whichever is lower. To be eligible for the 15 per cent rate, the small business corporation will still need to comply with the provisions of section 12R of the Income Tax Act.

2.48. Tax treatment of National Housing Finance Corporation

The Department of Human Settlements is consolidating all of its human settlement development finance institutions into the National Housing Finance Corporation. It is proposed that a special tax exemption similar to that provided to certain government entities be provided to the National Housing Finance Corporation. Further amendments will be considered to ensure the transfer of assets from the department's current development finance institutions to the National Housing Finance Corporation are tax neutral.

2.49. Tax treatment of land donated under land-reform initiatives

Currently, tax legislation provides tax relief for land donated for land reform. This tax relief does not extend to all government land-reform initiatives. It is proposed that the legislation be amended to cover other land-reform initiatives, such as those set out in the National Development Plan.

2.50. Clarifying the tax treatment of government grants

Government grants that are not listed in the Eleventh Schedule to the Income Tax Act can still fall outside the definition of gross income if they are of a capital nature. It is proposed that all government grants be included in gross income and the Eleventh Schedule be the sole mechanism for determining whether they are taxable or not.

2.51. Withdrawal of withholding tax on service fees

The withholding tax on service fees has introduced unforeseen issues, including uncertainty on the application of domestic tax law and taxing rights under tax treaties. To resolve these issues, it is proposed that the withholding tax on service fees be withdrawn from the Income Tax Act and dealt with under the provisions of reportable arrangements in the Tax Administration Act (2011).

2.52. Foreing companies and collective investment schemes

Section 9D of the Income Tax Act taxes South African owners of foreign-owned entities on amounts equal to that entity's earned income. This has adverse consequences for collective investment schemes that hold shares in foreign collective investment schemes. There is uncertainty as to whether it is the local fund or the investor in the local fund that should be considered to be the holder of the participation rights in the foreign collective investment scheme. For clarity, it is proposed that collective investment schemes be excluded from applying section 9D to investments made in foreign companies.

2.53. Bad debt deduction

Section 11(i) of the Income Tax Act provides for a deduction of any debt owing to the taxpayer that has gone bad during the year, provided that this amount is or was included in the taxpayer's income. Where a taxpayer, not being a money-lender, lends an amount denominated in a foreign currency to another person, any exchange differences arising on such a loan are taken into account in the determination of taxable income as an inclusion in or deduction from income, as the case may be. However, where such a loan becomes bad, no deduction is available under section 11(a) of the act regarding any exchange gains included in income. The loss is of fixed, rather than floating, capital. The result is that a taxpayer would not be entitled to any tax relief in relation to irrecoverable amounts on which they have been taxed. Based on the above, it is proposed that section 11(i) of the act be amended to specifically apply to any exchange difference in respect of a debt that has been included in income.

2.54. Interest withholding tax where interest is written off

The Income Tax Act requires that tax be withheld from interest paid to a foreign person. Interest is deemed to be paid on the date on which the interest becomes due and payable. In situations where interest withholding tax is paid on interest that becomes due and payable, but the interest is subsequently written off as irrecoverable, there is no mechanism for a refund of interest withholding tax already paid. It is proposed that a mechanism be developed to allow for a refund of interest withholding tax paid.

2.55. Tax base protection and hypothetical foreign tax payable due to foreign group tax losses

In 2009, a high-tax exemption was introduced for controlled foreign companies (CFC). As a result, all CFC income is exempt from tax in South Africa in cases where the CFC pays an amount of foreign tax equal to at least 75 per cent of the tax that would have been due and payable in South Africa, had the CFC been a South African tax resident. The high-tax exemption is based on a calculation of hypothetical amount of foreign taxes, by disregarding foreign group company losses. Government is aware that in applying this calculation, an exemption is granted in situations where no foreign tax is actually payable. In addition, in the absence of the high-tax exemption, no foreign tax rebates would have been granted in this regard to avoid economic double taxation. In order to address the unintended anomaly, it is proposed that the adjustment for foreign group losses in the calculation for high-tax exemption be deleted.

2.56. VAT – Notional input tax on goods containing gold

In 2014, changes were made in the Value-Added Tax Act to exclude goods containing gold from the definition of second-hand goods. It has come to government’s attention that the exclusion of goods containing gold from this definition is too restrictive, especially in situations where the gold content of such goods is minimal or inconsequential. It is proposed that the 2014 amendment be revised to eliminate this anomaly.

2.57. VAT – Taxation of non-executive directors' fees

Under the Income Tax Act and the Value-Added Tax Act, a non-executive director's fees may be subject to both employees' tax (PAYE) and VAT. Views differ on whether to deduct PAYE from these fees or if the director should register as a VAT vendor. It is proposed that these issues be investigated to provide clarity.

2.58. VAT – Grants from the National Skill Fund and sector education and training authorities

The Value-Added Tax Act (1991) zero-rates grants allocated through sector education and training authorities (SETAs), but does not specifically mention those allocated through the National Skills Fund. Aligning the VAT treatment of these two grant allocations will be considered.

2.59. VAT – Loyalty programmes

Section 10(18), (19) and (20) of the Value-Added Tax Act deals with how issuing and redeeming tokens, vouchers or stamps are to be treated for VAT. There are no similar provisions in the act to deal with loyalty programmes and the VAT implications of redeeming loyalty points. It is proposed that loyalty programmes be analysed and legislative amendments be considered to provide clarity on their VAT treatment. The provisions relating to vouchers will also be reviewed to determine if they require amendments.

2.60. VAT – Determined value of company cars

VAT Regulation 2835 specifies a method for establishing the determined value of a company car for output tax purposes. This method differs from the method prescribed in paragraph 7(1) of the Seventh Schedule of the Income Tax Act. These differences have resulted in employers and payroll managers calculating the determined value of company cars using two methods and maintaining two sets of records. In addition, both of these determined values can be depreciated. The use of two methods and maintenance of two sets of records creates an administrative burden. It is proposed that the provisions of the VAT Regulation 2835 be aligned with the provisions of the Seventh Schedule of the Income Tax Act.

2.61. VAT – Waivers and cancellations of debt

Waivers and cancellations are not included in the definition of financial services. Vendors who waive or cancel debts provide a service through the surrender of a right. Debts that are waived or cancelled between connected persons would trigger an output tax liability calculated on the open market value of the amount waived, even though no consideration will be received. Surrendering the right to receive money (surrendering of a debt security) could also be perceived to be a separate supply. It is proposed that the tax implications relating to these supplies be analysed to determine if a legislative amendment is required.

2.62. VAT – Alignment of prescription periods

A person may deduct an amount from output tax attributable to a later tax period, provided this later period falls within five years from the date of certain events, for example, the date a tax invoice should have been issued. It is proposed that an input tax deduction be limited in certain instances to the tax period in which the time of supply occurred. In addition, it is proposed that the time limit for the payment of refunds be clarified.

2.63. VAT – Indirect exports

In terms of the Value-Added Tax Act, a vendor that elected to supply goods at the zero rate for an indirect export may in certain instances be required to account for output tax if the documentary requirements of Regulation 2761 are not met. Provision is made in Regulation 2761 for the vendor to claim an input tax deduction where the relevant documents are subsequently obtained within certain time periods. This section of the act, however, does not refer to the input tax deduction allowed in Regulation 2761. It is therefore proposed that this right to a deduction be referred to in the act to align it with Regulation 2761.

2.64. VAT – Alignment of VAT and customs schedules

Schedule 1 of the Value-Added Tax Act contains items that are exempt from VAT on importation. According to the Customs and Excise Act, items that are exempt from VAT on importation are identified by heading numbers or rebate items and descriptions as contemplated in schedules 1 and 4 of the act. It is proposed that the notes to the item numbers in schedule 1 of the Value-Added Tax Act be aligned with the notes to the item numbers in schedules 1 and 4 of the Customs and Excise Act.

2.65. VAT – Goods lost, destroyed or damaged

The Value-Added Tax Act was amended to include item number 412.07 to exempt goods from VAT on importation if they are unconditionally abandoned to the commissioner or destroyed with the commissioner's permission. No similar exemption exists for goods proved to have been lost, destroyed or damaged through, for example, natural disasters or such circumstances that the commissioner deems exceptional. It is therefore proposed that the legislation be amended to exempt the above-mentioned goods from VAT.

2.66. VAT – Payments basis

The Value-Added Tax Act provides for public authorities and municipalities as defined in section 1 to be registered on the payments basis. In turn, section 15(2A) requires vendors who are registered on the payments basis to issue a tax invoice for any one supply that exceeds R100 000. However, public authorities and municipalities do not have to meet this requirement. This dispensation is not extended to municipal entities. It is proposed that a similar dispensation be granted to municipal entities.

2.67. VAT – Alternative documentary proof

Section 16(2)(g) of the Value-Added Tax Act determines that a deduction may be allowed where a vendor is in possession of alternative documentary proof that is acceptable to the commissioner. The commissioner's discretion is limited to circumstances where the vendor is unable to obtain the documents prescribed in section 16(2)(a) to (f). It is proposed that scope be provided for the commissioner to take other considerations into account in accepting alternative documentary proof.

2.68. VAT – Removal of goods from a customs controlled area located in a special economic zone

Businesses that are located in a customs-controlled area (CCA) within a special economic zone enjoy certain VAT cash-flow benefits when importing goods into the CCA. To further support the benefits of investing in special economic zones, an amendment is proposed to allow for the VAT-free movement of goods that are imported into a special economic zone's CCA to a manufacturing duty rebate user, provided there is a sale subject to VAT.

3. NOTICES & REGULATIONS

3.1. Special Voluntary Disclosure Programme in respect of offshore assets and income

In the 2016 Budget Speech, the Minister of Finance announced a Special Voluntary Disclosure Programme to give opportunity for non-compliant taxpayers to voluntarily disclose offshore assets and income. With a new global standard for the automatic exchange of information between tax authorities providing SARS with additional information from 2017, time is now running out for taxpayers who still have undisclosed assets abroad. To encourage compliance, Government proposes a Special Voluntary Disclosure Programme for individuals and companies to regularise both their tax and exchange control affairs for a limited window period described below.

SARS and the South African Reserve Bank (SARB) are working jointly to ensure that applications for the Special Voluntary Disclosure Programme are assessed through one joint process for both tax non-compliance and exchange control contraventions.

<u>TAX RELIEF</u>

<u>Window period of Special Voluntary Disclosure Programme</u>

- Applications for relief under the Special Voluntary Disclosure Programme will apply for a limited window period of six months starting on1 October 2016 and closing on 31 March 2017.

<u>Persons that may apply for the Special Voluntary Disclosure Programme</u>

- Individuals and companies may apply for the Special Voluntary Disclosure Programme on the same basis as for the existing Voluntary Disclosure Programme contemplated in Part B of Chapter 16 of the Tax Administration Act. That is to say, an initial 'no-name approach' may be made, applications may be made in a representative capacity, etc.
- Trusts will not qualify to apply for the Special Voluntary Disclosure Programme.

- Settlors, donors, deceased estates or beneficiaries of foreign discretionary trusts may, however, participate in the Special Voluntary Disclosure Programme if they elect to have the trust's offshore assets and income deemed to be held by them.

- Persons may not apply for the Special Voluntary Disclosure Programme if they are aware of a pending audit or investigation in respect of foreign assets or foreign taxes or an audit or investigation in respect of foreign assets or foreign taxes has commenced. However, if the scope of an audit or investigation is in respect of other areas (other than foreign assets or foreign taxes, e.g. in respect of PAYE), persons may still qualify to apply for relief under the Special Voluntary Disclosure Programme.

- Amounts in respect of which SARS obtained information under the terms of any international exchange of information procedure will not be eligible for the Special Voluntary Disclosure Programme.

Relief granted under the Special Voluntary Disclosure Programme

- Only 50 per cent of the total amount used to fund the acquisition of offshore assets ('seed money') before 1 March 2015, if the applicant failed to comply with a tax Act administered by SARS, will be included in taxable income and subject to normal tax.

- Investment returns in respect of those offshore assets received or accrued only from 1 March 2010 onward will be included in taxable income in full and subject to normal tax.

- Investment returns prior to 1 March 2010 will be exempt.

Interest charged in terms of the Special Voluntary Disclosure Programme

- Interest on tax debts arising from the disclosure of amounts used to fund the acquisition of offshore assets or investment returns in respect of those offshore assets will commence only from 1 March 2010.

Waiver of penalties under the Special Voluntary Disclosure Programme

- No understatement penalties will be levied where an application under the Special Voluntary Disclosure Programme is successful.

Exemption from criminal prosecution under the Special Voluntary Disclosure Programme

- As is currently the case in the existing Voluntary Disclosure Programme, SARS will not pursue criminal prosecution for a tax offence where an application under the Special Voluntary Disclosure Programme is successful.

Application process under the Special Voluntary Disclosure Programme

- The application process for the existing Voluntary Disclosure Programme will be extended to the Special Voluntary Disclosure Programme.

EXCHANGE CONTROL RELIEF

Disclosure of Exchange Control Contraventions under the Special Voluntary Disclosure Programme

- The Financial Surveillance Department of the South African Reserve Bank (FinSurv) will be offering an opportunity to South African residents to regularise their exchange control affairs by applying for relief under the Special Voluntary Disclosure Programme of contraventions of the provisions of the Exchange Control Regulations, 1961 and which contraventions include, *inter alia*, the ownership of an unauthorised foreign asset(s).
- Applications for relief for Exchange Control under the Special Voluntary Disclosure Programme are to be made pursuant to the provisions of Regulation 24 of the Exchange Control Regulations, 1961.
- South African residents (individuals and entities) will be allowed to disclose and regularise their exchange control contraventions that occurred prior to 29 February 2016.
- South African residents who are the subject of any current and/or

pending investigation by FinSurv into their contraventions of the provisions of the Regulations will not qualify for Exchange Control relief under the Special Voluntary Disclosure Programme.

<u>Window period of the Special Voluntary Disclosure Programme</u>

- Applications for Exchange Control Relief under the Special Voluntary Disclosure Programme will commence on 1 October 2016 and will continue until 31 March 2017

<u>Exchange Control Relief under the Special Voluntary Disclosure Programme</u>

- Applicants who are granted administrative relief in respect of unauthorised foreign assets and/or structures (of whatever nature, excluding bearer instruments) may have to pay a levy based on the current market value thereof as at 29 February 2016.
- The following conditions will apply:
    - 5% of the leviable amount if the regularised assets or the sale proceeds thereof are repatriated to South Africa;
    - 10% of the leviable amount if the regularised assets are kept offshore;
- The levy must be paid from foreign-sourced funds. Where insufficient liquid foreign assets are available, an additional 2% will be added, to the extent that local assets are utilised to settle the levy; and
- Individuals will not be allowed to deduct their R10 million foreign capital allowance or any remaining portion thereof from any leviable amount and the levy may not be reduced by any fees or commissions.

<u>Exchange Control Relief post the Special Voluntary Disclosure Programme</u>

- South African residents who do not apply for Exchange Control Relief under the Special Voluntary Disclosure Programme and voluntarily make a full disclosure directly to FinSurv outside of the Special Voluntary Disclosure Programme shall, at the discretion of FinSurv, have to pay a settlement ranging from 10% to 40% on the current market value of their unauthorised foreign assets. The determination of the final settlement amount will, *inter alia*, depend on whether the applicant elects to retain the funds abroad or repatriate such funds.

- South African residents who neither applied for Exchange Control relief in terms of this Special Voluntary Disclosure Programme nor voluntarily approached the FinSurv for assistance may face the full force of the law. In this regard, the FinSurv is mandated to, where appropriate, recover the full amount of the contravention.

<u>Treatment of disclosure and regularisation</u>

- Further information on the treatment of disclosures and declarations in respect of specific transactions conducted by natural persons, corporates and donors of discretionary trusts will be made public in due course.

<u>TAX LEGISLATION AND EXCHANGE CONTROL REGULATIONS</u>

Provisions regarding tax relief under the Special Voluntary Disclosure Programme will be made available in the Rates and Monetary Amounts and Amendment of Revenue Laws Bill, 2016, the Rates and Monetary Amounts and Amendment of Revenue Laws (Administration Bill), 2016 and under the Exchange Control Regulation 24 of 1961.

3.2. Regulation in terms of par. 12D(5)(a) of the Seventh Schedule to the Income Tax Act, on determination of fund member category factor

SCHEDULE

Definitions

1. In these Regulations, any word or expression to which a meaning has been assigned in the Income Tax Act, 1962 (Act No. 58 of 1962), bears the meaning so assigned, and –

'annuity accrual rate' means, in relation to a period for which a certificate is issued, the annual increase in the annuity benefit of a defined benefit component –

(a) occurring as a result of fund membership during the period in respect of which the certificate is issued; and

(b) expressed as the average of a proportion of final salary (as defined in the rules of the fund) in respect of all members of a fund member category;

as if all those members would have qualified in terms of the rules of fund to a receive an annuity benefit upon retirement.

'annuity benefit' means an annuity –

(a) payable by a fund on retirement in consequence of membership or past membership of that fund; and

(b) in respect of which a portion of the final salary (as defined in the rules of the fund) is utilised to calculate the amount of the benefit of the fund member;

'death benefit' means a benefit payable in respect of the death of a member to that member, the estate of that member or to a dependant or nominee of that member;

'lump sum' means a single amount –

(a) payable by the fund on retirement in consequence of membership or past membership of that fund to a member of that fund; and

(b) of which the value is calculated as constituting a portion of the final salary (as defined in the rules of the fund) of the fund member;

'lump sum accrual rate' means in relation to a period for which a certificate is issued, the annual increase in the lump sum of a defined benefit component –

(a) occurring as a result of fund membership during the period in respect of which the certificate is issued; and

(b) expressed as the average of a proportion of final salary in respect of all members of a fund member category;

Fund member category factor is aggregate

2. The fund member category factor must, for the purposes of paragraph 12D(3) of the Seventh Schedule to the Income Tax Act, 1962, be calculated by aggregating –

(a) the defined contribution component factor determined as prescribed by regulation 3;

(b) the defined benefit component factor determined as prescribed by regulation 4;

(c) the underpin component factor determined as prescribed by regulation 5, and

(d) the risk benefit component factor determined as prescribed by regulation 6,

for that fund member category.

Determination of defined contribution component factor

3.(1) The defined contribution component factor is the contribution rate (as specified in the rules of the fund) in respect of the total of the contributions to the fund by or on behalf of the employee and by or on behalf of the employer in respect of each defined contribution component.

(2) Any contribution in respect of a risk benefit provided by the fund directly or indirectly for the benefit of a member of the fund or a dependant or nominee of that member, other than risk benefits provided by the fund solely by means of a policy of insurance if the fund pays the premiums in respect of that policy of insurance, must not be taken into account in determining the defined contribution component factor as contemplated in subregulation (1).

(3) If a fund member is entitled to receive more than one defined contribution component –

(a) the fund must calculate a defined contribution component factor in respect of each defined contribution component; and

(b) the defined contribution component factor for the purposes of this regulation is the sum of the amounts calculated in terms of paragraph (a) less any defined contribution component factors used to calculate an underpin component factor in terms of regulation 5.

Determination of defined benefit component factor

4. (1) The defined benefit component factor in respect of a defined benefit component must be determined in accordance with the formula –

X= (A X B)+ (C X D)

in which formula –

(a) 'X' represents the defined benefit component factor to be determined;

(b) 'A' represents the annuity accrual rate;

(c) 'B' represents the number that must be obtained-

(i) by establishing a number in terms of the following formula

Y = (E+F)/2

In which formula –

(a) 'Y' represents the number to be determined;

(b) 'E' represents the number 65;

(c) 'F' represents the earliest age at which members of that fund member category may retire without any retirement benefit being reduced as a result of that retirement in terms of the rules of the fund;

(ii) by utilising the factor in the column in Schedule I entitled 'factor' that corresponds with the number determined in terms of paragraph (i) in the column 'midpoint between 65 and earliest age of unreduced benefits' in that schedule.

(d) 'C' represents the lump sum accrual rate; and

(e) 'D' represents the number 0.8.

(2) If a fund member is entitled to receive more than one defined benefit component in respect of a fund member category –

(a) the fund must calculate a defined benefit component factor in respect of each defined benefit component; and

(b) the defined benefit component factor for the purposes of this regulation is the sum of the factors calculated in terms of paragraph (a) less any defined benefit component factors used to calculate an underpin component factor in terms of regulation 5.

Determination of underpin component factor

5. (1) The underpin component factor must be determined in accordance with the formula –

X=A+ BxC

in which formula –

(a) 'X' represents the underpin component factor to be determined;

(b) 'A' represents the greater factor of –

(i) the defined contribution component factor calculated utilising the formula in regulation 3(1) for the defined contribution component used for the purposes of determining the underpin component; or

(ii) the defined benefit component factor calculated by utilising the formula in regulation 4(1) for the defined benefit component used for the purposes of determining the underpin component.

(c) 'B' represents the number 0.1 0; and

(d) 'C' represents the smaller factor of –

(i) the defined contribution component factor calculated utilising the formula in regulation 3(1) for the defined contribution component used for the purposes of determining the underpin component;

or

(ii) the defined benefit component factor calculated by utilising the formula in regulation 4(1) for the defined benefit component used for the purposes of determining the underpin component.

(2) If a fund member is entitled to receive more than one underpin component in respect of a fund member category –

(a) the fund must calculate an underpin component factor in respect of each underpin component; and

(b) the underpin component factor for the purposes of this regulation is the sum of the factors in terms of paragraph (a).

Determination of risk benefit component factor

6. (1) The risk benefit component factor must be determined in respect of all death benefits provided by the fund for the benefit of a member of the fund or a dependant or nominee of that member, other than any risk benefit –

(a) provided by the fund solely by means of a policy of insurance and the fund pays the premiums in respect of that policy of insurance; or

(b) that constitutes a return of the member's interest in any defined contribution components of the fund payable upon the death of that member.

(2) The risk benefit component factor must be determined in accordance with the formula

X=A x B

in which formula –

'X' represents the risk benefit component factor to be determined;

'A' represents the number 0.005; and

'B' represents the average of a proportion of retirement funding income of all members of a fund member category in respect of each member of that fund member category in respect of risk benefits to which the member or his or her dependants or nominees would have become entitled if the member had died during the year of assessment in respect of which the certificate is issued (including the valuator's estimate of the average capital value of any spouse's pensions or dependant's annuities paid to that spouse or those dependants by virtue of that member's membership of that fund).

(2) If a fund member is entitled to receive more than one risk benefit component in respect of a fund member category –

(a) the fund must calculate a risk benefit component factor in respect of each risk benefit; and

(b) the risk benefit component factor for the purposes of this regulation is the sum of the factors calculated in terms of paragraph (a) less any risk benefit component factors used to calculate an underpin component factor in terms of regulation 5.

Data to be used in respect of fund member category factor calculations

7. For the purposes of these regulations, the data that must be used in respect of the calculation of any fund member category factor may not be older than the data available on the date of the last statutory actuarial valuation.

Short title and commencement

8. These Regulations are called the Regulations in terms of paragraph 120(5)(a) of Seventh Schedule to the Income Tax Act, 1962, on determination of fund member category factor and come into operation on 1 March 2016.

