TAX UPDATE

For period: July 2024 to September 2024

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1. FOREWORD

The purpose of this update is to summarise developments that occurred during the third 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. MEDIA STATEMENT: PUBLICATION OF THE 2024 DRAFT TAX BILLS AND DRAFT REGULATIONS

The National Treasury and the South African Revenue Service (SARS) today publish, for public comment, draft tax bills and draft regulations for 2024. These draft tax bills and draft Regulations contain tax proposals made in the 2024 Budget on 21 February 2024.

These are:

- the 2024 draft Taxation Laws Amendment Bill (2024 draft TLAB),
- the 2024 draft Revenue Laws Amendment Bill (2024 draft RLAB),
- the 2024 draft Tax Administration Laws Amendment Bill (2024 draft TALAB),
- draft Regulations on the method for determining the VAT liability in respect of casino table games of chance,
- issued in terms of section 74(2) of the Value-Added Tax Act, 1991,
- draft Regulations on amendments to the Carbon Offset Regulations prescribing carbon offsets in terms of section 19(c) of the Carbon Tax Act, 2019, and
- draft Regulations on domestic reverse charge relating to valuable metal in terms of 74(2) of the Value-Added Tax Act.

2024 Draft TLAB

The 2024 draft TLAB provides the necessary legislative amendments required to implement the more complex tax announcements made in Chapter 4 and Annexure C of the 2024 Budget Review that require greater consultation with the public. Key tax proposals contained in the 2024 draft TLAB include the following:

- Curbing the abuse of the employment tax incentive scheme
- Reviewing the connected person definition in relation to partnerships
- Relaxing the assessed loss restriction rule under certain circumstances
- Reviewing the prohibition against transfers of assets to non-taxable transferees in terms of an ‘amalgamation transaction’
- Clarifying anti-avoidance rules dealing with third-party backed shares
- Impact of IFRS 17 on the taxation of insurers

- An investment allowance for automotive companies investing in production capacity for electric and hydrogen-powered vehicles in South Africa
- Refining the definition of ‘exchange item’ for determining exchange differences
- Reviewing the interaction of the set-off of assessed loss rules and rules on exchange differences on foreign exchange transactions
- Retrospective amendment applicable to fuel products of heading 27.10 Clarifying the VAT treatment of supply of services to non-resident subsidiaries of companies based in the Republic
- Reviewing the foreign donor funded project regime
- Prescription period for input tax claims
- Aligning Schedule 1 of the Carbon Tax Act with the updated greenhouse gas emissions methodological guidelines
- Renewable energy premium deduction

Retrospective amendment applicable to fuel products of heading 27.10 under the Schedules to the Customs and Excise Act, 1964, and the Value-Added Tax Act

The 2024 draft TLAB also proposes a retrospective amendment applicable to fuel products of heading 27.10 under the Schedules to the Customs and Excise Act and the Value-Added Tax Act that was not announced in the 2024 Budget. Substantive proposals outside the Budget are exceptional and are made in response to exceptional events, such as the COVID-19 pandemic or the identification of pressing issues that pose a substantial threat to the fiscus. An example of such an issue was the argument advanced by certain multinationals and their advisers in 2004 that dividends could be declared to offshore group companies free of tax.

South Africa is a member of the World Customs Organisation (WCO) and a signatory to the Harmonised System Convention (HS) issued by the WCO. The HS is a multipurpose goods nomenclature used as the basis for customs tariffs and for the compilation of trade statistics all over the world. With the implementation of changes in terms of the HS recommended by the WCO for 2002 (HS2002), a new 6-digit tariff structure as well as a new subheading note were introduced to define ‘light oils and preparations’ for the purposes of subheading 2710.11 (now 2710.12). When this change was made at a national level in South Africa, all the national subheadings under 27.10 were transposed to 2710.11 as light oils and preparations, irrespective of whether the oils and preparations complied with new HS subheading Note 4, which

specifies a threshold for distillation. These provisions have been applied according to their obvious intent for many years.

More recently, however, a technical interpretation has been advanced by some industry members that would, if accepted, give rise to a glaring absurdity, render certain wording meaningless and pose a substantial threat to the fiscus. Essentially the interpretation advanced is that, due to the introduction of a distillation threshold in Note 4 applicable to subheading 2710.11 (now 2710.12), certain products previously classified under such subheading, including those expressly provided for in Additional Note 1(g), conflicted with Note 4 and ought more appropriately to have been reclassified under subheading 2710.19. A review of international practice reveals that these products are classified under subheading 2710.19. Government wishes to bring South African legislation in line with international practice and make it clear that it is not, and has never been, the intention to exclude the relevant products from fuel levies.

It is, therefore, proposed that the bulk of the products that were transposed in 2002 to 2710.11 as light oils and preparations also be transposed to subheading 2710.19 as they may have a distillation point above the threshold provided for in Note 4 applicable to 2710.11 (now 2710.12). It is further proposed that the transposition be done retrospectively from 1 January 2002, being the date this threshold for distillation was introduced at an international level.

2024 Draft RLAB

The 2024 draft RLAB 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.

2024 Draft TALAB

The 2024 draft TALAB provides more complex and technical legislative amendments dealing with tax administration made in Annexure C of the 2024 Budget Review, that also require greater consultation with the public. Key tax proposals contained in the 2024 draft TALAB include the following:

- Implementing the Constitutional Court judgment regarding access to tax records
- Simplifying the process of substituting bills of entry in certain circumstances
- Timeframe for delivery of export bills of entry
- Non-resident vendors with no or a limited physical presence in South Africa

- Timing of VAT on imported services
- Overpayments of VAT on the importation of goods and imported services
- Expanding the provision requiring the attendance and presentation of relevant information in person to include tax recovery and debt relief processes
- Clarifying provisions relating to original assessments where no return is required or a taxpayer voluntarily submits a return
- Clarifying the right to appearance before the tax court by taxpayers' representatives who are not legal practitioners and the taxation of legal costs where SARS legal practitioners appear for SARS
- Reviewing of dispute resolution proceedings to improve their efficiency
- Reviewing of temporary write-off provisions
- Removing of grace period for new company to appoint a public officer

Draft Regulations on the method for determining the VAT liability in respect of casino table games of chance, issued in terms of section 74(2) of the Value-Added Tax Act

The draft Regulations on determining the VAT liability in respect of casino table games of chance contain the following key proposals announced in Annexure C of the 2024 Budget Review:

- Clarification of the definition of a 'casino'
- Clarification of the amount to be recognised as the 'gross gaming revenue'
- Clarification of the term 'table game of chance'
- Clarification on the accounting for VAT in the VAT returns in in respect of table games of chance

Draft Regulations on the domestic reverse charge issued in terms of section 74(2) of the Value-Added Tax Act

The draft Regulations on domestic reverse charge contain the following key proposal announced in Annexure C of the 2024 Budget Review:

- The exclusion in paragraph (a) to the definition of 'valuable metal' in regulation 1 aimed at schemes and malpractices that are being shifted to the primary gold sector.

