TAX UPDATE

For period: January 2024 to March 2024

Prepared by: Johan Kotze

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1. FOREWORD

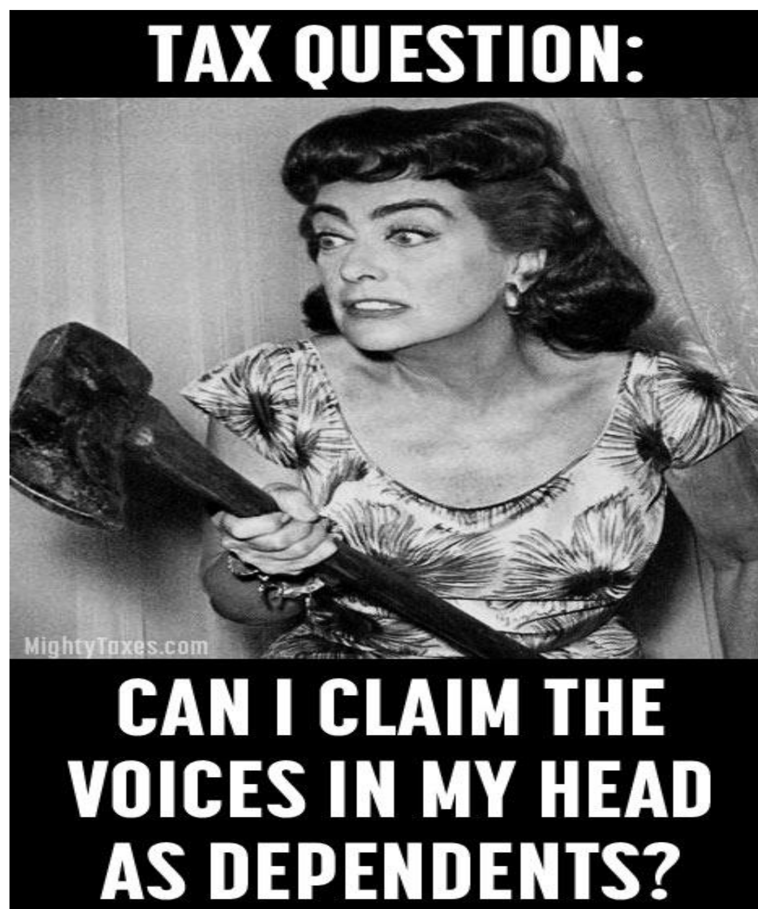
The purpose of this update is to summarise developments that occurred during the first quarter of 2024, specifically in relation to Income Tax and VAT. Johan Kotze, a Tax Executive at Shepstone & Wylie Attorneys, has compiled this summary.

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

Please take some time and consider the tax cases.

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

Enjoy reading on!



2. BUDGET

2.1. Personal tax rates

2024 year of assessment		2025 year of assessment	
Taxable Income	**Rates of tax**	**Taxable Income**	**Rates of tax**
R0 – R237 100	18% of each R1	R0 – R237 100	18% of each R1
R237 101 – R370 500	R42 678 + 26% of the amount above R237 100	R237 101 – R370 500	R42 678 + 26% of the amount above R237 100
R370 501 – R512 800	R77 362 + 31% of the amount above R370 500	R370 501 – R512 800	R77 362 + 31% of the amount above R370 500
R512 801 – R673 000	R121 475. + 36% of the amount above R512 800	R512 801 – R673 000	R121 475. + 36% of the amount above R512 800
R 673 001 – R857 900	R179 147 + 39% of the amount above R673 000	R 673 001 – R857 900	R179 147 + 39% of the amount above R673 000
R857 901 – R1 817 000	R251 258 + 41% of the amount above R857 900	R857 901 – R1 817 000	R251 258 + 41% of the amount above R857 900
R1 817 001 and above	R644 489 + 45% of the amount above R1 817 000	R1 817 001 and above	R644 489 + 45% of the amount above R1 817 000
Rebates		**Rebates**	
Primary	R17 235	Primary	R17 235
Secondary	R9 444	Secondary	R9 444
Third rebate	R2 997	Third rebate	R3 145
Tax threshold		**Tax threshold**	

Below age 65	R91 250	Below age 65	R95 750
Age 65 and over	R141 250	Age 65 and over	R148 217
Age 75 and over	R157 900	Age 75 and over	R16 6895

2.2. Medical tax credits

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

2.3. Incentivising local electric vehicle production

To encourage the production of electric vehicles in South Africa, it is proposed that an investment allowance be made available for new investments from 1 March 2026. Producers will be able to claim 150 per cent of qualifying investment spending on production capacity for electric and hydrogen-powered vehicles in the first year of investment. The tax expenditure is estimated to amount to R500 million for 2026/27.

2.4. Learnership tax incentive extension

The section 12H learnership tax incentive is aimed at supporting workplace education, skills development and employment. The sunset date for this incentive will be extended by three years to 31 March 2027 to allow sufficient time for the incentive to be evaluated before a decision is made on its future.

2.5. Tax treatment of certain infrastructure projects

To encourage infrastructure investment, government will investigate the feasibility of a flow-through tax treatment, similar to what is afforded to trusts and other investment vehicles, for certain clearly defined infrastructure projects under specified circumstances.

2.6. *Section 12B renewable energy allowance*

Currently, embedded solar photovoltaic energy production assets with generation capacity not exceeding 1 megawatt are written off in one year. This was linked to the private electricity generation threshold. However, the private threshold has since been lifted due to the electricity crisis. As a result, government will reconsider the generation threshold and leasing restrictions of section 12B. Any proposals will be designed to take effect from 1 March 2025.

2.7. *Interest limitation rules*

Current law limits interest deductions when there is a relationship between a debtor and a creditor, and the corresponding interest income is not taxed fully. An unintended consequence of this rule may unfairly prejudice tax-exempt investors, such as pension funds, when they lend to a related party. Government will consider this matter further, with the possibility of including amendments in the 2024 Taxation Laws Amendment Bill.

2.8. *Individuals, employment and savings – Curbing the abuse of the employment tax incentive scheme*

Changes were made to the Employment Tax Incentive Act (2013) in 2021 and 2023 to curb abuse of the employment tax incentive from aggressive tax schemes, which used training institutions to claim the incentive for students. It is proposed that punitive measures to support those amendments be refined in the legislation to address the abusive behaviour of certain taxpayers towards the incentive.

2.9. *Individuals, employment and savings – Amending the definition of 'remuneration proxy' in section 1*

In 2013, the definition of 'remuneration factor' in the Seventh Schedule to the Income Tax Act was replaced by a new definition of 'remuneration proxy' in section 1. The new definition of 'remuneration proxy' refers to an 'associated institution' in relation to the employer without referencing paragraph 1 of the Seventh Schedule, where this term is defined. It is proposed that the definition of 'remuneration proxy' be amended to include

a reference to ‘an ‘associated institution’ as defined in paragraph 1 of the Seventh Schedule’.

2.10. *Individuals, employment and savings – Payroll amendments and refunds made in the current year*

With the move by SARS for payroll administrators to report payroll monthly, government proposes amending section 11(nA) of the Income Tax Act to cater for taxpayers seeking to make refunds of amounts received or accrued during the same year of assessment.

2.11. *Individuals, employment and savings – Clarifying anti-avoidance rules for low-interest or interest-free loans to trusts*

The Income Tax Act contains an anti-avoidance measure aimed at curbing the tax-free transfer of wealth to trusts using low-interest or interest-free loans, advances or credit arrangements (including cross-border loan arrangements). The transfer pricing rules in the act also apply to counter the mispricing of cross-border loan arrangements. To avoid the possibility of an overlap or double taxation, the trust anti-avoidance measures specifically exclude low- or no-interest loan arrangements that are subject to the transfer pricing rules. It has come to government’s attention that the above-mentioned exclusion does not effectively address the interaction between the trust anti-avoidance measures and transfer pricing rules where the arm’s length interest rate is less than the official rate on these cross-border loan arrangements. It is proposed that amendments be made to the legislation to provide clarity in this regard.

2.12. *Retirement provisions – Transfers between retirement funds by members who are 55 years or older*

In 2023, changes were made to the legislation to allow for tax-neutral transfers between retirement funds in instances where members of pension or provident funds who have reached the normal retirement age as contained in the rules of the fund, but have not yet elected to retire, to transfer their retirement interest tax-free if it is an involuntary transfer. However, to be tax-free the transfer of the retirement interest

should be made to a fund that is not less restrictive. It has come to government's attention that the law only allows certain tax-free transfers of an involuntary nature but excludes transfers from one retirement annuity fund to another. It is proposed that the law be amended to allow involuntary transfers of this nature.

2.13. Business (general) – Reviewing the connected person definition in relation to partnerships

Paragraph (c) of the definition of 'connected person' in section 1 of the Income Tax Act provides that, in the context of a partnership or foreign partnership (as defined in section 1), each member of the partnership is a connected person in relation to any other member of the partnership and any connected person in relation to any member of such partnership or foreign partnership.

Therefore, partners are connected to each other as well as to all connected persons of the partners in the partnership. It has come to government's attention that limited partners in an *en commandite* partnership (a partnership carried out in the name of only some of the partners; the undisclosed partners contribute a fixed sum and are not liable for more than their capital contribution in the case of a loss) are affected by the wide ambit of paragraph (c) of the definition of connected person.

It is proposed that the status of connected persons in relation to a 'qualifying investor' as defined be reviewed in the definition of 'connected person' in the Income Tax Act.

2.14. Business (general) – Limiting interest deductions in respect of reorganisation and acquisition transactions

It is proposed that the definition of 'adjusted taxable income' and the formula applied to limit an interest deduction in section 23N of the Income Tax Act be reviewed for closer alignment with the changes made to the definition of the adjusted taxable income and the formula applied for the interest limitation rules for debts owed to persons not subject to tax in section 23M of the Income Tax Act.

2.15. *Business (general) – Relaxing the assessed loss restriction rule under certain circumstances*

When a company is in the process of liquidation, deregistration or being wound up, it cannot make use of the full assessed loss. It is proposed that the legislation be amended to exempt companies from applying the assessed loss restriction rule while in the process of liquidation, deregistration or winding up.

2.16. *Corporate reorganisation rules – Clarifying the interaction of the value shifting provisions and the definition of 'value shifting arrangement' in paragraph 1 of the Eighth Schedule*

Disposals between group companies falling within the ambit of the corporate rollover relief provisions should, in principle, be tax neutral. In essence, rationalising a group of companies can result in the market value of an existing shareholding of one group entity decreasing and another group entity's newly acquired shareholding increasing (this would trigger the application of the value shifting rules). However, commercially, the market value of the ultimate holding company's combined direct and indirect interests in all the subsidiary companies remains unchanged. It is proposed that the definition of 'value shifting arrangement' be amended to exclude certain corporate rollover transactions between groups of companies or where the value of the effective interest of the connected person remains unchanged.

2.17. *Corporate reorganisation rules – Reviewing the prohibition against transfers of assets to non-taxable transferees in terms of an 'amalgamation transaction'*

In general, 'amalgamation transaction' rules do not apply if assets are transferred to companies that are wholly or partially exempt or fall outside the South African tax base because they are not fully taxable, in order to ensure that rollover relief is not used to obtain a permanent exemption. It has come to government's attention that the interaction between the definition of 'amalgamation transaction' and the aforementioned rule, its reference to an 'amalgamated company' and cross-references to a resultant company that is a foreign company that does not have a place of effective

management in South Africa seem to be misaligned and unclear. It is proposed that this interaction be reviewed and clarified.

2.18. Corporate reorganisation rules – Reviewing the ambit of the de-grouping charge in intra-group transactions

The anti-avoidance measures of the intra-group corporate reorganisation rules set out the tax consequences for capital assets, allowance assets and trading stock in the event of de-grouping subsequent to an intra-group transaction. This is commonly referred to as a de-grouping charge and is applied when the transferee company and a transferor company cease to form part of the same group of companies or when the transferee company ceases to form part of the same group as any controlling group company in relation to the transferor company. For the de-grouping charge to be triggered, the de-grouping must take place within six years of the transfer of the assets if the assets were transferred between group companies as envisaged in paragraph (a) of the definition of 'intra-group transaction'. It is proposed that the scope of the de-grouping charge be narrowed to avoid the de-grouping charge being triggered when there is a change in shareholding affecting a group of companies, while the companies involved in the original intra-group transactions are still part of another group of companies.

2.19. Clarifying anti-avoidance rules dealing with third-party backed shares

Third-party backed share anti-avoidance rules deem dividend yields of preference shares, backed by third parties through an enforcement right of the holder, to be income except where the funds derived from the issue of these third-party backed shares are used for a qualifying purpose. The anti-avoidance rules do not apply if the funds derived from the issue of the preference shares in question are used for a qualifying purpose, for example, if the funds are used directly or indirectly to acquire equity shares in an operating company. It has come to government's attention that the following amendments are required to clarify the rules.

2.20. *Clarifying anti-avoidance rules dealing with third-party backed shares – Extending the definition of 'enforcement right' to a connected person*

An 'enforcement right', as defined in the Income Tax Act, encompasses a right of the holder of a share, or any connected person in relation to that holder (a third party), to enforce performance by another person in respect of that share. However, the definition of a 'third-party backed share' in section 8EA of the Income Tax Act does not clearly match the intent that either a holder or a connected person to that holder could hold that enforcement right. Government proposes that the definition of a 'third-party backed share' be clarified to address this anomaly.

2.21. *Clarifying anti-avoidance rules dealing with third-party backed shares – Extending exclusions to the ownership requirement*

In 2023, amendments were made to the qualifying purpose provisions to clarify the ownership requirement for the equity shares in the operating company by the person that acquired those equity shares at the time of the receipt or accrual of any dividend or foreign dividend, subject to certain exclusions. The exclusions include a provision that the ownership requirement will not apply if that equity share was a listed share and was substituted for another listed share in terms of an arrangement that is announced and released as a corporate action on a South African regulated stock exchange. It is proposed that the ownership requirement exclusions be extended to include corporate actions relating to listed share substitutions on a recognised exchange in a country other than South Africa.

In addition, the ownership requirement exclusions will apply if the equity shares in the operating company are disposed of and the funds derived from that disposal are used to redeem the preference share within 90 days of the disposal. It has come to government's attention that further clarity is required on whether settlement of any dividends, foreign dividends or interest accrued from that preference share that are payable also falls within the ambit of its allowable redemption. It is proposed that the legislation be amended to include the settlement of any amounts of dividends, foreign dividends or interest accrued in respect of the redemption of a preference share.

2.22. *Refining 'contributed tax capital' provisions*

The contributed tax capital of any company is a notional and ring-fenced tax amount derived from a deemed market value amount when a foreign company becomes a South African tax resident and the consideration for the issue of a class of shares by a company. It is reduced by any amounts referred to as capital distributions, transferred by the company to the shareholders. It has come to government's attention that the following amendments are needed to further refine the contributed tax capital provisions.

2.23. *Refining 'contributed tax capital' provisions – Effect on legitimate transactions due to 'contributed tax capital' anti-avoidance measures*

Section 8G of the Income Tax Act is an anti-avoidance measure that limits the 'contributed tax capital' of a resident company in a share-for-share transaction with a non-resident group company. The taxation consequences of this anti-avoidance measure may affect legitimate corporate finance practices and limit South Africa's attractiveness as an investment destination. Government proposes that further refinements be considered to minimise any inadvertent tax consequences.