Schedule I

Midpoint between 65 and earliest age of unreduced benefits	Factor

55	12.5
55.5	12.2
56	11.9
56.5	11.6
57	11.4
57.5	11.1
58	10.8
58.5	10.5
59	10.3
59.5	10.0
60	9.7
60.5	9.5
61	9.3
61.5	9.2
62	9
62.5	8.8
63	8.6
63.5	8.4
64	8.2
64.5	8.1
65	7.9

3.3. Regulations in terms of par. 12D(5)(b) of the Seventh Schedule to the Income Tax, on information to be contained in contribution certificates

SCHEDULE

Definitions

1. In these Regulations, any word or expression to which a meaning has been assigned in the Income Tax Act, 1962 (Act No. 58 of 1962) or the Regulations in terms of paragraph 12D(5)(a) of the Seventh schedule to the Income Tax Act, 1962, on the determination of the fund member category factor bears the meaning so assigned.

Persons that must prepare contribution certificate

2. The contribution certificate must be prepared by the board, as defined in section 1 of the Pension Funds Act, in consultation with the valuator of that fund.

Signing of contribution certificate

3. The contribution certificate must be signed by the valuator of the fund and two board members of the board of the fund, as contemplated in section 7 A of the Pension Funds Act, and the principal officer of the fund as contemplated in section 8 of the Pension Funds Act.

Preparation of contribution certificate in respect of each fund member category

4. A contribution certificate must be prepared in respect of each fund member category.

Content of contribution certificate

5. A contribution certificate must contain –

(a) the year of assessment in respect of which the contribution certificate is issued;

(b) the name and such details as are necessary to identify the fund that issues the certificate;

(c) the name and such details as are necessary to identify the employer in respect of whose employees the contribution certificate is issued;

(d) the fund member category in respect of which the certificate is issued;

(e) the defined contribution, defined benefit and underpin components for which members of that fund member category may become eligible in terms of the rules of the fund, and the number of the fund rule in respect of which members become entitled to each benefit component;

(f) the composition of the fund member category factor in respect of the defined contribution component factor, defined benefit component factor, underpin component factor and risk benefit component factor of which that fund member category factor is comprised;

(g) the composition of the actual contributions in respect of employer and employee contributions; and

(h) the fund member category factor for the fund member category in respect of which the contribution certificate is issued.

Short title and commencement

6. These Regulations are called Regulations in terms of paragraph 12D(5)(b) of Seventh Schedule to the Income Tax Act, 1962, on the information to be contained in contribution certificates and come into operation on 1 March 2016.

3.4. Returns of information to be submitted by third parties in terms of section 26 of the TA Act

SCHEDULE

1. General

In this notice, any term or expression to which a meaning has been assigned in a 'tax Act' as defined in section 1 of the Tax Administration Act.

2011, has the meaning so assigned, unless the context indicates otherwise, and the following terms or expressions have the following meanings:

'interest' includes any amount treated as interest under section 24J of the Income Tax Act;

'Record' means the recorded information in respect of a person that the third party must submit;

'records' means the recorded information in respect of all persons that the third party must submit; and

'SARS electronic filing service' means a SARS electronic filing service as defined in. paragraph 1 of the Rules on Electronic Communication published in Government Gazette No. 37940 on 25 August 2014.

2. Persons required to submit third party returns

The following persons are required to submit a return as specified in paragraph 3:

2.1 Banks regulated by the Registrar of Banks in terms of the Banks Act, 1990, or the Mutual Banks Act, 1993;

2.2 Co-operative Banks regulated by the Co-operative Banks Development Agency in terms of the Co-operative Banks Act, 2007;

2.3 The South African Post bank Limited (Post bank) regulated in terms of the South African Post bank Limited Act, 2010;

2.4 Financial institutions regulated by the executive officer, deputy executive officer or board, as defined in the Financial Services Board Act, 1990, whether in terms of that Act or any other Act;

2.5 Companies listed on the JSE, and connected persons in relation to those companies, that issue bonds, debentures or similar financial instruments;

2.6 State-owned companies, as defined in section 1 of the Companies Act, 2008, that issue bonds, debentures or similar financial instruments;

2.7 Organs of state, as defined in section 239 of the Constitution of the Republic of South Africa, 1996, that issue bonds or similar financial instruments;

2.8 Any person (including a co-operative as defined in section 1 of the Income Tax Act) who purchases any livestock, produce, timber, ore, mineral or precious stones from a primary producer other than on a retail basis;

2.9 Any medical scheme registered under section 24(1) of the Medical Schemes Act, 1998;

2.10 Any person, who for their own account carries on the business as an estate agent as defined in the Estate Agency Affairs Act, 1976, and who pays to, or receives on behalf of, a third party, any amount in respect of an investment, interest or the rental of property;

2.11 Any person, who for their own account practices as an attorney as defined in section 1 of the Attorneys Act, 1979, and who pays to or receives on behalf of a third party any amount in respect of an investment, interest or the rental of property;

2.12 A person liable to pay withholding tax on interest in terms of section 50F(2) of the Income Tax Act; and

2.13 A person referred to in paragraph 2 of the Regulations issued in terms of section 12T (8) of the Income Tax Act, and who issued a financial instrument or policy in respect of a tax free investment.

3. Returns required to be submitted

Every person mentioned in Column 1 must submit a third party return that relates to the information specified in Column 2, in the form specified in Column 3 of the following Table:

Column 1: Person mentioned in paragraph	Column 2: Information concerning	Column 2: Form
2.1, 2.2, 2.3, 2.4, 2.5, 2.6, 2.7, 2.10, 2.11 and 2.12	Amounts paid, due and payable, or received in respect of, or by way of any investment, rental of immovable property, interest or royalty; transactions that are recorded in an account maintained for another person (i.e . transactional accounts like bank accounts); and any tax withheld.	IT3(b); or Data compiled in accordance with SARS's Business Requirement Specification: IT3 Data Submission
2.1, 2.2, 2.3, 2.4, 2.6 and 2.7	Amounts paid in respect of the purchase and disposal of financial instruments	IT3(c); or Data compiled in accordance with SARS' Business Requirement Specification: IT3 Data Submission
2.4	The purchase of, and contributions made in respect of, any retirement annuity policy.	IT3(f); or Data compiled in accordance with SARS' Business Requirement
2.4	The payment of an amount that occurs upon the death of a person in terms of an insurance policy.	IT3(f); or Data compiled in accordance with SARS' Business Requirement

		Specification: Insurance Payments
2.8	Monies paid in respect of a purchase, sale, or shipment of livestock, produce, timber, ore, mineral, precious stones, or by way of a bonus.	IT3(e); or Data compiled in accordance with SARS's Business Requirement Specification: IT3 Data Submission
2.9	Contributions made by persons in respect of a medical scheme, and all expenses paid for a person by a medical scheme.	IT3(f); or Data compiled in accordance with SARS' Business Requirement Specification: Medical Scheme Contributions
2.13	(a) Contributions to, withdrawals from and transfers to and from a tax free investment; and (b) any other amounts received or accrued in respect of a tax free investment.	IT3(s); or Data compiled in accordance with SARS' Business Requirement Specification: IT3 Data Submission

4. Due date for submitting a third party return

Subject to paragraph 5, the returns mentioned in the above Table, containing all prescribed information in respect of the period from-

4.1 1 March to 31 August, must be submitted by 31 October; and

4.2 1 March to the end of February, must be submitted by 31 May.

5. Due date for submitting first return for persons listed in paragraph 2.12 and 2.13

Persons, who must submit a return for the first time as a result of being listed in paragraphs 2.12 and 2.13, are not required to submit a return for the period from 1 March 2015 to 31 August 2015.

6. Manner of submitting a third party return

6.1 Where a third party return comprises:

- 20 or fewer records, the data must be submitted electronically using the SARS electronic filing service - exiling;
- 21 to 50 000 records, the data must be submitted electronically by using the SARS electronic filing service - hypertext transfer protocol secure (https) bulk data filing; and
- more than 50 000 records, the data must be submitted electronically using the SARS electronic filing service - Connect Direct (C: O) bulk data filing.

6.2 Declarations in respect of third party returns must be submitted electronically using the SARS electronic filing service - exiling.

7. Alternative arrangements with SARS

SARS may agree that a person, who is required to submit a return in accordance with this Schedule, may submit a return in respect of a different period, upon an alternative date and in an alternative manner, as the case may be.

3.5. *Regulation listing the organs of state or institutions to which a senior SARS official may lawfully disclose information*

List of organs of state or entities:

1. A municipality established in terms of section 12 of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998).
2. Companies and Intellectual Property Commission established in terms of section 185 the Companies Act, 2008 (Act No. 71 of 2008).
3. Department of Home Affairs.
4. Government Pensions Administrations Agency as established by Proclamation No. 10 of 26 March 2010, published in terms of Section 7A(4) of the Public Service Act, 1994 (Proclamation No. 103 of 1994).

4. CASE LAW

4.1. *C:SARS v C-J van der Merwe*

The principal protagonists in this matter were the Appellant, being the Commissioner for SARS, and the Respondent's father, Mr Gary van der Merwe ('Van der Merwe').

SARS had obtained a tax judgment in the amount of R66 206 256,53 against Van der Merwe by way of an entry in the judgment book of the registrar of the High Court as contemplated by section 91(1)(*b*) of the Income Tax and SARS had contended that despite Van der Merwe having amassed substantial wealth, he claimed not to own any assets, which so the contention went, was a stratagem designed to obstruct tax collection.

Van der Merwe had over a number of years been associated with certain juristic entities that had fraudulently claimed VAT refunds from SARS and they were collectively liable to it for tax, additional tax, penalties and interest in an amount in excess of R225 million and, in the result, on 19 August 2011 SARS had applied to the Western Cape Division of the High Court, Cape Town, against a total of 22 respondents, including Van der Merwe, the Respondent (Ms van der Merwe) and a host of corporate entities for a preservation order, as also the appointment of a *curator bonis* in terms of s section163(4)(*a*) of the TA Act.

Appellant, in support of the aforementioned application, stated that the preservation order was sought to secure assets, which may be executed against in respect of existing indebtedness to SARS, but also in respect of indebtedness still to be established and SARS entertained the 'reasonable belief that Mr van der Merwe uses the respondents, other persons and entities to hide his assets' and had asserted that 'the appointment of a *curator bonis* will be required for the collection of the outstanding taxes'.

SARS had contended that it had a claim against Ms van der Merwe, being Van der Merwe's daughter and the Respondent in this case, in relation to the tax debt due by her father.

Respondent had earned relatively modest earnings from her modelling career from 2009 to 2012 but 'lady luck' suddenly smiled on her during 2013 when, according to SARS, it had been made aware by the Financial Intelligence Centre that the Standard Bank of South Africa had received USD 15,3 million for her benefit on 16 May 2013. The remitter of those funds, which had been transferred from the Bank Med Sal in Lebanon, was identified as Muhamad Muhamad Nazih Rawwas.

Respondent had in addition acquired two motor vehicles during May and June of that year, namely an Audi R8 Spyder and a Range Rover Evoque collectively valued in excess of R2,5 million.

SARS had asserted that Respondent was simply a conduit and had received the funds in question on behalf of and for the benefit of her father and that her income declared by her could not sustain the acquisition of those vehicles and on that basis had persuaded the Cape High Court to issue a provisional preservation order in respect of those assets.

Rogers J, on 20 August 2013, had issued a provisional preservation order in terms of section 163(4)(*a*) of the TA Act but the learned judge, who dealt with the matter *ex parte* and in chambers, did not appoint the *curator bonis* sought by SARS.

A provisional order was made in respect of Candice van der Merwe interdicting her from dealing with, disposing of, encumbering or removing from the Republic the Audi R8 Spyder and Land Rover Evoque as well as any monies standing to the credit of any bank accounts in her name or in respect of which she had signing powers to the extent that such monies had represented any residue of the sum of USD15,3 million received by her on or about 16 May 2013.

The aforementioned provisional preservation order was granted to preserve assets in respect of which there was *prima facie* evidence indicating that the assets in question in truth belonged to Gary van der Merwe and were thus realisable in respect of his alleged tax debts.

After the grant of the order by Rogers J, Respondent had alone chosen to anticipate the return day, with the result that SARS' application in relation to her proceeded separately from the other respondents.

Respondent, in her answering affidavit, wherein she sought to persuade the Cape High Court to set aside the preservation order in respect of her assets, explained her acquisition of the two vehicles and the large sum of money received from overseas.

Respondent had been a model since the age of 19 and had been invited to travel to the Seychelles to be in attendance at a club resort there which she had accepted. The Plantation Club was a private resort in the Seychelles which was owned and frequented by some of the richest private individuals in the world and privacy, and more importantly security, was paramount to these persons.

She stated that models from only the trusted agencies were routinely flown in from all over the world to lend a sense of glamour and exclusivity to these events and by definition the resort.

She stated that she got on very well with the persons that she met at the resort and suggested that this was because she led a healthy lifestyle and had a very engaging personality and this resulted in her being booked through Ice Models to travel to the Seychelles on subsequent occasions. During one of the trips one of the topics of conversation that came up was her preference for cars and she made no secret of the fact that her dream car was an Audi R8 and she had even had a picture of it on her cell phone.

Respondent, after returning to Cape Town, had been involved in a motor accident in which the car she was driving was written off and she suffered a sprained ankle and she had discussed this incident with persons whom she became friendly with while in the Seychelles.

A few days later she 'was thrilled to receive a phone call' from the Audi dealership in Cape Town to inform her that a new Audi R8, paid for in cash and registered in her name, was ready for her to collect. A few months later a benefactor gave her a new Range Rover, and she had also received two brand new cell phones *via* courier which had already been paid for.

On a separate occasion, when her Seychelles friends had visited Cape Town, she mentioned to them that she would like to look for a house in the upmarket suburbs of Camps Bay, Clifton or Fresnaye and 'it was suggested to me that I look for a house in one of those areas which I liked because I would receive funds to pay for it.'

She then saw a house in Fresnaye that she loved and the asking price was R110 million which she then communicated to her friends and, subsequently, the amount of USD15,3 million was remitted to her by Mr Muhamad Rawas and it was this amount that formed the subject-matter of and catalyst for the bringing of this application.

Further, after 'negotiations by my father on my behalf' Respondent had bought the property and transfer was passed to her.

Appellant had taken the view that the aforementioned valuable assets that had fallen into Ms van der Merwe's possession in this unusual way were in reality received by her on behalf of her father and could therefore be seized to pay his tax debts.

The matter eventually came before the Cape High Court (*per* Savage AJ), see *C:SARS* v *C-J Van der Merwe* 76 SATC 138 wherein the court confirmed the whole of the provisional order granted by Rogers J with costs, on the basis that SARS had shown that a final preservation order was required against the Respondent to secure the collection of tax on its version and that the case put up by Respondent in answer to that of SARS was so highly improbable in human experience that it could not be accepted and for these reasons the provisional preservation order granted in terms of section 163(3) of the Act stood to be confirmed.

Savage AJ did not enter into the question of the appointment of the *curator bonis* as sought by SARS who then attempted to have the order rectified but this effort had come to nought.

After negotiations between the parties, a consent order was issued by the Cape High Court on 28 March 2014 granting Ms van der Merwe leave to appeal against the preservation order granted by Savage AJ and granting the SARS leave to cross-appeal to rectify defects in the court order, *ie* against the failure of the High Court to appoint the *curator* sought by it.

In terms of the Rules of the Supreme Court of Appeal, Respondent should have filed a notice of appeal within one month of the date of the order that had granted her leave to appeal but she had failed to take any steps whatsoever to prosecute her appeal with the result that it had lapsed.

Appellant, on 21 May 2014 and on the basis that it was now *dominus litis* in the appeal, served and filed its notice of appeal.

Communication concerning the content of the record to be filed on appeal ensued in June and July of that year between SARS' attorney and Respondent's attorney and the record was filed on 26 August 2014.

It was only thereafter on 29 August 2014 that Respondent's attorney sought to obtain consent from the Appellant for the late filing of a notice of appeal and this request was refused.

Thereafter Respondent made a formal application to the Supreme Court of Appeal for condonation of the late filing of the notice of appeal and this application is the subject for determination by the court at present.

The application for condonation had been brought by Mr van der Merwe on behalf of the Respondent and he had deposed to the founding and replying affidavits in the application in which he had provided various explanations for the delay in prosecuting the appeal, which included the appointment of new attorneys, relocation of the attorneys' practice and ignorance of the correct procedures.

Judge Ponnan held the following:

As to the application for condonation

(i) That condonation of non-compliance with the rules 'is not to be had merely for the asking' and factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice.

(ii) That what calls for an explanation is not only the delay in the timeous prosecution of the appeal, but also the delay in seeking condonation. An appellant should, whenever she realises that she has not complied with a rule of this court, apply for condonation without delay.

(iii) That the affidavit deposed to by Mr Van der Merwe on 8 October 2014 still mirrored the earlier defective condonation application without purging the identified defects. The founding affidavit does not explain why the application, which was evidently ready on 30 September 2014, was not formally served and filed then or why it was held in abeyance until after SARS' heads of argument had been filed. The application was launched approximately five months after the applicant's notice of appeal should have been filed and three months after the applicant's notice of appeal was belatedly filed in the High Court.

(iv) That, despite professing to be fully aware of the facts and circumstances leading up to the application, Mr van der Merwe did not disclose exactly when the various events specified in the affidavit actually occurred and this demonstrated an obvious lack of attention to matters that plainly called for an explanation and evidenced a failure to fully and candidly enlighten the court, as an applicant in a matter such as this was obliged to do and it followed that the explanation proffered was woefully inadequate and it was thus impossible to hold that the delay in bringing this application had been explained in a manner which was even remotely satisfactory.

(iv) That, furthermore, Respondent's explanation, such as it was, failed at virtually every level – nowhere did Mr van der Merwe provide an explanation for failing since 3 July 2014 to file a simple notice of appeal; his affidavit also did not identify any of the grounds sought to be advanced as it simply attached the application for leave to appeal in the High Court and nor did it address the prospects of success. It was advisable, where application for condonation is made, that the application should set forth briefly and succinctly such essential information as may enable the court to assess the appellant's prospects of success. This was not done in the present case and, indeed, the application does not contain even a bare averment that the plaintiff enjoys any prospect of success on appeal.

(v) That in applications of this sort the prospects of success are in general an important, although not decisive, consideration. It has been pointed out that the court is bound to make an assessment of an applicant's prospects of success as one of the factors relevant to the exercise of its discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration.

(vi) That the court had not dealt with the applicant's prospects of success on appeal because, in its view, the circumstances of the present case were such that it should refuse the application for condonation irrespective of the prospects of success. This court has often said that in cases of flagrant breaches of the rules, especially where there is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the appeal and this applies even where the blame lies solely with the attorney. Here the breaches of the rules are of such a nature and the explanation offered so unacceptable and wanting that condonation ought not, in the court's view, be granted, irrespective of the applicant's prospects of success, which were in any event poor.

(vii) That, accordingly, the application for condonation by the Respondent was dismissed with costs and it remained to add that the conduct encountered here was deserving of an order of costs on the punitive scale. The conduct of the applicant and her father throughout had generated costs that should not have been incurred and those costs should plainly not be borne by compliant taxpayers and it followed that the award of costs on the scale as between attorney and client was justified in this case.

<u>As to the appointment of a curator bonis</u>

(ix) That the appeal by SARS was confined to a consideration of whether the order of the High Court should, as well, have made provision for the appointment of a curator bonis and this was provided for in section 163(7)(b) of the TA Act which stated that a court granting a preservation order may make any ancillary orders regarding how the assets must be dealt with including appointing a curator bonis in whom the assets must vest.

(x) That SARS had sought the appointment of a curator and had stipulated his powers in its application for a preservation order and its founding affidavit made plain that the purpose of the application was to apply 'for an order in terms of section 163 of the Tax Administration Act, for the preservation of the [applicant's] assets and the appointment of a curator bonis to take control thereof in order to secure the collection of tax'. The founding affidavit went on to identify the purpose for which SARS had sought the appointment of a curator as being to investigate 'the whereabouts of Mr van der Merwe's assets and the assets of the other respondents'.

(xi) That it appeared that Mr Van der Merwe also controlled the affairs of his daughter, the Respondent, and she had provided his contact details in the application to sell the foreign currency and she had furnished Standard Bank with his cellular number, address and e-mail address. Thus, at the very least, Respondent allowed her accounts to be used by her father or could not prevent him from doing so and it was evidently Mr van der Merwe's facility to control or influence the transfer of the funds between accounts for which he held signing powers.

(xii) That Mr van der Merwe's evident involvement of family members and his obviously close relationship with his daughter coupled with the extraordinary wealth which she had suddenly acquired, allegedly as a gift, required investigation and it thus seemed imperative that a curator investigate how and on what basis those funds were effectively placed at the disposal of Mr van der Merwe and whether and how he had disposed of the funds and it followed that SARS's application for the appointment of a curator bonis should have succeeded before Savage AJ and that its appeal in that regard must succeed.

(xiii) That, accordingly, a curator bonis was to be appointed in whom the right, title and interest in all the assets of the Respondent would vest, including, but not limited to, any shareholding, loan accounts, member's interest, moveable and immovable assets and funds held in bank accounts.

5. INTERPRETATION NOTES

5.1. Year of assessment of natural person and trusts: Accounts accepted to a date other than the last day of February – No. 19 (Issue 4)

This Note provides guidance on the application of section 66(13A) and the discretionary power vested in the Commissioner to grant permission to a natural person or trust to submit accounts for a period (the 'accounting period') which differs from the year of assessment ending on the last day of February.

This Note deals primarily with natural persons and trusts carrying on a trade. A brief commentary is also included on the application of section 66(13A) to PBOs and share purchase arrangements.

Section 66(13A) provides that a taxpayer may apply to the Commissioner to draw up accounts to a date other than the last day of February when the Commissioner is satisfied that the whole or some portion of the taxpayer's income cannot be conveniently returned for any year of assessment.

Under section 66(13A) a taxpayer who cannot conveniently return income from a business or profession to the last day of February may apply to a SARS branch office for permission to draw up accounts to another closing date. Any request of this nature is subject to conditions that the Commissioner may impose. Generally the closing date so approved will determine into which year of assessment the results for the accounting period must be included and the dates on which provisional tax payments must be made.

5.2. Headquarter Companies – No. 87

This Note provides guidance and clarity on the interpretation and application of section 9I which deals with headquarter companies. Section 9I was initially inserted into the Act effective for years of assessment commencing on or after 1 January 2011.

The Note also briefly discusses the provisions of the Act that provide special tax relief for headquarter companies, as well as the specific anti-avoidance rules that are designed to prevent misuse or abuse of those provisions.

The Note does not discuss all of the sections which are applicable to headquarter companies. For example, the Note does not discuss 'gross income' as defined in section 1(1) or section 11(*a*) which, although these sections do not specifically refer to headquarter companies, are applicable to headquarter companies.

The South African government wishes to promote South Africa as a gateway for investments into Africa. The *Explanatory Memorandum on the Taxation Laws Amendment Bill, 2010* stated:

> As part of the initiative to promote South Africa as a location for headquarter companies, the government amended certain provisions of the Act in order to create a more favourable tax dispensation for parties using South Africa as a gateway for investment into Africa.

A headquarter company is subject to tax in the same way as any other resident company, however it is entitled to certain relief from income tax, CGT and dividends tax which is not available to resident companies that are not headquarter companies. As a consequence of the special relief granted to headquarter companies they are also subject to special anti-avoidance rules.