Draft Regulations on Electronic Services for the purpose of the definition of 'electronic services' in section 1 of the Value-Added Tax Act

The draft Regulations on electronic services contain the following key tax proposals announced in Annexure C of the 2024 Budget Review:

- Adding a new definition of 'content' and revising the definition of 'telecommunications services'
- Clarification relating to supplies between group of companies
- Providing the services supplied by a non-resident person where such supplies are made solely to vendors that are registered in the Republic

Draft Carbon Offset Regulations

The draft Carbon Offset Regulations contain the following key tax proposal announced in Chapter 4 of the 2024 Budget Review:

- Increasing the threshold for eligible renewable energy projects from 15 megawatts to 30 megawatts

After receipt of written comments, National Treasury and SARS normally engage with stakeholders through public workshops to discuss the written comments on the draft tax bills and draft regulations.

With regard to the 2024 draft tax bills, the Standing Committee on Finance (SCoF) and the Select Committee on Finance (SeCoF) in Parliament are expected to make a similar call for public comment and convene public hearings on the 2024 draft TLAB, 2024 draft RLAB, and 2024 draft TALAB, before their formal introduction in Parliament. It is further expected that the same will be accorded by SCoF and SeCoF to the 2024 Draft Rates and Monetary Amounts Bill, Draft Global Minimum Tax Bill and Draft Global Minimum Tax Administration Bill that were published for comment on 21 February 2024.

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 its consideration. The tax bills will be tabled in Parliament later this year. For legal reasons, the tax amendments continue to be split into two types of bills, namely a money bill (section 77 of the Constitution) dealing with money bill issues and an ordinary bill (section 75 of the Constitution) dealing with issues relating to tax administration.

With regard to the draft regulations, after National Treasury and SARS have engaged with stakeholders through public workshops to discuss the written comments, the Notices on Regulations on determining the VAT liability in respect of casino table games of chance, Regulations on domestic reverse charge relating to valuable metal in terms of 74(2) of the Value-Added Tax Act, Regulations on electronic services and Carbon Offset Regulations will be published in the Government Gazette after taking into account public comments to be received.

The 2024 draft tax bills, the accompanying draft Explanatory Memoranda containing a comprehensive description of the proposed tax amendments contained in the 2024 draft TLAB, 2024 draft RLAB, draft TALAB, the draft Regulations on determining the VAT liability in respect of casino table games of chance, draft Regulations on domestic reverse charge, draft Regulations on electronic services and Carbon Offset Regulations can be found on the National Treasury (www.treasury.gov.za) and SARS (www.sars.gov.za) websites.

More general information underlying the changes in rates, thresholds or any other tax amendments can be found in the 2024 Budget Review, available on the National Treasury website.

Due date for public comments on the 2024 draft tax bills and draft Regulations

With respect to the 2024 RLAB published for comment on 21 February 2024 and public workshops held on 6 June 2024, National Treasury and SARS invite a second round of comments in writing on this revised 2024 draft RLAB. 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 close of business on 16 August 2024.

National Treasury and SARS invite comments in writing on the 2024 draft TLAB, 2024 draft TALAB, the draft Regulations on determining the VAT liability in respect of casino table games of chance, draft Regulations on domestic reverse charge and draft Regulations on electronic services and Carbon Offset Regulations. 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 close of business on 31 August 2024.

- 2024 Draft Taxation Laws Amendment Bill (2024 draft TLAB)
- 2024 Draft Revenue Laws Amendment Bill (2024 draft RLAB)
- 2024 Draft Tax Administration Laws Amendment Bill (2024 draft TALAB)

- Draft Regulations on the method for determining the VAT liability in respect of casino table games of chance, issued in terms of section 74(2) of the Value-Added Tax Act, 1991,
- Draft Regulations on the domestic reverse charge issued in terms of section 74(2) of the Value-Added Tax Act, 1991
- Draft Regulations on Electronic Services for the purpose of the definition of ‘electronic services’ in section 1 of the Value-Added Tax Act
- Draft Regulations on amendments to the Carbon Offset Regulations prescribing carbon offsets in terms of section 19(c) of the Carbon Tax Act, 2019 Issued by Ministry of Finance Date: 1 August 2024

3. DRAFT EXPLANATORY MEMORANDUM ON THE DRAFT TAXATION LAWS AMENDMENT BILL, 2024

3.1. Curbing the abuse of the employment tax incentive scheme

[Applicable provisions: Sections 1(1) and 5(3) of the Employment Tax Incentive Act, No. 26 of 2013 (‘the ETI Act’)]]

Background

In 2013, the Government introduced the Employment Tax Incentive (ETI) as an incentive aimed at encouraging employers to hire young work seekers. The ETI reduces the cost of hiring young people to employers through a cost-sharing mechanism with the government while leaving the wage the employee receives unaffected. The ETI commenced on 1 January 2014 and is due to expire on 28 February 2029.

Reasons for change

In the past three years, the Government has amended the ETI Act to curb abuse of the incentive through aggressive tax schemes. These schemes often involved training institutions claiming the incentive for students classified as employees under the ETI Act, who, however, never received cash payouts in their bank accounts. Instead, the training institutions would deduct training fees from their wages. The Government's position is that training costs should be the responsibility of the employer. The misuse of the ETI for creating fictitious employment, primarily to exploit the incentive, contradicts the policy's intention.

It is essential to emphasise that millions of young South Africans are excluded from economic participation, resulting in high levels of unemployment, discouragement, and economic marginalisation. This high youth unemployment rate prevents young people from acquiring the skills and experience necessary to drive economic growth, potentially leading to long-term adverse effects on the economy. The primary purpose of the ETI is to incentivise employers to hire young job seekers, providing them with a living wage and valuable work experience for future employability.

Proposal

It is proposed that punitive measures to curb the abuse of ETI be refined in the legislation to address the abusive behaviour of certain taxpayers towards the incentive.

Effective date

The proposed amendments will come into operation on 1 March 2025 and apply in respect of years of assessment commencing on or after that date.

3.2. Amending the definition of 'remuneration proxy' in section 1

[Applicable provision: Definition of 'remuneration proxy' in section 1 of the Income Tax Act No. 58 of 1962 ('the Act')]

Background

In the tax legislation, the meaning of an employer-employee relationship is generally expanded to include an 'associated institution' as defined in paragraph 1 of the Seventh Schedule to the Act. In addition, the concept of an 'associated institution' has the purpose and effect of expanding the employer-employee relationship to the granting of a taxable benefit to an employee. With effect from 1 March 2014, the definition of 'remuneration proxy' was introduced in section 1 of the Act with the purpose that the design of the definition of 'remuneration proxy' in section 1 to specifically refer to an 'associated institution' as defined in paragraph 1 of the Seventh Schedule to the Act.