2.24. *Refining 'contributed tax capital' provisions – Translating 'contributed tax capital' from foreign currency to rands*

In 2023, amendments were proposed in the draft Taxation Laws Amendment Bill to clarify the translation of 'contributed tax capital', denominated in a foreign currency, to rands. The initial effective date for these proposed amendments was 1 January 2024. After reviewing stakeholder comments on the draft bill, government decided to postpone the effective date for these amendments to 1 January 2025 to give both the National Treasury and affected stakeholders more time to consider the impact of the proposed amendments. Government proposes reviewing the impact of the 2023 amendments during the 2024 legislative cycle.

2.25. *Business (financial sector) – Clarifying the interaction of section 24JB(3) of the Income Tax Act and the gross income definition*

Section 24JB(3) of the Income Tax Act seeks to ensure that financial assets and financial liabilities that are measured at fair value in terms of the International Financial Reporting Standards (IFRS) 9 and whose income, expenses, gains or losses are recognised in the statement of profit or loss and other comprehensive income are only included in or deducted from the income of certain persons under section 24JB(2) of the Act. Therefore, the amounts cannot be dealt with under any other section of the Income Tax Act. It has come to government's attention that further clarity is required on the interaction between the aforementioned rule and the definition of 'gross income'. It is proposed that section 24JB(3) be amended to specifically exclude the application of the definition of gross income.

2.26. *Business (financial sector) – Impact of IFRS 17 on the taxation of insurers*

In May 2017, the International Accounting Standards Board issued IFRS 17 to replace IFRS 4 as the new accounting standard for insurers. In 2022, tax legislation was developed to cater for the application of IFRS 17 for the financial years of insurers starting on or after 1 January 2023. The implementation of IFRS 17 is a complex, ongoing process, with insurers now starting to report on the new standard. Given the significant adjustments required due to implementing IFRS 17, several unintended consequences have come to government's attention and need to be addressed in the tax legislation. For example, an amendment is required to reduce an excessive phasing-in amount as a result of liabilities for remaining coverage not specifically being allowed as a deduction under the IFRS 17 tax system. Government proposes to adjust the legislation to cater for these unintended consequences.

2.27. *International – Clarifying the translation for hyperinflationary currencies*

The net income of a controlled foreign company (CFC) is determined in the currency used by that CFC for financial reporting (the functional currency) and is translated into

rand at the average exchange rate for that foreign tax year. An ‘exchange item’, as defined in the Income Tax Act, is treated as not attributable to any permanent establishment of the CFC if the currency used for financial reporting is that of a country with an official rate of inflation of 100 per cent or more throughout the foreign tax year. However, in contrast to the intention that a hyperinflationary functional currency not be used for translation purposes, section 9D(2A)(k) of the Income Tax Act requires the local currency to be used. It is proposed that the rules be changed so that section 9D(2A)(k) does not allow the use of a hyperinflationary functional currency for translation purposes.

2.28. International – Clarifying the 18-month period in relation to shareholdings by group entities

In 2023, tax legislation was amended to require an 18-month holding requirement for the participation exemption on the foreign return of capital similar to the participation exemption relating to the disposal of shares in a foreign company. However, the test for the holding period for a foreign return of capital does not cover the situation where more than one company in a group of companies was holding the shares during the 18-month period. It is proposed that the holding period rules be amended to cater for this situation.

2.29. International – Clarifying the rebate for foreign taxes on income in respect of capital gains

South African tax residents are subject to income tax on their worldwide income. The Income Tax Act provides relief to them from double taxation where the same amount is taxed by more than one tax jurisdiction. Section 6quat of the Income Tax Act provides that a taxpayer should get credit for the taxes paid in the relevant foreign jurisdiction but limits this to the South African tax on the amount taxed in South Africa. According to the foreign tax credit rules dealing with foreign dividends, the tax-exempt portion must not be taken into account when determining the allowable foreign tax credit. However, the rules dealing with capital gains have no corresponding provision for the non-taxable portion of the capital gain.

It is proposed that section 6quat be amended to explicitly allow for a full foreign tax credit against tax payable in South Africa on a capital gain for taxes payable in the

relevant foreign jurisdiction on the disposal of an asset. This will ensure a similar treatment as for foreign tax credits for taxable foreign dividends.

2.30. International – Aligning the section 6quat rebate and translation of net income rule for CFCs

Foreign taxes payable by a CFC must be translated to rand at the average exchange rate for the year of assessment, of the resident having an interest in the CFC, in which an amount of net income of the CFC is included in the income of that resident. However, the net income of the CFC must be translated by applying the average exchange rate for the foreign tax year of the CFC. A mismatch arises when the year of assessment of the resident and the foreign tax year of the CFC are different. To address this anomaly, it is proposed that the Income Tax Act align the years used to translate net income and foreign tax payable by referring to the foreign tax year of the CFC.

2.31. International – Refining the definition of 'exchange item' for determining exchange differences

Certain financial arrangements that include preference shares are eroding the tax base due to a mismatch because some elements of the arrangement result in an exchange loss for tax purposes, while gains on the preference shares are not being taken into account for tax purposes. Government proposes to address the tax leakage associated with these financial arrangements by extending the definition of 'exchange item' to include shares that are disclosed as financial assets for purposes of financial reporting in terms of IFRS.

2.32. International – Reviewing the interaction of the set-off of assessed loss rules and rules on exchange differences on foreign exchange transactions

When determining taxable income, the Income Tax Act enables taxpayers to set off their balance of assessed losses carried forward from the preceding tax year against their income, provided that the taxpayer continues trading. The interaction between the

assessed loss set-off and exchange differences rules mean that a foreign exchange loss on an exchange item may not be set off in future years against gains from the same exchange item if the trading requirement is not met. It is proposed that consideration be given to ring-fencing all foreign exchange losses on exchange items from a future year of assessment.

2.33. VAT – Amendments to schedule 2 part B for fruit and vegetables

It is proposed that items 12 and 13 of part B of schedule 2 of the VAT Act be amended to clarify that the zero-rating of VAT does not apply to pre-cut or prepared fruit or vegetables. Amendments to schedule 1 part 1 of the Customs and Excise Act may also be needed in order to align both the schedules.

2.34. VAT – VAT treatment of rental stock paid in terms of the National Housing Programme

Amendments to section 8(23) of the VAT Act that came into effect from 1 April 2017 have resulted in confusion about the VAT status of rental stock under the National Housing Programme. It is proposed that amendments be made to the VAT Act to clarify the VAT status of this rental stock.

2.35. VAT – Providing VAT relief for non-resident lessors of parts of ships, aircraft or rolling stock required to deregister as a result of recent amendments to the VAT Act

Previously, foreign lessors of parts of ships, aircraft or rolling stock were required to register for VAT because they were not covered under the proviso (xiii) exclusion in the definition of ‘enterprise’ in section 1(1) of the VAT Act. However, the addition in 2023 of the words ‘or parts directly in connection thereto’ to proviso (xiii) implied that foreign lessors were now required to deregister.

This amendment had the unintended consequence of such vendors now facing an output tax liability under section 8(2). It is proposed that the VAT Act be amended to provide relief from this unintended consequence.

2.36. VAT – Clarifying the VAT treatment of the Mudaraba Islamic financing arrangement

Section 8A of the VAT Act does not address the VAT treatment of 'Mudaraba' financing arrangements (Islamic financing arrangements, mostly used as an investment or transactional account). This causes disparity with the Income Tax Act and uncertainty as to the VAT treatment thereof. It is proposed that the VAT Act be amended to clarify this.

2.37. VAT – Clarifying the VAT treatment of supply of services to non-resident subsidiaries of companies based in South Africa

The definition of 'resident of the Republic' (of South Africa) in section 1(1) of the VAT Act refers to the definition of 'resident' in section 1 of the Income Tax Act. The proviso to this definition in the VAT Act envisages a resident as someone conducting an 'enterprise' in South Africa. Non-resident subsidiaries of companies based in the country may qualify under the definition of 'resident' in the Income Tax Act (as a result of being effectively managed in South Africa), and hence in the VAT Act as well. As a result, services supplied by the resident to the non-resident subsidiary may not be zero-rated. Since these services will be effectively consumed outside the country, it is proposed that the VAT Act be amended to exclude such subsidiaries from the definition of 'resident of South Africa'.

2.38. VAT – Reviewing the foreign donor funded project regime

The VAT Act requires each foreign donor funded project, as defined in the VAT Act, to be separately registered for VAT as a branch of the implementing agency. This results in an increased administrative burden for recipients of foreign donor funding. To ease the administrative burden on the implementing agents, it is proposed that the foreign donor funded project regime be reviewed.

2.39. VAT – Updating the Electronic Services Regulations

Government proposes to revise and update the Electronic Services Regulations (and relevant sections of the VAT Act) to keep up with changes in the digital economy and

ease the administrative burden. The scope of the regulations should be limited to only non-resident vendors supplying electronic services to non-vendors or end consumers.

2.40. VAT - Regulations on the domestic reverse charge mechanism relating to valuable metal

Effective from 1 July 2022, government introduced regulations to curb VAT fraud schemes in relation to gold and goods containing gold. The regulations exclude from the definition of 'valuable metal' the gold produced by 'holders', as defined under the Mineral and Petroleum Resources Development Act (2002), or a person contracted to such 'holder'. It has come to government's attention that these schemes and malpractices have now shifted to the primary gold sector. It is proposed that the regulations be revised to foreclose these schemes.

2.41. VAT – Accounting for VAT in the gambling industry

In 2019 changes were made to section 72 of the VAT Act, which deals with the SARS Commissioner's discretion to make arrangements or decisions regarding the application of the act to specific situations where the manner in which a vendor or class of vendors conducts their business leads to difficulties, anomalies or incongruities. These changes affected the arrangements or decisions made on or before 21 July 2019. Government has reviewed the impact of these decisions to ascertain whether they should be discontinued or incorporated into the VAT Act. The amended section 72 affected the gambling industry and more specifically table games of chance, which previously accounted for VAT in terms of a section 72 arrangement or decision with SARS. It is proposed that this specific ruling relating to accounting for VAT for table games of chance be incorporated into the VAT Act.

2.42. VAT – Prescription period for input tax claims

To ease the administrative burden on both taxpayers and SARS, it is proposed that the VAT Act be amended in relation to the tax period in which past unclaimed input tax credits may be claimed. To ensure ease of audit functions and clarity of returns in this regard, it is also proposed that the act be amended to clarify that such deductions be made in the original period in which the entitlement to that deduction arose.

2.43. VAT – VAT claw-back on irrecoverable debts subsequently recovered

The current provisions of the VAT Act entitle a recipient of an account receivable at face value on a non-recourse basis to a deduction of the tax amounts written off as irrecoverable. However, the act does not provide for any claw-back of these deductions on amounts subsequently recovered. It is proposed that the VAT Act be amended to provide for this.

2.44. VAT – Supplies by educational institutions to third parties

It has come to government's attention that the VAT treatment of supplies provided by educational institutions to third parties is unclear, resulting in differing treatment of these supplies. It is proposed that the VAT Act be amended to clarify the policy intention relating to these supplies.

2.45. Tax Administration – VAT – Non-resident vendors with no or a limited physical presence in South Africa

Due to the wide definition of 'enterprise', non-resident vendors may be required to register as vendors, despite not having any physical presence in South Africa or having a very limited presence for a short period of time. These non-residents have difficulties in appointing a representative vendor who resides in South Africa and in opening a South African bank account, as is required to register as a vendor. As a result, non-resident suppliers of electronic services were exempted from these requirements.

To facilitate engagement and compliance, it is proposed that electronic services suppliers be required to appoint a representative vendor, but that the requirement that such person must reside in South Africa be waived while maintaining the exemption from opening a South African bank account. Furthermore, it is recommended that the aforementioned dispensation be afforded to non-resident vendors with no, or a limited, presence in South Africa in specified circumstances.

2.46. *Tax Administration – VAT – Overpayments of VAT on the importation of goods and imported services*

Prior to the introduction of the Tax Administration Ac, the VAT Act made specific provision for a refund of tax paid in excess of what was properly chargeable under the VAT Act. While the VAT Act, read with the Tax Administration Act, provides for a refund of an amount under an assessment and of an amount erroneously paid, it does not adequately cater for a reduction in the amount of tax chargeable as result of a subsequent event in respect of the import of goods by persons who are not registered as vendors or in respect of imported services. It is proposed that this be corrected.

2.47. *Tax Administration – VAT – Timing of VAT on imported services*

In terms of the VAT Act, VAT should be accounted for and is payable by the recipient of imported services within 30 days of the earlier of receipt of the invoice issued by the supplier or the recipient or the time any payment is made by the recipient in respect of that supply. In many instances it is impractical to comply with the 30-day time period. Failure o pay VAT within this timeframe will result in the imposition of penalties and interest. To address this concern, it is proposed that the 30-day time period be extended to 60 days.

2.48. *Tax Administration – Expanding the provision requiring the presentation of relevant information in person*

SARS may require a person to attend the offices of SARS to be interviewed by a SARS official concerning the tax affairs of a person. This would be the case where the interview is intended to clarify issues of concern to SARS that would render further verification or audit unnecessary or to expedite a current verification or audit. It is proposed that the provision be expanded to also include instances where a taxpayer is subject to recovery proceedings for an outstanding tax debt or has applied for debt relief, to expedite the processes.

2.49. Tax Administration – Clarifying provisions relating to original assessments

Concerns have been raised that the current legislative framework only covers certain types of original assessments by implication. It is proposed that the legislative framework be further clarified.

2.50. Tax Administration – Alternative dispute resolution proceedings

In terms of the Tax Administration Act and the rules issued under the act, alternative dispute resolution proceedings can only be accessed at the appeal stage of a tax dispute, where they are responsible for the resolution of most appeals. It is proposed that SARS review the dispute resolution process to improve its efficiency, which may include allowing alternative dispute resolution proceedings at the objection phase of a tax dispute.

2.51. Tax Administration – Reviewing temporary write-off provisions

SARS may decide to temporarily write off an amount of tax debt if it is satisfied that the tax debt is uneconomical to pursue or for the duration of the period that the debtor is subject to business rescue proceedings under the Companies Act (2008). It is proposed that the circumstances under which SARS may decide to temporarily write off an amount of tax debt be reviewed.

2.52. Tax Administration – Removing the grace period for a new company to appoint a public officer

Every company that carries on business or has an office in South Africa must be represented by a public officer. Given that companies are automatically registered for income tax on formation, it is proposed that the one-month period within which the public officer must first be appointed be removed. A newly formed company will thus have both its directors and public officer in place on formation.

2.53. Tax Administration – Implementing the Constitutional Court judgment regarding tax records access

In Arena Holdings (Pty) Limited t/a Financial Mail and Others v South African Revenue Service and Others [2023] ZACC 13, the Constitutional Court has made findings regarding the constitutional invalidity of certain provisions of the Promotion of Access to Information Act (2000) as well as the Tax Administration Act. It has ordered that Parliament considers measures to address their constitutional validity and, in the meantime, the court has ordered a 'read-in' to the relevant provisions of the Promotion of Access to Information Act and those of the Tax Administration Act. It is proposed that these measures and the necessary amendments to affected legislation be addressed during the next legislative cycle.