In addition to the headquarter companies themselves, a foreign person receiving interest or royalties from a headquarter company will, under specified circumstances, be exempt from withholding tax on interest and royalties respectively.

A company that meets the requirements and elects to be a headquarter company under section 9I for a specific year of assessment will be entitled to the relief outlined in this Note.

A headquarter company potentially qualifies for the following relief:

- Exclusion from the CFC legislation under section 9D(2).
- Exemption from normal tax on foreign dividends received by or accrued

under section 10B(2)(*a*) and 10B(3).

- Relaxation of the transfer pricing rules under section 31(5), but accompanied by ring-fencing of interest incurred under section 20C(2) and ring-fencing of royalties incurred under section 20C(2A).
- Relaxation of the income tax and CGT treatment of foreign exchange transactions under section 24I(3), 25D(4) and (7) and paragraph 43(1A).
- Disregarding of the capital gain or capital loss on the disposal of equity shares in a foreign company under paragraph 64B(2) and disregarding of the capital gain on a foreign return of capital received from a foreign company under paragraph 64B(4).
- A possible rebate for foreign taxes under section 6*quat*(1A) or a deduction for foreign taxes under section 6*quat*(1C).
- Exemption for a foreign person from withholding tax on interest under section 50D(1)(*a*)(i)(*cc*) on the interest paid by a headquarter company on so much of the financial assistance to which section 31 did not apply as a result of the application of section 31(5)(*a*).
- Exemption for a foreign person from withholding tax on royalties under section 49D(*c*) on the granting of the use, right of use or permission to use intellectual property to which section 31 does not apply as a result of the application of section 31(5)(*c*).
- Exclusion from dividends tax legislation under section 64E(1).

Although a headquarter company qualifies for certain tax relief, anti-avoidance provisions have been introduced to protect the South African tax base:

- A company that becomes a headquarter company is subject to CGT on the deemed disposal of some of its assets under section 9H(3)(*a*), and to dividends tax on a dividend *in specie* deemed to have been declared and paid by that company under section 9H(3)(*c*)(iii) for purposes of section 64EA(*b*). The deemed disposal and deemed dividend are deemed to have taken place on the day before becoming a headquarter company.

- A headquarter company does not qualify for the relief provided for under the corporate restructuring rules in sections 41 to 47.

Section 9I came into operation with effect from the commencement of years of assessment of a headquarter company commencing on or after 1 January 2011.

5.3. Tax deduction of amounts refunded – No. 88

This Note provides guidance and clarity on the tax implications of amounts that were included in a person's taxable income, and subsequently refunded.

A person may receive remuneration and other similar amounts (for services rendered or to be rendered, or by virtue of employment or the holding of any office) which subsequently have to be refunded, often because of contractual obligations not having been fulfilled or due to an overpayment which was previously subject to tax. These amounts can include, for example, paid maternity or sick leave benefits, or retention bonuses, which are often refunded by the person in a subsequent year of assessment. The amounts refunded may qualify for an income tax deduction in the hands of the person under section 11(*n*A).

Before the introduction of section 11(*n*A), there was no provision in the Act under which amounts that were included in taxable income in a previous year of assessment could be reversed or claimed as a deduction. A deduction could not be claimed because a refund of an amount is not an expense incurred in the production of income. The initial payment made to, for example, an employee, is taxable when it is received, yet the employee does not qualify for a tax deduction or an adjustment to remuneration when amounts are refunded. Section 23(*m*), at that stage, also limited the types of expenses an employee could deduct. This overall result violated basic tax principles because the employee was effectively taxed, even though no net enrichment arose.Section

11(*n*A) was enacted to overcome this inequity. Section 23(*m*), which is a prohibitive deduction section, was also amended so as not to apply to deductions allowable under section 11(*n*A).

Amounts, which have been received by or accrued to a person, for services rendered or to be rendered (or which have been received or accrued, or by virtue of any employment or the holding of any office), may subsequently be refunded by that person. The Act permits a deduction of the amount repaid in the year of assessment during which that the amount is refunded. This has the effect of reducing the person's taxable income on assessment, or creating or increasing an assessed loss.

5.4. Maintenance orders and the tax-on-tax principle

This Note provides guidance and clarity on the treatment of maintenance orders and the tax-on-tax principles relating to maintenance orders that retirement funds pay while a member is still a contributing member and has not left the retirement fund.

General Note 37 dated 31 October 2008 is hereby withdrawn.

There is an obligation on a person to provide his or her spouse and children with financial support, particularly relating to food, housing, education, healthcare or anything else that may be considered necessary for living.

A maintenance order is normally awarded by a court against a person, in this case a member of the retirement fund, who has the obligation to provide the financial support. Should the member fail to meet this obligation the non-member may approach the court and obtain a maintenance order against the fund directing that the maintenance be deducted directly from the member's benefit in a retirement fund.

The Pension Funds Act provides that a maintenance order can be deducted from a member's minimum individual reserve. The Income Tax Act was amended to provide that any maintenance order deducted from a member's minimum individual reserve is deemed to be income in the hands of the member, irrespective of whether the amount is paid monthly or annually. The effect of the change is that the spouse claiming the maintenance no longer needs to wait for the member to exit the retirement fund to claim the outstanding maintenance amount.

A maintenance order paid by a retirement fund out of the member's minimum individual reserve is deemed to have accrued to the member on the day the amount is deducted from the member's minimum individual reserve in the fund. The additional amount paid out of the member's minimum individual reserve to cover the employees' tax payable on the maintenance order results in the accrual of an additional deemed amount in the hands of the member. The tax-on-tax formula can be used to determine the additional tax payable as a result of the tax-on-tax effect.

5.5. VAT – Documentary proof required for the zero-rating of goods or services – No. 31 (Issue 4)

This Note sets out the documentary proof that is acceptable to the Commissioner as contemplated in section 11(3), in instances where goods or services are supplied at the zero rate.

A fundamental principle of VAT is that goods or services supplied by a vendor in the course or furtherance of the vendor's enterprise should generally be subject to VAT at the standard rate (that is, 14%). Section 11(1) and (2) respectively, make provision for a vendor to supply certain goods or services at the zero rate. In order to zero-rate these supplies, a vendor must comply with section 11(3) which requires a vendor to obtain and retain sufficient documentation to substantiate the zero-rating of such supplies.

The documentation referred to above is acceptable to the Commissioner for the purposes of section 11(3) and must be obtained and retained by a vendor that supplies goods or services at the zero rate in terms of section 11(1) or 11(2). The vendor must be in possession of the applicable documentary proof within a period of 90 days calculated from the earlier of the time an invoice is issued or the time any payment of consideration is received by the vendor in respect of the supply, except where a supply of goods is made in terms of section 11(1)(*a*)(i), read with paragraph (*a*) of the definition of 'exported' in section 1(1) and section 11(1)(*a*)(ii)(*aa*), read with paragraph (*d*) of the definition of 'exported' in section 1(1). In this instance the required documentary proof to be obtained and retained by a vendor and the time period within which the documentary proof must be obtained by the vendor are set out in Interpretation Note No. 30 (Issue 3) and the Regulation respectively.

A vendor that is not in possession of the applicable documentary proof within the mentioned 90-day period, subject to the aforementioned exceptions, is required to account for output tax by applying the tax fraction to the consideration for the supply [that is, the consideration is deemed to include VAT in terms of section 64(1)]. The vendor must include the amount of output tax in Block 12 of the VAT return for the tax period in which the said period ends. This does not apply in respect of supplies that would have been exempt from VAT in terms of section 12 had it not been zero-rated in terms of section 11 (for example, the supply of financial services to a person that is not a resident of the Republic). These supplies will therefore revert to being exempt with the corresponding denial of input tax. This would also not apply in respect of goods that are zero rated without being subsequently exported, the default zero rating would apply in this instance.

The vendor is not required to account for output tax in respect of proof of payment required for supplies that require the relevant approval from the South African Reserve Bank, provided that the vendor has complied with the Regulations as set out by the South African Reserve Bank.

The vendor is entitled to an adjustment should the vendor receive the required documentation within five years from the end of the tax period during which the original tax invoice was issued. The output tax adjustment previously declared may be deducted as an adjustment in field 18 of the vendor’s VAT return for the tax period in which the documentation is received.

The rate of tax applicable to the adjustment is the rate of tax in force at the date of issue of the tax invoice.

A vendor that does not have all the documentary proof required, may, before the expiry of the 90-day period mentioned above, submit a written application to SARS and request the approval of the alternative documentary proof obtained by the vendor for purposes of section 11(3).

A vendor that is not able to comply with the 90-day period must submit an application within 30 days from the expiry of the original 90-day period, substantiating why the application could not have been submitted timeously.

Section 55 read with Part A of Chapter 4 of the Tax Administration Act No. 28 of 2011, places the burden of proof on the vendor to retain documentation acceptable to the Commissioner in order to substantiate the entitlement to apply the zero rate to the supply of goods or services.

6. DRAFT INTERPRETATION NOTES

6.1. The taxation of foreing dividends

This Note provides guidance on the interpretation and application of various provisions of the Act relating to foreign dividends. The Note does not deal with the income tax consequences of a dividend paid by a headquarter company since this is addressed in the draft Interpretation Note issued on 12 February 2015 'HeadquarterCompanies'.

With effect from 1 January 2011 a definition of 'foreign dividend' was introduced into section 1(1) and, combined with the insertion of the definition of 'foreign company' and changes to the definition of 'dividend', had the result that on or after that date foreign dividends no longer fall within the definition of 'dividend' in section 1(1). A dividend and a foreign dividend are mutually exclusive. A dividend relates solely to certain amounts transferred or applied by a resident company. A foreign dividend relates solely to certain amounts paid or payable by a foreign company, which by definition is a non-resident.

Broadly speaking, a foreign dividend is included in a resident's gross income but may qualify for a full or partial exemption from normal tax. With effect from March / April 2012 the exemptions available for foreign dividends meeting the relevant criteria under section 10(1)(*k*)(ii)(*aa*) to (*dd*) were moved to section 10B(2) and underwent some amendment. In addition, the basic exemption available to natural persons of R3 700 under section 10(1)(*i*)(xv)(*aa*) for foreign dividends and foreign interest not otherwise exempt, was deleted and an alternative partial exemption was introduced under section 10B(3). The partial exemption under section 10B(3) was intended to ensure that the effective rate of tax on taxable foreign dividends would generally not exceed the 15% rate of tax applicable to local dividends under dividends tax, which was introduced on 1 April 2012.

This Note discusses the current gross income inclusion, exemptions and other provisions applicable to foreign dividends.

Any amount received by or accrued to a person as a foreign dividend is included in that person's gross income under paragraph (*k*) of the definition of 'gross income' in section 1(1).

Section 10B provides for exemptions of foreign dividends received by or accrued to a person. The exemptions under section 10B(2) are applied separately to each foreign dividend received or accrued while the partial exemption under section 10B(3) applies to the aggregate amount of foreign dividends not exempt under section 10B(2). The partial exemption is determined by applying the applicable ratio to a specific type of person. The exemptions will not apply to the extent that section 10B(4), (5) or (6) applies.

Foreign dividends received by or accrued to a person constitute income from a foreign source under section 9(4)(*a*). Foreign tax paid on foreign dividends potentially qualifies for a tax rebate under section 6*quat*(1).

Under section 25D a foreign dividend received by or accrued to a person is translated from a foreign currency to rand at the spot rate, or at the average exchange rate if a natural person or non-trading trust so elects. Special rules apply to foreign permanent establishments, CFCs, headquarter companies, domestic treasury management companies and international shipping companies. Foreign tax payable on a foreign dividend is translated to rand on the last day of a year of assessment at the average exchange rate for that year of assessment under section 6*quat*(4). Section 23(*q*) prohibits the deduction of expenditure incurred in the production of foreign dividends.

For the purposes of determining its net income, a CFC is deemed to be a resident for purposes of the definition of 'gross income' in section 1(1). Foreign dividends received by or accrued to a CFC are therefore included in its gross income. Section 10B also applies to foreign dividends received by or accrued to a CFC for purposes of determining its net income for inclusion in a resident's income. Special rules apply to a CFC in calculating its net income and in determining the cost price or base cost of the right in a CFC when foreign dividends are distributed by the CFC or by another CFC in which the first-mentioned CFC has an interest.

The anti-avoidance provisions of sections 8E, 8EA, 22B and paragraphs 19 and 43A are relevant when entering into share or dividend transactions.

6.2. Small business corporations (SBC)

This Note provides guidance on the interpretation and application of section 12E of the Income Tax Act which provides accelerated depreciation allowances for a taxpayer that qualifies as an SBC.

This Note does not address other sections in the Act which contain provisions that refer to or are applicable to a 'small business corporation' as defined in section 12E. For example, section 8FA(3)(*a*) provides that section 8FA, which deems hybrid interest to be a dividend in specie, does not apply to a debt owed by an SBC. Section 8FA is not discussed in this Note.

Section 10(1)(*z*K) and section 23O apply when an amount of funding has been received by or accrued to an SBC from a 'small business funding entity' as defined in section 1(1). Generally, these sections provide for the exemption of such receipts and accruals and the reduction of the deduction available for related expenditure. In this regard, this note considers only the impact of such receipts and accruals on the allowances available under section 12E(1) and section 12E(1A).

Some of the requirements in section 12E refer to the Companies Act. This Note discusses those requirements with reference to that Act but does not discuss the requirements, which may have been different in some respects, when the Act previously referred to the Companies Act No. 61 of 1973.

Section 12E sets out the requirements which must be met in order for a specified entity to qualify as an SBC. It provides accelerated depreciation allowances on certain capital assets brought into use by an SBC.

In addition, section 5(2) and the annual Rates and Monetary Amounts and Amendment of Revenue Laws Acts provide for concessionary tax rates which follow a graduated marginal structure (0%, 7%, 21% and 28%) as opposed to a flat corporate rate of 28%.

The ITR14 return contains a question asking taxpayers whether they are an SBC as referred to in section 12E. The question must be answered 'yes' if a taxpayer meets the requirements of an SBC as stipulated in section 12E. If the question is answered 'yes', a further set of questions relating to section 12E will be asked within the return. The answers to these additional questions will determine whether the taxpayer will be assessed as an SBC for that year of assessment.

Section 12E sets out the requirements for a 'close corporation', 'co-operative' or 'private company' as defined in section 1 of the Companies Act to qualify as an SBC. All the holders of shares in the SBC must be natural persons who may not hold shares in other unlisted companies (with some exceptions), its turnover for the year may not exceed R20 million and not more than 20% of its receipts and accruals, other than those of a capital nature, plus capital gains may consist of 'investment income' and income from rendering a 'personal service'. In addition, the entity may not be a 'personal service provider' as defined in the Fourth Schedule.

Section 12E provides for an accelerated depreciation allowance on certain capital assets acquired and brought into use by an SBC. There are two sets of accelerated depreciation rates which may apply. Subject to certain conditions, assets used directly in a process of manufacture or process of a similar nature, may qualify for a 100% write-off of cost in the year of assessment in which the asset is brought into use. Assets that do not fall into this category may be subject to a write-off under section 12E(1A), the amount of which may, at the election of the SBC, be calculated under the provisions of section 11(*e*) or over a period of three years at a rate of 50%, 30% and 20% of cost in the respective years. The term 'cost' is specifically defined in section 12E(2). In addition to the accelerated depreciation allowance the section also deals with the deduction of costs incurred in moving assets which fall within the ambit of the section.

SBCs are subject to concessionary tax rates which follow a graduated marginal structure and are not taxed at the corporate tax rate of 28%.

In order to qualify as an SBC an entity must meet the requirements of section 12E in each year of assessment.

6.3. Deduction for energy-efficiency savings

This Note provides guidance on the deduction for energy-efficiency savings under section 12L and the related Regulations.

In response to South Africa ranking as one of the top 20 contributors of carbon dioxide in the world, it voluntarily announced during the 2009 United Nations Climate Change Conference in Copenhagen that it would act to significantly reduce domestic greenhouse gas emissions. Consequently, environmental-related tax incentives have been introduced to address concerns related to global warming and energy security such as section 12K (exemption of certified emission reductions).

Another incentive is a deduction for energy-efficiency savings under section 12L. In an effort to encourage taxpayers to convert old technologies to newer, more energy-efficient technologies which may involve substantial amounts of capital and change behaviour related to energy usage, section 12L allows taxpayers to claim a deduction for most forms of energy-efficiency savings that result from activities performed in the carrying on of any trade and in the production of income. The deduction, when claimed, reduces the taxable income of a taxpayer and is not limited to the taxable income of a taxpayer. It can therefore create an assessed loss.

Section 12L became effective on 1 November 2013 and applies up to years of assessment ending before 1 January 2020.

For years of assessment commencing on or after 1 March 2015, the deduction is calculated at 95 cents per kilowatt hour (previously 45 cents per kilowatt hour).

Another incentive is a deduction for energy-efficiency savings under section 12L. In an effort to encourage taxpayers to convert old technologies to newer, more energy-efficient technologies which may involve substantial amounts of capital and change behaviour related to energy usage, section 12L allows taxpayers to claim a deduction for most forms of energy-efficiency savings that result from activities performed in the carrying on of any trade and in the production of income. The deduction, when claimed, reduces the taxable income of a taxpayer and is not limited to the taxable income of a taxpayer. It can therefore create an assessed loss.

Section 12L became effective on 1 November 2013 and applies up to years of assessment ending before 1 January 2020.

For years of assessment commencing on or after 1 March 2015, the deduction is calculated at 95 cents per kilowatt hour (previously 45 cents per kilowatt hour).

Section 12L provides a deduction to taxpayers for savings derived from implementing more energy-efficient methods of conducting their businesses. In claiming the deduction, attention should be paid to the –

- Regulations;
- method of calculating the baseline and the energy savings in multi-year projects;
- certificates that have to be obtained from SANEDI for each project and

year of assessment;

- exclusions and limitations; and
- the effective date of section 12L.

6.4. *The taxation of foreing dividends*

This Note provides guidance on the interpretation and application of various provisions of the Act relating to foreign dividends. The Note does not deal with the income tax consequences of a dividend paid by a headquarter company since this is addressed in the draft Interpretation Note issued on 12 February 2015 'Headquarter Companies'.

With effect from 1 January 2011 a definition of 'foreign dividend' was introduced into section 1(1) and, combined with the insertion of the definition of 'foreign company' and changes to the definition of 'dividend', had the result that on or after that date foreign dividends no longer fall within the definition of 'dividend' in section 1(1). A dividend and a foreign dividend are mutually exclusive. A dividend relates solely to certain amounts transferred or applied by a resident company. A foreign dividend relates solely to certain amounts paid or payable by a foreign company, which by definition is a non-resident.

Broadly speaking, a foreign dividend is included in a resident's gross income but may qualify for a full or partial exemption from normal tax. With effect from March / April 2012 the exemptions available for foreign dividends meeting the relevant criteria under section 10(1)(*k*)(ii)(*aa*) to (*dd*) were moved to section 10B(2) and underwent some amendment. In addition, the basic exemption available to natural persons of R3 700 under section 10(1)(*i*)(xv)(*aa*) for foreign dividends and foreign interest not otherwise exempt, was deleted and an alternative partial exemption was introduced under section 10B(3). The partial exemption under section 10B(3) was intended to ensure that the effective rate of tax on taxable foreign dividends would generally not exceed the 15% rate of tax applicable to local dividends under dividends tax, which was introduced on 1 April 2012.

This Note discusses the current gross income inclusion, exemptions and other provisions applicable to foreign dividends.

Any amount received by or accrued to a person as a foreign dividend is included in that person's gross income under paragraph (*k*) of the definition of 'gross income' in section 1(1).

Section 10B provides for exemptions of foreign dividends received by or accrued to a person. The exemptions under section 10B(2) are applied separately to each foreign dividend received or accrued while the partial exemption under section 10B(3) applies to the aggregate amount of foreign dividends not exempt under section 10B(2). The partial exemption is determined by applying the applicable ratio to a specific type of person. The exemptions will not apply to the extent that section 10B(4), (5) or (6) applies.

Foreign dividends received by or accrued to a person constitute income from a foreign source under section 9(4)(*a*). Foreign tax paid on foreign dividends potentially qualifies for a tax rebate under section 6*quat*(1).

Under section 25D a foreign dividend received by or accrued to a person is translated from a foreign currency to rand at the spot rate, or at the average exchange rate if a natural person or non-trading trust so elects. Special rules apply to foreign permanent establishments, CFCs, headquarter companies, domestic treasury management companies and international shipping companies. Foreign tax payable on a foreign dividend is translated to rand on the last day of a year of assessment at the average exchange rate for that year of assessment under section 6*quat*(4). Section 23(*q*) prohibits the deduction of expenditure incurred in the production of foreign dividends.

For the purposes of determining its net income, a CFC is deemed to be a resident for purposes of the definition of 'gross income' in section 1(1). Foreign dividends received by or accrued to a CFC are therefore included in its gross income. Section 10B also applies to foreign dividends received by or accrued to a CFC for purposes of determining its net income for inclusion in a resident's income. Special rules apply to a CFC in calculating its net income and in determining the cost price or base cost of the right in a CFC when foreign dividends are distributed by the CFC or by another CFC in which the first-mentioned CFC has an interest.

The anti-avoidance provisions of sections 8E, 8EA, 22B and paragraphs 19 and 43A are relevant when entering into share or dividend transactions.

6.5. Exemption from income tax: Remuneration derived by a person as an officer or crew member of a ship – No. 34 (Issue 2)

This Note provides guidance on the circumstances under which section 10(1)(*o*)(i) exempts the remuneration derived by a person as an officer or crew member of a ship from normal tax.

Section 10(1)(*o*)(i) was inserted into the Act in 1993, to bring the provisions of the Act in line with that of other major maritime nations, which exempt certain seafarers from normal tax if they are absent from their home countries for a period or periods exceeding 183 days in aggregate during the year of assessment.

In 2007, the definition of 'Republic' in section 1(1) was amended, and the effect of that amendment is discussed in this Note. The impact of any agreement for the avoidance of double taxation is not discussed, as the terms of such agreements vary from treaty to treaty.

The remuneration of officers or crew members of ships engaged for reward in the international transportation of passengers or goods, or ships engaged in the prospecting, exploration, mining or production of minerals if employed solely for the passage of such ships, is exempt from taxation if those officers or crew members are outside South Africa for a period or periods exceeding 183 full days in total during a year of assessment.

In certain circumstances, the remuneration of officers or crew members may not be sufficient to qualify for the exemption in section 10(1)(*o*)(i). It may, however, be possible that the remuneration of these officers or crew members qualify for the exemption under section 10(1)(*o*)(ii).

7. BINDING PRIVATE RULINGS

7.1. BPR 210 – Liquidation distribution followed by an amalgamation transaction

This ruling determines the tax consequences of a liquidation distribution followed immediately by an amalgamation transaction.

In this ruling references to sections are to sections of the Income Tax Act applicable as at 27 August 2015. 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 44; and
- section 47.

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

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

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

Subco: A company incorporated in and a resident of South Africa

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

The Applicant and the Co-Applicant are fellow subsidiaries and have common shareholders. Subco is a wholly owned subsidiary of the Applicant. The proposed transaction is to amalgamate the Applicant and the Co-Applicant in order to consolidate their operations, as there is no longer any commercial rationale for the operation of separate companies.