Reasons for change

In 2013, the definition of 'remuneration factor' in paragraph 9(1) of the Seventh Schedule to the Act was deleted and the definition of 'remuneration proxy' was inserted in section 1 of the Act effective 1 March 2014. Currently, the term 'associated institution' is used in the definition of 'remuneration proxy' with its ordinary meaning, as 'associated institution' is not defined in the main body of the Act, but in the Seventh Schedule. Since the ordinary meaning of the term 'associated institution' is used in the

definition of ‘remuneration proxy’ in section 1 of the Act, this creates an inconsistency in the application of:

- Section 10(1)(q)(ii)(aa) of the Act for any bona fide scholarship or bursary granted by the employer to enable or assist any person to study;
- Section 10(1)(qA)(ii)(aa) of the Act for any bona fide scholarship or bursary to enable any person living with a disability to study;
- Paragraph 5(3A)(a) of the Seventh Schedule to the Act, which caters for the no-value provision regarding the cash equivalent for employer-provided accommodation (low-cost housing); and
- Paragraph 9(3)(i) of the Seventh Schedule to the Act dealing with the rental value to be placed on employer-provided residential accommodation.

The difficulty lies with the term ‘associated institution’ which cannot be given its ordinary meaning but be given its meaning by reference to where it is defined in the Act, i.e. in paragraph 1 of the Seventh Schedule. Therefore, Government proposes aligning the policy objective for an ‘associated institution’ to carry its intended meaning and use in the Act.

Proposal

It is proposed that a cross-reference be added in the definition of ‘remuneration proxy’ to refer to the definition of an ‘associated institution’ by reference to paragraph 1 of the Seventh Schedule to the Act.

Effective date

The proposed amendment will come into operation on 1 March 2025 and apply in respect of years of assessment commencing on or after that date.

3.3. Payroll amendments and refunds made in the current year

[Applicable provision: Section 11(nA) of the Act]

Background

From the year of assessment commencing on 1 March 2009, the legislation allows a deduction of any amount included in the taxable income of an employee and the said amount is subsequently refunded by the employee to the employer. This is in terms of section 11(nA) of the Act which permits a deduction for any amount, including any voluntary award, received or accrued for services rendered, employment or holding of

an office, and the amount included in taxable income is subsequently refunded by the recipient.

Reasons for change

Section 11(nA) of the Act only permits a deduction for an amount that was refunded by an employee, but only if it was previously included in taxable income. As it stands, the legislation currently reads ‘as was included in the taxable income of that person and is refunded by that person’. The words ‘was included’ create an interpretation challenge for refunds taking place in the same year of assessment. The law is currently interpreted to mean that prior inclusion in taxable income is required or must take place before the refund can be claimed as a deduction. As a result, the interpretation meaning of section 11(nA) of the Act is limited only to refunds made in a year of assessment occurring after initial inclusion in taxable income. If the refund occurs in the same year of assessment as income received, there would be no prior inclusion in taxable income, as taxable income is only determined after the year of assessment has concluded.

In the past, SARS has informally allowed payroll administrators to make corrections within the same year of assessment to avoid prejudicing taxpayers. However, with the introduction of monthly payroll reporting, it is now necessary to amend section 11(nA) of the legislation. This amendment should explicitly clarify that refunds made within the same year of assessment can be allowed as a deduction under section 11(nA) of the Act if the income received is included in taxable income.

Proposal

It is proposed to amend section 11(nA) of the Act to explicitly state that refunds occurring within the same year of assessment can be allowed as a deduction under section 11(nA) of the Act if the income received is included in taxable income.

Effective date

The proposed amendment will come into operation on 1 March 2025 and apply in respect of years of assessment commencing on or after that date.

3.4. Clarifying anti-avoidance rules for low-interest or interest-free loans to trusts

[Applicable provision: Section 7C of the Act]

Background

The Act contains a trust anti-avoidance measure aimed at curbing the tax-free transfer of wealth to trusts (both local and foreign) using low-interest or interest-free loans, advances or credit arrangements (including cross-border loan arrangements). In terms of the trust anti-avoidance measure, interest incurred by the trust at an interest rate lower than the official rate of interest in respect of a loan, advance or credit made to the trust is treated as ongoing and annual donation made by a natural person or a company that is a connected person in relation to that natural person, on the last day of the year of assessment of that trust. The amount of the deemed donation made by the natural person to the trust is determined as the difference between the interest charged on the loan, advance or credit and the interest that would have been payable by the trust had the interest been charged at the official rate of interest.

Similarly, the transfer pricing rules in the Act also apply to counter the mispricing of any transaction, operation, scheme, agreement or understanding (including cross-border loan arrangements). In terms of a trust, the transfer pricing rules determines that any cross-border loan arrangement between a person that is a resident and any other person that is not a resident (including a foreign trust) would be an affected transaction subject to tax if that cross-border loan arrangement is different from any term or condition (including interest rates) that would have existed had those persons been independent persons dealing at arm’s length.

Reasons for change

To avoid the possibility of an overlap or double taxation, the trust anti-avoidance measures specifically exclude a low- or no-interest loan arrangement that constitutes an affected transaction that is subject to the transfer pricing rules contained in the Act.

At issue is 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.

Example

> X, a resident natural person, makes a non-arm’s length interest free cross-border loan to a connected non-resident trust of R10 million and a tax benefit is derived. Had the trust borrowed the funds from a financial institution, it would have paid interest at a market-related rate of 5 per cent a year (R10 million x 5% = R500 000). The official rate of interest for tax purposes is 8 per cent. In light of the fact that this is a non-arm’s length transaction, the cross-border loan is subject to the transfer pricing rules of section 31 of the Act which essentially

results in X having a primary adjustment to its taxable income of R500 000 in terms of section 31(2) of the Act and a secondary adjustment in terms of section 31(3) of the Act, a deemed donation of R500 000, as X is a natural person.

As it was a non-arm's length transaction the anti-avoidance exclusion of section 7C(5)(e) of the Act is applied. Had the transfer pricing rules not applied, in terms of section 7C of the Act, the taxpayer would have had to declare a deemed donation of R800 000 (R10 Million x 8%) The R300 000 difference between the deemed donation value for the trust anti-avoidance measure in terms of section 7C of the Act and the deemed donation in terms of section 31 of the Act is an unintended anomaly in the interaction between the trust anti-avoidance measures and transfer pricing rules. This can create structuring opportunities that if left without legislative intervention, could lead to the erosion of the tax base.

Proposal

To address the anomaly and to clarify the policy intent of the trust anti-avoidance measure regarding the tax-free transfer of wealth to a trust using a low-interest or interest-free loan, advance or credit arrangement, any improper or undue structuring opportunities should be shut down.

It is proposed that an amendment be made to ensure that the exemption of the trust anti-avoidance measure in respect of a loan, advance or credit that constitutes an affected transaction, as defined in the transfer pricing provisions, only applies to the amount or portion thereof, owing by that trust in respect of that loan, advance or credit, to the extent of an adjustment being made on that amount or part thereof in terms of the transfer pricing provisions.

Effective date

The proposed amendment will come into operation on 1 January 2025 and will apply in respect of years of assessment commencing on or after that date.