3. MEDIA STATEMENT: PUBLICATION OF THE 2024 DRAFT TAX BILLS AND DRAFT GLOBAL MINIMUM TAX BILLS FOR PUBLIC COMMENT: 2024 DRAFT RATES BILL, DRAFT 2024 REVENUE LAWS AMENDMENT BILL, DRAFT GLOBAL MINIMUM TAX BILL AND DRAFT GLOBAL MINIMUM TAX ADMINISTRATION BILL.

The National Treasury and SARS on 21 February 2024 published, for public comment, the 2024 Draft Rates Bill (2024 Draft Rates Bill), the 2024 Draft Revenue Laws Amendment Bill, the Draft Global Minimum Tax Bill and the Draft Global Minimum Tax Administration Bill.

The 2024 Draft Rates Bill contains announcements made in Chapter 4 and Annexure C of the 2024 Budget Review that deal with the increase of excise duties.

The 2024 Draft Revenue Laws Amendment Bill is aimed largely at clarifying the existing language and to simplify the directives system for both administrators and SARS to allow for an efficient implementation of the 'two-pot' retirement reform.

The Draft Global Minimum Tax Bill is aimed at implementing the GloBE Model Rules in South Africa to enable South Africa to impose a multinational top-up tax at a rate of

15 per cent on the profits of in-scope multinational enterprise groups. The Draft Global Minimum Tax Administration Bill is aimed at the administration of the Draft Global Minimum Tax Bill.

After receipt of written comments, the National Treasury and SARS will engage with stakeholders through public workshops to discuss the written comments on the draft bills. The Standing Committee on Finance (SCoF) and the Select Committee on Finance (SeCoF) in Parliament are expected to make a similar call later this year for public comment and convene public hearings on the draft bills before their formal introduction in Parliament. Thereafter, a response document on the comments received will be presented at the parliamentary committee meetings, after which the draft bills will then be revised, taking into account public comments and recommendations made during committee hearings, before they are tabled formally in Parliament for consideration.

The 2024 Draft Rates Bill, 2024 Draft Revenue Laws Amendment Bill, Draft Global Minimum Tax Bill and Draft Global Minimum Tax Administration Bill can be found on the National Treasury (www.treasury.gov.za) and SARS (www.sars.gov.za) websites. More general information underlying the draft legislation can be found in the 2024 Budget Review, available on the National Treasury website. The 2024 Draft Taxation Laws Amendment Bill and 2024 Draft Tax Administration Laws Amendment Bill, which contain the remaining tax proposals announced in the 2024 Budget Review, will be released for public comment later in the year.

Due date for public comments

National Treasury and SARS hereby invite comments in writing on the 2024 Draft Rates Bill, 2024 Draft Revenue Laws Amendment Bill, Draft Global Minimum Tax Bill and Draft Global Minimum Tax Administration Bill. Please forward written comments to the National Treasury's tax policy depository at 2024AnnexCProp@treasury.gov.za, and SARS at acollins@sars.gov.za by the close of business on 31 March 2024.

4. DRAFT EXPLANATORY MEMORANDUM ON THE REVENUE LAWS AMENDMENT BILL, 2024, 21 FEBRUARY 2024

[Applicable provisions: Definitions of "legacy retirement annuity policy", "member's interest in the retirement component", "member's interest in the savings component", "member's interest in the vested component", pension fund, pension preservation fund,

provident fund, provident preservation fund, retirement annuity fund, retirement component, retirement interest, savings component and vested component, paragraph 2 and paragraph 6B of the Second Schedule, paragraphs 2 and 9 of the Fourth Schedule to the Income Tax Act, No. 58 of 1962 ("the Act")]

<u>Background</u>

In 2023, Government proposed a further reform to the retirement saving regime to introduce the so-called "two-pots" retirement system from 1 September 2024. In terms of this reform, retirement savings will be split into a "vested component", "savings component" and "retirement component". In summary it is envisaged that:

i. The "vested component" will be made up of retirement savings on 31 August 2024. It was proposed that the regime makes provision for the creation of once-off seed capital, calculated as ten per cent of the "vested component" or R30 000, whichever is the lowest, to be allocated from the retirement savings to the new "savings component".

ii. From 1 September 2024:

    a. retirement contributions will be split into two, with one third of the contributions going to the "savings component" and two-thirds going to the "retirement component";

    b. members will be able withdraw funds allocated to the "savings component" once every tax year should they need to, for example, in the case of financial distress or emergency. The minimum withdrawal amount is R2 000 and will be taxed at marginal income tax rates.

    c. The two-thirds which will be allocated to the "retirement component" will be required to be preserved until retirement (i.e. withdrawals from this component will be triggered by the member reaching normal retirement age per the fund rules).

The 2023 amendments to the retirement saving regime proposed the introduction of tax-free transfers between components as well as the introduction of paragraph 6B of the Second Schedule to the Act, dealing with these transfers wherein, members are allowed to make intrafund transfers at any time and these transfers will be treated as tax-free transfers and be subject to the fund obtaining a tax directive.

The 2023 amendments allow for section 37D deductions, as outlined in the Pension Funds Act of 1956, against the savings, vested, and retirement components. However,

it is worth noting that while section 37D deductions are typically taxed under paragraph 2(1)(b) of the Second Schedule to the Act, an exception exists for maintenance awards, which are taxed under section 7(11) of the Act, specifically in respect of a maintenance awards ordered by a court under the Maintenance Act of 1998.

Reasons for change

Despite the changes made in 2023 to enhance the two-pot regime, it has become apparent that further adjustments are necessary to clarify the existing language. For instance, there is a need to explicitly exclude maintenance awards, which are taxed under section 7(11) of the Act, from the three components mentioned above.

In order to simplify the directives system for both administrators and SARS and cater for speedy implementation of this reform, the requirement to obtain a directive when transferring the seeding amount from the "vested component" to the "savings component" is not necessary as tax is only imposed on withdrawal from the "savings component".

Proposal

A. Technical considerations

It is proposed that:

- various drafting changes be implemented to enhance clarity and precision in the wording.
- The definitions of the three components be amended to exclude maintenance awards that are taxed under section 7(11) of the Act.

B. Intra-fund transfers and directives

It is proposed that reallocations of amounts between the three components not be treated as transfers and that the requirement to obtain a directive for reallocations between the three components be withdrawn.

Effective date

The proposed amendments will come into effect on 1 September 2024.

5. NOTICES / REGULATIONS

5.1. Provisional tax – Solar energy tax credit

26 January 2024 – In order to encourage households to invest in clean electricity generation capacity as soon as possible, a tax credit has been introduced under section 6C of the Income Tax Act for a limited time period. Section 6C is deemed to have come into operation on 1 March 2023 and applies in respect of years of assessment commencing on or after this date. Furthermore, this section is only available for a period of one year, that is, from 1 March 2023 to 29 February 2024.

This tax credit applies to any natural person who is liable for personal income tax and who invests in qualifying solar photovoltaic panels (solar PV panels).

Under this section, a natural person may be eligible for the tax credit on the cost that has been actually incurred in respect of the acquisition of qualifying solar PV panels. The cost relating to other components of a complete solar energy system such as inverters, batteries and supporting structures do not qualify for the tax credit.

Since the intention is to encourage natural persons to invest in renewable energy, the carrying on of a trade is not a requirement to be eligible to claim this tax credit.

The Provisional Tax Return (IRP6) has been updated with a 'Solar energy tax credit' field to enable provisional taxpayers to take the tax credit into account in determining provisional tax payable for the second provisional period of the 2024 year of assessment.

6. TAX CASES

6.1. Arena Holdings (Pty) Ltd t/a Financial Mail and others v SARS and others (86 SATC 1) – Constitutional Court

First Applicant was Arena Holdings (Pty) Ltd (Arena), a private company that owned various media houses.

Second Applicant was AmaBhungane Centre for Investigative Journalism NPC, a non-profit company engaged in public interest investigative journalism.

Third Applicant was Mr Warren Thompson, a financial journalist, who was employed by Arena at the time of the High Court application.

First Respondent was the SARS.

Second Respondent was Mr Jacob Zuma, the former President of the Republic of South Africa.

Third and Fourth Respondents were the Minister of Justice and Correctional Services and the Minister of Finance, respectively.

Fifth Respondent was the Information Regulator, the authority tasked with the monitoring and enforcement of PAIA.

Early in 2019 the Mr Thompson had made an application to SARS in terms of PAIA to gain access to Mr Zuma's tax records and the application was premised on allegations that were made by Mr Jacques Pauw in his book titled The President's Keepers and subsequently by several other persons. It was averred that there was 'credible evidence' that, while he was President, Mr Zuma was not tax compliant.

On 19 March 2019 SARS refused Mr Thompson's application on the basis that Mr Zuma was entitled to confidentiality under sections 34(1) and 35(1) of PAIA as well as section 69(1) of the TA Act and Mr Thompson launched an internal appeal against SARS' refusal.

On 30 March 2019 SARS dismissed the appeal on the same grounds and, following SARS' refusal, the Applicants launched an application in the form of a constitutional challenge in the High Court (see Arena Holdings (Pty) Ltd and Others v South African Revenue Service and Others 84 SATC 153) on 25 November 2019 requesting it to determine whether tax information held by the State received absolute protection from disclosure under PAIA.

Applicants, in their application, challenged the constitutional validity of the statutory prohibition of the disclosure of a taxpayer's tax information held by SARS, in circumstances where such disclosure would reveal evidence of a substantial contravention of the law and would be in the public interest.

Before the High Court the Applicants contended that there was credible evidence that Mr Zuma had evaded tax while he was President and had failed to disclose other sources of income that he had received and they relied on allegations contained in Mr Pauw's book and maintained that all the evidence they tendered could only be verified by the tax information that SARS had refused the Applicants to access.

Applicants argued in the High Court that the prohibition to access information of a taxpayer rendered by sections 35(1) and 46 of PAIA and Chapter 6 of the TA Act was

unconstitutional in so far as such access was in the interest of the public. In addition, that this prohibition was an unjustifiable limitation of their constitutional right to freedom of expression and right of access to information.

Applicants consequently sought the following relief:

(a) a declaration that PAIA and the TA Act were unconstitutional to the extent that they did not permit access to a taxpayer's tax information under PAIA by a requester other than the taxpayer concerned, even if it was clearly in the public interest that this information should be disclosed;

(b) reading-in relief that would extend the limited public interest exception in PAIA; and

(c) an order granting access to Mr Zuma's tax records.

The High Court held that the assertion of the right to privacy and secrecy relied on by SARS and the Ministers did not fulfil the limitation test as set out in section 36 of the Constitution. Therefore, the limitations on the access to information were not justified.

The High Court found that the argument that public interest overrode the limitation of taxpayer confidentiality was justified and it held that the blanket prohibitions of disclosure of taxpayer information contained in section 35 of PAIA and section 69 of the TA Act unjustifiably limited the right of access to information provided for in section 32 of the Constitution and it concluded that a 'reading-in' of the 'public-interest override' provisions contained in section 46 of PAIA was justified and competent.

The High Court thus declared sections 35 and 46 of PAIA to be unconstitutional and invalid to the extent that they precluded access to tax records by a person other than the taxpayer ('a requester') even in circumstances where the requirements set out in section 46(a) and (b) of PAIA were met. The court also declared sections 67 and 69 of the TA Act to be unconstitutional and invalid to the extent that they precluded access to information being granted to a requester in respect of tax records in circumstances where the requirements set out in section 46(a) and (b) of PAIA were met and to the extent that those provisions precluded a requester from further disseminating information obtained as a result of a PAIA request.

The High Court thus declared the impugned provisions invalid and unconstitutional and it ordered an interim reading-in.

After making the declaration of invalidity, the High Court granted the application for the release of Mr Zuma's tax records.

Applicants then approached the Constitutional Court to confirm the declaration of invalidity made by the High Court, i.e. the confirmation application.

In terms of section 167(5) of the Constitution, the Constitutional Court makes the final decision whether an Act of Parliament was constitutional and must confirm any order of invalidity made by the Supreme Court of Appeal and High Court before that order has any force.

The Constitutional Court conducted its own evaluation and had to satisfy itself that the impugned provisions did not pass constitutional muster before confirming the order of invalidity.

Applicants submitted that there was an absolute prohibition on disclosure of tax information of a taxpayer held by SARS to a PAIA requester other than the taxpayer concerned. They submitted that a 'public-interest override' which permitted disclosure of information listed in Chapter 4 of Part 2 of PAIA did not apply to section 35 of PAIA.

Applicants submitted that although section 69 of the TA Act was subject to some exceptions, these exceptions did not include a PAIA request. Additionally, section 67 of the TA Act prohibited the disclosure to a third party and prohibited the further disclosure of taxpayer information that had been obtained contrary to Chapter 6 of the TA Act.

Applicants contended that the aforementioned prohibitions prevented the media from obtaining tax information, through PAIA or in any other way, from SARS, and from reporting on any tax information the media had managed to obtain, 'even if the information contains conclusive evidence of corruption, malfeasance or other law-breaking'.

Applicants argued that the impugned provisions were unconstitutional to the extent that they limited the right of access to information under section 32 of the Constitution, in that taxpayer information was information held by the State, access to which had been unjustifiably precluded. They also submitted that the right to freedom of expression, under section 16 of the Constitution, was implicated in that the media was prevented from lawfully obtaining tax information and from reporting on it.

Applicants submitted that the limitation of the rights in sections 16 and 32(1) of the Constitution was not justifiable under section 36 of the Constitution. They contended that the impugned prohibitions were not justifiable, as they were not necessary to protect the privacy of taxpayers for taxpayer compliance. They submitted that the Respondents had failed to prove that the limitation was justifiable and argued that the

limitation of the section 16 and section 32(1) rights was disproportionate and unconstitutional.

SARS submitted that the regime created by the TA Act and PAIA was established after extensive consultation and careful consideration of other tax regimes, and it strikes a fair and reasonable balance between the right to privacy and the right of access to information.

According to SARS, taxpayers are not only encouraged, but are compelled, to make full and frank disclosure of their personal information and 'secrets' to SARS, including disclosure of their own criminal conduct. Taxpayers are essentially stripped of their privilege against self-incrimination.

SARS submitted that the impugned provisions served to preserve taxpayers' secrets and that the extension of the override provision in section 46 will materially undermine the assurance given to taxpayers that SARS will keep their secrets and undermine taxpayers' confidence in SARS.

SARS submitted that the impugned provisions of the TA Act were not absolute as they were subject to narrowly circumscribed and tightly controlled exceptions. Further, it contended that the relief sought by the Applicants violated the right to privacy, under section 14 of the Constitution, as well as the Marcel principle, in that the relief would enable a PAIA requester to freely disseminate tax information to any person, without constraint and this incursion into the right of privacy and the Marcel principle had not been justified by the Applicants.

According to SARS, an appropriate balance had to be found between the right to privacy, on the one hand, without limiting the rights of access to information and freedom of expression, on the other. Parliament had already struck a rational and appropriate balance between these rights by placing the impugned provisions in the TA Act and PAIA.