The transaction steps to achieve the amalgamation will be as follows:

Step 1: Subco, which does not have any liabilities, will first distribute all its assets to the Applicant as a 'liquidation distribution' as defined in section 47(1), thereafter its corporate existence will be voluntarily terminated within 36 months.

Step 2: The Applicant and the Co-Applicant will be amalgamated in terms of an amalgamation agreement under section 113 of the Companies Act 2008, as follows:

- The Applicant will transfer its business and all of its assets to the Co-Applicant as a going concern.
- The Co-Applicant will, as consideration for the transfer of the Applicant's business and all of its assets to the Co-Applicant:
  - assume all debts (including the intra-group loans currently owing by the Applicant to the Co-Applicant) and the contingent liabilities of the Applicant; and
  - issue equity shares to the Applicant.
- The Applicant will distribute the Co-Applicant shares, received as consideration, to its shareholders *pro rata* to their shareholding in the Applicant.
- The Applicant will be deregistered under section 116 of the Companies Act.

<u>Conditions and assumptions</u>

This ruling is subject to the additional condition and assumption that the shareholders of the Applicant hold the shares in the Applicant on capital account.

<u>Ruling</u>

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

(A) The distribution of Subco's assets (the distributed assets) to the Applicant will be a 'liquidation distribution' as contemplated in paragraph (*a*) of the definition thereof in section 47(1) and consequently:

- Subco will not:

  (i) recover or recoup allowances previously deducted by it in respect of the applicable allowance assets as contemplated in section 47(3)(*a*)(i), or

  (ii) realise any capital gain arising out of the transfer of those assets as contemplated in section 47(2)(*a*).

- The Applicant and Subco will, under section 47(3)(*a*)(ii), be deemed to be one and the same person for the purposes of:

  (i) claiming allowances on allowance assets in the future; and

  (ii) the recovery or recoupment of allowances in respect of allowance assets on the future disposal of those assets by the Applicant.

- The Applicant must, under section 47(5), disregard, for the purposes of determining it's taxable income, assessed tax loss, aggregate capital gain or aggregate capital loss resulting from:

  (i) the disposal of the equity shares held by the Applicant in Subco as a consequence of the liquidation, winding-up or deregistration of Subco; and

  (ii) any return of capital which the Applicant receives from Subco by way of a distribution of cash or an asset *in specie*.

(B) The transfer by the Applicant of all its assets to the Co-Applicant in terms of the amalgamation agreement will constitute an 'amalgamation transaction' as contemplated in paragraph (*a*) of the definition thereof in section 44(1) and, accordingly:

- The Applicant will not:

  (i) recover or recoup any allowances previously deducted by either the Applicant or Subco in respect of the applicable allowance assets, as contemplated in section 44(3)(*a*); or

(ii) realise a taxable capital gain as a result of the transfer of any capital assets, as contemplated in section 44(2)(*a*)(i).

- The transfer by the Applicant of the distributed assets to the Co-Applicant will not result in the application of section 47(4).
- The Co-Applicant will be entitled to the same capital allowances in respect of the applicable allowance assets to which the Applicant was previously entitled, as contemplated in section 44(3)(*a*)(ii).
- The shareholders of the Applicant will be deemed to have disposed of their shares in the Applicant for their base cost amount, as contemplated in section 44(6)(*b*)(i).
- The shareholders of the Applicant will be deemed to have acquired the equity shares in the Co-Applicant at the base cost value of the Applicant's shares, as contemplated in section 44(6)(*b*)(ii).
- The shareholders of the Applicant will be deemed to have acquired the equity shares in the Co-Applicant on the date that they had acquired the shares in the Applicant, as contemplated in section 44(6)(*b*)(iii).
- The equity shares acquired in the Co-Applicant by a shareholder of the Applicant will be deemed not to be an amount transferred or applied by the Applicant for the benefit or on behalf of that person in respect of the shares held by that person in the Applicant, as contemplated in section 44(6)(*c*). The acquisition of equity shares in the Co-Applicant will therefore not be subject to dividends tax or normal tax in the shareholder's hands.
- All the liabilities to be assumed by the Co-Applicant in terms of the amalgamation agreement, including:

(i) the contingent liabilities;

(ii) the liabilities under contracts; and

(iii) the debts currently owed by the Applicant to the Co-Applicant that will be discharged by merger,

will qualify as 'debts' assumed by the Co-Applicant as consideration for purposes of section 44(4).

7.2. *BPR 211 – Transfer of exchange items using corporate rules*

This ruling determines the consequences under section 24I of the Income Tax Act for the transferor and transferee of intra-group loan assets, denominated in foreign currency, in terms of an asset-for-share transaction under section 42.

In this ruling references to sections are to sections of the Income Tax Act applicable as at 1 September 2015. 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 24I; and
- section 42.

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

The Applicant: A resident and a wholly-owned subsidiary of a company listed on the JSE. The Applicant is the transferor of loan assets.

The Co-Applicant: A resident and a wholly-owned subsidiary of the Applicant. The Co-Applicant is the transferee of loan assets.

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

Over time, the Applicant extended interest-bearing long term loans (loans) to a fellow subsidiary based offshore. These loans are unsecured, have no fixed terms of repayment and are considered mezzanine debt. As a result the provisions of section 24J have not been applied. The Applicant intends to transfer these loans to the Co-Applicant in exchange for the issue of shares in the Co-Applicant in terms of an asset-for-share transaction under the provisions of section 42.

The Applicant treats these loans as capital assets. The Co-Applicant will also treat them as capital assets after the implementation of the proposed transaction.

The Applicant applied the deferral of tax on all unrealised exchange differences in relation to the loans under section 24I(10) in the past. Since section 24I(10A) came into effect, the taxation of unrealised exchange differences were deferred under this section.

The Co-Applicant will be a group treasury entity, providing funding from South Africa to certain of the foreign jurisdictions where the group is active, once the loans have been transferred to the Co-Applicant. For accounting purposes, they will be transferred at their face values, determined in Rand. It is not intended that the transferred loans be capitalised or disposed of by the Co-Applicant, otherwise than as a result of their repayment.

Conditions and assumptions

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

- No unrealised exchange differences in relation to the loans that comprise the assets to be transferred in terms of the proposed transaction have previously been included in or deducted from the Applicant's income.

- No forward exchange contract or foreign currency option contract serves as a hedge for any of these loans.

Ruling

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

- The proposed transfer by the Applicant of the loans in exchange for the issue of shares in the Co-Applicant will qualify as an 'asset-for-share transaction' under section 42.

- For purposes of section 24I, the 'ruling exchange rate', as defined, on the date of the transaction, will be deemed to be the spot rate applicable on the date that each loan was advanced to the debtor. Therefore, no amount will be included in the income of the Applicant in respect of exchange differences in consequence of the transfer of these loans.

- At the end of the year of assessment during which the transaction will occur, the Co-Applicant must determine the exchange difference on the loans acquired, by multiplying the exchange item by the difference between the spot rate, applicable at the time when these loans were advanced by the Applicant to the debtor, and the spot rate on the translation date (the end of that year of assessment). This exchange difference must either be included in or deducted from the Co-Applicant’s income under section 24I(3) or deferred under section 24I(10A), if the requirements of that section are met.

7.3. BPR 212 – Tax consequences for the issuer and security company of listed credit linked notes

This ruling determines the tax consequences for the Issuer of listed credit linked notes (notes) that are enhanced by the conclusion of a credit default swap (CDS) with the Applicant, as well as the tax consequences that will arise for the Issuer and the Security Company in the event of default.

In this ruling references to sections and paragraphs are to sections of the relevant Acts and paragraphs of the Eighth Schedule to the Act applicable as at 22 October 2015. Unless the context indicates otherwise, any word or expression in this ruling bears the meaning ascribed to it in the relevant Act.

This is a ruling on the interpretation and application of the following provisions of:

- the Income Tax Act:
  - section 1(1) – definition of 'gross income';
  - section 24J;
  - paragraph 3;
  - paragraph 4;
  - paragraph 12A; and
  - paragraph 20(3)(*b*).
- the VAT Act:
  - section 2; and
  - section 12(*a*).

Parties to the proposed transaction

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

The Issuer: A special purpose company incorporated in and a resident of South Africa

The Security Company: Another special purpose company incorporated in and a resident of South Africa

Description of the proposed transaction

The Issuer intends to issue listed notes and to hold the underlying assets. The Applicant will administer the notes and the underlying assets while the Security Company will guarantee the obligations of the Issuer.

The purpose of the notes is to provide capital market investors (investors) with an opportunity to access bankruptcy remote corporate credit exposures. The notes will be registered on the Interest Rate Market of the JSE.

The Issuer and the Security Company are not connected persons in relation to the Applicant.

The proposed transaction steps are as follows:

- The Issuer will issue the notes to investors and will enter into a CDS with the Applicant. The coupon rate of the notes will be determined with reference to the income under the CDS and the interest under the debt instruments, to be acquired by the Issuer.

- The Security Company will issue guarantees in favour of the investors and the Applicant, in respect of the Issuer's obligations under the notes and the CDS.

- The Issuer will indemnify the Security Company in relation to the guarantees and will provide security in the form of a security cession of the debt instruments and the rights under the CDS.

- Under the CDS, the Issuer will assume the credit risk of corporate debtors in relation to the CDS reference assets and will receive a monthly payment from the Applicant.

- In the event of a default in relation to any of the CDS reference assets, the Issuer will take transfer of the defaulting reference asset(s), or will make a lump sum payment. The amount of the lump sum will be derived from the extent of the default in relation to the CDS reference asset(s).

- On the redemption of the notes and in the absence of a default event in relation to the CDS reference asset(s), the investors will be entitled to a redemption amount, to be determined according to the priority of payments set out in the transaction documentation. This amount should correspond to the realisable value of the debt instruments and the rights under the CDS at that time.

- On the redemption of the notes, following a default event in relation to the CDS reference asset(s), the redemption amount due to the investors will be limited by the prior ranking claim of the Applicant under the CDS.

Conditions and assumptions

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

Ruling

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

- The interest payments to be made by the Issuer to the investors pursuant to the notes will be allowed as a deduction under section 24J(2) of the Act to the extent of the income received by or accrued to the Issuer from the CDS and debt instruments. These amounts may be set-off against each other.

- In the event that the Issuer becomes obliged to perform under the CDS, it will not realise a capital loss in relation to the settlement of the CDS, whether in cash or otherwise.

- There will be no capital gain for the Issuer if the notes are redeemed for less than the issue price because the Issuer's obligation towards the investors will be limited to the value of the debt instruments after the Issuer's obligations under the CDS has been fulfilled. There will be no 'reduction amount' under paragraph 12A.

- In the event that the Security Company must perfect the security, the Security Company will neither receive, nor pay any amount on its own behalf. No tax consequences will arise for the Security Company.

- The issue of the notes will constitute a financial service as contemplated in section 2(1) of the VAT Act. The supply thereof is exempt under section 12(*a*) of the VAT Act.

7.4. BPR 213 – Repayment of intercompany loans from proceeds of a new share issue

This ruling determines the tax consequences of the repayment of intercompany loans out of the proceeds of a new share issue.

In this ruling references to sections and paragraphs are to sections of the relevant Acts and paragraphs of the Eighth Schedule to the Income Tax Act applicable as at 3 December 2015. 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:

- the Income Tax Act:
  - section 8(4)(*a*);
  - section 19; and
  - paragraph 12A.
- the STT Act:
  - section 1 – definition of 'transfer'.

Parties to the proposed transaction

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

The Holding Company: A company incorporated outside South Africa and not a resident of South Africa, which is the sole shareholder of the Applicant

Group Companies: Companies incorporated outside South Africa and not residents of South Africa, which form part of the same group of companies as the Holding Company

Description of the proposed transaction

The Applicant obtained intercompany loans from the Holding Company and the Group Companies to fund its operational expenditure.

The Holding Company will subscribe for further ordinary no par value shares in the Applicant. The subscription price, which will be equal to the total amount of the Applicant's outstanding intercompany loans, will be paid in cash.

The Applicant will use the cash to repay both the capital of and the interest on its outstanding intercompany loans.

Conditions and assumptions

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

Ruling

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

- The issue of the further ordinary no par value shares will not constitute a 'transfer' as defined in section 1 of the STT Act and will, therefore, not be subject to securities transfer tax.
- Section 8(4)(*a*) of the Act will not be applicable to the payment of the capitalised interest on the intercompany loans.
- Section 19 of the Act and paragraph 12A of the Eighth Schedule to the Act will not be applicable to the repayment of the intercompany loans, or to the payment of the interest on the intercompany loans.

Additional note

This ruling does not consider any general anti-avoidance provisions which may be applicable to the proposed transaction.

7.5. BPR 214 – Third-party backed shares

This ruling determines whether cumulative redeemable preference shares constitute 'third-party backed shares'.

In this ruling references to sections are to sections of the Income Tax Act applicable as at 5 November 2015. 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

8EA.

Parties to the proposed transaction

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

Other parties: A listed company incorporated in and a resident of South Africa (Company A)

A private company incorporated in and a resident of South Africa (Company B)

A private company incorporated in and a resident of South Africa (Company C)

A listed company incorporated in and a resident of South Africa (Company D)

A listed company incorporated in and a resident of South Africa (Company E)

A listed company incorporated in and a resident of South Africa, acting through its Corporate and Investment Banking division (Company F)

Description of the proposed transaction

The Applicant is a wholly owned subsidiary of Company B, which in turn is a wholly owned subsidiary of Company A. Company C is a wholly owned subsidiary of the Applicant.

Company C borrowed an amount from Company B with the sole purpose of acquiring shares in Company D, a special purpose, non-operating company which was created to hold equity shares in Company E, an operating company.

The loan was subsequently delegated by Company C to the Applicant, with the result that the Applicant is now indebted to Company B. The Applicant required funds to partially settle the loan and, therefore, issued cumulative redeemable preference shares (shares) to Company F in order to finance the partial settlement of the loan.

The following additional arrangements will apply in addition to the share subscription:

- the Applicant will, amongst others, indemnify Company F in the event of all non-payments relating to the shares and will enter into a pledge and cession agreement, in respect of certain rights it holds, with Company

F;

- Company B will subordinate all of its claims against the Applicant in favour of Company F;

- Company A will extend a guarantee to Company F for all the post-redemption obligations of the Applicant; and

- Company A or Company B, or both of them, may also extend a guarantee(s) to Company F in respect of non-payments in respect of the shares.

Three classes of dividends (calculated in accordance with the share subscription agreement) are to be payable in respect of the shares.

Conditions and assumptions

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

Ruling

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

- The shares were applied for a qualifying purpose as contemplated in section 8EA(3) read with subparagraph (*b*)(i)(*aa*) of the definition of 'qualifying purpose' in section 8EA(1), by virtue of the shares being issued for the indirect acquisition of an equity share in an operating company. The shares do not constitute 'third-party backed shares' as defined in section 8EA(1).

- No regard must be had to the enforcement right exercisable by Company F where the security provider is Company A or Company B as contemplated in section 8EA(3)(*b*)(iv)(*bb*) read with section 8EA(3)(*b*)(ii), by virtue of Company A and Company B forming part of the same group of companies as the Applicant.

7.6. BPR 215 – Source and nature of satellite fees

This ruling determines the source of satellite capacity fees and whether those fees, when they are paid, are subject to the withholding tax on service fees.

In this ruling references to sections are to sections of the Income Tax Act applicable as at 10 November 2015. 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';
- section 51A – definition of 'service fees'; and
- section 51B.

Parties to the proposed transaction

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

The Co-Applicant: A company that is not a resident of South Africa

Description of the proposed transaction

The Applicant is a distributor of satellite services in Africa (excluding South Africa) and the Co-Applicant is the owner and operator of satellites. The Applicant and Co-Applicant are members of the same group of companies.

The Applicant will conclude contracts directly with its customers in Africa (excluding South Africa) to provide satellite capacity services to them. The Applicant will receive fees from its customers for the use of the satellite capacity.

The Applicant will contract with and pay the Co-Applicant fees to provide the satellite capacity to the Applicant's customers.

Conditions and assumptions

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

Ruling

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

- The source of the satellite capacity fees will not be within South Africa.
- The satellite capacity fees to be paid by the Applicant to the Co-Applicant will not be subject to the withholding tax on service fees as contemplated in section 51B.

7.7. BPR 216 – Tax consequences of the issuing of additional tier 1 capital instruments by a registered bank

This ruling determines the income tax consequences for the issuer of specified instruments, the proceeds of which qualify as 'additional tier 1 capital' as defined in the Banks Act No. 94 of 1990.

In this ruling references to sections and paragraphs are to sections of the Income Tax Act and paragraphs of the Eighth Schedule thereto applicable as at 2 December 2015. 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';
- section 8(4)(*a*);
- section 8F;
- section 8FA;
- section 11(*a*) read with section 23(*g*);
- section 19;
- section 24J;
- section 24JB; and

- paragraph 12A.

Parties to the proposed transaction

The Applicant: A public company that is a registered bank in terms of the Banks Act, incorporated in and a resident of South Africa

Description of the proposed transaction

The Basel Committee on Banking Supervision published various documents on 16 December 2010 and updated on 1 June 2011 pertaining to banking supervision – Basel III: A framework for more resilient banks and banking systems (Basel III Accord).

Pursuant to the Basel III Accord, the Banks Amendment Act, 2013 published in *Government Gazette* No. 37144 of 10 December 2013, amended the Banks Act, to provide for the full implementation of the Basel III Accord in South Africa.

In terms of the Banks Act Regulations were published by GN No. R. 1029 in *Government Gazette* No. 35950 of 12 December 2012 and amended with effect from 1 April 2015 and GN No. R. 261 published in *Government Gazette* No. 38616 of 27 March 2015 (the Regulations). The Regulations provide, amongst others, for the partial implementation of the Basel III Accord in South Africa and the requirements with which specific categories of instruments and/or shares must comply in order for the proceeds of the issue thereof to qualify for inclusion in the regulatory capital of banks.

The Applicant proposes to issue instruments that qualify as 'additional tier 1 capital' as defined in the Banks Act (the Notes).

The Applicant intends to utilise the proceeds of the Notes for general banking purposes.

The salient terms of issue as recorded in the pricing supplement for the issue of the Notes are as follows:

- The Notes will constitute direct, unsecured and subordinated obligations of the Applicant and will rank *pari passu* without any preference or priority among themselves and *pari passu* with all securities issued by the Applicant the proceeds of which qualify (or are deemed under the Capital Regulations to qualify) as additional tier 1 capital, and at least *pari passu* with all other claims of creditors of the Applicant which rank or are expressed to rank (or are deemed under the Capital Regulations to rank) *pari passu* with the additional tier 1 Notes.

- Interest is payable semi-annually in arrears. The Applicant has full discretion regarding the payment of interest. The Applicant may elect not to pay interest at the payment interval. The interest payments will not be cumulative.
- The Notes have no maturity date. Their maturity date is at the discretion of the Applicant and they are redeemable at their original issue price, subject to regulatory approval, on a date not earlier than five years and one day following the issue date. The Notes are also early redeemable in the case of so-called 'tax events' or 'regulatory events' as defined in the pricing supplement.
- The relevant amounts owing under the Notes are written off in certain circumstances as set out in the terms and conditions of their issue, being so-called trigger events.
- The Notes are to be redeemed on the winding up or liquidation of the Applicant, if they have not been redeemed earlier.

<u>Conditions and assumptions</u>

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

- The proceeds of the Notes are not recognised in profit-and-loss in the statement of comprehensive income in respect of the financial assets and liabilities of the Applicant.
- This ruling is applicable only to the issue of the Notes contemplated in the pricing supplement for the issue of the instruments.

<u>Ruling</u>

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

- The proceeds derived by the Applicant from the issue of the Notes will not form part of its 'gross income', as defined in section 1(1).

- The periodic payments, referred to as interest in the pricing supplement, to be made by the Applicant in terms of the Notes constitute 'interest', as defined in section 24J(1).

- Section 24J will not be applicable to the incurral of interest in respect of the Notes.

- The interest will be deductible under section 11(*a*) read with section 23(*g*) when incurred.

- Interest will be incurred when the obligation to make the payment becomes unconditional. If a decision is made by the Applicant not to pay the interest as provided in the pricing supplement, such 'interest' will not have been incurred. The aforementioned interest expenditure will not be incurred upfront in a particular payment period or on a day-to-day basis during that particular payment period.

- To the extent that any interest is written-off by the Applicant that has been incurred and claimed as a deduction under section 11(*a*), such interest must be recouped under section 8(4)(*a*).

- To the extent that the capital of the Notes is written-off, as envisaged in the pricing supplement, a recoupment under section 19 and/or an adjustment under paragraph 12A of the Eighth Schedule must be made in respect of the base cost of the assets generally funded by the Applicant from the proceeds of the Notes.

- Sections 8F, 8FA and 24JB will not apply to the Notes.

7.8. BPR 217 – Estate duty implications for non-resident individual investors

This ruling determines the estate duty implications for non-resident individual investors who invest in a linked investment plan in Country X with exposure to, amongst others, underlying South African assets.

In this ruling references to sections are to sections of the Estate Duty Act applicable as at 14 October 2015. Unless the context indicates otherwise, any word or expression in this ruling bears the meaning ascribed to it in that Act.

This is a ruling on the interpretation and application of the provisions of:

- section 2;
- section 3; and
- section 4A.

Parties to the proposed transaction

The Applicant: A company incorporated and resident in Country X carrying on the business of life insurance

Contracting Party: Any individual investor resident in Country X

Description of the proposed transaction

The Applicant offers traditional insurance risk based products (e.g. death and disability cover) and investment products to individuals who are resident in Country X.

The Applicant proposes to offer each Contracting Party a linked investment plan with exposure to South African assets and to assets located in Country X. South African unit trust funds will be offered as underlying asset options to Contracting Parties under the linked investment plan.

The proposed linked investment plan will:

- be a discretionary savings vehicle;
- allow each Contracting Party to have complete liquidity and earn

dividends and interest from either or both the Country X and South African assets;

- be a single premium discretionary (non-compulsory) product held under Linked Investment Service Providers; and
- be a single contract with the Applicant to purchase multiple underlying unit trust products in Country X or South Africa, or both.

The Contracting Party will be the beneficial owner of the underlying investment funds or unit trust funds, which will be held in the name of an independent nominee of the Applicant on behalf of the Contracting Party.

Upon the death of a Contracting Party, the investment policy will fall into the Contracting Party's estate and be dealt with by his/or her executor.

Conditions and assumptions

This binding private ruling is subject to the additional condition and assumption that there is no treaty between South Africa and Country X in respect of taxes on estates of deceased persons.

Ruling

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

- Estate duty, levied under the Estate Duty Act, will be applicable to the estate of the deceased Contracting Party in respect of any underlying South African assets held under the linked investment plan.
- The South African investments held in the name of an independent nominee of the Applicant on behalf of the Contracting Party will constitute property of the Contracting Party's deceased estate for estate duty purposes.
- The Contracting Party's deceased estate will be able to claim any rebates provided for under section 4A in determining the dutiable amount of the estate.

- Estate duty will be levied on the dutiable amount of the estate in respect of investment proceeds relating to the South African assets at the rate set out in the First Schedule to the Estate Duty Act from time to time.