3.5. *Transfers between retirement funds by members who reached normal retirement age before retirement date*

[Applicable provisions: Definition of 'retirement annuity fund' in section 1, paragraphs 2(1)(c) and 6A of the Second Schedule to the Act]

Background

In general, paragraph 2(1)(c) of the Second Schedule to the Act specifies the amount included in gross income for any amount transferred for the benefit of a member of a retirement fund scheme on or after normal retirement age but before the retirement date. This amount is reduced by any allowable deductions under paragraph 6A of the Second Schedule to the Act.

With effect from 1 March 2024, paragraph 6A of the Second Schedule to the Act added to the list of deductions, tax-neutral transfers between pension or provident funds to another pension or provident fund for members who have reached normal retirement age (as contained in the fund's rules) but have not yet elected to retire. This allows them to transfer their retirement interest tax-free in the event of an involuntary transfer.

Reasons for change

Government seeks to address an inconsistency in the law, whereby tax-free transfers are allowed for involuntary transfers between pension, or provident funds, but not for retirement annuity fund members who transfer to another retirement annuity fund in similar circumstances. Specifically, members who have reached normal retirement age, but have not elected to retire and are subject to tax on these transfers, despite the involuntary nature of the transfer.

Proposal

To ensure parity amongst members of retirement annuity funds who have reached normal retirement age in terms of the fund rules, but have not yet opted to retire from their respective fund, the following is proposed as it relates to involuntary transfers:

- that members of retirement annuity funds who have reached normal retirement age as stipulated in the fund rules, but have not yet opted to retire from said fund, must have the ability to have their retirement interest transferred from a retirement annuity fund into another retirement annuity fund without incurring a tax liability; and
- that the value of the retirement interest, including any growth thereon, will remain ringfenced and preserved in the receiving retirement annuity fund until the member elects to retire from that fund subject to fund rules. This means that these members will not be entitled to the payment of a withdrawal benefit in respect of the amount transferred.

Effective date

The proposed amendment will come into operation on 1 March 2025 and apply in respect of years of assessment commencing on or after that date.

3.6. Reviewing the connected person definition in relation to partnerships

[Applicable provision: Definition of ‘connected person’ in section 1 of the Act]

Background

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

As a result, large corporate investors forming part of a large group of companies which invest in fund partnerships inadvertently become connected to other commercially unrelated corporate investors and connected parties in relation to such investors and to each other in relation to all other unrelated transactions that are entered into by these investors.

Reasons for change

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 case of a loss) are affected by the wide ambit of paragraph (c) of the definition of ‘connected person’.

Proposal

It is proposed that the definition of a ‘connected person’ be amended to exclude ‘qualifying investors’ due to their isolated involvement in the partnership

Effective date

The proposed amendment will come into operation on 1 January 2025 and applies in respect of years of assessment commencing on or after that date.

3.7. Limiting interest deductions in respect of reorganisation and acquisition transactions

[Applicable provision: Section 23N of the Act]

Background

In general, the provisions of limitation of interest deductions in respect of reorganisation and acquisition transactions cater for interest deductions associated with share acquisitions that can be achieved indirectly through the use of the section 45 or section 47 rollover provisions of the Act or under section 24O of the Act because this form of acquisition is comparable to indirect share acquisitions.

The amount of interest allowed to be deducted in terms of all debts owed that are within the scope of section 23N(2) of the Act is subject to an annual limitation pursuant to a defined formula in respect of any year of assessment in which the acquisition transaction or reorganisation transaction is entered into and in respect of five years of assessment immediately following that year of assessment.

Deductible interest must not exceed the sum of:

(a) the amount of interest received by or accrued to the acquiring company;

(b) the highest of the amounts determined by multiplying the percentage determined under section 23N(4) (referred below) by the adjusted taxable income of the acquiring company for each of the years of assessment: (i) in which the acquisition transaction or reorganisation transaction is entered into (ii) in which the amount of interest is incurred by that acquiring company or (iii) immediately prior to the year of assessment contemplated in (i); and

(c) reduced by interest incurred in respect of other debt (i.e. excluding debt to which section 23N applies).

The percentage mentioned in (b) above must be determined in accordance with the formula:

A= B x C/D where:

- A represents the percentage to be determined;
- B represents the number 40;
- C represents the average repo rate plus 400 basis points; and
- D represents the number 10

The amount of the interest deductible may not exceed 60 per cent of the adjusted taxable income of that acquiring company.

For section 23N purposes, adjusted taxable income in general means the taxable income of the taxpayer less all interest received or accrued, section 9D controlled foreign company net income inclusion and recovered or recouped amounts in respect of capital assets with the addition of deductible interest incurred, all capital allowances, an additional 75 per cent of the debtor's income from the letting of immovable property and any losses set off against income.

Reasons for change

In 2023, changes were made to the definition of 'adjusted taxable income' in section 23M of Act stating that the calculation must be done before setting off any balance of assessed loss against income and that the result of the calculations may not be less than zero.

Over and above the changes mentioned above, in 2021 amendments were made to section 23M of the Act that formed part of the corporate tax package to broaden the tax base and reduce the headline corporate income tax rate in a revenue neutral manner. The percentage calculated under the formula was replaced by a fixed amount of 0,3 (i.e. 30%).

Given that the nature of limitation of interest deductions in respect of reorganisation and acquisition transaction rules is broadly similar to the limitation of interest deductions in respect of debts owed to persons not subject to tax rules, it is proposed that the amendments made to section 23M of the Act be mirrored in section 23N of the Act.

Proposal

Based on the above, it is proposed that:

- the definition of 'adjusted taxable income' and the methodology applied to limit an interest deduction in section 23N of the Act be reviewed and changed for closer alignment with the provisions of section 23M of the Act;
- the formula applied be replaced with a fixed amount of 0,3; and
- the definitions of 'repo rate' and 'average repo rate' be deleted.

Effective date

The proposed amendment will come into operation on 1 January 2025 and apply in respect of years of assessment commencing on or after that date.

3.8. Relaxing the assessed loss restriction rule under certain circumstances

[Applicable provisions: Sections 20 and 41 of the Act]

Background

In general, section 20 of the Act previously allowed most taxpayers carrying on a trade to set-off assessed losses brought forward from prior years of assessments against taxable income in the current year of assessment, with any unutilised portion of the assessed loss available for carry forward to subsequent years of assessment. However, an assessed loss restriction rule was introduced into the Act for companies with years of assessment commencing on or after 1 April 2022. This proposal broadened the corporate tax base by restricting the offset of assessed losses carried forward to 80 per cent of taxable income.

Reasons for change

As stated above, a taxpayer that continuously carries on a trade can set off its balance of assessed loss against income, subject to the assessed loss limitation provisions. However, where companies are being liquidated, deregistered or wound-up during a year of assessment, taxable income is often calculated in that year. Therefore, there may be instances where the assessed loss limitation will result in the balance of assessed loss not being fully utilised and partially forfeited by the company that is being liquidated, deregistered or wound-up.

Proposal

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.

Effective date

The proposed amendment will come into operation on 1 January 2025 and apply in respect of years of assessment commencing on or after that date.