SARS sought a dismissal of the confirmation application and the setting aside of the order of the High Court declaring the impugned provisions unconstitutional.

Section 35 of PAIA provided for the 'mandatory protection of certain records of the South African Revenue Service'. Its subsection (1) provided that 'the information officer of SARS…must refuse a request for access to a record…if it contains information which was obtained or is held by SARS for the purposes of enforcing legislation concerning the collection of revenue as defined in section 1 of the South African Revenue Service Act 34 of 1997.'.

Section 46 of PAIA provided for disclosure of information in the public interest. It provided that 'despite any other provision of this Chapter [Chapter 4]' the information officer of a public body must grant a request for access to a record of the body contemplated in [various sections] if the disclosure of the record would reveal evidence of 'a substantial contravention of, or failure to comply with, the law [or] an imminent and serious public safety or environmental risk' and 'the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.' Significantly section 35 is not included in the list of sections named in section 46 and, accordingly, records of SARS, as the statute reads, are excluded from the 'public interest override' provisions of section 46.

Section 67 of the TA Act provides for a 'general prohibition of disclosure' of 'SARS confidential information' and 'taxpayer information which means any information provided by a taxpayer.' Its subsection (4) provides that 'a person who receives information…must preserve the secrecy of the information and may only disclose the information to another person if the disclosure is necessary to perform [certain specified] functions.'

Section 69(2) provides for certain exceptional situations in which the disclosure by SARS of taxpayer information is not prohibited.

The first judgment in the Constitutional Court was the minority judgment penned by four judges and the second judgment was the majority judgment penned by five judges, from para [123] onward.

Judge Kollapen held the following for the majority of the court:

(i) That the majority agreed with the minority that the matter engaged the Constitutional Court's jurisdiction and that leave to appeal should be granted. It, however, disagreed with the conclusion of the minority that the prohibition on access to taxpayer records found in section 35(1), read with section 46 of PAIA, was not absolute. It concluded that the impugned provisions did not pass constitutional muster as they did not meet the limitation test in section 36 of the Constitution.

(ii) That individual autonomy and the rights associated with it were important aspects of human development in the modern world. In the context of this application, these rights included the rights of freedom of expression, access to information and privacy. At the same time, and beyond the demands of

individual autonomy, the legitimate communal interests and the rights of others must moderate the outer bounds of individual autonomy.

(iii) That the minority judgment correctly described this matter as involving the balance to be struck between competing rights. Modern democracies are in many respects characterised by the challenge of competing interests, especially in diverse societies such as ours. In this diversity, it was not uncommon for communal interests to stand in conflict with individual interests. It was also not uncommon for the interests of privacy and individual self-determination to stand in conflict with the collective public interest and the values of openness and transparency. When those interests and rights come into conflict, there is no magical hierarchy that one can resort to in order to resolve the conflict. The conflict is invariably approached through the lens of the Bill of Rights by balancing those rights and interests in the manner contemplated by the limitation exercise in section 36 of the Constitution.

(iv) That the rights to privacy, access to information and freedom of expression all come together in this matter, in order to achieve different but legitimate and interconnected individual and societal interests. This case is, in particular, about how that balance is managed between the right to privacy in respect of taxpayer records against the communal interest and the claimed right to access those records when they provide evidence of serious criminality or a risk to public health or safety.

(iv) That Chapter 4 of PAIA created a framework for the mandatory or discretionary protection of records that generally contain information deserving of protection from disclosure by virtue of private or public considerations and it moderated that framework by including a 'public-interest override.' The consequence of this legislative scheme was that records that generally contain information deserving of protection by virtue of private or public considerations, must be disclosed if the requirements of the 'public-interest override' are met.

(v) That, however, section 46 of PAIA did not remove the cloak of confidentiality without just cause or due process as it set a relatively high bar for the lifting of confidentiality. It may be described as finding the balance between the withholding of information generally worthy of protection from disclosure and the mandatory disclosure of information in the public interest.

(vi) That in a rules-based society, serious criminality undermines the values of the Constitution, just as a serious and imminent environmental or health risk poses

a high level of threat to the populace. These considerations are, objectively, sufficiently serious in the public interest to warrant lifting the cloak of confidentiality that would otherwise vest in information worthy of protection by virtue of private or public considerations.

(vii) That a PAIA requester who sought to successfully invoke the benefit of section 46 had formidable substantive and procedural hurdles to overcome. An information officer must be satisfied that the record sought revealed evidence of a substantial contravention of the law or an imminent or serious public safety or environmental risk. This in itself was a high threshold to meet and, at least objectively, represented aims that were closely aligned with the public interest. The procedural provisions in Part 4 of PAIA ensured that third parties must be notified where disclosure of a record pertaining to them is contemplated. If a person (including such a third party) is aggrieved by a decision of the information officer concerning the application of section 46, there could be recourse to an internal appeal, a complaint to the Information Regulator, or an application to the High Court, if need be. A decision of the High Court may in turn be subject to further appeal and these procedures would have to be exhausted before a record is finally disclosed or withheld in terms of section 46.

(ix) That section 46 went on to provide that the information officer, before being obliged to release the record, must also be satisfied that the public interest in disclosure clearly outweighed the harm that the provision in question contemplated. What was contemplated was not just a balancing between equally weighted considerations of the public interest and the personal information of individuals or the interests of the state. It was an exercise that required that the public interest must quantitatively outweigh the harm contemplated. This bias in favour of the non-disclosure of information generally worthy of protection meant that section 46, far from negating the claim to confidentiality, retained it, not absolutely but substantially so and this again was a weighted exercise in balancing rights.

(x) That the effect of the 'public-interest override' was to continue to maintain a high level of confidentiality while providing a carefully crafted, limited, restrained and relatively onerous basis for the lifting of confidentiality in the public interest.

(xi) That the majority agreed with the conclusion reached in the first judgment, that taxpayer records generally contained personal information submitted to the tax authorities as part of compliance with the tax obligations imposed by law. That information should ordinarily be of no concern or interest to the public at large, was correctly characterised as confidential and warranted the mandatory protection from disclosure that PAIA afforded it. It involved quintessentially the relationship between the taxpayer and the tax authority in terms of which the taxpayer provided information to the tax authority on the basis of confidentiality.

(xii) That the more focused question, however, was whether such information should enjoy unqualified and absolute protection from public disclosure. In this regard, the language of section 35(1) was so wide and limitless that it extended protection to all information in the tax records held by the state, irrespective of its nature and regardless of whether those records or parts thereof justified a claim to protection. This was in contrast to the other provisions of Chapter 4 which provided protection from disclosure to carefully and explicitly worded categories of information. Section 35(1) protected all taxpayer information irrespective of whether its character warranted protection. It was protected simply because it was taxpayer information. It was this wide category of information that was the subject of the challenge in this case and it was totally immunised from the section 46 override that applied to all other categories of information that enjoyed protection in terms of Chapter 4 of PAIA.

(xiii) That the prohibition on disclosure found in section 35(1) of PAIA was reinforced by the provisions of section 69(1) of the TA Act as well as those of sections 67(3) and (4). PAIA is the national legislation contemplated in section 32 of the Constitution to give effect to a general right of access to information. The TA Act was not the legislation that provided for a right of access to information and did not purport to do so. The prohibitions contained therein, particularly those reflected in section 67(3) and (4) and section 69, primarily related to the administration of the tax system and the work of other organs of state and they were not prohibitions on any general right of access to information.

(xiv) That section 69(2) of the TA Act provides for some exceptions to the general prohibition against the disclosure of confidential information, while these are all important exceptions, they relate to the work of state organs and courts in investigating, prosecuting and adjudicating tax cases and related matters. Disclosure under sections 69 and 70 was not public disclosure and, in any

event, was never intended to constitute disclosure that would be aligned with the public interest.

(xv) That this case was about the limitation of the right of access to information under PAIA, and the prohibition that was referred to can only be the prohibition in section 35(1) of PAIA. The TA Act does not provide for a right of access to information. The 'exceptions' in the TA Act were not a partial allowance of the constitutional right that the public has of access to information held by the state. The TA Act 'exceptions' do not afford any public right of access to information.

(xvi) That there was nothing in the language of the TA Act that suggested that those exceptions are or could be anything more than the limited and fit-for-purpose exceptions that they were. They were not inspired by section 32 of the Constitution and they would exist in the TA Act regardless of whether we had section 32 of the Constitution and PAIA.

(xvii) That given that the TA Act exceptions were totally disconnected from the operation of PAIA, there could be no basis to suggest that those exceptions had the effect of rendering the prohibition on disclosure found in section 35(1) anything other than absolute. Mindful that the limitation in this matter is about the right of access to information and freedom of expression, none of the exceptions advance those rights in any manner and they cannot, therefore, be regarded as exceptions to the prohibition on the right of access to information.

(xviii) That arising from the conclusion that the prohibition in section 35(1) was absolute, it must follow that the prohibition could not withstand constitutional scrutiny. The first judgment characterised this matter as one involving competing rights from which the need emerged to find a balance between such rights. Sections 35(1) and 46, however, closed the door firmly in the face of any balancing of rights when it came to taxpayer information.

(xix) That the approach in section 35(1) read with the exclusion of the section 46 override was not about balance and was not about a consideration of the less restrictive means that section 46 offered. It was an approach of absoluteness – one that could not be reconciled with the proper constitutional approach to competing rights. It was not open to a consideration of any other means to achieve the purpose of the limitation of the right.

(xx) That one had to be careful not to elevate taxpayer confidentiality to some sacrosanct place where no exception to enable public access to it was possible.

This was the effect of section 35(1) of PAIA. It was difficult to conceive any reasonable basis to hold that taxpayer information cannot be subject to the 'public-interest override' in circumstances where the override was potentially available to justify the disclosure of information that may relate to the life and the safety of an individual, the defence or the security interest of the country or the private information of a third party (including their medical records), all of which can happen in terms of section 46.

(xxi) That it must therefore follow that section 35(1) cannot survive constitutional scrutiny on this basis alone. It is offensive to the idea that, when rights compete, the desirable approach is to seek to find a balance between them. The legislative approach in Chapter 4 and section 46, in particular, is about seeking and finding that balance. That approach is, however, abandoned in respect of taxpayer records without proper justification and even in the face of a carefully balanced override.

(xxii) That there was no basis in principle nor in terms of any evidence that absolute confidentiality was required to achieve taxpayer compliance. On the contrary, while most taxpayers might assume that in general their tax information will be protected, it was another matter to suggest that such taxpayers many also insist, as a condition of compliance, that information that evidences serious criminality or a public risk will also be the subject of protection.

(xxiii) That the court did not accept the language used by SARS of a 'compact' between SARS and taxpayers regarding confidentiality. Whether or not there is absolute confidentiality, taxpayers have a statutory duty to comply with the law. They are in no position to bargain with SARS for absolute secrecy as a condition for their compliance with the law. Nor did the court accept, either on the evidence or as a matter of inherent probabilities, that most taxpayers only comply (or only comply fully) with the law because of a guarantee of absolute confidentiality.

(xxiv) That, while international comparisons have some value, they are limited, and much would depend on the prevailing legal culture, the existence or not of a written constitution, the time period when the law would have been enacted and other unique and localised considerations. The fact that the United Kingdom and Canada have absolute prohibitions while Sweden and Slovenia provide for disclosure is really of no moment. The more pressing question, and

the one central to these proceedings, is whether section 35(1) stands up to our constitutional framework.

(xxv) That, accordingly, the court differed from the conclusion in the first judgment that the purpose of the limitation, as being necessary to achieve taxpayer compliance, passes the limitation test. Some limitation may be justified, but no case has been advanced for an absolute limitation.

(xxvi) That it was for the aforementioned reasons that the court concluded that the limitation in section 35(1) was absolute and could not be said to be reasonable and justifiable in an open and democratic society. The section 46 override provided a mechanism that was not only less restrictive than an absolute prohibition, but was one that was narrowly constructed with substantial checks and balances.

(xxvii) That it must follow that sections 35(1) and 46 of PAIA as well as sections 67(4) and 69(2) of the TA Act were unconstitutional to the extent found by the High Court and the order of invalidity of the High Court stood to be confirmed.

6.2. Erasmus v C:SARS (86 SATC 56)

The taxpayer had brought an application in the High Court seeking an order reviewing and setting aside a decision by SARS that he was party to an alleged impermissible tax avoidance arrangement in terms of section 80A (read with sections 80B and 80L) of the Income Tax Act and an assessment that he was consequently liable for dividends tax in the amount of R183 536 979 and an understatement penalty of R137 652 734 plus interest.

The dividends tax represented 15% of the amount of approximately R1.2 billion, which it was common cause was paid to the taxpayer on 27 March 2015 by a company, Treemo (Pty)Ltd. The understatement penalty represented 75% of the value of the dividends tax imposed.

The taxpayer was the former CEO of Pepkor Holdings Ltd, a public company founded in 1965 and which operated a portfolio of retail chains in South Africa and other countries. At one time or other, relevant to these proceedings, he was a director and shareholder of the company and numerous other companies, including Klee Investments (Pty) Ltd, Newshelf 103 (Pty) Ltd and Treemo (Pty) Ltd, and a beneficiary

of the PJ Erasmus Family Trust, which in 2015 changed its name to the Black River View Trust ('the Trust'), and the Trust in turn was also a shareholder in Treemo.

On 25 March 2015 Treemo's directors approved a 'capital' distribution to the taxpayer of R167 696 542 and cash distributions of R1 222 303 458 and R1 276 400. In addition, approval was granted for the payment of a cash distribution to the Trust of R8 723 600. These distributions were paid out two days later, on 27 March 2015.

As shareholders of Treemo, the cash distributions constituted the payment of dividends to the taxpayer and the Trust, and in the ordinary course would accordingly have been subject to dividend tax at the rate of 15%. However, no such tax was levied or paid, because at the time Treemo had Secondary Tax on Companies (STC) credits which in value exceeded a billion rand, and these were set off against the value of the distributions.

Some four years later, on 20 March 2019, the taxpayer was requested to provide SARS with a detailed explanation and documentation pertaining to the various transactions that had taken place between Treemo, the Trust and himself, between the 2015 and 2018 tax years.

In the response which he provided on 30 April 2019 the taxpayer revealed that during December 2014 he had sold 5.5 million shares which he had held in Pepkor with a market value of R510 million, and his entire shareholding in Klee, which had a market value of R310 million, to Treemo, in exchange for shares in it. At the same time, he had also sold redeemable preference shares which he held in Newshelf, which had a market value of R750 million, to Treemo, in exchange for shares in it. As far as the distributions which were made to him and the Trust in March 2015 were concerned, he confirmed that these totalled just short of R1.4 billion.

In June 2019 the taxpayer was notified that the distributions would be subjected to an audit and, pursuant thereto, he was called upon to provide additional documentation and to explain why neither the 'capital' distribution of R167 million odd nor the combined cash distributions of R1.2 billion odd had been declared in his 2016 return.

In the response which he provided on 5 August 2019 the taxpayer claimed that the distributions had not been disclosed because of an 'oversight' by his accountants, but that no tax consequences flowed from this as they were exempt from tax: the 'capital' contribution was exempt as it constituted a return of capital, and the other distributions were exempt because of the STC credits which were held by Treemo.