7.9. BPR 218 – Qualifying distributions to be made by a REIT

This ruling determines the relevant year of assessment when considering whether a 'qualifying distribution' is made by a REIT.

In this ruling references to sections are to sections of the Income Tax Act applicable as at 29 June 2015. 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 'REIT'; and
- section 25BB.

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

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

A CISP A portfolio created as a collective investment scheme in property

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

The Applicant's first financial year and its first year of assessment ended on 30 June 2015. The Applicant will, subsequent to a proposed amalgamation transaction with the CISP, list on the JSE as a REIT shortly after 30 June 2015. As from its listing, the Applicant will commence trading as a corporate REIT.

The CISP, under the regulatory requirements pertaining to its industry, converted its business to a corporate structure which is housed in the Applicant. The conversion became effective as from 1 July 2015. It consisted of the transfer of the assets and liabilities of the CISP to the Applicant in exchange for the CISP receiving shares or linked units in the corporate REIT, on the basis that those shares or linked units were issued on behalf of the CISP to the unit holders. The CISP was thereafter voluntarily wound up. The conversion constituted an 'amalgamation transaction' as contemplated in section 44. The Applicant conducted no business activities and earned no income prior to the conversion.

The Applicant will make distributions in respect of its year of assessment ending 30 June 2016, being its first year of earning rental income and its first year to be assessed as a REIT.

The distribution in respect of its 2016 year of assessment (to be determined with reference to its financial results for the financial year ending 30 June 2016) will only be made after 30 June 2016, once the financial results have been finalised, unless an interim distribution is made during the course of the 2016 year of assessment, in accordance with the manner in which REITs ordinarily make distributions.

Conditions and assumptions

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

Ruling

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

- In establishing whether 75% of the gross income of the Applicant consists of 'rental income', in order for it to make a 'qualifying distribution', in respect of its year of assessment ending 30 June 2016, being its first year of assessment as a REIT, the applicable year of assessment to consider will be the year of assessment in which the Applicant was incorporated, which ended on 30 June 2015. Paragraph (*b*) of the definition of 'qualifying distribution' must, therefore, be considered.

- The Applicant will comply with the provisions of paragraph (*b*) of the definition of 'qualifying distribution' in section 25BB, and provided that all the other requirements of this definition are met, the Applicant will be making a 'qualifying distribution' in respect of the 2016 year of assessment.

7.10. BPR 219 – Corporatisation of collective investment scheme in property and an amalgamation followed by an asset-for-share transaction

This ruling determines the income tax and securities transfer tax (STT) consequences for the parties to the corporatisation of the Applicant and an amalgamation of the Applicant followed by an asset-for-share transaction in respect of the minority unitholders.

In this ruling references to sections are to sections of the relevant Act applicable as at 15 December 2015. Unless the context indicates otherwise, any word or expression in this ruling bears the meaning ascribed to it in the relevant Act.

This is a ruling on the interpretation and application of the following provisions of:

- the Act:
  - section 25BB;
  - section 42;
  - section 44; and
  - section 56(1)(*r*).
- the STT Act:
  - section 8.

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

The Applicant: A collective investment scheme in property, listed as a REIT on the JSE and a resident of South Africa

PropCo: A company, incorporated in and a resident of South Africa, which is a subsidiary of the Applicant

Company A A company, incorporated in and a resident of South Africa, which is listed as a REIT on the JSE and the holder of the majority of the units of the Applicant

Company B A company, incorporated in and a resident of South Africa, which is a subsidiary of Company A

Description of the proposed transaction

The Applicant currently owns letting enterprises conducted in respect of properties directly, and certain shares in property companies. The Applicant holds the properties on capital account. The letting enterprises include certain loans, owing by the Applicant, which are secured by the properties. The Applicant's business accordingly comprises letting enterprises, shares in property companies and loans, and properties.

The Applicant does not derive any imputed income from any controlled foreign companies under section 9D of the Act. At least 75% of the gross income received by or accrued to the Applicant or a subsidiary (as defined in the International Financial Reporting Standards) of the Applicant, in the previous year of assessment and in the first year of assessment that the Applicant qualified as a REIT, consists of 'rental income', as defined in section 25BB(1) of the Act.

The Applicant will declare a final distribution to its unitholders for the period ending on the date on which the last suspensive condition to the amalgamation agreement is fulfilled. This declaration will take place prior to the Applicant ceasing to be a REIT and its deemed last financial year-end, even though the amount of this distribution will not be finally quantified, albeit quantifiable, at the time of the declaration.

PropCo will assume the payment obligations in relation to the final distribution under a separate assignment for no consideration, other than the payment of the amounts necessary to enable PropCo to discharge the assigned liabilities to pay this distribution in cash.

The Applicant intends to transfer its business to PropCo in terms of an 'asset-for-share transaction' as contemplated in section 42 of the Act, in return for the issuing of equity shares in PropCo. The business will be transferred as a going concern and the obligations under the loans will be assumed by PropCo (the first S42 transaction).

The first S42 transaction will become unconditional on the date on which the last outstanding suspensive condition is fulfilled. Transfer of ownership of the properties by registration in the Deeds Office may only occur subsequent to this date.

The loans to be transferred to PropCo in terms of the first S42 transaction were either incurred earlier than 18 months before the first S42 transaction, or, if incurred more recently than that, either –

- were incurred at the same time as the asset that secured the relevant debt was acquired; or
- constitute the refinancing of any debt incurred earlier than 18 months before the first S42 transaction.

Immediately before the first S42 transaction, trading stock and allowance assets will comprise less than 50% of the market value of all of the Applicant's assets. Immediately after the first S42 transaction, the Applicant will hold all of the equity shares in PropCo.

After the first S42 transaction, the Applicant will transfer all of its assets, being its entire shareholding in PropCo, to Company B in terms of an amalgamation transaction as contemplated in section 44 of the Act (S44 transaction), in return for the issuing of equity shares in Company B.

The market value of the shares in Company B will be equal to or exceed the base cost thereof (which, insofar as the equity shares issued by Company B are concerned, equals the base costs of all the assets comprising the business of the Applicant transferred in terms of the first S42 transaction) on the date on which the last suspensive condition to the S44 transaction is fulfilled.

The Applicant will distribute all of its shares in Company B, received in terms of the S44 transaction, to its unitholders approximately 10 business days after the date of issue of these shares. These shares will be kept in escrow for the benefit of the unitholders. The Applicant will still be a REIT at the time of this distribution.

Subsequent to the S44 transaction and the above mentioned distribution, the minority unitholders in the Applicant will dispose of their portion of the equity shares in Company B (held in escrow) in return for the issuing of equity shares in Company A in terms of an 'asset-for-share transaction' as contemplated in section 42 of the Act (second S42 transaction).

The second S42 transaction is expected to occur one day after the S44 transaction, when the suspensive conditions will be fulfilled.

Conditions and assumptions

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

- The chronology of the transactions and transaction steps, as set out in point 4, is adhered to during the implementation of the proposed transaction.

- The market values of the capital assets comprising the business to be transferred under the first S42 transaction are equal to or exceed the base cost of these assets.

- The amount of the Applicant's final distribution as a REIT is determined with reference to the financial results of the Applicant as reflected in financial statements prepared for the current year of assessment, which is deemed to end on the date on which the Applicant ceases to be a REIT for tax purposes.

- The existence of the Applicant is terminated in consequence of the S44 transaction.

Ruling

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

- In respect of the first S42 transaction, the disposal of the properties will occur for income tax purposes on the date on which the last outstanding suspensive condition is satisfied and the equity shares to be issued by PropCo constitute a 'qualifying interest' as defined for purposes of section 42 of the Act.

- Any amount that is derived in respect of the use of immovable property, including any penalty or interest in respect of late payment of such amount, during the period from the date on which the first S42 agreement becomes unconditional and the actual date of registration of the transfer of the immovable properties to PropCo in the Deeds Office, will be regarded as being derived for the benefit of PropCo and will be regarded as PropCo's 'rental income', as defined in section 25BB(1) of the Act.

- To the extent that the obligations under the loans will be assumed by PropCo in terms of the first S42 transaction, the proceeds on the disposal of the equity shares in PropCo in terms of the S44 transaction will include an amount equal to the face value of the loans in accordance with section 42(8) of the Act, so that for capital gains tax purposes the Applicant's proceeds are equal to its base cost for the equity shares in PropCo, upon their disposal to Company B.

- In respect of the S44 transaction:
    - as the properties have been disposed of to PropCo in terms of the first S42 transaction, irrespective of whether the transfer of ownership in those properties have been registered in the Deeds Office, the Applicant will be regarded as having disposed of all of its assets (being the shares in PropCo) to Company B, irrespective of the fact that the Applicant may still retain legal

ownership of those properties;

- the Applicant will have disposed of the shareholding in PropCo in terms of the S44 transaction on the date on which the last outstanding suspensive condition is fulfilled; and

- in accordance with section 44(8) the Applicant must disregard the disposal of the equity shares in Company B to its unitholders for purposes of determining its taxable income or assessed loss.

- On the basis that the Applicant declares its final distribution prior to its ceasing to be a REIT, the Applicant will be able to deduct such distribution from its income for that year of assessment, to the extent that all the requirements of the definition of 'qualifying distribution' in section 25BB(1) of the Act are met, even though the amount will only be quantified later and payment in respect of the distribution will be made by PropCo in consequence of the proposed assignment of the liability.

- The assignment of the obligation to make payment of the final distribution to PropCo will be exempt from any donations tax under section 56(1)(*r*) of the Act.

- The payment to the unitholders of the Applicant's final distribution by PropCo will not qualify as a deductible expense for PropCo.

- No STT will be payable in respect of the transfer of the Applicant's shares in PropCo to Company B in terms of the S44 transaction and to the distribution of the equity shares in Company B by the Applicant to the unitholders under section 44 of the Act.

- No STT will be payable in respect of the transfer of the minority unitholders' portion of the equity shares in Company B to Company A under section 42 of the Act.

7.11. BPR 220 – Contribution by a mining company to a trust pursuant to a share incentive scheme

This ruling determines whether a contribution by a mining company to a trust pursuant to a perpetuity share incentive scheme will be deductible in terms of the specific dispensation afforded to mining entities.

In this ruling references to sections are to sections of the Income Tax Act applicable as at 2 October 2015. 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 read with paragraph (*e*) of the definition of 'capital expenditure' in section 36(11).

Parties to the proposed transaction

The Applicant: An unlisted mining company, incorporated in and a resident of South Africa

The Co-Applicant: A trust, founded by the Applicant, registered in and a resident of South Africa

Description of the proposed transaction

The Applicant intends to establish an employee share ownership plan (ESOP) and founded the Co-Applicant for that purpose.

The Applicant will contribute an amount to the Co-Applicant for the sole purpose of enabling the Co-Applicant's trustees (trustees) to subscribe for a separate class of ordinary shares (scheme shares) in the Applicant.

The scheme shares will rank *pari passu* with the ordinary shares of the Applicant with regards to voting rights, participation in the capital and income of the Applicant and other share related matters. The sole distinction between the ordinary shares and the scheme shares is that the dividends of the scheme shares must be determined and paid, based on a formula which requires a percentage of the free cash flow determined for that financial year to be distributed as a dividend.

The beneficiaries of the Co-Applicant will be the permanent employees of the Applicant within the Applicant's lower employment grades.

The Applicant's aims, through the ESOP, are to:

- promote shared interests of the employees and the shareholders in the growth of the Applicant;
- maintain and promote sound employment relations and attract, incentivise, empower and retain employees on an on-going basis; and
- enhance its compliance with and furtherance of the objects contained in section 2(*d*) and (*f*) of the Mineral and Petroleum Resources Development Act No. 28 of 2002 and compliance with the Scorecard in terms of the Mining Charter.

The objects of the Co-Applicant, in turn, are to:

- accept and use the contribution to be received from the Applicant solely for the purpose of subscribing for the scheme shares in terms of the subscription agreement;
- receive the distributable income arising from holding the scheme shares and distribute such distributable income to the beneficiaries who are entitled thereto;
- receive special payments arising from holding the scheme shares and distribute such payments to the beneficiaries who are entitled thereto; and
- vote the scheme shares through the trustees of which the majority are appointed by the representative worker's unions.

The Applicant's board of directors will, in relation to each financial year after the finalisation of the Applicant's audited financial statements, determine whether a distribution will be paid to the Co-Applicant as the holder of the scheme shares, calculated in accordance with a prescribed formula.

The distributable income (if any) will be paid to the beneficiaries who were employees on the last day of the financial year to which the distributable income relates, in equal amounts (by dividing the distributable income by the number of beneficiaries receiving distributable income). The trustees will ensure that the distributable income will always be paid to the beneficiaries within the same financial year as the receipt thereof.

Persons who cease to be employees will cease to be regarded as beneficiaries or to have any rights under the ESOP.

The trustees will be entitled to vote the scheme shares on behalf of the beneficiaries at all shareholders meetings. Each recognised workers union will be entitled to appoint, remove or replace one trustee and one additional trustee for every completed 25% of the beneficiaries who are members of such union. The Applicant will appoint one trustee fewer than the number of trustees appointed by the recognised unions. One independent trustee will also be appointed by the majority of the trustees.

It is intended that the ESOP will exist for an indefinite period. In this regard the Co-Applicant's trust deed determines that the Co-Applicant will endure in perpetuity, unless it is terminated on the occurrence of any one of the following events:

- the Applicant terminates its corporate existence;
- there are no beneficiaries left; or
- the Applicant exercises its rights as against the Co-Applicant in terms of a 'come along' arrangement, if a third party offers to buy all of the ordinary shares in the Applicant.

If the Co-Applicant is terminated for any of those reasons, the Applicant will repurchase the scheme shares from the Co-Applicant at market value. Upon termination of the Co-Applicant, before the Co-Applicant is deregistered, the trustees will realise the Co-Applicant's assets, discharge the Co-Applicant's liabilities and distribute any surplus to the beneficiaries in equal portions in the same financial year that the Co-Applicant's assets are realised. If there are no beneficiaries left, any surplus will be paid to a public benefit organisation in the same financial year that the Co-Applicant's assets are realised. The public benefit organisation will be decided upon by the trustees.

The scheme shares must remain in the Co-Applicant and the Co-Applicant's trust deed provides that neither the Co-Applicant nor the trustees will:

- be entitled to divest the Co-Applicant of the scheme shares, except in terms of the termination provision as mentioned above; or
- enter into any agreement in respect of the manner in which any votes attached to any scheme shares will be exercised; or
- purport to agree, whether or not subject to any suspensive or resolutive condition, to do any of the aforegoing.

Beneficiaries will not be entitled to dispose of, cede or encumber any or all of their rights acquired under the Co-Applicant's trust deed.

Conditions and assumptions

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

Ruling

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

- The contribution to be made by the Applicant will be deductible from the Applicant's mining income under section 15(*a*), read with paragraph (*e*) of the definition of 'capital expenditure' in section 36(11).

7.12. BPR 221 – Contribution by a mining company to a trust pursuant to a share incentive scheme

This ruling determines whether the cost of assets to be acquired and brought into use solely to construct roads will be deductible under section 12C of the Act.

In this ruling references to sections are to sections of the Act applicable as at 11 February 2016. 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 12C(1)(*a*).

Parties to the proposed transaction

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

Description of the proposed transaction

The Applicant will acquire tipper trucks and water tankers which will be used by the Applicant solely for the construction of roads.

Conditions and assumptions

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

Ruling

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

- The cost of the tipper trucks and water tankers to be acquired by the Applicant will qualify for the deduction under section 12C(1)(*a*).

7.13. BPR 222 – Foreign partnership – rebate in respect of foreign taxes on income

This ruling determines whether the income tax and solidarity surcharge payable by a South African resident in Germany, as well as the trade tax payable by certain foreign partnerships, also in Germany, will qualify for a rebate under the provisions of section 6*quat* of the Act.

In this ruling, references to sections are to sections of the Act applicable as at 3 December 2015. 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 6*quat*.

Parties to the proposed transaction

The Applicant: An individual who is currently resident in Germany and will become ordinarily resident in South Africa

Foreign Partnership A: A limited liability foreign partnership which has its place of effective management in Germany

Foreign Partnership B: A limited liability foreign partnership which has its place of effective management in Germany

Foreign Partnership C: A limited liability foreign partnership which has its place of effective management in Germany

Description of the proposed transaction

The Applicant is an individual who is a 100% limited partner in Foreign Partnership A.

Foreign Partnership A is the 100% limited partner in two other foreign partnerships, Foreign Partnership B and Foreign Partnership C, which have trade businesses and property holdings in Germany, so that the income derived by a foreign partner from these two entities will qualify as business income derived from a permanent establishment in Germany.

Taxes are imposed by different tiers of government under the tax system of Germany, namely by the federal government of Germany itself, by the individual states and by municipalities.

The foreign partnerships are tax transparent for income tax purposes, but not for trade tax purposes. As a result, the Applicant is subject to personal income tax in Germany on income derived by the foreign partnerships. The Applicant is also subject to a solidarity surcharge in Germany.

The Applicant is proposing to relocate to South Africa with his family. Once he has done this, he intends to become ordinarily resident in South Africa, where he will be subject to income tax on his worldwide income and capital gains.

The Applicant will continue to hold an interest in Foreign Partnership A and an indirect interest in Foreign Partnerships B and C. The partnerships all fall within the ambit of the definition of a 'foreign partnership' in section 1(1). The Applicant will continue to be taxed in Germany on the income accruing to him from his partnership interests.

Conditions and assumptions

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

Ruling

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

- The income tax and solidarity surcharge payable by the Applicant in Germany, as well as the Applicant's *pro rata* share of the trade tax payable by the three foreign partnerships in Germany (to the extent not credited against his income tax in the foreign country), will qualify for a foreign tax credit under section 6*quat* against the Applicant's income tax liability in South Africa in respect of the amount included in the Applicant's income which originates from the foreign partnerships.

7.14. BPR 223 – Headquarter companies: Acquisitions of shares and loans

This ruling determines the income tax consequences resulting from the acquisition by a company, that is a resident of South Africa, of shares in and loans of a foreign company for purposes of the headquarter company regime.

In this ruling references to sections are to sections of the Act applicable as at 29 January 2016. 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 8FA;
- section 9I(2)(*b*) and (*c*);
- section 20C(2); and
- section 31(5).

Parties to the proposed transaction

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

ForeignCo: A non-resident holding company

Description of the proposed transaction

The Applicant is a wholly-owned subsidiary of ForeignCo. ForeignCo serves as the holding company for a large number of foreign companies located in Africa and Latin American countries. Some of the foreign subsidiaries are wholly-owned while others are majority owned, with minority shareholders in their local countries.

ForeignCo intends to establish the Applicant as a headquarter company in South Africa, both for the purposes of the Act and under the exchange control Regulations.

In terms of the proposed transaction the Applicant will, wherever possible, acquire 100% of the equity interest currently held by ForeignCo in the latter's foreign subsidiaries. In certain cases in which, for either fiscal or regulatory reasons, it is not possible to transfer the entire shareholding to the Applicant, ForeignCo will transfer one share in the relevant subsidiary to the Applicant.

ForeignCo will also transfer all of its facility loans owing by the foreign subsidiaries to the Applicant (including loans owed by subsidiaries of which only one share in the subsidiary will be transferred to the Applicant). In terms of the facility loans, the foreign subsidiaries may draw down on the credit facility granted under the loans from time to time as required. Under the proposed structure whenever there is a draw down request, ForeignCo will grant the

Applicant an increase in the loan created under the proposed transaction in order for it to meet the obligation under the facility loans.

The shares will be transferred in exchange for shares in the Applicant, and the loans will be transferred on interest bearing loan account owed to ForeignCo.

The interest payable to ForeignCo will be an amalgam of the interest payable on the various loans that were previously owed to ForeignCo by the various foreign companies and which will now be owed to the Applicant. The interest rate on the loan will be the weighted average interest rate based on the interest payable by the foreign subsidiaries.

The foreign subsidiaries required specialised software given the nature of their business. The group, using an associated service provider, contracted with a third party software developer to produce the software, which is being used by all of the various subsidiaries in the different countries. The copyright remained with the software developer, but the associated service provider (and after the assignment of the contracts, the Applicant) will be granted an unlimited number of licenses to authorise the use of the software, though only by companies within the group.

The software development fees charged to the associated service provider by the third party developer was on-billed to the various subsidiaries on a cost recovery basis.

As the development is essentially complete, it is proposed that the agreements with the operational companies and the third party developer be assigned to the Applicant for no consideration as revenues will always merely cover costs. The Applicant will, therefore, grant the subsidiaries the licenses to use the software and will recover any charges related to the use thereof.

Conditions and assumptions

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

Ruling

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

- The interest paid by the Applicant to ForeignCo on the interest-bearing loan from ForeignCo, which finances the acquisition of the loans owing by the relevant foreign subsidiaries, will not be 'hybrid interest' as defined in section 8FA.

- In respect of a foreign subsidiary in which only one share will be acquired and held by the Applicant, which, together with the remaining shares held by ForeignCo, represent more than 10% of the equity shares and voting rights in the relevant foreign subsidiary:

  - The cost of the relevant share and any loan owing by the relevant foreign subsidiary to the Applicant will be included in the cost of the Applicant's qualifying assets, as contemplated in section 9I(2)(*b*). The one share plus the loan will form part of the cost of 80% of total assets of the company which, amongst others, qualify the Applicant as a headquarter company.

  - Income from the relevant share and any loan owing by the relevant foreign subsidiary to the Applicant will be taken into account in determining whether the minimum 50% of the gross income threshold contemplated in section 9I(2)(*c*) has been met.

- The amount of interest that is allowed as a deduction for the interest expenditure incurred by the Applicant in respect of the loan received from ForeignCo will be limited, under section 20C(2), to the interest income received in respect of the loans advanced to the foreign subsidiaries.

- Section 31(5)(*a*), (*b*) and (*d*) will apply to the Applicant in respect of the loan provided by ForeignCo to the Applicant, the loans owing by the foreign subsidiaries to the Applicant and the granting of software licenses to the foreign subsidiaries.

7.15. BPR 224 – Non-resident – Source of income from the operation of ships

This ruling determines whether the profits of a company, that is not a resident of South Africa, from the operations of ships in international waters and South African ports will constitute gross income as defined in section 1(1) of the Act.

In this ruling references to sections are to sections of the Act applicable as at 10 December 2015. 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 1(1) – definition of 'gross income'; and
- section 33.

Parties to the proposed transaction

The Ship Owners: Non-resident ship owners that lease ships to the Applicant

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

The Sub-lessees: Third party entities from across the world that lease ships, or space on ships, from the Applicant

Description of the proposed transaction

The Applicant is a worldwide time charterer of shipping tankers that conclude contracts at its various worldwide business operations, depending on where the Sub-lessee resides. The Applicant's place of effective management is not located in South Africa, nor does it have any operations or offices in South Africa.

The Applicant has managers at the offices worldwide who conduct its business activities, for example, they market the vessels, enter into cargo and vessel leases, issue voyage orders to the vessels, etc.

The Applicant will lease a ship from the Ship Owner and will sub-lease the ship to its customer, known as the Sub-lessee. The Sub-lessee will either lease the entire ship from the Applicant, or rent space on the ship, to carry a variety of liquid products to various international ports. The Sub-lessee will also off-load and/or load the products at South African ports. The Applicant will not perform or be involved in any of the off-loading and/or loading activities.