3.9. *Reviewing the prohibition against the transfer of assets in terms of an amalgamation transaction*

[Applicable provision: Section 44 of the Act]

Background

In general, an ‘amalgamation transaction’, as defined in section 44 of the Act, envisages transactions in terms of which an amalgamated company transfers all of its assets into and merges with a resultant company. The following three types of transactions are covered in the definition of ‘amalgamation transaction’: (i) a South African resident company transfers its assets to another resident company (domestic transfers), (ii) a foreign company transfers its assets to a South African resident company (inbound transfers) and (iii) a foreign company transfers its assets to another foreign company which is a controlled foreign company and is in the same group of companies as the transferee foreign company (foreign to foreign transfers).

Further, ‘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 and to ensure that rollover relief is not used to obtain a permanent exemption. The current paragraphs (a) to (g) of section 44(14) of the Act provides for scenarios where the amalgamation provisions will not apply and includes a scenario in paragraph (d) where amalgamation provisions will not apply for domestic transfers where the resultant company is any association, corporation or company incorporated outside South Africa or the resultant company is a portfolio of collective in any investment scheme carried outside South Africa that is comparable to a portfolio of a collective investment scheme in participation bonds or portfolio of a collective investment in securities and does not have its place of effective management in South Africa. However, the scenario in paragraph (d) seem to be contradictory as domestic transfers only includes a resultant company which is a resident.

Reasons for change

It has come to Government’s attention that the reference in paragraph (d) of section 44(14) of the Act to a resultant company that is a foreign company that does not have a place of effective management in South Africa in relation to domestic transfers seem to be misaligned and unclear as domestic transfers only include a resultant company which is a resident.

Proposal

Given that domestic transfers in terms of 'amalgamation transaction' rules do not include transfers to foreign companies, it is proposed that the exclusion for domestic transfers to a resultant company that is any association, corporation or company incorporated outside South Africa or the resultant company that is a portfolio of collective in any investment scheme carried outside South Africa and does not have its place of effective management in South Africa be deleted.

Effective date

The proposed amendment will come into operation on the date of promulgation of the Taxation Laws Amendment Act of 2024.

3.10. Third-party backed shares: Extending the definition of 'enforcement right' to a connected person

[Applicable provision: Section 8EA of the Act]

Background

The Act contains dedicated third-party backed share anti-avoidance rules to deal with preference shares with dividend yields backed by third parties through an enforcement right. These anti-avoidance rules deem dividend yields of third-party backed shares as ordinary revenue unless the funds derived from the issue of the third-party backed shares are used for a qualifying purpose.

Reasons for change

An 'enforcement right', as defined in the Act, encompasses a right of the holder of a share or equity instrument, or any connected person in relation to that holder to enforce performance by another third-party person in respect of that share, by obligating that third-party person, to:

- acquire that share from that holder;
- make any payment in respect of that share in terms of a guarantee, indemnity or similar arrangement; or
- procure, facilitate or assist with any of the above.

A 'third-party backed share', as defined in the Act, encompasses any preference share or equity instrument in respect of which an enforcement right is exercisable by the holder of that preference share or equity instrument as a result of any amount of any

specified dividend, foreign dividend, return of capital or foreign return of capital attributable to that share or equity instrument not being received by or accruing to any person entitled thereto.

At issue is that there is an unintended anomaly between the two definitions where the definition of a 'third-party backed share' does not clearly match the policy intent and respective legislative wording, compared to the 'enforcement right' definition, that either a holder or a connected person to that holder could hold that enforcement right.

Proposal

Government proposes that the definition of a 'third-party backed share' be clarified to address this anomaly by amending that definition to match the policy intent that the enforcement right is exercisable by either the holder or any connected person in relation to that holder.

Effective date

The proposed amendments will come into operation on 1 January 2025 and applies in respect of dividends or foreign dividends received or accrued during years of assessment commencing on or after that date.

3.11. Third-party backed shares: Extending exclusions to the ownership requirement

[Applicable provision: Section 8EA]

Background

The 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.

With effect from 01 January 2024, certain ownership requirement refinements on equity shares acquired in a targeted operating company, for a qualifying purpose, by the person that acquired those equity shares, came into effect. The main objective of these refinements was to specifically clarify the ownership requirement test, on the equity shares in the targeted operational company, at the time of the receipt or accrual of any dividend or foreign dividend. The new ownership requirement test includes certain exceptions, including that:

• if the equity shares in the targeted operating company were disposed of and the funds derived from that disposal are used by the issuer of the preference share to settle that preference share within 90-days of that disposal; and

• 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.

Reasons for change

It has come to Government's attention that the exceptions to the ownership requirement test might be to narrow and could impede legitimate transactions envisaged in the relevant policy rationale.

A. Settlement

A qualifying purpose for the use of funds derived from the issue of a preference share includes, amongst others, the:

- acquisition or redemption of any preference shares previously used for any qualifying purpose;
- settlement of debt used for the purposes set out above and any interest accruing on such debt.

The use of funds for the qualifying purpose refinancing arrangements above has specific legislative clarity to, as a matter of policy, extend the use of funds or consideration for the newly issued preference share to settle any accrued dividends, foreign dividends or interest in the relevant settlement amount.

At issue is that the new ownership requirement test does not contain the same legislative clarity in terms of the settlement of any accrued dividends, foreign dividends or interest payable by the issuer of a preference share in relation to the settlement of that preference share within 90-days of that disposal.

B. Recognised exchange

The purpose of the corporate action exception in the ownership requirement test was to cater for those instances where that corporate action impacted on the person's ability to, at the time of the receipt or accrual of any dividend or foreign dividend came into effect, still hold the acquired listed equity shares of the targeted operating company.

The 'operating company' definition read together with the 'qualifying purpose' definition allows for the acquisition of equity shares in a listed company which

would by definition include a company whose shares or depository receipts in respect of its shares are listed on a stock exchange in a country other than the Republic which has been recognised by the Minister of Finance as contemplated in paragraph (c) of the definition of ‘recognised exchange’ in paragraph 1 of the Eighth Schedule.

At issue is that the corporate action exception noted above in the ownership requirement test currently only applies to equity shares that is listed on a South African exchange licensed under the Financial Markets Act.

Proposal

In order to address concerns regarding the fact that the ownership requirement test exceptions are too narrow, and may impede legitimate transactions, an amendment is proposed to the legislation:

A. Settlement

It is proposed that the legislation be amended to clarify that the redemption of the preference share in terms of the ownership requirement test includes the settlement of any amounts of dividends, foreign dividends or interest accrued in respect of that preference share.

B. Recognised exchange

It is proposed that the ownership requirement test exclusion be extended to include corporate actions relating to listed share substitutions on a recognised exchange in a country other than South Africa. As a result, the ownership requirement will not apply if that foreign 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 stock exchange in a country other than the Republic which has been recognised by the Minister of Finance as contemplated in paragraph (c) of the definition of ‘recognised exchange’ in paragraph 1 of the Eighth Schedule

Effective date

The proposed amendments will come into operation on 1 January 2025 and applies in respect of dividends or foreign dividends received or accrued during years of assessment commencing on or after that date.