On 30 July 2020 the taxpayer was given notice that, the audit having been completed, SARS was of the view that the provisions of the so-called 'General Anti-Avoidance Rule', as embodied in sections 80A-80L of the Act, were applicable, as it appeared that the taxpayer and the Trust had, together with a number of other corporate entities (including those previously referred to), engaged in an impermissible tax avoidance scheme or arrangement via a series of interrelated transactions in 2014 and 2015, which SARS proceeded to set out.

It was not feasible, given the volume and intricacy of the transactions which it was alleged made up this arrangement, to traverse them in detail, nor was it necessary to do so for the purpose of these proceedings. Essentially, SARS contended that the parties thereto had contrived to obtain and utilise STC credits in order to shield the taxpayer from an anticipated liability for dividends tax by way of an interlinking series of what could fairly be described as complex and opaque transactions.

According to SARS, the initial set of dealings (which included inter-entity loans, various subscriptions for shares and capital and cash distributions, including dividends), constituted a form of 'round-tripping' of funds and a 'dividend strip' which had no apparent commercial rationale other than to transfer STC credits from two companies which originally held them, to Treemo.

That was followed by a second set of transactions which were concluded between the taxpayer, the Trust and Treemo (which involved loans, share-sale/share-buyback and 'asset-for-share' arrangements, cessions and delegations, and a put and call option), which ultimately culminated in the distributions which form the subject of this matter.

Included amongst this set of transactions were dealings in February 2015 whereby Newshelf repurchased certain shares which were held by Treemo and Klee for R1.62 billion odd which, in the circumstances, constituted an impermissible tax avoidance arrangement as contemplated in section 80A of the Income Tax Act.

On 24 February 2021 SARS notified the taxpayer that, having considered the responses and additional information that had been provided by the taxpayer, he was not dissuaded from his original findings as set out in his section 80J notice dated 30 June 2020. Consequently, SARS had raised an assessment of dividends tax on the amounts received by the taxpayer as cash distributions from Treemo, which was payable by no later than 30 April 2015, together with an understatement penalty of 75% of the value thereof, which had been levied, plus interest. The taxpayer was advised that should he wish to object to the assessment he was required to file the requisite notice in this regard.

On 15 March 2021 the taxpayer's attorneys responded that they had been instructed to launch an application in the High Court for the review and setting aside of SARS' decision, on the basis that his assessment was irregular and fatally defective in that its factual basis was incorrect, as the Newshelf repurchase dividend had not flowed directly or indirectly to the taxpayer, but had been used to invest in other shares. Consequently, the assessment was liable to be set aside as it was not authorised by the empowering provisions of the Income Tax Act or had been levied on the basis of irrelevant considerations being taken into account or relevant ones being ignored, and it was not rationally connected to the information which SARS had before him at the time.

The taxpayer submitted that in the circumstances, no useful purpose would be served in requiring the taxpayer to lodge his objection and SARS was asked to agree to a stay of the objection process until such time as the review had been heard and any appeals against the judgment therein had been finalised.

SARS, in his response on 24 March 2021, noted that the taxpayer had not made use of the internal remedies which were available to him, in order to dispute the assessment.

Consequently, SARS was of the view that the proposed review was premature, and he was not prepared to accede to a request to stay the objection or to extend the due date for the filing thereof, sine die. This prompted the taxpayer's attorneys to request an extension of 30 days in order to allow the taxpayer to submit his objection, under protest. An extension was subsequently granted until 17 May 2021, which was complied with and on 9 June 2021 the taxpayer launched the instant application in the High Court, which in due course was enrolled for hearing.

The taxpayer contended that the various transactions referred to by SARS did not constitute an impermissible tax avoidance arrangement and the distributions that were made were not liable for dividends tax.

Upon allocation, and after considering the contents of the affidavits which had been filed, the court invited the parties to make submissions, if any, as to why an order should not be made directing that SARS' point in limine that the application should not be entertained as the taxpayer had failed to exhaust his internal remedies, should not be separated from the merits of the application and heard prior to a consideration thereof. Both parties duly made submissions. After considering them the court made an order whereby it directed that the point in limine should be separated from the remaining issues and argument was subsequently heard only in respect thereof.

Shortly before the hearing the taxpayer filed an application for leave to amend his notice of motion, in order to seek an order exempting him from exhausting his internal remedies prior to the hearing of the review and directing that it may be heard.

Judge Sher held the following:

(i) That it was accepted that SARS decision in levying a tax assessment on the taxpayer constituted administrative action as per the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and that the review before the court had been framed in terms thereof. As a result, the provisions of sections 7(2)(a)–(c) of PAJA and section 105 of the Tax Administration Act ('TA Act') came into play.

(ii) That it has been held by our highest courts that compliance with the duty to exhaust all internal remedies was compulsory before a PAJA review was brought, unless the party concerned was excused from this obligation by a court, or the remedies specified are not available or would not be effective, or their pursuit would be 'futile.'

(iii) That in terms of section 7(2)(c) of PAJA a court may, on application, exempt a party from discharging this obligation, in 'exceptional circumstances,' 'if it deems this to be in the interests of justice.' Exceptional circumstances are not defined in PAJA and one must accordingly look to the interpretation which has been given to the term in the case law. In this regard, courts have eschewed formulating a precise definition of general application, holding instead that the meaning to be given to the phrase will depend on the facts and circumstances of each particular case, including in tax matters. So, the phrase is 'sufficiently flexible' in its application that circumstances which might be regarded as ordinary in one matter may qualify as exceptional in another.

(iv) That in arriving at a determination of the proper meaning to be afforded the term in the case before it, the court was essentially required to be mindful of the trite and well-established three-legged canon of interpretation that regard must be had to the language used, in the context of the statute in respect of which it appeared or to which it was applicable, and its purpose.

(iv) That, ultimately, and by way of summary, it has been held that what needs to be shown is that the circumstances are out of the ordinary, such that they render it inappropriate to require that the taxpayer should first exhaust any

alternative remedies that may be available to them and justify the intervention of the court, rather than of an alternative, available forum.

(v) That both the Constitutional Court and the Supreme Court of Appeal implicitly adopted two corollaries that flowed from the test espoused in MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas and Another 2002 (6) SA 150 (C) viz that (1) whether or not exceptional circumstances exist was not a decision which depended on the exercise of a judicial discretion, but was a matter of fact to be determined on the evidence and (2) where a statutory provision directs that a fixed rule shall be departed from only in 'exceptional circumstances' effect will, generally speaking, best be given to the intention of the legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining the circumstances relied upon as allegedly being exceptional.

(vi) That section 105 of the TA Act provides that unless a High Court 'otherwise directs', a taxpayer may only dispute a tax assessment or a decision as described in section 104 of the Act pertaining to their tax affairs, in terms of the dispute resolution procedures provided for in the TA Act. To this end a taxpayer who is dissatisfied with an assessment which has been levied may lodge an objection to it to SARS, and if that objection is unsuccessful, may lodge an appeal against the refusal thereof to the special Tax Court, established in terms of the Act.

(vii) That in a review of the powers afforded to the Tax Court, the Constitutional Court held in Metcash Trading Ltd v C:SARS and Another 63 SATC 13 that it was an independent and impartial tribunal specially tooled to deal with tax cases. Although it operated to all intents as an ordinary court it had wide and extensive powers to interfere with, amend or reverse decisions of SARS and given the extensive powers which had been afforded to it, it had consequently been described as a court of revision, rather than a court of appeal.

(ix) That, in the circumstances, it was trite that the Tax Court may exercise what would traditionally be defined as review powers, in a tax appeal which had been raised before it. It was by now also well-established that such review powers included the power to determine both so-called PAJA reviews in terms of the grounds provided for in PAJA as well as legality reviews, i.e. reviews on the basis that the decision-maker acted outside of their powers. Legality reviews challenge the conduct of an official or organ of state on the basis that it constituted the exercise of public power, whereas PAJA reviews did so on the

basis that it constituted the exercise of administrative action, as defined in terms of PAJA.

(x) That, after reviewing the relevant case law, the court summarised the current state of the law as it understood it, in the context of this matter. In the first place, the effect of the decisions in ABSA Bank Ltd and Another v C:SARS 83 SATC 401 and C:SARS v Rappa Resources (Pty) Ltd 85 SATC 517 was that in any civil review of a tax dispute as referred to in section 104 of the TA Act read with Chapter 9 thereof (i.e. one which involved a dispute pertaining to a tax assessment or a decision by SARS which could be resolved by way of an objection or appeal), whether it was brought as a so-called PAJA review or as a legality review, the taxpayer would need to show the existence of exceptional circumstances which justified the matter being heard by a civil court as opposed to the fora and procedures available under the TA Act, i.e. by way of an objection to SARS and, if that failed, an appeal to the Tax Court. The effect of these decisions had therefore been, at least insofar as such reviews were concerned, to subsume the PAJA requirement of exceptional circumstances into the determination of whether a court should make a directive in terms of section 105 of the TA Act.

(xi) That matters which dealt with disputes which did not fall within the ambit of section 104 (read with Chapter 9 of the TA Act) were not subject to such a restriction and did not require a directive in terms of section 105. All that needed to be said was that there would clearly be instances where, depending on the facts and circumstances, the taxpayer may be entitled to approach a civil court directly for relief, without such strictures.

(xii) That, essentially, the decisions in ABSA, supra, and Rappa Resources, supra, had therefore standardised the material requirement which the taxpayer needed to meet, whatever form their review took, save in one respect, which it appeared had not as yet enjoyed the attention of the courts in tax-related disputes. In this regard, in terms of section 7(2)(c) of PAJA, in a PAJA review the taxpayer could only be exempted from exhausting the internal remedies of objection and appeal if he succeeded not only in showing that there were exceptional circumstances present but also that they render it necessary in the interests of justice that he be heard, instead of utilising such remedies. This did not seem to be required in a legality review, nor when seeking a directive under section 105 of the TA Act, although it could, and perhaps should, be read into

the provision, in order not to have a disjunct between the operation of the two provisions.

(xiii) That as far as the court had been able to ascertain, this issue had not been expressly dealt with in any of the reported tax cases to which I was referred. In the court's view it was an aspect which assumed some importance in matters which involved alleged impermissible tax avoidance arrangements or schemes, in terms of the GAAR provisions, such as the one before the court.

(xiv) That in terms of section 105 of the TA Act, prior to such a review (in whatever form) being entertained, the taxpayer would need to obtain a directive from the court that the matter may be heard by it, instead of being dealt with via the objection and appeal processes set out in the TA Act, which was the default route that should be followed. Unless and until such a directive is obtained, a civil court did not have jurisdiction to hear the review.

(xv) That in order to show the existence of exceptional circumstances the taxpayer bore the onus of showing, on a balance of probabilities, that there were circumstances present which were out of the ordinary in the sense that they were unusual, uncommon or different, to the extent that they justified that the matter should be heard by the court, instead of being dealt with via the default route. This meant that inevitably, where such circumstances were disputed and were not common cause, the issue would fall to be decided on the version which was put up by the respondent, which in the case of a tax review would be SARS, unless of course that version was so fanciful, implausible, or untenable that it could be rejected out of hand. Whether such circumstances were present was a determination which was to be made on the facts which were before the court, in each and every instance. This did not constitute the exercise of a discretion on the part of the court but a factual determination that needed to be made by it, based on the evidence submitted by the parties.

(xvi) That this brought the court to consider the decision in ABSA Bank, supra, on which the taxpayer had relied heavily. There were aspects of the decision with which the court disagreed and which, in its respectful view, were wrong. In this regard, in the first place, the court was of the view that the court in ABSA Bank had erred in holding that a civil court had a 'discretion' to deal with a tax dispute and to insist that internal remedies which may be available to a taxpayer should be exhausted, and, likewise, it had erred in holding that a civil court had a

'discretion' to approve a deviation from the default route of objection and appeal via the TA Act.

(xvii) That not only the ratio of the subsequent decision of the SCA in Rappa Resources, supra, in relation to section 105 of the TA Act, but the provisions of section 7(2) of PAJA and the cases that had dealt with it excluded the exercise of a discretion, in both instances referred to: the taxpayer must exhaust their internal remedies and a civil court may only approve a deviation from the default route, if and when the taxpayer had shown that there were exceptional circumstances present which justified this. In this regard the determinations of whether or not exceptional circumstances had been shown and whether or not the taxpayer should therefore be excused from exhausting their internal remedies were not discretionary, but were fact-bound determinations.

(xviii) That in arriving at its conclusions, the court in ABSA Bank, supra, pointed out that there were precedents such as Metcash Trading Ltd v C:SARS and Another 63 SATC 13 where civil courts had entertained tax disputes on points of law, instead of compelling taxpayers to exhaust internal remedies that were available to them but the decision in Metcash, supra, needed to be considered in its proper context.

(xix) That what the court in ABSA Bank, supra, appeared to have failed to appreciate was not only that the common law precedent referred to in Metcash, supra, was expressed in relation to the power of civil courts in tax-related matters to grant declaratory relief and not in relation to its power of review, but also that Metcash was decided in 2000, some eleven years before the passing of the TA Act, whereby section 105 was introduced. Section 105 had now considerably restricted a taxpayer's ability to approach a civil court for relief, in such matters, contrary to the position that previously prevailed at common law, as per the decisions referred to in Metcash. Thus, the line of cases which related to the power of a civil court to grant relief in tax matters, which predate the passing of the TA Act, no longer serve as authority for the proposition that civil courts have a discretionary power to decide tax cases which concern points of law, at least not those that fall within the remit of section 104 read with Chapter 9 of the TA Act.

(xx) That even if a tax dispute in relation to a decision or assessment, which can be resolved by way of an objection or appeal is 'purely' one of law, and involves no question of fact, or turns wholly on a point of law, this in itself will not mean

that a civil court could deal with it and, in the court's view, and contrary to what was held in the ABSA Bank case, such an attribute did not in itself confer, or satisfy, the necessary requirement of exceptionality.

(xxi) The hurdle which must be overcome was not, as per ABSA Bank, supra, simply that there were circumstances present which 'sensibly' justify the alternative route of having the matter dealt with by a civil court. There must be circumstances present which are so out of the ordinary, unusual or uncommon, that they justify that route being followed, and errors or points of law, without more, hardly constitute such circumstances. Errors of fact obviously result in errors of law and neither of these will therefore ordinarily constitute circumstances which in themselves are out of the ordinary, uncommon or unusual. Thus, whilst an error of fact will obviously be a ground for an appeal before a Tax Court, which strives at arriving at the correct decision, it will hardly constitute an exceptional circumstance so as to justify a civil court in entertaining a review in a tax matter of the kind under discussion.

(xxii) That, as was correctly submitted by SARS, the circumstances which were raised by the taxpayer did not constitute 'pure' points of law, nor was this a matter which turned wholly, or even partially, on a 'pure' point of law. It was about the underlying facts and the complaint which was put forward by the taxpayer was principally that SARS' assessment was based on an incorrect factual premise and was arrived at as a result of an error of fact, not law. An error of fact is corrected on appeal, not on review, which dealt with process rather than result and usually culminated in a referral back to the decision-maker, and not a revised tax assessment.

(xxiii) That this was not an exercise that could be performed by a civil court in a review, on cold paper, but was one best suited to ventilation in a Tax Court where the parties were able to put the necessary evidence before a judge and two qualified and experienced members, one drawn from the accounting profession and one from the business sector. Complex tax avoidance schemes or arrangements such as the one in this matter, need to be dealt with by a Tax Court panel rather than by an ill-equipped civil court judge.