The ship owners are responsible for –

- making the ship available to the Applicant;
- insuring the ship; and
- providing the crew, skipper, food and spare parts for the maintenance of the ship.

The Applicant is responsible for –

- making the ship available to the Sub-lessee en-route via the Sub-lessee's first port of call, through the international voyage and to the Sub-lessee's final destination port;
- facilitating the international voyage;
- paying for the vessel's fuel and port charges, such as pilot and coast guard charges, and expenses which relate to the moving of the cargo; and
- paying the ship owner a rental.

The Sub-lessee is responsible for:

- dealing with all commercial issues relating to its cargo, including the load and off-load of its cargo;
- insuring the cargo;
- the appointment of third party service providers (and paying associated costs and bearing associated risks) in connection with the commercial issues referred to above; and
- paying the rental to the Applicant.

Conditions and assumptions

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

Ruling

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

- The income derived by the Applicant from its international shipping activities will not constitute 'gross income' as defined in section 1(1).

- The Applicant will not be deemed to derive taxable income under section 33(1); nor does the Applicant need to render any accounts under that section.

7.16. BPR 225 – Hybrid debt instruments

In this ruling references to sections are to sections of the Act applicable as at 2 February 2016. 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 8F;
- section 64D; and
- section 64EA.

Parties to the proposed transaction

The Applicant: A company incorporated in and a resident of a foreign country, that does not have a permanent establishment in South Africa

Investors: Companies that are tax residents of South Africa

Description of the proposed transaction

The Applicant proposes to issue secured and unsecured interest bearing notes (SA Notes) that will be listed on the interest rate market of the JSE.

The terms of the SA Notes will, amongst others, specify an interest rate payable in respect of the SA Notes, and that the obligation of the Applicant to make payments in respect of the SA Notes is conditional upon the market value of the Applicant's assets being equal to or greater than its liabilities.

The salient terms of issue of the SA Notes are as follows:

- The SA Notes will constitute unsubordinated and unsecured obligations of the Applicant and will rank *pari passu* amongst themselves and equally with all other like obligations of the Applicant.

- The SA Notes will be denominated in ZAR.

- Interest will be payable quarterly in arrears.

- The interest rate in respect of each issue of SA Notes will either be a floating rate or a rate calculated with reference to an index or a rate calculated with reference to a basket of financial instruments. Interest payable on a floating rate will be limited to the income derived on the corresponding income investment made by the Applicant in respect of that SA Note.

- The maturity date of the SA Note will be either five or six years after the date of issue.

- The redemption amount will be equal to the subscription price of the SA Note.

- The SA Notes are issued subject to early redemption provisions following the occurrence of events specified in the pricing supplement.

- The holders of the SA Notes will have no voting rights.

The Applicant will use the proceeds of the SA Notes to invest in non-South African debt instruments, index-tracking instruments or other financial instruments in respect of which the Applicant will receive income. There will be no direct or indirect re-investment into South African assets.

Conditions and assumptions

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

Ruling

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

- The SA Notes will constitute instruments and hybrid debt instruments for the purposes of section 8F. The interest payments made by the Applicant in respect of the SA Notes will be deemed to be dividends *in specie* declared and paid by the Applicant on the last day of its year of assessment as contemplated in section 8F(2).

- Dividends tax will not be payable by the Applicant in respect of the interest paid on the SA Notes which have been deemed payments of dividends *in specie*.

7.17. BPR 226 – Transfer of the long-term insurance business, partly to a third party and partly intra-group

This ruling determines the income tax, value-added tax (VAT) and securities transfer tax (STT) consequences of the transfer of the business of a long-term insurer, in part to a third party long-term insurer and the remainder to a long-term insurer that forms part of the same group of companies as the transferor.

In this ruling references to sections and paragraphs are to sections of the relevant Acts and paragraphs of the Eighth Schedule to the Act applicable as at 26 November 2015. Unless the context indicates otherwise, any word or expression in this ruling bears the meaning ascribed to it in the relevant Income Tax Act.

This is a ruling on the interpretation and application of the provisions of –

- the Income Tax Act –

  - section 29A;
  - section 41(3);
  - section 45;
  - paragraph 10(*b*)(ii);
  - paragraph 12A;
  - paragraph 35(1)(*a*); and
  - paragraph 55(1)(*a*)(i).
- the VAT Act –
  - section 1(1) – paragraph (v) of the proviso, to the definition of 'enterprise';
  - section 1(1) – definition of 'financial services' and 'supply';
  - section 2;
  - section 7(1)(a);
  - section 12(a) read with section 2(1)(i); and
  - section 12(*a*) read with section 2(1)(*c*) or (*d*).
- the STT Act –
  - section 1 – paragraph (a) of the definition of 'transfer';
  - section 2(1); and
  - section 8(1)(*a*)(iii).

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

The Applicant: A long-term insurer incorporated in and a resident of South Africa and the seller of its business

Company A: A long-term insurer incorporated in and a resident of South Africa that does not form part of the same group of companies as the Applicant

Company B: A long-term insurer incorporated in and a resident of South Africa that forms part of the same group of companies as the Applicant

Description of the proposed transaction

Third party transaction

In terms of a substitution agreement, the Applicant and Company A wish to substitute the rights and obligations of the Applicant in relation to the policyholders under certain annuity policies, with the rights and obligations of Company A in relation to the same policyholders in terms of replacement policies, to be issued by Company A. The annuity policies are backed by a reinsurance policy issued to the Applicant by Company A. The policyholders are all pensioners who were members of pension funds. The annuity policies are annuity contracts in respect of which annuities are paid and the reinsurance policy issued by Company A is thus accounted for in the Applicant's untaxed policyholder fund (UPF).

Company A holds assets, including securities, to back its obligations under the reinsurance agreement. Following the proposed transaction, Company A will be the primary insurer towards the policyholders and the reinsurance policy will be cancelled. Company A remains the owner of the underlying assets, including securities.

Intra-group transaction

The Applicant's group, of which Company B forms part, seeks to rationalise the life licences in the group and the proposed restructuring involves the transfer of all of the Applicant's identifiable businesses, other than the subject of the third party transaction, to Company B. Any value left in the Applicant after the transfer of its businesses (that is, the corporate fund) will be distributed to its shareholder prior to deregistration.

The intra-group transaction comprises of three distinct, but inter-related transactions:

- Transaction 1: Termination of the reinsurance policy issued by Company B (T1 reinsurance policy) and assumption by Company B of the rights and obligations under linked insurance policies.

- Transaction 2: Transfer by the Applicant of the direct asset portfolio, including the underlying assets, and assumption by Company B of the rights and obligations under linked insurance policies.
- Transaction 3: Transfer by the Applicant of its reinsurance asset portfolio and termination of the reinsurance policy issued by the Applicant to Company B (T3 reinsurance policy).

The assets to be transferred by the Applicant as part of the proposed transaction do not include any exchange items for purposes of section 24I, or instruments for purposes of section 24J of the Act.

The following is relevant in relation to the Intra-group transaction:

- Transaction 1
  - The rights under the T1 reinsurance policy are held by the Applicant and the portfolio of assets backing the T1 reinsurance policy is held by Company B in their respective untaxed policyholder fund (UPF), individual policyholder fund (IPF) and company policyholder fund (CPF).
  - The linked policies will be transferred by the Applicant to Company B in terms of a transfer agreement. The T1 reinsurance policy will simultaneously be terminated and Company B will, thereafter, act as primary insurer towards the policyholders, instead of reinsurer.
- Transaction 2
  - The Applicant is the primary insurer and has issued living annuity policies and linked pure endowment policies (linked policies). The Applicant holds the assets backing these liabilities in its UPF, IPF and CPF. These assets comprise listed and unlisted shares, preference shares, listed debentures, interests in unit trust funds and cash.
  - These linked policies, the assets and all asset management and

broker agreements will be transferred by the Applicant to Company B in terms of a transfer agreement.

- Transaction 3
  - Company B is the primary insurer of a pensioner portfolio and has issued linked insurance policies. The liabilities in terms of these linked insurance policies are fully reinsured by the Applicant in terms of the T3 reinsurance policy. The Applicant holds the assets backing the linked liabilities via the T3 reinsurance policy. The Applicant holds the reinsurance assets in its UPF. Company B holds the T3 reinsurance policy in its UPF.
  - The reinsurance assets will be transferred by the Applicant to Company B in terms of a transfer agreement and the T3 reinsurance policy will consequently be terminated.
  - All asset management agreements in respect of the management of the reinsurance assets will be transferred by the Applicant to Company B.

Conditions and assumptions

This binding private ruling, insofar as it relates to the third party transaction, is not made subject to any additional conditions and assumptions.

This binding private ruling, insofar as it relates to the intra-group transaction, is subject to the following additional conditions and assumptions –

- The Applicant and Company B each holds all relevant assets, appropriately held in the UPF, IPF or CPF, on capital account.

- The transfer of the policyholder businesses by the Applicant is allocated in such a manner that –
  - the policyholder businesses, assets and liabilities previously allocated to the UPF of the Applicant are allocated to the UPF of

Company B;

- the policyholder businesses, assets and liabilities previously allocated to the CPF of the Applicant are allocated to the CPF of Company B; and

- the policyholder businesses, assets and liabilities previously allocated to the IPF of the Applicant are allocated to the IPF of Company B.

- Capital assets of the Applicant will be held as capital assets by Company B following the proposed transaction.

- No ruling is sought or made in relation to the ultimate winding-up, liquidation or deregistration of the Applicant and the potential impact this event may have on relief obtained under section 45 of the Act.

- No ruling is sought or made in relation to a potential disposal of an asset acquired under section 45 of the Act by Company B within 18 months of the proposed intra-group transaction as contemplated in section 45(5) of the Act.

<u>Ruling</u>

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

- The substitution by the Applicant of its rights and obligations in terms of the annuity policies for replacement policies to be issued by Company A to the policyholders will not result in any taxable capital gain for the Applicant.

- The termination of the Applicant's reinsurance policy, issued by Company A, will not result in any taxable capital gain for the Applicant due to the operation of paragraph 55(1)(*a*)(i)) of the Eighth Schedule to the Act.

- The proposed third party transaction will not result in a 'reduction amount' for purposes of paragraph 12A of the Eighth Schedule to the Act for Company A.

- No STT consequences will ensue from the proposed transaction for Company A.

- The transfer of ownership by the Applicant of the annuity policies, being long-term insurance policies, to Company A by way of substitution will be exempt from VAT in terms of section 12(*a*) read with section 2(1)(*i*) of the VAT Act.

- Paragraph (v) of the proviso to the definition of 'enterprise' in section 1(1) of the VAT Act provides that any activity shall, to the extent to which it involves the making of exempt supplies, not be deemed to be the carrying on of an enterprise. In light of the fact that the termination of the Applicant's reinsurance policy, issued by Company A, is done in the course and furtherance of an exempt activity, it will not be subject to VAT.

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

- Transaction 1

    - The transfer by the Applicant of any assets held in the UPF, IPF and CPF in terms of the linked insurance policies to Company B and the termination of the T1 reinsurance policy will not result in any taxable capital gain for the Applicant.

    - The assumption by Company B of the linked insurance policies and the termination of the T1 reinsurance policy do not result in any taxable capital gain or loss for Company B.

    - The transfer of the linked long-term insurance policies from the Applicant to Company B will be exempt from VAT under section

12(*a*) read with section 2(1)(*i*) of the VAT Act.

- Paragraph (v) of the proviso to the definition of 'enterprise' in section 1(1) of the VAT Act provides that any activity shall, to the extent to which it involves the making of exempt supplies, not be deemed to be the carrying on of an enterprise. In light of the fact that the termination of the T1 reinsurance policy is done in the course and furtherance of an exempt activity, it will not be subject to VAT.

- Transaction 2

  - The transfer by the Applicant of assets associated with the living annuity policies and linked pure endowment policies comprising transaction 2 will not result in any taxable capital gain for the Applicant due to the application of section 45 of the Act, to the extent that these assets are transferred from the IPF and CPF. To the extent that these assets are transferred from the UPF, no taxable capital gains are included for tax purposes under paragraph 10(*b*)(ii) of the Eighth Schedule to the Act.

  - The disposal of the securities (listed shares, unlisted shares and preference shares) and unit trusts units to Company B will be exempt from STT under section 8(1)(*a*)(iii) of the STT Act.

  - The transfer of the living annuity policies and linked pure endowment insurance policies from the Applicant to Company B will be exempt from VAT under section 12(*a*) read with section 2(1)(*i*) of the VAT Act.

  - The transfer by the Applicant to Company B of the assets associated with the living annuity policies and linked pure endowment policies, which comprise of equity securities, participatory securities, debt securities and cash, will be exempt from VAT under section 12(*a*) read with section 2(1)(*c*) or (*d*) of the VAT Act.

- Transaction 3

    - The transfer of the reinsurance assets and the termination of the T3 reinsurance policy do not result in any taxable capital gain for the Applicant.

    - The termination of the T3 reinsurance policy will not result in any taxable capital gain for Company B.

    - The disposal of the securities (listed shares, unlisted shares and preference shares) and unit trusts to Company B will be exempt from STT under section 8(1)(*a*)(iii) of the STT Act.

    - The transfer by the Applicant to Company B of the reinsurance assets held in respect of the T3 reinsurance policy will, to the extent that they comprise of equity securities, participatory securities, debt securities and cash, be exempt from VAT under section 12(*a*) read with section 2(1)(*c*) or (*d*) of the VAT Act.

    - Paragraph (v) of the proviso to the definition of 'enterprise' in section 1(1) of the VAT Act provides that any activity shall, to the extent to which it involves the making of exempt supplies, not be deemed to be the carrying on of an enterprise. In light of the fact that the termination of the T3 reinsurance policy is done in the course and furtherance of an exempt activity, it will not be subject to VAT.

8. BINDING CLASS RULING

8.1. BCR 49 – Deductibility of insurance premiums in respect of an environmental maintenance programme guarantee

This ruling determines the deductibility of insurance premiums incurred by a mine owner for an environmental maintenance programme guarantee issued to the Department of Mineral Resources.

In this ruling references to sections are to sections of the Income Tax Act applicable as at 16 July 2015. 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*);
- section 23(*g*); and
- section 23L.

Class Members

The class members to whom this ruling applies are Mining companies operating in South Africa that carry on the business of mining in pursuance of schemes of profit-making.

Parties to the proposed transaction

The Applicant: A public company incorporated in and a resident of South Africa, that carries on business as an insurer

Class Members

Description of the proposed transaction

The Mineral and Petroleum Resources Development Act No. 28 of 2002 (the MPRD Act) requires an applicant for, amongst others, a mining right to conduct an environmental impact assessment and to submit an environmental management programme (EMP) and also requires the mine owner to make financial provision for the rehabilitation of the land in respect of which mining activities are conducted. The financial provision is assessed on an annual basis and its extent is adjusted as is considered necessary.

Financial provision may be in the form of an insurance policy, guaranteeing the availability of sufficient funds to undertake the agreed work programmes and to rehabilitate the prospecting, mining, reconnaissance, exploration or production areas, as the case may be.

The Applicant developed a product to enable mine owners to provide the Department of Mineral Resources (DMR) with the required financial provision.

It consists of:

- a guarantee insurance policy (as defined in the Short Term Insurance Act No. 53 of 1998) to be issued by the Applicant to the mine owner; and

- a guarantee, in the prescribed form, to the extent of the liability as determined in the EMP for three years, to be issued by the Applicant to the DMR, in terms of which the Applicant will assume the liability for the cost of the environmental rehabilitation obligation on behalf of the mine owner.

In the event that the mine owner fails or remains in default to execute its obligations, , the DMR may call for payment in terms of the guarantee. In the event that the Applicant is called upon to pay any amount in terms of the guarantee, the mine owner will be obliged to pay an additional premium to the Applicant, equal to the excess of the amount payable in terms of the underlying guarantee, after taking into account the amount of the premiums actually paid by the mine owner to the Applicant.

The DMR may also call for payment in terms of the underlying guarantee when:

- the mine owner ceases to conduct mining or prospecting operations;

- the mine owner is sequestrated;

- the mine owner surrenders his estate, in terms of the Insolvency Acts that are applicable in South Africa; or

- the Applicant, as Guarantor, notifies the DMR that it wishes to withdraw from the guarantee.

Conditions and assumptions

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

Ruling

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

- The premiums incurred by a mine owner in terms of the insurance policy, written by the Applicant to the extent that it relates to the financial guarantee to be lodged with the Department of Mineral Resources for purposes of executing the mine owner's environmental maintenance programme, will be deductible by the mine owner under section 11(*a*) read with sections 23(*g*) and 23L.

8.2. *BCR 50 – Tax consequences for unitholders in a REIT of an amalgamation transaction, followed by an asset-for-share transaction*

This ruling determines the income tax and securities transfer tax consequences for the unitholders in a listed REIT of an amalgamation of the REIT, followed by an asset-for-share transaction.

In this ruling references to sections are to sections of the relevant Act applicable as at 15 December 2015. Unless the context indicates otherwise, any word or expression in this ruling bears the meaning ascribed to it in the relevant Act.

This is a ruling on the interpretation and application of the following provisions of:

- the Income Tax Act:
  - section 9C;
  - section 42; and

- section 44(6).

- the STT Act:
  - section 8.

Class Members

The Class Members to whom this ruling will apply are the minority unitholders of a collective investment scheme in property, listed as a REIT on the JSE.

Parties to the proposed transaction

The Applicant: A collective investment scheme in property listed as a REIT on the JSE and a resident of South Africa

Class Members

Description of the proposed transaction

The Applicant will transfer all of its assets, being its entire shareholding in a property company (PropCo), to a subsidiary (Company B), of the holder of the majority of the Applicant's units (Company A) in terms of an 'amalgamation transaction' as contemplated in section 44 of the Act (S44 transaction), in return for the issuing of equity shares in Company B.

The Applicant will distribute the equity shares received in terms of the S44 transaction to its unitholders approximately 10 business days after the date of issue of these shares. These shares will be kept in escrow for the benefit of the unitholders. The Applicant will still be a REIT at the time of that distribution.

After the S44 transaction and this distribution of the equity shares in Company B to the unitholders, the Class Members will dispose of their portion of these equity shares in Company B in return for the issuing of equity shares in Company A in terms of an 'asset-for-share transaction' as contemplated in section 42 of the Act.

The asset-for-share transaction is expected to take effect one day after the amalgamation transaction's effective date, when the last suspensive conditions will be fulfilled.

The existence of the Applicant will then be terminated in due course.

Conditions and assumptions

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

- The chronology of the transactions and transaction steps, as set out in point 5, is adhered to during the implementation of the proposed transaction.

- The market value of the shares in PropCo is equal to or exceeds the base cost thereof on the date on which the last suspensive condition to the S44 transaction is fulfilled.

- The amount of the Applicant's final distribution as a REIT is determined with reference to the financial results of the Applicant as reflected in financial statements prepared for the current year of assessment, which is deemed to end on the date on which the Applicant ceases to be a REIT for tax purposes.

- The existence of the Applicant is finally terminated in consequence of the S44 transaction.

Ruling

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

- The income tax and capital gains tax rollover provisions of section 44(6) will apply, as the circumstances necessitate, to the distribution of the equity shares in Company B to the unitholders, even though these shares will only be distributed approximately 10 business days after the date of issue thereof in terms of the S44 transaction and be held in escrow until the Class Members' portion of these shares in Company B are exchanged for the equity shares in Company A.

- The substitution of the Class Members' investment in the Applicant for a temporary investment in Company B (in escrow) and ultimately an investment in Company A will not, in isolation, result in a change in the nature, for tax purposes, of the Class Members' investment.

- For purposes of the definition of 'qualifying share' in section 9C(1) of the Act, the equity shares in Company A will be considered to have been owned by the Class Members for a continuous period of 3 years if still held and not disposed of on the third anniversary of the issue date of the equity shares in Company A to the Class Members.

- No STT is payable in respect of the transfer of the Class Members' portion of the equity shares in Company B to Company A under section 42 of the Act.

8.3. *BCR 51 – Taxation of employees participating in a perpetuity employee share incentive scheme*

This ruling determines the taxability of dividends accruing to a trust that will, in turn, distribute those dividends to its beneficiaries pursuant to an employee share incentive scheme.

In this ruling references to sections are to sections of the Income Tax Act applicable as at 5 October 2015. 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 8C;
- section 10(1)(*k*);
- section 25B; and
- section 64F(1)(*l*).

<u>Class Members</u>

The class members to whom this ruling will apply are the Beneficiaries of the

Co-Applicant.

Parties to the proposed transaction

The Applicant: An unlisted company, incorporated in and a resident of South Africa

The Co-Applicant: A trust, founded by the Applicant, registered in and a resident of South Africa

The Beneficiaries: Qualifying employees who are permanent employees of the Applicant within the Applicant's lower employment grades 2

Description of the proposed transaction

The Applicant intends to establish an employee share ownership plan (ESOP) and founded the Co-Applicant for that purpose.

The Applicant will contribute an amount to the Co-Applicant to enable the Co-Applicant's trustees (trustees) to subscribe for a separate class of ordinary shares (scheme shares) in the Applicant.

The scheme shares will rank *pari passu* with the ordinary shares of the Applicant with regards to voting rights, participation in the capital and income of the Applicant as well as other share related matters. The sole distinction between the ordinary shares and the scheme shares is that the dividends of the scheme shares must be determined and paid, based on a formula which requires a percentage of the free cash flow determined for that financial year to be distributed as a dividend.

The distributable income (if any) will be paid to the Beneficiaries who were qualifying employees on the last day of the financial year to which the distributable income relates, in equal amounts (by dividing the distributable income by the number of Beneficiaries receiving distributable income). The trustees will ensure that the distributable income will always be paid to the Beneficiaries within the same financial year as the receipt thereof.

Persons who cease to be qualifying employees will cease to be regarded as Beneficiaries or to have any rights under the ESOP.

The trustees will be entitled to vote the scheme shares on behalf of the Beneficiaries at all shareholders meetings. Each recognised workers union will be entitled to appoint, remove or replace one trustee and one additional trustee for every completed 25% of the Beneficiaries who are members of such union. The Applicant will appoint one trustee fewer than the number of trustees appointed by the recognised unions. One independent trustee will also be appointed by the majority of the trustees.

It is intended that the ESOP will exist for an indefinite period. In this regard the Co- Applicant's trust deed determines that the Co-Applicant will endure in perpetuity, unless it is terminated on the occurrence of any one of the following events:

- the Applicant terminates its corporate existence;
- there are no Beneficiaries left; or
- the Applicant exercises its rights as against the Co-Applicant in terms of a 'come along' arrangement, if a third party offers to buy all of the ordinary shares in the Applicant.

If the Co-Applicant is terminated for any one of those reasons, the Applicant will repurchase the scheme shares from the Co-Applicant at market value. Upon termination of the Co-Applicant, before the Co-Applicant is deregistered, the trustees will realise the Co-Applicant's assets, discharge the Co-Applicant's liabilities and distribute any surplus to the Beneficiaries in equal portions in the same financial year that the Co-Applicant's assets are realised. If there are no Beneficiaries left, any surplus will be paid to a public benefit organisation in the same financial year that the Co-Applicant's assets are realised. The public benefit organisation will be decided upon by the trustees.