3.12. Translating ‘contributed tax capital’ from foreign currency to Rands

[Applicable provision: Section 25E of the Act]

Background

The contributed tax capital (CTC) of any company is a notional amount calculated for tax purposes only derived from either (1) contributions received by a resident company from a shareholder for shares issued to that shareholder or (2) an amount equal to the market value of shares when a foreign company becomes a South African tax resident. However, the CTC amount is reduced by any amounts referred to as capital distributions, transferred by the company to the shareholders.

In line with the 2023 Budget announcement, during the 2023 legislative cycle, rules were introduced to clarify the translation of the ‘contributed tax capital’ of a class of shares that are denominated in a foreign currency to the currency of the Republic. More specifically, these translation rules require that companies apply the applicable spot rate on the date that the relevant amount is recognised for income tax purposes.

Reasons for change

The translation rules for purposes of CTC have been welcomed by industry and taxpayers but concerns have been raised about certain potential application and interpretive shortcomings not sufficiently clarified. For a tax resident company they relate to the interaction between:

- the functional currency of that company;
- the share capital of that company which can be denominated in either the Rand or a currency other than the Rand, or both; and
- several distinguishable and separate tax events (both in the creation and reduction of CTC), over an extended period of time, that must be considered for purposes of the determination of CTC.

At issue is that CTC of a tax resident company could be impacted by several variables, currency fluctuations, that could influence the translation outcome for the relevant amount to be recognised for income tax purposes. This may require the use and keeping of data over a long period of time.

As such, it could be difficult to determine, by example, whether the capital distribution amount through CTC returned to a shareholder, should be translated into Rand at the

spot rate at the date of transfer or whether the spot rate on the date when the CTC was created should be used, so as to determine a rand amount of CTC available for distribution that would not be affected by subsequent currency fluctuations

<u>Proposal</u>

It is proposed that the rules introduced for the translation of the amount of CTC in 2023 in relation to a class of shares be amended to rather make a distinction for application based on (1) the functional currency of the tax resident company; and (2) the distinguishable and separate points of creation or reduction of CTC.

Where the functional currency of a tax resident company is:

A. The currency of the Republic: Rand

Any foreign amount of consideration received, in relation to a class of shares, as referred to in paragraphs (a) or (b) of the definition of 'contributed tax capital' in section 1 of the Act, must be translated to the currency of the Republic by applying the spot rate on the date receipt, accrual or conversion, as the case may be, for purposes of the determination of the increase of CTC. In the case of a foreign company that becomes a resident the translation of the market value of the shares is at the date immediately preceding the date of becoming a resident.

B. A currency other than the currency of the Republic

Any reduction of CTC denominated in a foreign currency, in relation to a class of shares, as referred to in paragraphs (a) or (b) of the definition of 'contributed tax capital' in section 1 of the Act, must be translated to the currency of the Republic by applying the spot rate on the date of transfer or conversion, as the case may be, for purposes of the reduction of CTC.

The impact of these amendments to the translation rules for purposes of CTC is best shown through examples:

Example A: Consideration received if a company has a functional currency in Rand

Facts:

On 1 January 2025, Company A, a SA tax resident company with a primary listing on the JSE and a secondary listing on the NSE, issues 100 ordinary shares of a particular class at a consideration of $10 a

share on the foreign exchange. On 30 July 2025, Company A makes a capital distribution per share in terms of that particular class of shares

$/R Exchange Rate:

- 1 January 2025 - R18.00
- 31 July 2025 – R19.00

Results:

Tax event 1:

Based on an assumed functional currency of the Republic, Company A's CTC will increase by an amount of R18 000 [$1000 x R18] on 1 January 2025.

Tax event 2:

Important to note that in light of the fact that Company A has a functional currency of the Republic, and an already Rand determined CTC-amount (based on the calculation of tax event 1 above), any subsequent reduction of CTC will not need to be translated for purposes of the determination of CTC as at 31 July 2025 in terms of section 25E of the Act. Rather, the reduction would be the relevant Rand amount at the date of transfer determined by the directors of the company or by some other appropriate person or body of persons.

Example B: Reductions of CTC made if a company has a functional currency other than that of the Republic

Facts:

On 1 May 2025, Company B, a SA tax resident company that is a wholly owned subsidiary of a UK company, issues 100 ordinary shares of a particular class at a consideration of £10 a share. On 16 August 2025, Company B makes a capital distribution per share for that particular class of shares.

£/R Exchange Rate:

- 1 May 2025 – R24.00
- 16 August 2025 – R25.00

Results:

Tax event 1:

Based on an assumed functional currency other than that of the Republic, Company B has CTC of £1000 [100 ordinary shares x £10] as at 1 May 2025. Important to note that in light of the fact that Company B has a functional currency other than that of the Republic that the foreign consideration received for the issues of that class of shares will not be translated as at 1 May 2025 in terms of section 25E of the Act for purposes of the determination of CTC.

Tax event 2:

On 16 August 2025, Company B makes a £1 per share capital distribution from CTC which results in a reduction in CTC of R2 500 [R25 x (100 x £1)]. The balance of the CTC, £900 [£1 000 – (100 x £1)] for that class of shares, will not be translated for purposes of the determination of CTC as at 16 August 2025. Based on the application of proposal B above, only the amount in foreign currency by which CTC is reduced must be translated to the currency of the Republic by applying the spot rate on the date of transfer. It is important to note that the translation is only applied to the capital distribution amount and not the total CTC amount available prior to or post that capital distribution.

Effective date

The amendments come into operation on 1 January 2025

3.13. Taxation issues involving unlisted property industry

[Applicable provision: Definition of 'REIT' in section 1 of the Act]

Background

Broadly, in 2012, a unified approach termed Real Estate Investment Trusts (REITs) was adopted for property investment schemes encompassing both the property unit trust and property loan stock companies in the Act. The aim was to ensure that South Africa's property investment scheme is in line with the international norms and ensuring that the objective of the REITs to provide investors with a steady rental stream while

also providing capital growth stemming from the underlying property is maintained. The REITs regime provided a flow-through principle where income and capital gains will normally be taxed solely in the hands of the investor and not in the hands of the REITs.

Section 1 of the Act defines a 'REIT' to be a South African resident company, listed on the South African stock exchange and the shares of which are listed as shares in a REIT as defined in the listing requirements of that exchange.

The unlisted property companies were not afforded a flow-through treatment due to the lack of comparable regulation offered by the exchanges for the listed REITs.

Reasons for change

As stated above, the issue is that the unlisted property companies were not afforded a flowthrough treatment due to the lack of regulation.

Proposal

To provide a rule for the tax treatment of the unlisted property companies and ensuring that a monitoring is done by the Financial Sector Conduct Authority ('FSCA'), it is proposed that the 'REIT' definition in section 1 of the Act be extended to cater for a company that is a South African company, that is not listed on the South African Stock Exchange, but is regulated by the FSCA through the published requirements approved in consultation with the Director-General of the National Treasury.