(xxiv) That should a civil review of an alleged tax avoidance scheme or arrangement be allowed in the High Court, at first instance, it would encourage dissatisfied taxpayers to frustrate and bypass the dispute resolution process which is provided for in the TA Act, by leapfrogging over it into the High Court, whenever

there was room to argue that SARS' understanding of one or other transaction or step in such scheme or arrangement was wrong.

(xxv) That to allow a civil review in such circumstances, based on contrary assertions in the affidavits which were filed by the parties, would be to ignore section 80G(2) of the Income Tax Act, which allowed for the purpose of a step in, or part of, an avoidance scheme or arrangement, to differ from the purpose attributable to the scheme or arrangement as a whole.

(xxvi) That, accordingly, the proper way for the matter of the taxpayer's possible tax liability to be resolved was for the processes of objection and appeal to be followed, and if warranted, from there the taxpayer would have recourse to this court on review or appeal.

(xxvii) That, in the result, the taxpayer had failed to show (1) that there were exceptional circumstances present and (2) that a directive in terms of section 105 of the TA Act, allowing for the matter to be heard in the High Court and exempting him from exhausting his internal remedies, should be granted.

Application dismissed with costs.

6.3. Trustees of the CC Share Trust and others v C:SARS (86 SATC 84)

The taxpayers were the trustees of six trusts and these trusts directly and indirectly owned interests in companies in a group known as the Amalgamated Metals Recycling ('AMR').

In 2016, Insimbi, a JSE listed company, expressed an interest in buying some of the companies that formed part of the AMR group by acquiring them from the taxpayers. To achieve this objective the taxpayers adopted what they termed a '…disposal methodology that gave effect to their commercial objectives.' Stripped of its jargon this meant doing the transactions in a way that they considered avoided liability for capital gains tax.

SARS on 30 July 2020 issued each taxpayer with a notice in terms of section 80J(1) of the Income Tax Act ('the ITA') inviting the taxpayers to give reasons to SARS why it should not apply the general anti-avoidance rule ('the GAAR') in Part 11A of Chapter 111 of the ITA.

Part 11A of the ITA dealt with the general anti-avoidance rules known as GAAR and SARS applied this provision when he considered that a taxpayer had entered into an arrangement designed to avoid anticipated tax liability and one of the tests applied was that the arrangement was conducted in a manner that '…lacks commercial substance in whole or in part.'

Sections 42(2)(b) of the Tax Administration Act 28 of 2011 (TAA) and section 80J of the ITA were both central to the dispute between the parties.

In an exchange of correspondence the taxpayers replied to the notices in terms of section 80J in which their attorneys pointed out what they alleged were errors contained in the notices and thereafter SARS requested further information in terms of section 80J(3) of the ITA.

SARS, on 25 March 2021, sent the second letter to the taxpayers which was crucial to these proceedings and which was headed 'Finalisation of audit: Restructuring and sale of AMR Group: Year of Assessment: 2017' and which was referred to as 'the March letter.'

SARS, in the March letter, set out his reasons for rejecting the taxpayers' responses and why he considered that the GAAR applied to the transactions. On the same day SARS sent out separately a letter of assessment to each taxpayer setting out the relevant adjustment and penalties.

After receiving the aforementioned letters dated 25 March 2021, which the taxpayers termed the 'first decision', their attorneys wrote back to SARS on 20 April 2021 requesting that the two communications received by each taxpayer, i.e. the March letter and the assessment letter be withdrawn.

The aforementioned request was based on section 9 of the TAA which provided that a decision of a SARS official may be withdrawn, inter alia, at the request of the relevant person. On 26 April 2021 SARS responded and refused the requests and the taxpayers referred to these decisions as the second decisions.

The dispute between the parties resulted in a review application to the High Court requesting the court to review and set aside the first and second decisions or, put differently, the March letter and the letter of 26 April 2021.

The taxpayers contended that the March letter did not comply with the requirements specified in section 42(2)(b) of the TAA and that justified them in asking SARS to reconsider his decision and when SARS refused to do so he had thus failed to comply with section 9 of the TAA, and this gave rise to the second reviewable decision.

The taxpayers, to support their allegations of unlawful administrative action, relied on the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and in the alternative raised a legality review.

The position of the taxpayers appeared to be that neither the March letter nor the July letter complied with section 42(2)(b) of the TAA. The March letter did not give them the right to respond, hence it was not compliant with the 21-day requirement of the section and they were denied their right to be heard. The July letter, whilst giving the taxpayers an opportunity to respond, was also non-compliant with the section because the audit had not yet been concluded at that time, and in addition, no amount for the assessment was stipulated. Thus, irrespective of which letter purported to be the section 42(2)(b) notice, they had been denied audi alteram partem.

SARS contended in his argument on the merits of the review that he had given adequate audi but contended further that this point did not need to be decided now given its preliminary objections to which the court then turned.

SARS contended that the review was incompetent on two grounds. First, the case could not be considered without a direction from the court in terms of section 105 of the TAA. Although belatedly such a direction was sought, SARS argued that the threshold to get such a direction had not been made out in the papers. Secondly, relief was incompetent because the taxpayers had failed to exhaust their internal remedies as was required in terms of section 7(2) of PAJA and both statutes required the taxpayers to show that exceptional circumstances existed.

Section 105 of the TAA provided at the relevant time: ‘A taxpayer may only dispute an assessment or ‘decision’ as described in section 104 in proceedings under this Chapter, unless a High Court otherwise directs.’

Held by judge Manoim:

(i) That section 105 of the TAA was the point of departure in the case before the court could consider any other issues. Without a direction as contemplated in that section the High Court did not have jurisdiction over a case of this nature.

(ii) That in C: SARS v Rappa Resources (Pty) Ltd 85 SATC 517 the Supreme Court of Appeal followed an earlier decision of the Constitutional Court in Competition Commission of South Africa v Standard Bank of South Africa 2020 (4) BCLR 429 (CC) which held that where there is a jurisdiction challenge this must be decided first.

(iii) That the taxpayers did not deal with section 105 of the TAA in their notice of motion or in their founding affidavit and it was only dealt with in their replying affidavit and they also amended their notice of motion to include the necessary relief. SARS contended that this change of direction could not be made in a replying affidavit but the court accepted the taxpayers' argument and went on to deal with the fundamental issue which was whether a case for a direction in terms of section 105 or under section 7(2)(c) of PAJA had been sufficiently made out.

(iv) That section 105 did not stipulate what the threshold test should be but this had now been clarified in C: SARS v Rappa Resources(Pty) Ltd, supra, where the court had held that the High Court will only permit such a deviation from the objection and appeal procedure in exceptional circumstances.

(iv) That, similarly, in terms of section 7(2)(c) of PAJA the test for a court to exempt a party from following internal remedies was 'exceptional circumstances.' Thus, although SARS had raised both section 105 of the TAA and section 7(2)(c) of PAJA, and formally they constituted separate enquiries, the analysis under both will be the same, given the identical threshold, albeit that the one emerges from case law and the other from the language of the text.

(v) That the only relevant point made by the taxpayers in support of their submission for 'exceptional circumstances' was that the nature of the dispute was purely legal and the High Court was on this argument in as good a position to decide the matter as the Tax Court.

(vi) That the nub of the taxpayers' argument then was that if SARS had not complied with the requirements of section 42(2)(b) of the TAA, this was a purely legal issue and hence qualified as an 'exceptional circumstance.'

(vii) That in regard to the 'exceptional circumstances' test post Rappa, the law is now clear. The default rule is that disputes are to be heard in the Tax Court. This means that the applicant must make out a case for exceptional circumstances and the mere fact that the case simply raises a question of law did not suffice to constitute an exceptional circumstance.

(ix) That the taxpayers in their second set of heads of argument contended that even though both courts may have jurisdiction, it would be appropriate for the High Court to assume jurisdiction because their review point was good. But as SARS pointed out, prospects for success do not justify failing to exhaust internal remedies. Such an approach was rejected by the Supreme Court of

Appeal in Nichol and Another v Registrar of Pension Funds and Others 2008 (1) SA 383 (SCA). That case dealt with section 7(2) of PAJA but as a matter of principle it was equally applicable here.

(x) That the court then asked what the exceptional circumstances were in this case and reiterated the decision of Thring J in MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas 2002 (6) SA 150 (C) where the court discussed the meaning and stated, inter alia, that what is ordinarily contemplated by the words 'exceptional circumstances' was something out of the ordinary and of an unusual nature; something which is expected in the sense that the general rule does not apply to it; something uncommon, rare or different..'

(xi) That the decision on finality of an audit was one to be made by SARS and not the taxpayers. What the taxpayers were suggesting, then, was that SARS was not bona fide on this point. But this did not assist them in extracting a pure point of law. It still remained a mixed question of fact and law and hence did not on the case law meet the grounds of being exceptional.

(xii) That, as to the adequacy of reasons given by SARS, this required engaging with the issues set out in SARS' July letter as well as the responses from the taxpayers and SARS' final view expressed in its March letter and it was precisely the type of enquiry best suited to the specialist [tax] court and this issue then was a mixed question of fact and law and did not meet the exceptionality threshold.

(xiii) That, as well, the burden of requiring parties to exhaust internal remedies was not a technical machination to deny a party their day in court. There were important policy grounds for doing so as the Constitutional Court had explained in Koyabe v Minister of Home Affairs 2010 (4) SA 327 (CC). The court mentioned only some of them relevant here. They were: undermining the autonomy of the administrative process; prematurity; and the need to benefit from specialist knowledge.

(xiv) That all the issues raised by the taxpayers could be decided in terms of the provisions of the TAA. First the objection process and then failing that the right to appeal.

(xv) That the taxpayers were not prejudiced from having to go through a whole appeal if they might succeed on their review point. As had been held by Binns-Ward in Forge Packaging (Pty) Ltd v C:SARS 85 SATC 357 the rules of the Tax

Court allowed a party to argue a point of law before the appeal was decided and the court referred to Tax Court Rule 42 read with Uniform Rule 33(4).

(xvi) That the taxpayers did not require SARS to withdraw its decision in terms of section 9 of the TAA. That section made it clear that an objection and appeal can be made without the need for a withdrawal because this process was excluded by the language of that section.

(xvii) That SARS had correctly argued that there was nothing that the taxpayers could obtain from a withdrawal that they could not get from the objection and appeal process. The court therefore did not consider that there was any basis for this relief either, given the nature of the internal remedies available to them.

(xviii) That the concern of the taxpayers in this matter seemed to be less about whether they had an adequate remedy by following their internal remedies in terms of the TAA than the fact, oft cited in their heads of argument, that by going that route they are prejudiced by having to follow the 'pay now argue later' principle.

(xix) That the 'pay now argue later' principle may have been a burden to them, but it was not one relevant to whether this court should exercise its jurisdiction in terms of section 105 of the TAA. That was the fate of all taxpayers who dispute a SARS assessment and it was not a basis for exceptional circumstances.

(xx) That SARS for SARS had succeeded in his preliminary objections and the taxpayers had not made out a case for this matter to be heard in the High Court in terms of section 105 of the TAA. For the same reasons but by a different mechanism, they had not made out a case for why they had not exhausted their internal remedies in terms of the TAA, and thus they had not complied with section 7(2) of PAJA. Despite their initial contentions to the contrary, these were threshold issues which they had to meet and for the reasons already given, they had not done so.

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

7. DRAFT INTERPRETATION NOTES

7.1. Consequences of an employer's failure to deduct or withhold employees' tax

This Note explains how certain of the employees' tax obligations of an employer and the income tax obligations of an employee operate in relation to each other when an employer incurs personal liability for failing to deduct or withhold employees' tax.

The employees' tax system was introduced into the Act in 1963 by the addition of the Fourth Schedule. It obliges employers to deduct or withhold employees' tax from remuneration paid or payable to employees, and to pay such amounts over to SARS.

It may occur that an employer does not comply with its obligation to deduct or withhold employees' tax. The employer's non-compliance will normally create additional obligations for both the employer and the employee. This Note discusses these obligations.

Amounts required to be deducted or withheld by an employer by way of employees' tax from remuneration paid or payable to employees are advance payments in respect of the income tax liability of the employees. The employer has an obligation to deduct or withhold employees' tax and a general obligation to pay over the amount so deducted or withheld to SARS. If the employer fails to deduct or withhold, or to pay over, the employer incurs a personal liability to SARS.

An employee incurs a debt owing to the employer at the same time that the employer incurs personal liability to SARS, for the same amount of tax. A taxable benefit may arise in the hands of the employee if the employer does not charge interest on this debt, or if the employer releases the employee from the obligation to repay the debt.

The employer has a statutory right to recover the amount paid to SARS under its personal liability, from the employee. Until this occurs, the employee is not entitled to an employees' tax certificate, and may not claim any tax credit for the shortfall on assessment.

Any amount paid by an employer under its personal liability is deemed to be a penalty and is not deductible in the determination of the taxable income of the employer, if the employer does not recover those amounts from the employee concerned.

The employer making payment under its personal liability, and the employee also paying an income tax liability on the untaxed remuneration, does not amount to double

taxation, as the amounts are taxed in the hands of different persons, on different grounds.

8. VAT RULINGS

8.1. Apportionment – VR 001

This VAT ruling approves the method of apportionment being the transaction-based method, which is applied to the Applicant, a private client wealth management business, offering specialised advisory services to high-net-worth individuals.

In this VAT ruling, all references to sections hereinafter are to sections of the VAT Act unless otherwise stated. Unless the context indicates otherwise any word or expression in this VAT ruling bears the meaning ascribed to it in the VAT Act.

This VAT ruling concerns the interpretation and application of the following provisions of the VAT Act:

- Section 1(1)
- Section 16
- Section 17(1)

Parties to the application

The Applicant is a private client wealth management business, offering specialised advisory services to high-net-worth individuals.

Description of the transactions

The Applicant is a wealth management business which conducts the following activities:

- Offering specialised advisory services to high-net-worth individuals
- Client referrals to group companies
- Holding investments in subsidiaries

The following income streams are received:

- Advisory fees. Its objective is to create a solid sustainable fee-based income stream from advising clients

- Commissions from group companies for client referrals
- Interest income earned on surplus funds in its bank accounts
- The Applicant also receives dividend income from some of its subsidiary companies

SARS is requested to issue a ruling under section 41B, read with section 17(1), confirming that the Applicant may apply the transaction-based method.

Conditions and assumptions

This VAT ruling is subject to the Standard Terms, Conditions and Assumptions issued by SARS, and the provisions of Chapter 7 of the Tax Administration Act, excluding sections 79(4)(f), (k), (6) and 81(1)(b).