The scheme shares must remain in the Co-Applicant and the Co-Applicant's trust deed provides that neither the Co-Applicant nor the trustees will:

- be entitled to divest the Co-Applicant of the scheme shares, except in terms of the termination provision as mentioned above; or
- enter into any agreement in respect of the manner in which any votes

attached to any scheme shares will be exercised; or

- purport to agree, whether or not subject to any suspensive or resolutive condition, to do any of the aforegoing.

Beneficiaries will not be entitled to dispose of, cede or encumber any or all of their rights acquired under the Co-Applicant's trust deed.

Conditions and assumptions

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

Ruling

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

- The dividends to be received by the Co-Applicant and distributed to the Beneficiaries within the same financial year the dividends were received will not be included in the income of the Co-Applicant under section 25B(1).

- The dividends to be distributed by the Co-Applicant to the Beneficiaries will not be exempt from normal tax under section 10(1)(*k*), as proviso (*ii*) to section 10(1)(*k*)(i) will apply.

- The dividends to be received by the Co-Applicant and distributed to the Beneficiaries will be exempt from dividends tax under section 64F(1)(*l*).

9. BINDING GENERAL RULING

9.1. BGR 11 (Issue 2) – Use of exchange rate

This BGR prescribes the foreign exchange rate that must be used when issuing tax invoices, debit notes or credit notes and determining the output tax due where the consideration for the standard-rated supply is in a foreign currency.

The issue under consideration is the exchange rate that should be applied to determine the consideration in rands for purposes of complying with sections 20(4), (5) and 21(3) as well as for determining the vendor's output tax liability.

Ruling

A vendor is required to issue a –

(a) tax invoice for a supply subject to VAT at the standard rate of 14% that complies with sections 20(4) or (5) in the currency of the Republic, within 21 days of the date of the supply. In addition to the requirements as set out in section 20(4) or (5) as the case may be, the vendor may also reflect the consideration for the supply in a foreign currency together with the relevant exchange rate on the tax invoice; and

(b) credit or debit note for a supply subject to VAT at the standard rate of 14% that complies with section 21(3) in the currency of the Republic. In addition to the requirements contained in section 21(3), the vendor may also reflect the amount by which the value of the supply has increased or decreased in a foreign currency together with the initial exchange rate as reflected on the corresponding tax invoice, on the credit or debit note.

In regard to issuing a tax invoice, credit or debit note, it will be acceptable to SARS if vendors use one of the following options to determine the rand equivalent of the consideration for the supply:

(i) The daily exchange rate on the date the time of supply occurs.

(ii) The daily exchange rate on the last day of the month preceding the time of supply.

(iii) The monthly average rate for the month preceding the month during which the time of supply occurs.

The options listed in (ii) and (iii) above may not be used during exceptional circumstances where the equivalent rand value is distorted due to the exchange rate used. Examples include, but are not limited to, the collapse of a foreign currency or the fluctuation of a foreign currency of 10% or more within the month referred to in options (ii) and (iii) respectively. In these instances, the option under (i) must be used as soon as the vendor becomes aware of the distortion.

The exchange rate to be used by the vendor is the rate as published on the website of –

- the South African Reserve Bank;
- Bloomberg; or
- the European Central Bank.

9.2. BGR 12 (Issue 2) – Input tax on the acquisition of a non-taxable supply of second-hand motor vehicles by a motor dealer

The purpose of this BGR is to make an arrangement relating to the amount motor dealers may deduct as 'input tax' with regard to a second-hand vehicle traded-in under a non-taxable supply.

Motor dealers may in certain instances pay an amount to a customer for a second-hand motor vehicle in excess of the generally accepted trade-in market value reflected in the Auto Dealers' Guide. The difference between this value and the amount actually credited or paid to the customer is referred to as an 'over-allowance'. The effect of paying an 'over-allowance' is that the open market value is less than the consideration paid to the customer. In terms of paragraph (*b*) of the definition of 'input tax', input tax is limited to an amount equal to the tax fraction of the lesser of the consideration in money given or the open market value of the supply. As a result, the notional input tax to which the dealer is entitled is limited to the tax fraction of the open market value of the vehicle traded-in.

An over-allowance is generally paid when the trade-in of a second-hand motor vehicle is an integral part of the supply of another vehicle to the same customer by the same motor dealer. In these circumstances, the overall position for the motor dealer is the same with regard to the VAT payable if –

- the generally accepted trade-in value (that is, the open market value) of the second-hand motor vehicle is paid and a discount is granted to the customer on the new vehicle; or
- a smaller or no discount is granted on the sale of a vehicle, and instead an over-allowance is paid to the customer on the second-hand motor vehicle traded in (in other words, the amount of the discount given on the new vehicle is reduced or not given so that a higher value can be given for the vehicle traded in). In both instances, the value of the smaller discount combined with the over-allowance given for the traded in vehicle would equal the value of the discount given on the new vehicle.

Ruling

An arrangement is made under section 72, allowing motor dealers to deduct input tax under section 16(3)(*a*)(ii)(*aa*) or 16(3)(*b*)(i) read with paragraph (*b*) of the definition of 'input tax' as defined in section 1(1), on the full consideration (including any over-allowance amount) paid or credited to the supplier for a second-hand vehicle traded-in under a non-taxable supply.

This section 72 arrangement is made under the following conditions:

(a) The trade-in of the second-hand motor vehicle transaction is dependent on the supply of another motor vehicle by that same motor dealer to the same customer.

(b) The parties are trading at arm’s-length and are not 'connected persons' as defined in section 1(1).

(c) The over-allowance given by the vendor does not exceed the total discount that is permissible on the motor vehicle being sold.

(d) The required records as prescribed in section 20(8) must be retained, as well as –

(i) a detailed list of the second-hand vehicles traded in, and the subsequent sale thereof (where applicable);

(ii) the details of the over-allowance; and

(iii) the net accounting effect of the combined transactions involved (that is, the trade-in and sale).

The above arrangement may not be applied by any motor dealer who fails to comply with any of the aforementioned conditions. As a result, it will be withdrawn in relation to any non-compliant transactions by such motor dealer with effect from the date of such non-compliance. Furthermore, SARS reserves the right to withdraw this arrangement, should it be found that such dispensation is being misused or causing verification problems for SARS.

9.3. BGR 20 (issue 2) – Interpretation of the term 'substantially the whole'

This BGR provides clarity on the interpretation of the term 'substantially the whole' as referred to in:

- section 10(1)(*c*N)(ii)(*aa*)(B)
- section 10(1)(*c*O)(ii)(*bb*)
- section 10(1)(*c*Q)(ii)(*aa*)(B)
- section 30B(2)(*b*)(iv), (vi) and (ix)
- section 30C(1)(*d*)(v) and (viii)

<u>Background</u>

The term 'substantially the whole' was introduced in the revised tax system for PBOs in 20001 in order to achieve a more supportive fiscal environment and to give effect to the proposals and recommendations by the Katz Commission set out in the Ninth Interim Report. In considering comparative international law with regard to trading activities conducted by non-profit organisations (NPOs) the Report stated that it was significant that:

> 'the United States' federal tax law exempts profits derived from a business which is 'substantially related' to a NPOs tax-exempt purposes. Substantially related in this context means that the conduct of the business activity must have a significant causal relationship to the achievement of a tax-exempt purpose. Thus, for the conduct of a trade or business from which a particular amount of gross income is derived to be exempt from taxation, the production or distribution of the goods or the performance of the services from which the gross income is derived must contribute importantly to the accomplishment of the organisations' exempt purposes.'

The Report stated further that:

> 'United Kingdom Revenue Practice is to accept ancillary trades provided they are 'small in absolute terms and the turnover of that part of the trade is less than 10 per cent of the turnover of the whole trade' '.

The term 'substantially the whole' has also been introduced into legislation dealing with:

- the exemption from normal tax of a recreational club;
- the exemption from normal tax of an SBFE;
- the requirements for approval as an association;
- the requirements for approval as an SBFE;
- capital gains tax affecting PBOs and SBFEs; and
- transfer duty affecting PBOs and institutions, boards or bodies contemplated in section 10(1)(*c*A)(i).

Discussion

The exemption from normal tax of public benefit organisations, recreational clubs and small business funding entities

The term 'substantially the whole' allows a PBO, recreational club and SBFE to carry on business undertakings or trading activities within certain parameters while at the same time ensuring that the sole or principal object of:

- a PBO remains the carrying on of public benefit activities (PBAs);
- a recreational club remains the provision of social and recreational amenities or facilities for its members; and
- an SBFE remains the provision of funding for small, medium and micro-sized enterprises.

The receipts and accruals derived by any of the aforementioned entities from any business undertaking or trading activity will be exempt from normal tax to the extent that substantially the whole of such undertaking or activity is directed towards the recovery of cost.

The requirements for approval as an association

Section 30B sets out the conditions and requirements that an 'entity' as defined in section 30B(1) must comply with to obtain and retain approval as an association in order for its receipts and accruals to be exempt from normal tax under section 10(1)(*d*)(iii) or (iv).

The Commissioner must approve an entity for the purposes of section 10(1)(*d*)(iii) or (iv) if the constitution or written instrument under which it has been established provides, among other things, that:

- substantially the whole of its funds will be used for the sole or principal object for which it has been established;
- substantially the whole of its activities will be directed to the furtherance of its sole or principal object and not for the specific benefit of an individual member or minority group; and
- substantially the whole of its funding will be derived from its annual or other long-term members or from an appropriation by the government of the Republic in the national, provincial or local sphere.

The requirements for approval as a small business funding entity

Section 30C sets out the conditions and requirements that an entity must comply with to obtain and retain approval as an SBFE in order for certain of its receipts and accruals to be exempt from normal tax under section 10(1)(*c*Q).

The Commissioner must approve an SBFE for the purposes of section 10(1)(*c*Q) if the constitution or written instrument under which it has been established provides, among other things, that:

- substantially the whole of its funds will be used for its sole or principal object for which it has been established; and
- substantially the whole of its activities will be directed to the furtherance of its sole or principal object.

Capital gains tax

Public benefit organisations

A PBO must disregard any capital gain or capital loss determined on the disposal of an asset if substantially the whole of the use of that asset by that PBO on and after valuation date was directed at:

- a purpose other than carrying on a business undertaking or trading activity; or
- carrying on a business undertaking or trading activity which qualifies for exemption under section 10(1)(*c*N)(ii)(*aa*), (*bb*) or (*cc*).

Small business funding entities

An SBFE must disregard any capital gain or capital loss determined on the disposal of an asset if substantially the whole of the use of that asset by that SBFE was directed at:

- a purpose other than carrying on a business undertaking or trading activity; or
- carrying on a business undertaking or trading activity which qualifies for exemption under section 10(1)(*c*Q)(ii)(*aa*), (*bb*) or (*cc*).

Transfer duty

In order to qualify for exemption from the payment of transfer duty under section 9(1)(*c*) of the Transfer Duty Act, the whole property, or substantially the whole of the property acquired by a PBO or institution, board or body contemplated in section 10(1)(*c*A)(i) must be used for purposes of carrying on any PBAs.

If at any time subsequent to the acquisition of property that has qualified for the exemption from transfer duty the whole or substantially the whole of the property is used for a purpose other than for carrying on any PBA, transfer duty will become payable.

Ruling

In the strict sense the term 'substantially the whole' is regarded by SARS to mean 90% or more. SARS will, however, accept a percentage of not less than 85%.

The percentage must be determined using a method appropriate to the circumstances.

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

9.4. BGR 24 (Issue 2) – Allocation of direct and indirect expenses within and between an insurer's funds

This BGR provides certainty on the application of the deeming provisions in section 37C(3) as far as it relates to a deduction claimed under section 18A.

Section 37C incentivises the conservation of ecologically-viable areas by enabling taxpayers to claim various tax deductions for these endeavours.

The deduction as contemplated under section 37C(3) is linked to section 18A. In this regard, the deductible amounts are deemed to be a donation paid or transferred to the government for which a receipt has been issued under section 18A(2).

Section 18A(2) expressly prohibits a deduction under section 18A(1), unless the claim is supported by a receipt issued in accordance with section 18A(2). Uncertainty exists as to whether the legislation requires a receipt as envisaged in section 18A(2) to be furnished to SARS, for purposes of a deduction as contemplated in section 37C(3).

Section 37C(3) provides for the tax deductibility of expenditure actually incurred by a taxpayer to conserve or maintain land owned by the taxpayer if the conservation or maintenance is carried out in terms of a declaration that has a duration of at least 30 years under section 20, 23 or 28 of the Protected Areas Act. The expenditure incurred is for purposes of section 18A deemed to be a donation by the taxpayer actually paid or transferred during the year to the government for which a receipt has been issued under section 18A(2).

Section 18A(1)(c) provides for the tax deductibility of donations made to any government department of the Republic in the national, provincial or local sphere, carrying on an approved public benefit activity as set out in Part II of the Ninth Schedule. A taxpayer making a bona fide donation in cash or of property in kind to any entity listed under section 18A(1), is entitled to a deduction from taxable income if the donation is supported by the necessary section 18A receipt, which must include the details as set out in section 18A(2).

Ruling

An amount claimed under section 18A and that is for purposes of section 37C(3) deemed to be a donation, will qualify for deduction notwithstanding the fact that a receipt as prescribed in section 18A(2) has not been issued.

9.5. BGR 28 (Issue 2) – Electronic services

This BGR sets out the –

- information that must be contained on a tax invoice, credit or debit note in order to satisfy the requirements of sections 20(7) or 21(5);
- exchange rate that must be applied in order to determine the amount of the VAT charged in the currency of the Republic; and

- manner in which prices must be advertised or quoted,

for the supply of electronic services by an electronic services supplier.

Ruling

This ruling constitutes a BGR as it relates to the items listed tax invoices, credit and debit notes, value of supply and advertised or quoted prices.

Tax invoices

The Commissioner directs under section 20(7)(*a*), that an electronic services supplier must issue a tax invoice for a supply of electronic services containing, as a minimum, the following information:

(a) The name and VAT registration number of the electronic services supplier.

(b) The name and address1 of the electronic services recipient.

(c) An individual serialised number.

(d) The date of issue.

(e) A description of the electronic services supplied.

(f) The consideration in money for the supply in the currency of any country. If the consideration is reflected in the currency of –

(i) the Republic, the amount of the VAT charged or a statement that it includes a charge for the VAT and the rate at which the VAT was charged; or

(ii) any country other than the Republic, the amount of the tax charged in the currency of the Republic or a separate document issued by the electronic services supplier to the electronic services recipient reflecting the amount of the tax charged in the currency of the Republic.

(g) The exchange rate used.

The tax invoice containing the aforementioned information satisfies the requirements of section 16(2)(*b*)(ii) for purposes of the electronic services recipient deducting input tax.

Credit and debit notes

The Commissioner directs under section 21(5), that a vendor that –

- has issued a tax invoice as contemplated in under invoices above; and
- is required to issue a credit or debit note as required by section 21(3), and is unable to issue a credit or debit note that complies with section 21(3);

must issue a credit or debit note containing the following information:

(i) The name and VAT registration number of the electronic services supplier.

(ii) The name and address of the electronic services recipient.

(iii) The date of issue.

(iv) A brief explanation of the circumstances giving rise to the issuing of the credit or debit note.

(v) The increased or decreased consideration together with the increased or decreased amount of tax, as the case may be. If the consideration is reflected in the currency of –

(aa) the Republic, the increased or decreased amount of the VAT or a statement that the consideration includes the increased or decreased amount of VAT and the rate at which the VAT was charged; or

(bb) any country other than the Republic, the increased or decreased amount of tax in the currency of the Republic or a separate document issued by the electronic services supplier to the electronic services recipient reflecting the increased or decreased amount of tax in the currency of the Republic.

(vi) The exchange rate used, being the exchange rate used in the tax invoice issued as contemplated under invoices above.

The credit or debit note containing the aforementioned information satisfies the requirements of section 16(2)(*b*)(ii) for purposes of deducting input tax.

<u>Value of supply</u>

A vendor issuing a tax invoice contemplated under invoices or a credit or debit note contemplated under credit or debit notes reflecting the consideration in money in the currency of any country other than the Republic must convert the tax charged to the currency of the Republic. In this regard, the exchange rate that must be applied in order to determine the tax charged, is the rate published by –

(a) the South African Reserve Bank;

(b) Bloomberg; or

(c) the European Central Bank.

The applicable exchange rate is the –

(i) daily exchange rate on the date the time of supply occurs;

(ii) daily exchange rate on the last day of the month preceding the time of supply; or

(iii) monthly average rate for the month preceding the month during which the time of supply occurs.

The options listed under (ii) and (iii) above may not be used during exceptional circumstances where the equivalent rand value is distorted due to the exchange rate used. Examples include, but are not limited to, the collapse of a foreign currency or the fluctuation of a foreign currency of 10% or more within the month referred to in options (ii) and (iii) respectively. In these instances, the option under (i) must be used as soon as the vendor becomes aware of the distortion.

<u>Advertised or quoted prices</u>

The Commissioner directs under proviso (iii) to section 65 that an electronic services supplier may, on or after 1 April 2015, advertise or quote the price of its electronic services exclusive of VAT on condition that it has a statement on its website indicating that VAT will be levied on supplies of electronic services to electronic services recipients.

9.6. BGR 30 – Allocation of direct and indirect expenses within and between an insurer's funds

This BGR determines:

- the allocation of direct and indirect operating expenses within and between the funds that are required to be established by insurers under section 29A and the subsequent deductibility of such operating expenses, and
- the deductibility of expenses against transfers under section 29A(7).

Background

Establishment of the funds

The taxable income derived by any insurer in respect of any year of assessment must be determined in accordance with the Act, but subject to sections 29A and 29B.

Every insurer is required to establish five separate funds and to maintain such funds. These funds form the foundation for the operation of section 29A as a whole. The taxable income derived by an insurer in respect of the individual policyholder fund, the company policyholder fund, the corporate fund and the risk policy fund must be determined separately in accordance with the Act as if each such fund had been a separate taxpayer. The income received by or accrued to an insurer from assets held by it in, and business conducted by it in relation to, the untaxed policyholder fund is exempt from tax.

An insurer is required to re-determine the value of liabilities in each policyholder fund and the risk policy fund within three months after the end of every year of assessment. Where the market value of the assets in the fund exceeds the value of liabilities, assets with a market value equal to the excess must be transferred from such fund to the corporate fund. Where the market value of the assets is, however, less than the value of liabilities, assets with a market value equal to the shortfall must be transferred from the corporate fund to the relevant fund. These transfers are viewed as notional adjustments relevant only for purposes of calculating the insurer's annual tax liability and do not affect the insurer's legal ownership of the assets concerned.

Allocation of expenses

Section 29A(12) stipulates that in the allocation of any expense to any of the funds an insurer must:

- to the extent to which the expense relates exclusively to business conducted by it in any one fund allocate that expense to that fund; and
- to the extent to which that expense does not relate exclusively to business conducted in any one fund, allocate that expense in a manner which is consistent with and appropriate to the manner in which its business is conducted.

Expenses which an insurer considers to be incurred to produce the excess assets to be transferred from a policyholder fund or the risk policy fund to the corporate fund and the associated costs attributed to it are to be allocated to such policyholder fund or risk policy fund. The transfer to the corporate fund is essentially a net profit that is derived by deducting all relevant expenses in the policyholder fund and the risk policy fund first.

Expenses allocated to the corporate fund are not regarded to be incurred with a view to obtain the transfer from the policyholder fund or the risk policy fund as the corporate fund will not incur any expense to produce these transfers. Expenses allocated to the corporate fund relate to shareholder activities only.

Expenses that do not relate exclusively to business conducted in any one fund and which have not been classified as direct policyholder expenses, for example, operational overhead costs, general marketing costs, directors' fees, audit fees, are inconsistently treated by insurers in calculating the taxable income of the different funds. The fact that 'the manner in which its business is conducted' referred to in section 29A(12) is not defined in the Act further contributes to the inconsistent treatment of these indirect operating expenses.

Determination of taxable income

Specific rules are set for the determination of the taxable income of the individual policyholder fund, the company policyholder fund, the risk policy fund and the corporate fund. The expenses and allowances allowed as a deduction in the policyholder funds are limited to the total of:

(a) the amount of expenses and allowances directly attributable to the income of such fund ('direct expenses'); and

(b) a percentage of the amount of:

 (i) all expenses allocated to the fund which are directly incurred during such year of assessment in respect of the selling and administration of policies; and

 (ii) all expenses and allowances allocated to such fund which are not included in (a) above ('indirect expenses'), but excluding any expenses directly attributable to any amounts received or accrued which do not constitute 'income' as defined in section 1(1).

The amount referred to in (b) above is determined in accordance with the formula set out in section 29A(11)(*a*)(ii).

The rules for the deduction of expenses by an insurer referred to in section 29A(11)(*a*) do not apply to the corporate fund. The expenses in the corporate fund are subject to the requirements of section 11 read with section 23.

The determination whether expenses are directly attributable to the income of a policyholder fund or risk policy fund, or directly attributable to amounts which do not constitute income of such a fund, also referred to as direct expenses, is a matter of fact. A direct causal link is required between income earned and the expense incurred to earn the income.

Certain expenses, such as asset management fees, can be attributed to multiple income streams within a specific fund. Other expenses may relate to a class of assets as opposed to a particular income stream. In these instances it becomes difficult to link a particular expense to a specific fund.

Ruling

In view of the inconsistent treatment of expenses within and between the separate funds of an insurer, the treatment of expenses set out below is accepted for purposes of section 29A(11) and 29A(12):

(a) Direct expenses must be allocated to the policyholder funds and the risk policy fund in a manner consistent with the way in which the insurer does business.

(b) Direct expenses relating to shareholder activities only must be allocated to the corporate fund.

(c) Indirect operating expenses incurred to produce the excess assets to be transferred from the policyholder fund or the risk policy fund to the corporate fund and the associated costs attributable to it are to be allocated to such policyholder fund or risk policy fund.

(d) To the extent that indirect operating expenses cannot be allocated to any fund in particular:

  (i) an apportionment of the expense must be made between the corporate fund and the other funds in aggregate, using the average value of liabilities for the policyholder funds and the risk policy fund and the average market value of assets for the corporate fund at the commencement and end of the year of assessment;

  (ii) once expenses have been allocated to the different funds a further apportionment between the individual policyholder fund, company policyholder fund, the untaxed policyholder fund and the risk policy fund must be made using the gross premiums received by the respective funds;

  (iii) the apportioned indirect operating expenses allocated to each policyholder fund are subject to the expense ratio contemplated in section 29A(11) for the individual policyholder fund and the company policyholder fund;

(iv) the apportioned indirect operating expenses allocated to the corporate fund and the risk policy fund should further be apportioned with reference to the ratio of income in the fund concerned plus the taxable capital gain applicable to the fund concerned over total amounts received or accrued (irrespective of whether these amounts are of a capital or revenue nature), provided that transfers from the policyholder funds at the end of the year of assessment are excluded in this calculation from both the income and the total amounts received or accrued.

Expenses directly attributable to income in the individual policyholder fund and the company policyholder fund are deductible under section 29A(11)(*a*)(i). Expenses directly attributable to exempt income in the untaxed policyholder fund are not deductible.