Effective date

The proposed amendment will come into operation with effect from a date determined by the Minister of Finance by notice in the Gazette after the publication of the requirements regulating the unlisted property companies.

3.14. Clarifying the interaction of section 24JB(3) of the Income Tax Act and the gross income definition

[Applicable provision: Section 24JB of the Act]

Background

Section 24JB(3) of the Act states that: 'any amount required to be taken into account in determining the taxable income in terms of any provision of Part I of Chapter II, or in determining any assessed capital loss of a covered person in respect of a financial asset or a financial liability contemplated in subsection (2) must only be taken into account in terms of this section.'

In general, the aim is that section 24JB(3) of the Act ensures that amounts in respect of financial assets and financial liabilities, measured at fair value in terms of International Financial Reporting Standard (IFRS) 9 that 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 in respect of these financial assets and financial liabilities that are measured at fair value in terms of the IFRS 9 accounting standard cannot be dealt with under any section of the Act.

Section 24JB(3) of the Act refers to all the provisions in Part I of Chapter II of the Act (Part I of Chapter II covers sections 5 to 37G of the Act) that are normally utilised to calculate the taxable income of a covered person in respect of a financial asset or liability contemplated in is section 24JB(2) of the Act. This means that the application of sections 5 to 37G of the Act (including paragraph 10 of the Eighth Schedule via section 26A of the Act) must be ignored in determining taxable income. Thus, only section 24JB must be applied as a form of fair-value-taxation.

However, the definition of 'gross income' in section 1(1) of the Act is not one of the provisions mentioned in section 24JB(3) of the Act when reference is made to Part I of Chapter II.

Reasons for change

It has come to Government's attention that further clarity is required on the interaction between the aforementioned rule in section 24JB(3) of the Act and the definition of 'gross income'.

Proposal

It is proposed that section 24JB(3) of the Act be amended to specifically exclude the application of the definition of 'gross income' to ensure that section 24JB of the Act takes preference over all other sections in the Act in determining taxable income in respect of financial instruments described in section 24JB(2) of the Act.

Effective date

The proposed amendment will come into operation on 31 December 2024 and applies in respect of years of assessment ending on or after that date.

3.15. *Impact of IFRS 17 on the Taxation of Insurers*

[Applicable provision: Section 28 of the Act]

Background

In 2022, amendments were made in the Act by introducing a phasing in period of three years to be provided to short-term insurers to cater for the tax impact as a result of the difference between the methodologies applied in valuing insurance liabilities between accounting standards IFRS 4 and IFRS 17 which was going to be effective for annual reporting periods beginning on or after 1 January 2023.

The 'phasing-in amount' was defined to be an amount that is a difference between the amount that is deductible from the income of a short-term insurer in terms of section 28(3) or section 28(3A) of the Act at the end of the latest year of assessment commencing on or after 1 January 2022 but before 1 January 2023 (measuring year) determined under the current rules of section 28(3) or section 28(3A) of the Act and the amount of the deduction for the measuring year had IFRS 17 been applied at the end of the measuring year.

In general, prior to the change in 2022, the insurance liabilities were made up of unearned premium reserve ('UPR'), liability for claims incurred but not reported ('IBNR') and the outstanding claims reserve ('OCR'), net of deferred acquisition costs, deferred revenue liability and the reinsurance reserve which was provided for in section 28(3) of the Act.

Under IFRS 17, the insurance liabilities are made up of the liability for remaining coverage ('LRC'), which is the equivalent to UPR and the liability for incurred claims ('LIC'), which is akin to the IBNR and OCR. However, under IFRS 17, the LRC is taken into account under section 28(2)(a) as a deduction through the inclusion of insurance revenue when a short-term insurer is determining the taxable income derived during a year of assessment from carrying on short-term insurance business.

Reasons for change

As stated above, the change in the treatment of UPR under IFRS 17 that led to it being taken into account under section 28(2)(a) of the Act has created complexity when calculating the 'phasing-in amount' as a difference between the amount that is deductible from the income of a short-term insurer in terms of section 28(3) or section 28(3A) of the Act at the end of the latest year of assessment commencing on or after 1 January 2022 but before 1 January 2023 (measuring year) determined under the current rules of section 28(3) or section 28(3A) of the Act and the amount of the

deduction for the measuring year had IFRS 17 been applied at the end of the measuring year.

Proposal

To avoid an excessive phasing in amount, as a result of LRC not specifically being allowed as a deduction under the IFRS 17, it is proposed that the phase-in provisions be amended to include the LRC when comparing the IFRS 4 liabilities to the IFRS 17 liabilities.

Effective date

The proposed amendment is deemed to have come into operation on 1 January 2023 and apply in respect of years of assessment commencing on or after that date

3.16. Investment allowance in respect of buildings, machinery, plant, implements, utensils and articles used in domestic production of electric and hydrogen-powered vehicles

[Applicable provisions: Sections 8, 12C, 13, 13quat and insertion of the new section 12V of the Act]

Background

To support the development of the automotive industry, government has – through the Department of Trade, Industry and Competition (‘the ‘DTIC’) – implemented various incentives over time. These included the Motor Industry Development Programme (‘MIDP’), which ran from 1995 until 2012 to bolster the automotive sector's international competitiveness and global reintegration utilizing strategies such as import duty reductions and export incentives. In 2013, the MIDP was replaced with the Automotive Production and Development Programme (‘APDP’), which focused on significantly growing production volumes in the specified motor vehicle industry and promoting value addition in the automotive component industry through stable and moderate tariffs, a local volume assembly allowance, a production incentive and grant funding. In line with the Automotive Masterplan, the APDP was updated in 2021 to APDP Phase 2 and outlines ambitious targets on vehicle production volumes and requirements for local content to sustain the sector's growth.

Reasons for change

The DTIC published the Electric Vehicles White Paper outlining its plan to transition the automotive industry from primarily producing Internal Combustion Engine ('ICE') vehicles to a dual platform that includes the production of electric vehicles ('EVs'). The compelling reasons behind this transition include the urgent need to address environmental concerns and for countries to meet their national emission reduction commitments stemming from the Paris Agreement. Additionally, some of South Africa's key export markets like the European Union ('EU') and the United Kingdom ('UK') have announced their intentions to ban the sale of new ICE vehicles by 2035. According to the DTIC, this paradigm shift threatens the country's strategic position in the global automotive export industry, since the majority of the vehicles manufactured in the country are currently exported to these countries.

Internationally, a number of countries have introduced various tax incentives to encourage investment in EVs production and related infrastructure. These incentives include accelerated depreciation allowances, tax holidays, lower corporate income tax rates for profits from EV and/or battery production facilities, tax credits for EVs production, R&D tax incentives for EVs and battery research, reduced customs duties for imports of components as well as VAT reductions or exemptions.

Proposal

To encourage investment in the local production of electric and hydrogen-powered vehicles, Government proposes to introduce a 150 per cent investment allowance targeting new investments in the production of electric and hydrogen-powered vehicles in South Africa. This means motor vehicle manufacturers will be able to claim 150 per cent of qualifying investment spending on production capacity for electric and hydrogen-powered vehicles in the year the investment assets are brought into use

A. Eligibility for the EVs investment allowance tax incentive

Any motor vehicle manufacturer investing in new and unused buildings, machinery, plant, implements, utensils and articles to be used for the production of electric or hydrogen-powered vehicles will qualify for the incentive.