Ruling

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

The Applicant may, for the purpose of determining the ratio to be applied to the VAT incurred relating to mixed expenses (refers to expenses incurred partly for making taxable supplies and partly for other non-taxable purposes (for example, exempt supplies or private use)), apply the transaction-based method of apportionment as set out below:

$y = a / (a + b + c) \times 100$

where:

y	=	The input recovery rate to be applied to VAT on mixed expenses
a	=	The total number of transactions in respect of taxable supplies during the period
b	=	The total number of transactions in respect of exempt supplies during the period
c	=	The total number of transactions in respect of non-taxable supplies

A transaction for purposes of calculating the apportionment ratio as set out in above is determined as follows:

Taxable supplies

- Advisory fees – these transactions are processed monthly based on advice provided to clients. The number of transactions that will be included as part of taxable income will be based on the fees processed monthly, that is, each fee receipted in the General Ledger (GL) will be counted as one transaction.
- Commissions and other income – this income is earned monthly based on client referrals. The number of transactions that will be included as part of taxable income will be based on the number of commissions recorded on the GL per month.

Exempt supplies

- Interest earned on surplus funds – The interest earned on surplus funds is processed once a month when the amount of interest on the balance in the account is allocated. The number of transactions that will be included as part of the exempt transactions annually in this instance will be twelve transactions.

Non–supplies

- Dividend income – Calculated as the greater of the actual dividend income received from the subsidiaries, that is, the number of transactions counted depending on the number of times dividends are receipted in GL, or a proxy for dividend income transactions from the subsidiaries, that is, an interim dividend and final dividend per subsidiary, which will amount to eight transactions per annum for the four subsidiaries.

8.2. Apportionment – VR 002

This ruling approves the method of apportionment being the transaction-based method which is applied to a vendor in the Stockbroking industry.

In this ruling, all references to sections hereinafter are to sections of the VAT Act unless otherwise stated. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the VAT Act.

This ruling concerns the interpretation and application of the following provisions of the VAT Act:

- Section 1(1) – definition of "input tax"
- Section 16

- Section 17(1)

Parties to the application

The Applicant is a subsidiary of a Group Company and is an independent stockbroking company registered with the Johannesburg Stock Exchange (the JSE) and a member of the South Africa Institute of Stockbrokers (SAIS).

Description of the transactions

The Applicant offers equity trading services to its clients for which it charges fees such as brokerage/commission which is done on an agency basis. The Applicant also actively trades in the equity market for its own account and benefit, that is, as principal and earns exempt income from this activity.

The Applicant is a company which conducts the following activities:

- Transacting in JSE-listed instruments on an agency basis on behalf of institutional clients
- Entering into equity contracts for difference (CFD) and market-making in Exchange Traded Funds (ETF) and other JSE-listed instruments The following income streams are received:
- Brokerage
- Profit or losses relating to the selling of derivatives (baskets of CFDs otherwise also referred to as portfolio swaps)
- Execution premium on these baskets of CFDs
- Other fee income
- Interest income
- Profit and losses relating to its trading in equities

SARS is requested to issue a ruling under section 41B, read with section 17(1), confirming that the vendor may apply the transaction-based method of apportionment with effect from the commencement of the 2022 financial year.

Conditions and assumptions

This VAT ruling is subject to the Standard Terms, Conditions and Assumptions issued by SARS, and the provisions of Chapter 7 of the Tax Administration Act, excluding sections 79(4)(f), (k), (6) and 81(1)(b).

Ruling

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

The Applicant may, for the purpose of determining the ratio to be applied to the VAT incurred relating to mixed expenses (Refers to expenses incurred partly for making taxable supplies and partly for other non-taxable purposes (for example, exempt supplies or private use)), apply the transaction-based method of apportionment as set out below:

y = a / (a + b + c) x 100 where:

y	=	Apportionment ratio/percentage
a	=	The total number of taxable transactions for the period
b	=	The total number of exempt transactions for the period
c	=	The total number of any other transactions not included in "a" or "b" in the formula which were generated during the period

A transaction will be counted as follows:

Taxable transactions

- Proprietary trading (S) – number of transactions per the BDA report
- Research services - the research services will also be counted based on the number of invoices issued by the Applicant

Exempt transactions

- Agency trading (C/DA) - number of transactions per the BDA report
- The interest earned by the Applicant must be included in the apportionment formula as follows:
    - Interest earned on operating account – one transaction per month which equates to 12 per annum.
    - Interest earned on cash collateral placed (note that in some instances equities are placed as collateral on which no interest is earned) – as the

collateral remains in place the interest earned would be counted in each month. For example, if the collateral is placed with the lender for 12 months, 12 exempt transactions would be included in the formula.

- Interest earned as a "lender of last resort" on collateral placed with the JSE – one transaction per month which equates to 12 per annum.
- Interest earned on collateral placed with the JSE in its capacity as a Clearing House - one transaction per month which equates to 12 per annum.
- The CFD and related margin settles daily. There are on average approximately 10 settlement transactions daily. This will be included in the formula as exempt.
- Execution Premiums are invoiced once per month.

8.3. Apportionment – VR 003

This ruling approves the method of apportionment being the varied turnover-based method which is applied to a vendor which is a holding company and an investment company.

In this ruling, all references to sections hereinafter are to sections of the VAT Act unless otherwise stated. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the VAT Act.

This ruling concerns the interpretation and application of the following provisions of the VAT Act:

- Section 1(1) – definition of "input tax"
- Section 16
- Section 17(1)

Parties to the application

The Applicant is a sizeable investment company with access to larger transactions and increased investment portfolio diversification.

Description of the transactions

The Applicant’s asset value enable it to develop robust investment platforms in key growth areas, particularly in the infrastructure, media, information and communications technology (ICT), healthcare, resources, power, property and financial services.

The following income streams are received:

- Director fees
- Sundry income
- Management fees; expense recoveries from group companies
- Bank interest
- Invest in short term deposits in terms of the groups treasury policy
- Preference shares dividend

SARS is requested to issue a ruling under section 41B, read with section 17(1), confirming that the Applicant may apply the varied turnover-based method which includes all income streams with the following variations:

Including:

- net interest margin where funds are borrowed to on-lend (Where the cost of funding is higher than the interest received from related party, the interest received should be limited to nil);
- dividends calculated by multiplying the dividends received during the year with the net interest margin (that is, the prime interest rate less JIBAR); and

Excluding:

- interest earned from bank accounts (current, term investment, call and money market accounts which includes the interest earned in respect of funds deposited in terms investments);
- proceeds from disposal of capital investments held for long term investment purposes;

with effect from the commencement of the 2023 financial year.

Conditions and assumptions

This VAT ruling is subject to the Standard Terms, Conditions and Assumptions issued by SARS, and the provisions of Chapter 7 of the Tax Administration Act 28 of 2011, excluding sections 79(4)(f), (k), (6) and 81(1)(b).

Ruling

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

The Applicant may, for the purpose of determining the ratio to be applied to the VAT incurred relating to mixed expenses (refers to expenses incurred partly for making taxable supplies and partly for other non-taxable purposes (for example, exempt supplies or private use)) , apply the varied turnover-based method of apportionment as set out below:

$y = a / (a + b + c) \times 100$

where –

y = Apportionment ratio/percentage

a = The value of all taxable supplies made during the period

b = The value of all exempt supplies made during the period,

including:

- net interest income (the net interest margin on loans granted to the related parties, should be the greater of:
  - the actual interest rate charged to the related party less deemed interest expense (JIBAR/ZORONIA), or
  - Prime Interest Rate less JIBAR/ZORONIA);
- all other interest received from accounts held with financial institutions;

excluding:

- interest received from operating bank account (that is for example the current accounts) held with financial institutions which are used for the day-to-day operations; and

c = The sum of any other amounts of income not included in "a" or "b" in the formula, which were received, or which accrued during the period (whether in respect of a supply or not) –

including –

- dividend income received, calculated as follows:
    - o dividend amount received multiplied with the margin, that is the difference between Prime Interest Rate and JIBAR/ZORONIA.

Note: All income streams should be taken into account when determining the apportionment ratio based on the formula above, except as otherwise provided in the formula. All the other notes in respect of the formula for the standard turnover-based method contained in BGR 16 (Issue 2 of 30 March 2015) shall apply (where applicable).

The prime interest rate to be used for all the adjustments listed above is the applicable prime interest rate at the end of the financial year.

The JIBAR to be used for all adjustments listed above is the 12-month term rate quoted on the last day of the financial year.

8.4. Apportionment – VR 004

This ruling approves the method of apportionment being the varied turnover-based method which is applied to a vendor in the financial industry.

In this ruling, all references to sections hereinafter are to sections of the VAT Act unless otherwise stated. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the VAT Act.

This ruling concerns the interpretation and application of the following provisions of the VAT Act:

- Section 1(1) – definition of "input tax"
- Section 16
- Section 17(1)

Parties to the application

The Applicant is incorporated in South Africa (SA) and an authorised credit provider.

Description of the transactions

The Applicant's principal activity is the provision of financial services and mainly offers production loans and trades in the financial industry.

The following income streams are received:

- Interest
- Administration fees
- Initiation fees

SARS is requested to issue a ruling under section 41B, read with section 17(1), confirming that the vendor may apply the varied turnover-based method which includes all income streams with the following variations:

Including:

- net interest (interest earned less interest paid);

Excluding:

- bank interest received; and
- accounting entries,

with effect from the commencement of the 2023 financial year.

Conditions and assumptions

This VAT ruling is subject to the Standard Terms, Conditions and Assumptions issued by SARS, and the provisions of Chapter 7 of the Tax Administration Act 28 of 2011, excluding sections 79(4)(f), (k), (6) and 81(1)(b).

Ruling

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

The Applicant may, for the purpose of determining the ratio to be applied to the VAT incurred relating to mixed expenses (refers to expenses incurred partly for making taxable supplies and partly for other non-taxable purposes (for example, exempt supplies or private use)), apply the varied turnover-based method of apportionment as set out below:

$y = a / (a + b + c) \times 100$

where:

y = Apportionment ratio/percentage

a = The value of all taxable supplies made during the period

b = The value of all exempt supplies made during the period:

including:

- net interest income calculated based on the actual interest received less actual interest paid;

excluding:

- interest earned in operating bank accounts used for day-to-day operations;

c = The sum of any other amounts of income not included in “a” or “b” in the formula, which were received, or which accrued during the period (whether in respect of a supply or not):

excluding:

- accounting entries.

Note: All income streams should be taken into account when determining the apportionment ratio based on the formula above, except as otherwise provided in the formula. All the other notes in respect of the formula for the standard turnover-based method contained in BGR 16 (Issue 2 of 30 March 2015) shall apply (where applicable).

8.5. Apportionment – VR 005

This ruling approves the method of apportionment being the varied turnover-based method which is applied to a vendor which is a subsidiary of an investment holding company in the fuel industry.

In this ruling, all references to sections hereinafter are to sections of the VAT Act unless otherwise stated. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the VAT Act.

This ruling concerns the interpretation and application of the following provisions of the VAT Act:

- Section 1(1) – definition of "input tax"
- Section 16
- Section 17(1)

Parties to the application

The Applicant is a wholly owned subsidiary of an ultimate investment holding company which is listed on the Johannesburg Stock Exchange.

Description of the transactions

The Applicant is responsible for developing, implementing and managing international ventures based on the Applicant's proprietary technology.

The Applicant is a company which conducts the following activities:

- Rendering of management services
- Technical services
- Administration support services

The following income streams are received:

- Local interest
- Foreign interest
- Joint venture (JV) distributions
- JV charges

SARS is requested to issue a ruling under section 41B, read with section 17(1), confirming that the vendor may apply the varied turnover-based method which includes all income streams with the following variations:

Including:

- JV distributions, limited to management fees charged,

with effect from the commencement of the 2023 financial year.

Conditions and assumptions

This VAT ruling is subject to the Standard Terms, Conditions and Assumptions issued by SARS, and the provisions of Chapter 7 of the Tax Administration Act 28 of 2011, excluding sections 79(4)(f), (k), (6) and 81(1)(b).

Ruling

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

The Applicant may, for the purpose of determining the ratio to be applied to the VAT incurred relating to mixed expenses (refers to expenses incurred partly for making taxable supplies and partly for other non-taxable purposes (for example, exempt supplies or private use)), apply the varied turnover-based method of apportionment as set out below:

y = a / (a + b + c) x 100

where –

y = Apportionment ratio/percentage

a = The value of all taxable supplies made during the period:

including:

- zero-rated net interest income calculated as the greater of:
  - actual interest rate charged by the Applicant less an imputed interest expense using JIBAR[2] when calculating the cost of borrowings; and
  - Prime Interest Rate less JIBAR;
- include all other interest received from accounts held with offshore financial institutions;

b = The value of all exempt supplies made during the period:

including:

- net interest income calculated as the greater of:
  - actual interest rate charged by the Applicant less an imputed interest expense using JIBAR when calculating the cost of borrowings; and
  - Prime Interest Rate less JIBAR;

- include all other interest received from accounts held with financial institutions;

excluding:

- interest received from current accounts (that is cheque accounts) held with financial institutions which are used for the day-to-day operations;

c = The sum of any other amounts of income not included in “a” or “b” in the formula, which were received, or which accrued during the period (whether in respect of a supply or not):

including:

- JV distributions received, calculated by averaging the JV distribution income over a period of five years (that is, the current and previous four financial years) and multiplying the averaged JV distribution amount by the margin, that is the difference between the Prime Interest Rate and JIBAR.

Note: All income streams should be taken into account when determining the apportionment ratio based on the Formula above, except as otherwise provided in the Formula. All the other notes in respect of the formula for the standard turnoverbased method contained in BGR 163 shall apply (where applicable). The prime rate to be used for all the adjustments listed above is the applicable prime rate at the end of the financial year. The JIBAR rate to be used for all adjustments listed above is the 12-month term rate quoted on the last day of the financial year.

8.6. Apportionment – VR 006

This ruling approves the method of apportionment being the varied turnover-based method which is applied to a vendor in the asset-based financial services.

Relevant tax laws In this ruling, all references to sections hereinafter are to sections of the VAT Act unless otherwise stated. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the VAT Act.

This ruling concerns the interpretation and application of the following provisions of the VAT Act:

- Section 1(1) – definition of “input tax”
- Section 16
- Section 17(1)

Parties to the application

The Applicant is the holding company of various South African (local) and non-South African (foreign) subsidiaries.

Description of the transactions

In addition to acting as an investment holding company, the Applicant provides administrative support and management services to these various group companies for which it charges fees on an ongoing basis.

The Applicant operates via two divisions, namely a Holdings Division which generally services South African group companies, and the Africa Holdings Division which services other non-South African group companies. The two divisions are separately identifiable, and the financial transactions of each division are separately recorded for accounting purposes.

The following income streams are received:

- Management fees
- Ad hoc fees may be earned from providing guarantees and from expense recoveries charged to group companies
- Dividend income, primarily from ordinary shares it owns in group companies
- In addition, it owns shares in certain non-group companies, and it may from time-to-time own preference shares in group companies
- Interest income from loans provided to certain group companies and other interest-bearing investments
- Interest income earned on current (cheque) accounts, bank call accounts and money market call accounts

SARS is requested to issue a ruling under section 41B, read with section 17(1), confirming that the vendor may apply the varied turnover-based apportionment method which includes all income streams with the following variations:

including:

- dividend income, limiting to the taxable administrative support and management fees charged during the financial year in question;

excluding:

- interest income earned from bank current accounts;
- amounts distributed as a dividend in specie in terms of any restructuring transaction undertaken by the Applicant,

with effect from the commencement of the 2022 financial year.