Expenses directly attributable to assets that give rise to income in the individual policyholder fund and the company policyholder fund may be claimed under section 29A(11)(*a*)(i) to the extent they are not of a capital nature. Expenses that are directly attributable to assets that give rise to exempt income will not be deductible. Indirect operating expenses that cannot be directly attributed to assets within a specific policyholder fund and allocated to the particular fund as directed above must be treated as indirect expenses and claimed under section 29A(*a*)(ii).

The deduction of expenses allocated to the corporate fund and the risk policy fund is subject to the requirements of section 11 read with section 23. No expenses relating to the corporate fund activities are allowed to be deducted in the corporate fund from the transfers contemplated in section 29A(7) since no expense is viewed to be incurred in the corporate fund to produce such transfer.

This ruling constitutes a BGR issued under section 89 of the Tax Administration Act No. 28 of 2011 insofar as it relates to the tax treatment of expenses incurred by an insurer.

9.7. BGR 31 – Interest on late payment benefits

This BGR provides clarity on when an amount constitutes interest, as opposed to forming part of the lump sum benefit, for purposes of the Second Schedule to the Act. This BGR replaces General Note 32.

Different practices currently exist in the retirement fund industry relating to the payment of an amount in circumstances when the benefit is paid late. Some administrators include this amount to form part of the lump sum benefit payable to a member, whereas other administrators pay the amount separately to the member as interest.

<u>Ruling</u>

An amount that is calculated after receipt of notification of the claim form until the date that the fund is obliged to pay the benefit in terms of the rules of the fund is regarded to be part of the lump sum benefit.

An additional amount that may become payable in circumstances where the fund fails to meet this obligation and is at fault for delaying the payment of the benefit. Such an amount constitutes interest that is not part of the lump sum benefit. The fund must issue an IT3(b) to the member and send a copy to SARS.

10. DRAFT BINDING GENERAL RULING

10.1. The VAT treatment of the supply and importation of vegetable oil

This BGR sets out the VAT rate applicable to the supply and importation of vegetable oil.

The supply of certain vegetable oil (excluding olive oil), is zero-rated under section 11(1)(*j*) read with Item 14, provided the vegetable oil is marketed and supplied for use in the process of cooking food.

In order for the zero rate to apply, the oil must be a 'vegetable oil' that is marketed and supplied in the process of cooking food. There is no specific legislation that requires vegetable oil to be labelled as oil for use in the process of cooking food. As a result, vegetable oil that is displayed with other cooking oils will be regarded as being supplied and marketed for use in the process of cooking food.

The vendor must obtain and retain documentary proof substantiating the vendor's entitlement to apply the zero rate under section 11(3).

<u>Standard-rated supplies</u>

The supply of vegetable oil in the following instances is specifically excluded from Item 14 and is therefore subject to VAT at the rate of 14%:

(a) Vegetable oil not marketed and supplied for use in the process of cooking food, for example, coconut oil displayed where toiletries are sold.

(b) Olive oil.

(c) Vegetable oil blends that contain olive oil.

(d) Any vegetable oil to which a standard-rated item has been added, for example, canola oil and butter blend.

(e) Any of the vegetable oils or blends marketed and supplied as salad dressing.

(f) Any vegetable oil to which another vegetable, in its natural state or processed, is added for purposes of flavouring, that is, a whole garlic clove or chilli added to canola oil.

(g) Vegetable oils supplied in the course of carrying out any agreement for the furnishing or serving of any meal, refreshment, cooked or prepared food, as the case may be, so as to be ready for immediate consumption when so supplied.

<u>The importation of vegetable oil</u>

The importation of vegetable oil is under section 13(3) read with paragraph 7(*a*) of Schedule 1 to the VAT Act, exempt from the VAT levied under section 7(1)(*b*).

The importation of vegetable oil is subject to VAT at the rate of 14% under section 7(1)(*b*).

10.2. Alternative documentary proof acceptable to SARS to substantial a vendor's entitlement to a deduction under section 16(3)

The BGR sets out the information that must be contained in documentation for it to be regarded as being acceptable to the Commissioner, where the vendor is unable to obtain the documents specified under section 16(2)(*a*)-(*f*) of the VAT Act.

SARS directs that a vendor must be in possession of documentation containing the following information <u>at the time a return is submitted in which the vendor is entitled to make the deduction</u>.

<u>Information acceptable to the Commissioner: In respect of a taxable supply as contemplated in section 16(2)(*a*)-(*b*)</u>

(a) The identity of the –

(i) supplier, by means of a valid VAT registration number and registered or applicable trading name(s) of the supplier; and

(ii) in instances where the consideration in money exceeds R5 000 for the particular supply, either the recipient's valid VAT registration number or the recipient's registered or trading name;

(b) The date on which the supply was made;

(c) A proper description of the goods or services supplied;

(d) The consideration due for the goods or services supplied; and

(e) The VAT amount reflected separately or a statement that the amount payable includes VAT and the rate at which VAT was charged.

Information acceptable to the Commissioner: In respect of a non-taxable supply as contemplated in section 16(2)(*c*)

(a) The identity of the non-registered supplier must be confirmed as follows:

  (i) If the non-registered supplier is a natural person, by means of a copy of that supplier's identity document or driver's licence; or

  (ii) If the non-registered supplier is not a natural person, by means of a copy of that supplier's representative's identity document or driver's licence as well as any documentation reflecting the legally allocated registration number of the supplier;

(b) A proper description of the goods supplied;

(c) Any documentation confirming that the supply is not a taxable supply;

(d) The consideration for the supply; and

(e) Proof and date of payment.

Alternative documentary proof in respect of a deduction as contemplated in section 16(2)(*d*)-(*f*)

A vendor seeking to rely on the use of alternative documents for these deductions must, before making the deduction, make a written application to SARS. The application should consist of a completed VAT301 form, a clearly motivated application, and must comply with the provisions of section 79 of the Tax Administration Act excluding section 79(4)(*f*), (*k*) and (6). The vendor must be in possession of the approval granted by SARS as well as the relevant documents at the time the return is submitted.

Record-keeping

The vendor must retain the alternative documentary proof as required under section 55 of the Value-Added Tax Act for the period prescribed in section 29 of the Tax Administration Act.

10.3. The VAT treatment of the supply and importation of vegetables and fruit

Zero-rated supplies

The supply of vegetables and fruit that have not been cooked or treated in any manner except for the purpose of preserving such vegetables and fruit in their natural state, is zero-rated under section 11(1)(*j*) read with Item 12 and Item 13 respectively.

Fresh and frozen vegetables and fruit supplied in the following manner are regarded as not having been 'treated' as envisaged in the said Item numbers, and therefore qualify for zero rating:

- Cut (including vegetables and fruit cut into specific shapes)
- Diced
- Sliced
- Shredded
- Crushed
- Minced
- Pureed
- Peeled
- De-pitted
- Compressed

Subject to standard-rated supplies, the aforementioned zero-rating applies regardless of whether the vegetables and fruit are sold individually (for example, a punnet of strawberries or a pocket of potatoes) or mixed (for example, mixed diced carrots and potatoes or mixed chopped strawberries and kiwi fruit).

Frozen vegetables and fruit that have been blanched in hot water are regarded as having been 'treated' for the purpose of preserving the vegetables and fruit in their natural state, and therefore, the supply of such frozen vegetables and fruit qualify for the zero rating.

The supply of a mix or a combination of vegetables and fruit by a store or similar establishment, whether or not at the delicatessen section of the establishment, may be zero-rated unless the vegetables and fruit fall under standard-rates supplies.

The vendor must obtain and retain documentary proof substantiating the vendor's entitlement to apply the zero rate under section 11(3).

Standard-rated supplies

Vegetables and fruit supplied in the following manner are specifically excluded from Items 12 and 13 respectively, and the supply of such vegetables and fruit is subject to VAT at the rate of 14% under section 7(1)(a):

(a) Cut, diced, sliced or peeled vegetables or fruit to which any other substance has been added whether or not separately packed in the same container (other than for purposes of preserving the vegetables or fruit in their natural state). Examples are –

   (i) a sachet of spices added to sliced mushrooms;

   (ii) fruit juice added to sliced fruit or a mixture of vegetable and fruit; and

   (iii) salad dressing and/or cheese added to a green salad (for example, a mixture of slices of lettuce, cucumber and tomato).

(b) Fresh or frozen vegetables and fruit that have been treated with an additive for the purpose of adding colour or flavour (for example, glucose, sugar or salt).

(c) Dehydrated, dried, canned or bottled vegetables or fruit.

(d) Vegetables or fruit smoothies or juices, and any similar products.

The supply of vegetables and fruit in the course of carrying out any agreement for the furnishing or serving of any meal, refreshment, cooked or prepared food or any drink, so as to be ready for immediate consumption when supplied, is subject to VAT at the rate of 14% under section 7(1)(*a*). The supply of vegetables and fruit by a restaurant or similar establishment, or in the course of providing catering services, is therefore subject to VAT at the rate of 14% under section 7(1)(*a*), irrespective of whether they fall under zero-rated supplies.

Importation of vegetables and fruit

The importation of vegetables and fruit listed under zero-rated supplies are, under section 13(3) read with paragraph 7(*a*) of Schedule 1 to the VAT Act, exempt from the VAT levied under section 7(1)(*b*).

The importation of vegetables and fruit listed standard-rated supplies are subject to VAT at the rate of 14% under section 7(1)(*b*).

11. GUIDES

11.1. Guide to the disposal of a residence from a company to a trust

This guide:

- deals with the window of opportunity covering the period 1 October 2010 to 31 December 2012 for the disposal of a residence from a company or trust into the hands of individuals free of transfer duty, capital gains tax, secondary tax on companies and dividends tax;
- seeks to provide general guidance on the interpretation of paragraph 51A and related exemption provisions and does not deal with every possible situation which can arise;
- is not a binding general ruling issued under section 89 of the Tax Administration Act 28 of 2011; and

- reflects the law as amended by the Taxation Laws Amendment Act 24 of 2011, which was promulgated on 10 January 2012. This version of the guide has also been updated to include references to the Rates and Monetary Amounts and Amendment of Revenue Laws Act 13 of 2012 (promulgated 9 October 2012) and the Tax Administration Act 28 of 2011 (effective 1 October 2012 except for certain provisions relating to interest).

This guide deals with CGT, dividends tax, STC and transfer duty relief measures that apply to the acquisition by a natural person of a residence from a company or trust between 1 October 2010 and 31 December 2012. The donations tax and value-added tax consequences are also examined.

Paragraph 45 provides that only a natural person (individual) or special trust is entitled to disregard the whole or a portion of the capital gain or capital loss on disposal of that person's primary residence. Subject to certain exceptions:

- the first R2 million of the capital gain or capital loss must be disregarded, or
- if the proceeds are R2 million or less, the full amount of any capital gain must be disregarded.

Historically many individuals purchased their residences in companies or trusts for a variety of reasons, including protection from creditors, avoidance of transfer duty and estate duty and circumvention of the Group Areas Act 36 of 1966 (repealed). A window of opportunity was granted in 2002 which enabled these individuals to transfer their residences out of their companies or trusts into their own names without suffering any adverse CGT, STC or transfer duty consequences [see Appendix A of the *Comprehensive Guide to CGT* (Issue 4)]. Following the amendment of the Transfer Duty Act in 2002, it is no longer possible to avoid transfer duty by disposing of the shares or member's interest in a company holding residential property, or by substituting beneficiaries holding contingent interests in the residential property of a discretionary trust.

Before the amendments effected by the Revenue Laws Amendment Act 74 of 2002 the distribution of a capital profit in anticipation of or in the course of liquidation, winding up or deregistration of a company was exempt from STC. However, since the amendments, any capital profit derived by a company on or after 1 October 2001 is subject to STC, even if distributed in anticipation of or in the course of liquidation, winding up or deregistration. Furthermore, with effect from 1 January 2011 all capital profits, regardless of whether derived before or after 1 October 2001, are subject to STC. STC has been repealed with effect from 1 April 2012 but has been replaced by dividends tax under section 64E which also applies regardless of the capital or revenue nature of profits out of which a dividend is distributed. Dividends tax is levied at a rate of 15% compared to the previous STC rate of 10%.

Outside the relief measures discussed in this guide, maintaining a residence in a company or trust has, amongst others, the following tax consequences:

- A natural person who holds an interest in a primary residence owned by a trust is not entitled to the primary residence exclusion except in the case of a lessee who is not a connected person in relation to the trust.
- A company or trust is not entitled to the primary residence exclusion.
- A company would potentially be liable for CGT at a rate of 14% on any capital gain on a residence disposed of during years of assessment commencing before 1 March 2012 and at 18,65% thereafter.
- A trust would potentially be liable for CGT at a rate of 20% on any capital gain on the disposal of a residence before 1 March 2012 and at 26,64% thereafter.
- A trust that vests a residence in a resident beneficiary must disregard any capital gain on such a disposal and the beneficiary must take it into account. An individual's effective CGT rate is 0% to 10% up to 29 February 2012 and 0% to 13,32% thereafter.
- A natural person acquiring the residence will be subject to transfer duty on a sliding scale at a rate varying between 0 and 8%.
- A company would potentially be liable for STC at a rate of 10% on the distribution of a residence as a dividend *in specie* before 1 April 2012.

Thereafter it would potentially be liable for dividends tax at a rate of 15% on such a distribution *in specie* unless the dividend was exempt or qualified to be taxed at a reduced rate.

Retaining a residence in a company or trust may carry other benefits (for example, a trust may provide estate duty savings and protection of assets from creditors). However, these advantages need to be weighed up against the loss of the primary residence exclusion (worth up to R266 400 in tax savings) and the higher rate of CGT in a company (18,65% v 13,32%) or trust (26,64% v 13,32%) and the imposition of dividends tax at 15%.

It has emerged that many individuals did not avail themselves of the 2002 opportunity, with the result that they now face the adverse tax consequences described above when disposing of a residential property from a company or trust.

Paragraph 51

A further window of opportunity in the form of paragraph 51 of the Eighth Schedule, which operated on a roll-over basis, was introduced by the Taxation Laws Amendment Act 17 of 2009. Paragraph 51 applies to the disposal of a residence by a company or trust on or after 11 February 2009 but no later than 30 September 2010. Thus paragraph 51 will apply to residences acquired under contracts signed on or before 30 September 2010 which are not subject to any suspensive conditions at that date. There is no time limit on the registration of the property in the deeds registry. In other words a property acquired unconditionally on or before 30 September 2010 which is registered after that date must still be dealt with under paragraph 51.

A disposal of a residence that is subject to suspensive conditions which are only fulfilled after 30 September 2010 must be addressed under paragraph 51A.

For guidance on paragraph 51, see Appendix B of the *Comprehensive Guide to CGT* (Issue 4).

Paragraph 51A

On 17 February 2010 it was announced in the 2010 Budget Tax Proposals that paragraph 51 was inadequate and that a:

> 'new, more flexible window period is proposed so that these residential property entities are to be liquidated or dissolved with limited compliance and enforcement effort.'

The Taxation Laws Amendment Act 7 of 2010, promulgated on 2 November 2010,

inserted paragraph 51A which widens the relief in a number of respects but also imposes new conditions. The revised relief measure came into operation on 1 October 2010 and applies to the disposal of a residence from a company or trust on or after that date and before 1 January 2013.

Further amendments to paragraph 51A have been made by the Taxation Laws Amendment Act 24 of 2011, most of which have been backdated to 1 October 2010. These amendments:

- extend the relief to qualifying holiday homes;
- clarify who may be an acquirer;
- confirm that the connected person relationship between the company or trust and the acquirer must be determined at the time of disposal;
- require a trust to be terminated rather than revoked; and
- effect a number of technical corrections.

This guide deals with the relief measures in paragraph 51A and related provisions.

11.2. Tax Guide for Recreational Clubs (Issue 3)

This guide provides general guidance on the taxation of recreational clubs in South Africa.

Section 10(1)(*c*O) and section 30A were introduced into the Act to deal with previously exempt clubs. The provisions of these sections are more detailed and comprehensive resulting in improved consistency and certainty.

Specific punitive measures have been introduced in the Act to deal with situations in which a recreational club misuses its approval or exemption status or does not comply with the Act.

An organisation will enjoy preferential tax treatment only after it has applied for and been granted approval as a recreational club by the Commissioner and continues to comply with the relevant requirements and conditions as set out in the Act.

Clubs are formed for the mutual benefit of members who contribute to share the cost of providing a collective benefit, namely, the social or recreational facility. The common objective of recreational clubs excludes personal financial gain of individual members. Under this principle, the sharing of expenses by various members joining together based on mutuality, does not generate additional taxable income for the recreational club and it is to this extent that clubs enjoy preferential tax treatment.

Sporting organisations qualifying for preferential tax treatment may be divided into two categories, namely –

- recreational clubs; and
- amateur sporting bodies generally approved as PBOs.

Although both categories qualify for exemption from income tax on certain of their receipts and accruals, they are approved under different sections of the Act, each section having its own requirements and conditions.

11.3. Guide for Associations not for Gain and Welfare Organisation (VAT 414)

This guide is a general guide concerning the application of the VAT Act in respect of associations not for gain and welfare organisations in South Africa. Although fairly comprehensive, the guide does not deal with all the legal detail associated with VAT and is not intended for legal reference.

Associations not for gain and welfare organisations often make supplies of goods and or services for no consideration and should also refer to Interpretation Note 70 'Supplies Made for No Consideration' for a more comprehensive discussion on this topic.

Non-profit organisations have a significant role to play in society as they address the social and developmental needs of the country, thereby relieving the State from the financial burden of providing much needed goods or services to the general public, particularly the poor and needy. Tax benefits in general are designed to assist non-profit organisations with an enabling environment in which to achieve their objectives. For example, certain receipts and accruals derived from a trading activity or business undertaking by a public benefit organisation (PBO) are exempt from income tax. Furthermore, provision is specifically made for welfare organisations to register for VAT in respect of any welfare activities conducted, even though supplies are made for no consideration. In order for a non-profit organisation to qualify for the aforementioned, it must apply for approval as a PBO.

Associations not for gain that do not qualify as welfare organisations also enjoy certain benefits under the VAT Act that are not available to other vendors. There are however many different types of associations not for gain, ranging from those that are exclusively involved in serving the personal interests of their members, to those that carry on religious activities and those that are focused on serving the needs of the community at large. Some associations not for gain also carry on normal trading activities and may therefore be in competition with other businesses. This ranges, for example, from the sale of festivity cards to the manufacturing and sale of goods. Whilst the occasional sale of goods or the provision of services should, in principle, not affect the special VAT treatment of an association not for gain, the regular supply of goods or services in a business setting should not receive special tax treatment which is more favourable than other businesses.

In establishing the correct VAT treatment of supplies made by associations not for gain, different terminology and definitions used for purposes of the Income Tax Act and VAT Act must be considered. For example, a 'recreational club' and 'public benefit organisation' are defined for income tax purposes, but not for VAT purposes. Similarly, the terms 'association not for gain' and 'welfare organisation' are only defined for VAT purposes as there are special provisions which apply to these organisations.

The correlation between a PBO, an association not for gain and a welfare organisation is discussed. At this stage it can be noted that for income tax purposes, the list of approved public benefit activities (PBAs) are contained in Part I of the Ninth Schedule to the Income Tax Act (the Ninth Schedule). The VAT list of welfare activities is contained in a separate regulation and does not include all of the PBAs listed in the Ninth Schedule.

The terms 'public benefit organisation', 'association not for gain' and 'welfare organisation' can therefore not be used interchangeably as each one describes a specific kind of organisation.

In practice there is a significant overlap between PBOs, associations not for gain and welfare organisations. This guide will therefore distinguish between these concepts and explain the VAT consequences of some of the most common situations which arise for associations not for gain and welfare organisations in the course of conducting an enterprise.

The approach of this guide is set out below:

Chapter 1 – Gives a brief overview of the scope and background to the topics that will be discussed in the guide, the approach adopted, and a brief overview of general tax administration matters.

Chapter 2 – Sets out the important concepts, terms and definitions mentioned in this guide so that the VAT treatment of supplies which are explained in later chapters can be understood. Some of the key concepts addressed in this chapter are 'donation', 'enterprise', 'supply' and 'consideration'.

Chapter 3 – Describes the VAT registration requirements in general and how it applies to associations not for gain and welfare organisations.

Chapter 4 – Focuses on the various aspects involved in accounting for VAT on transactions, including, where applicable, the special provisions applying to associations not for gain and welfare organisations.

Chapter 5 – Deals with some additional aspects such as the importation of donated goods, which are not specifically dealt with in any of the other chapters.

12. DRAFT GUIDES

12.1. Draft guide on the taxation of franchisors and franchisees

This guide considers the income tax implications of income received and expenditure incurred by franchisors and franchisees.

The growing franchise industry in South Africa is a major contributor to the South African economy. The rapid rate at which new franchises are entering the market has given rise to a need for clarity concerning the tax implications that arise in relation to franchise arrangements. More particularly, there is a need to examine the tax treatment of income received and expenditure incurred by both franchisors and franchisees. This guide focuses mainly on transactions between franchisors and franchisees that are resident in South Africa. The aim of this guide is to assist in clarifying uncertainties that may arise on the application of the tax laws to a franchise arrangement.

This guide is intended to provide clarity regarding some of the general issues pertaining to franchisors and franchisees in South Africa. Note that each case has to be considered on its own merits when determining the taxability of a franchisor and a franchisee. The terms and conditions of the franchise agreement, as well as the manner in which payments are construed, will be important in determining the tax implications of the different types of amounts received, or expenses incurred, by franchisors and franchisees.

12.2. Draft tax guide for micro businesses 2015 / 16

This guide contains information about a simplified tax system that is available for micro businesses (businesses with a qualifying turnover of R1 million or less). The system provides for a single tax in the place of normal tax, capital gains tax (CGT) and dividends tax. Under normal circumstances an application to switch to (or from) the system must be made before 1 March each year. As the system is optional, it is important to thoroughly review the operations of a business before deciding on whether to switch or not. Factors such as the overhead costs of the business, its expected tax contributions and – most importantly – its tax compliance costs should be taken into account in making the decision.

This guide provides guidance on the application of the Sixth Schedule and Part IV (sections 48 to 48C) of the Act which regulates the turnover tax system available to micro businesses.

Small and micro businesses have the potential to grow the economy, generate jobs and reduce poverty. In order to alleviate the tax compliance burden on micro enterprises, a turnover tax regime was introduced with effect from 1 March 2009. It streamlines the tax compliance process for micro businesses by replacing a registered micro business' liability for income tax (including CGT) and dividends tax with a liability to account for turnover tax. As the term 'turnover tax' suggests, the registered micro business' tax liability is determined by applying a specific turnover tax rate to the registered micro business' 'taxable turnover' in a particular year of assessment.

A micro business is not exempt from the duty to withhold payroll and other taxes, such as employees' tax, skills development levies (SDL) and unemployment insurance fund (UIF) contributions, or to account for VAT (if voluntarily registered as a VAT vendor). However, as a means of reducing its compliance burden, a micro business has the option of making twice-yearly payments for these taxes as from 1 March 2014.

Turnover tax is a stand-alone tax, meaning that its determination is separate and independent from the normal tax system. Despite being liable to account for turnover tax, certain receipts and income streams of a micro business could be taxable under the normal tax system. These receipts and income streams may relate to remuneration and investment income received by the micro business, as well as amounts derived by the micro business from carrying on business activities outside South Africa.

13. INDEMNITY

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