Conditions and assumptions

This VAT ruling is subject to the Standard Terms, Conditions and Assumptions issued by SARS, and the provisions of Chapter 7 of the Tax Administration Act 28 of 2011, excluding sections 79(4)(f), (k), (6) and 81(1)(b).

Ruling

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

The Applicant may, for the purpose of determining the ratio to be applied to the VAT incurred relating to mixed expenses (refers to expenses incurred partly for making taxable supplies and partly for other non-taxable purposes (for example, exempt supplies or private use)), apply the varied turnover-based method of apportionment as set out below:

$y = a / (a + b + c) \times 100$

where –

y = Apportionment ratio/percentage

a = The value of all taxable supplies (including deemed taxable supplies) made during the period

b = The value of all exempt supplies made during the period

including:

- net trading interest, calculated by deducting an imputed interest expense (based on JIBAR2) from total interest received;

- in respect of loans to related parties, net interest is calculated as the greater of:
  - ➢ actual interest rate charged by the Applicant less an imputed interest expense using JIBAR; or
  - ➢ Prime Interest Rate less JIBAR;

excluding:

- interest received from current accounts (that is, for example, the cheque account) held with financial institutions which are used for the day-to-day operations.

c = The sum of any other amounts of income not included in “a” or “b” in the formula, which were received, or which accrued during the period (whether in respect of a supply or not):

including:

- dividends, calculated based on the difference between Prime Interest Rate and JIBAR, multiplied by the dividends received;

excluding:

- dividend in specie.

Notes:

- The Applicant may continue calculating a separate apportionment ratio for each of its two divisions.
- Where mixed expenses cannot be separately attributed to either of the two divisions, the Applicant must calculate an apportionment ratio, based on the method as set out above for the business as a whole and apply the ratio to the said expenses.

8.7. Apportionment – VR 007

This ruling approves the method of apportionment being the varied turnover-based method which is applied to a vendor in the micro-lending industry.

In this ruling, all references to sections hereinafter are to sections of the VAT Act unless otherwise stated. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the VAT Act.

This ruling concerns the interpretation and application of the following provisions of the VAT Act:

- Section 1(1) – definition of "input tax"
- Section 16
- Section 17(1)

Parties to the application

The Applicant is a special purpose vehicle which purchases instalment credit agreements under a securitisation transaction.

Description of the transactions

The principal activity of the Applicant is to acquire and/or hold financial receivables and to issue notes in order to raise capital, to acquire, refinance and settle the receivables. The Applicant purchases instalment sale agreements from a financial services provider and trades in the micro-lending industry.

The following income streams are received:

- Fees under the National Credit Act 34 of 2005
- Early settlement fees
- Profit on settlement
- Interest income on instalment sale assets receivables

SARS is requested to issue a ruling under section 41B, read with section 17(1), confirming that the vendor may apply the varied turnover-based method which includes all income streams with the following variations:

including:

- the proceeds from the sale of repossessed goods;
- dividend income, limiting to the taxable administrative support and the net interest margin (interest receipts that are reduced by the interest portion of the actual bad debts written off less interest paid);

- net interest margin (interest receipts that are reduced by the interest portion of the actual bad debts written off less interest paid);
- a three-year moving average of the net trading margin from financial asset trading activities (such as interest rate swaps), each amount to be included in the three-year moving average calculation expressed as an absolute, irrespective of whether it is a negative or a positive value;

excluding:

- the portion of the actual bad debts written off relating to the fee income;
- the capital value of all loans supplied in terms of the ICAs,

with effect from the commencement of the 2024 financial year.

Conditions and assumptions

This VAT ruling is subject to the Standard Terms, Conditions and Assumptions issued by SARS, and the provisions of Chapter 7 of the Tax Administration Act 28 of 2011, excluding sections 79(4)(f), (k), (6) and 81(1)(b).

Ruling

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

The Applicant may, for the purpose of determining the ratio to be applied to the VAT incurred relating to mixed expenses (refers to expenses incurred partly for making taxable supplies and partly for other non-taxable purposes (for example, exempt supplies or private use)), apply the varied turnover-based method of apportionment as set out below:

$y = a / (a + b + c) \times 100$

where:

y = Apportionment ratio/percentage

a = The value of all taxable supplies (including deemed taxable supplies) made during the period:

including:

- the proceeds from the sale of repossessed goods;

- reducing the fee income from ICAs by the portion of the actual bad debts written off relating to the fee income;
- early termination fees to the extent that the fee is for the supply of a service.

b = The value of all exempt supplies made during the period:

including:

- the net interest margin (that is, interest receipts that are reduced by the interest portion of the actual bad debts written off less interest paid);
- a three-year moving average of the net trading margin from financial asset trading activities (such as interest rate swaps), each amount to be included in the three-year moving average calculation expressed as an absolute, irrespective of whether it is a negative or a positive value;
- early termination fees to the extent that the fee is an interest adjustment;

excluding:

- the capital value of all loans.

c = The sum of any other amounts of income not included in "a" or "b" in the formula, which were received, or which accrued during the period (whether in respect of a supply or not)

Notes:

- All income streams should be taken into account when determining the apportionment ratio based on the formula above, except as otherwise provided in the formula. All the other notes in respect of the formula for the standard turnover-based method contained in BGR 162 shall apply.

8.8. Apportionment – VR 008

This ruling approves the method of apportionment being the varied input-based method which is applied to a vendor in the short-term insurance industry.

In this ruling, all references to sections hereinafter are to sections of the VAT Act unless otherwise stated. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the VAT Act.

This ruling concerns the interpretation and application of the following provisions of the VAT Act:

- Section 1(1) – definition of "input tax"
- Section 16
- Section 17(1)

Parties to the application

The Applicant is a short-term insurance company that conducts short-term insurance operations and related investment activities.

Description of the transactions

The Applicant provides insurance cover directly to both individuals and business owners without the use of brokers.

The following income streams are received:

- Premium income
- Interest income (exempt)
- Dividend income
- Salvage income generated when damaged goods are sold to scrap dealers
- Receipts in terms of local reinsurance and foreign reinsurance
- Fair value adjustments on financial instruments whenever applicable

SARS is requested to issue a ruling under section 41B, read with section 17(1), confirming that the vendor may apply the varied input-based method as follows:

excluding:

- expenses incurred relating to local reinsurance recoveries; and
- expenses incurred relating to foreign reinsurance recoveries,

with effect from the commencement of the 2024 financial year.

Conditions and assumptions

This VAT ruling is subject to the Standard Terms, Conditions and Assumptions issued by SARS, and the provisions of Chapter 7 of the Tax Administration Act 28 of 2011, excluding sections 79(4)(f), (k), (6) and 81(1)(b).

Ruling

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

The Applicant may, for the purpose of determining the ratio to be applied to the VAT incurred relating to mixed expenses (refers to expenses incurred partly for making taxable supplies and partly for other non-taxable purposes (for example, exempt supplies or private use)), apply the varied input-based method of apportionment as set out below:

$y = a / (a+b) \times 100$

where –

y = Apportionment ratio/percentage

a = VAT incurred on goods or services acquired wholly for purposes of making taxable supplies:

excluding:

- expenses incurred relating to local reinsurance.

b = VAT incurred on goods or services acquired wholly for purposes of making exempt and/or out-of-scope supplies –

excluding –

- expenses incurred relating to foreign reinsurance recoveries.

Note:

The abovementioned varied input-based method is subject to the following:

- Input tax on any goods or services acquired in respect of which a deduction is specifically denied under section 17(2) must be excluded from the calculation.
- VAT incurred on capital goods or services acquired must be excluded from the calculation, unless acquired under a rental agreement or operating lease.
- The apportionment percentage should be rounded off to two decimal places.

- Where the formula yields an apportionment ratio/percentage of 95% or more, the full amount of VAT incurred on mixed-use expenses may be deducted.
- Should the previous financial year's information be used to determine the current year's apportionment ratio, the Applicant is required to make an adjustment (that is, the difference in the ratio when applying the current and previous years' financial information) within six months after the end of the financial year.

9. BINDING CLASS RULING

9.1. En commandite partners investing in solar assets – No. 88

This ruling determines the deductibility of expenditure to be incurred, and the limitation of any allowance and deductions claimed by en commandite partners investing in photovoltaic solar energy assets to be owned by the en commandite partnerships which will be installed at clients' premises in terms of power purchase agreements (PPAs).

In this ruling references to sections are to sections of the Income Tax Act applicable as at 23 January 2024. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the Act.

This is a ruling on the interpretation and application of:

- section 12B(1)(h);
- section 24H; and
- section 20(1)(b) and 20(2A)(a).

<u>Class</u>

The class members to whom this ruling will apply are the limited partners.

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

The Applicant: A resident company which will be the general partner in multiple en commandite partnerships

The Class: Resident individuals, trusts or companies who will be the en commandite partners

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

The Applicant intends to establish multiple en commandite partnerships between itself, as the general partner, and investors who will be limited partners investing in solar renewable energy generation assets contemplated in section 12B(1)(h), acquired as new installations or existing installations, to generate and sell electricity to end users in terms of PPA's entered into with clients.

A partnership will be formed for a project or a group of similar projects, and the Applicant will raise only the essential capital contributions from investors for the investment amounts required for the specific projects. Once the necessary capital commitments have been secured, a partnership will be closed. It will not be open-ended for further capital contributions by new investors, except where a new class member is substituted for an existing class member who subsequently withdraws.

A limited partner who enters into such a partnership will sign a deed of adherence which details the value of the capital contribution to be made by that limited partner to the partnership.

The class members will have limited liability in respect of the debts of the partnership as provided for in the partnership agreement or in terms of common law. If the partnership is unable to pay its debts, each class member's liability is limited to its capital contribution commitment.

The partnership will pay the profits made from the portfolio of generation assets owned by the partnerships to class members according to their partnership interests, which is based on the value of their respective capital contributions.

The Applicant will sign PPA's with clients in terms of which the clients will pay for the use of electricity generated by the generation assets and the client will lease the premises where the solar system is installed to the partnership. The partnership will own, operate, maintain and be responsible to insure the generation assets.

The generation assets will consist of the following types of assets:

- Solar photovoltaic panels
- Solar photovoltaic panels mounting structures (fixed)
- Solar photovoltaic panels mounting structures (tracking)
- Solar tracking motors, control hardware and structural components
- Grid-tied central inverters

- Grid-tied string inverters
- Solar resource measurement equipment and accessories
- Battery inverters
- Battery units, cable connections, containers, switchgear and associated control systems
- Step-up transformers and accessories
- Power transformers and accessories
- High and medium-voltage switchgear
- Battery backup systems for electrical protection systems
- Low, medium and high-voltage cabling
- Electrical distribution boards
- Electricity Metering (four-quadrant tariff metering)
- Insulation equipment (High and medium voltage)
- Reactive power compensation equipment
- Power quality measurement and correction equipment
- SCADA and power plant control systems
- Overhead power infrastructure and towers, including accessories and foundations

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:

- Under section 24H(2) each class member is deemed to carry on the trade of the partnership.
- Under section 24H(5)(a) a class member's portion of the partnership's income must be included in such class member's income in the relevant year of assessment.

- A class member is entitled to deduct its proportionate share of the partnership's deductions and allowances allowable under the Act in the determination of the class member's taxable income. Subject to section 12B(4), this will include a proportionate share of the allowances under section 12B in respect of the generation assets, previously not owned or used by the class member, that the partnership brings into use for the purpose of its trade.
- The generation assets, that are brought into use and used in the partnership's trade to generate electricity will meet the requirements of section 12B(1)(h)(ii) and will therefore qualify for the allowance as contemplated in section 12B(1)(h) read with section 12B(2).
- Under section 24H(3), in any year of assessment, the aggregate allowances and deductions that a class member may deduct in respect of or in connection with the trade carried on by the partnership, may not exceed the sum of the amount for which the class member may be held liable to any creditor (which includes the capital contribution to the partnership) and the cumulative portion of the partnership income included in the class member's income in the current and any previous years of assessment.
- Subject to section 20A, a class member may set off an assessed loss arising from the partnership's trade, determined after the application of section 24H(3), against income from carrying on any other trade during the same year of assessment under section 20(1)(b). Subject to section 20A, a class member who is not a company, may set off an assessed loss arising from the partnership's trade, determined after the application of section 24H(3), against income otherwise than from carrying on a trade under section 20(2A)(a).
- The assessed loss may not be set off against any amount from a retirement fund lump sum benefit, retirement fund lump sum withdrawal benefit or severance benefit included in taxable income.
- Any assessed loss or balance of assessed loss from carrying on a trade outside South Africa may not be set off against any amount derived from the partnership trade carried on in South Africa.
- When a class member disposes of all or part of its interest in the partnership, the class member must recoup any allowances claimed under section 12B(1)(h) and account for any capital gain or loss in respect of the decrease in its proportionate interest in the partnership assets on such disposal.

- A new class member may claim section 12B(1)(h) allowances in respect of its proportionate interest in the partnership assets acquired, provided that the new class member is acquiring and bringing such assets into use for the first time.

10. GUIDES

10.1. Guide on the Solar Energy Tax Credit provided under section 6C

This guide provides general guidance on the newly introduced solar energy tax credit under section 6C of the Income Tax Act

The current energy crisis in the country, coupled with the rising demand for electricity, has resulted in various tax incentives and policy measures being introduced in an attempt to alleviate the pressure on the national grid, as well as to improve energy efficiency in South Africa.

Although the focus has generally been to promote cleaner technologies in businesses, emphasis has shifted to also encourage the use of renewable energy technology in residential properties, while still providing further allowances to businesses.

To this effect, two short-term incentives have been introduced, namely, a solar energy tax credit under section 6C for natural persons, and an enhanced deduction on certain assets used in the production of renewable energy under section 12BA for taxpayers who conduct a trade.

This guide provides detail only on the tax credit under section 6C for natural persons.

In order to encourage households to invest in clean electricity generation capacity as soon as possible, a tax credit has been introduced under section 6C for a limited time period. Section 6C is deemed to have come into operation on 1 March 2023 and applies to years of assessment commencing on or after this date. Furthermore, this section is only available for a period of one year, that is, from 1 March 2023 to 29 February 2024.

This tax credit applies to natural persons who are liable for personal income tax and who invest in qualifying solar PV panels.

Under this section, a natural person may be eligible for the tax credit on the cost that has been actually incurred on the acquisition of qualifying solar PV panels. The cost relating to other components of a complete solar energy system such as inverters,

batteries and supporting structures do not qualify for the tax credit. The rationale behind allowing a tax credit on the cost of only the solar PV panels is because it is the solar PV panels that promote or expand electricity generation capacity in the country. Inverters and batteries on their own create no additional supply of electricity and may even increase the demand on the electrical grid. While batteries and inverters can be used on their own to provide a private benefit to a particular household, it is the addition of solar PV panels that enhances generation supply, which provides a public benefit.

Since the intention is to encourage natural persons to invest in renewable energy, the carrying on of a trade is not a requirement to be eligible to claim this tax credit.

The tax credit under section 6C is available for a limited period. The aim of this incentive is to encourage and promote renewable energy in households thereby reducing the pressure on the national electricity grid.

Section 6C applies only to natural persons meeting the strict requirements and for the years of assessment commencing on 1 March 2023 and ending on 29 February 2024. Thus, the allowance will be available only for one year.

11. 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.