The general overriding requirements for businesses to deduct a capital allowance will be applicable to companies wanting to make use of this incentive. These requirements are:

- will be carrying on a trade as a result of the bringing into use of the assets; and
- the business must have acquired and brought the asset into use (the business must own the asset). Additional requirements will include:
- the capital assets will be used by the company mainly for the local production of electric and hydrogen-powered vehicles in South Africa;
- only new and unused assets qualify (including improvements on buildings only), to ensure that assets will add to the production capacity for electric and hydrogen-powered vehicles that the company plans to produce; and
- assets must be brought into use for the first time on or after 1 March 2026 and before 1 March 2036.

B. Manufacturing assets used in the production of electric and hydrogen-powered vehicles eligible for the investment allowance

The incentive will be available for new and unused buildings (including improvements), plant and machinery acquired and brought into use for the first time by the company on or after 1 March 2026. Assets acquired and brought into use before this date will not be eligible for the incentive (because an incentive in this instance would represent a deadweight loss).

Assets will qualify if they will be used mainly in the production of electric and hydrogen-powered vehicles in South Africa. While eligibility will be based on facts and circumstances, it is envisaged that eligible assets will be those that are necessary to set up a new facility or extend an existing building to cater for the domestic production of electric vehicles and hydrogen-powered vehicles.

The cost of the asset for tax purposes will be limited to the lesser of the arm's length market value on the date of acquisition or the actual cost to the taxpayer. This is intended to ensure that taxpayers do benefit from an additional allowance on financing costs.

C. Recoupment of the investment allowance

Where an asset in respect of which an investment allowance was granted is disposed of within a period of 5 years from the date it was brought into use, there shall be included in the taxpayer's income 50 per cent of the cost of that asset, which has been recouped during the current year of assessment, in

addition to the inclusion of amounts in terms of section 8(4)(a) of the Act, but limited to the total amount allowed to be deducted in respect of that asset.

D. Limitation of deduction in respect of assets granted a deduction in terms of section 12V of the Act

To ensure that there is no double deduction, taxpayers who qualify for the section 12V deduction will not be allowed to claim deductions under section 12C, section 13, and section 13quat of the Act for assets brought into use during the period of the incentive.

Effective date

The proposed incentive will come into effect on 1 March 2026 and applies in respect of assets brought into use on or after that date.

3.17. Clarifying the translation for hyperinflationary currencies

[Applicable provisions: Sections 9D(2A) and 9D(6) of the Act]

Background

The meaning of 'local currency' is defined in section 9D(2A)(k) of the Act for purposes of gains or losses on foreign exchange transactions and for purposes of paragraph 43 of the Eighth Schedule to the Act that deals with assets disposed of or acquired in foreign currency.

In general, the term 'local currency' of a controlled foreign company (CFC) means the currency used for purposes of its financial reporting. In general, the net income of a CFC is determined in the currency used by that CFC for purposes of financial reporting (the functional currency) and is translated into the currency of the Republic at the average exchange rate for that year of assessment. Exchange items are treated as not attributable to any permanent establishment of the CFC if the currency used for financial reporting is the currency of the country which has an official rate of inflation of 100 per cent or more throughout the foreign tax year.

Reasons for change

For hyperinflationary cases, the policy intention is that transactions in a third currency should be translated directly to Rand and not into the hyperinflationary functional currency and thereafter translated to Rand applying the average exchange rate. However, currently the proviso to section 9D(6) of the Act deems those exchange items

not to be attributable to a permanent establishment, and subsection (2A)(k) requires the hyperinflationary functional currency to be the local currency.

Proposal

In order to align the rules with the policy intention, it is proposed that section 9D(2A)(k) of the Act be amended to cater to a situation where the functional currency of a particular country has an official inflation rate of 100 per cent or more for the foreign tax year, such that the 'local currency' be deemed to be the currency of the Republic.

Effective date

The proposed amendment will come into operation on 31 December 2024 and applies in respect of foreign tax years of CFCs ending on or after that date.

3.18. Clarifying the 18-month period in relation to shareholdings by group entities

[Applicable provision: Paragraph 64B of the Eighth Schedule to the Act]

Background

The participation exemption under paragraph 64B of the Eighth Schedule to the Act requires a person to disregard any capital gain or capital loss resulting from the disposal of equity shares in a non-resident company if certain requirements are met. Amongst those requirements is that that the person disposing of such equity shares should have held the interest for a period of at least 18-months prior to that disposal.

Prior to 2023, the participation exemption under paragraph 64B(4) of the Eighth Schedule to the Act required that a person must disregard any capital gain determined in respect of any foreign return of capital received by or accrued to that person from a 'foreign company' as defined in section 9D of the Act. This rule applied when that person (whether alone or together with any other person forming part of the same group of companies as that person) holds at least 10 per cent of the total equity shares and voting rights in that company.

In 2023, an amendment was made to the Act such that an 18-months holding requirement that applies to the participation exemption relating to the sale of shares in a foreign company was introduced for the participation exemption in respect of foreign return of capital in a foreign company.

Reasons for change

It has come to Government's attention that the 2023 amendment is not clear in certain instances such as where a multiple group companies held the shares in the foreign company during an 18- months period and a clarification is required in this regard.

Proposal

It is proposed that the legislation be made clear that when it comes to disposals by any group of companies to another group of companies or foreign companies the 18-months requirement will apply in aggregate to all the other group entities the disposal has been made to.

Effective date

The proposed amendment will be deemed to come into operation on 1 January 2024 and applies in respect of any foreign return of capital received or accrued on or after that date.

3.19. Clarifying the rebate for foreign taxes on income in respect of capital gains

[Applicable provision: Section 6quat(1A)(a)(iii) in the Act]

Background

In order to prevent double taxation on capital gains of residents attributable to the disposal of assets situated outside the Republic, section 6quat(1A)(a)(iii) of the Act provides for residents to claim a credit against South African tax for irrecoverable foreign taxes paid on these foreign sourced capital gains. The rebate is an amount equal to the sum of the irrecoverable foreign taxes payable in respect of the taxable capital gain (which is a percentage of the net capital gain, say 40 per cent) included in the resident's taxable income in respect of the foreign sourced gains. Where the resident's taxable capital gain and tax payable as determined in the foreign jurisdiction in terms of such jurisdiction's tax rules is higher than that determined in the Republic in terms the Act, the resident will not be able to fully reduce the South African capital gains tax payable by the foreign capital gains tax payable on the same gain resulting in double taxation.

Reasons for change

It has come to Government's attention that section 6quat(1A)(a)(iii) is inconsistent with its original intention. A resident taxpayer that disposes of a capital asset in a foreign jurisdiction resulting in a capital gain that is subject to tax in that jurisdiction cannot utilise the full tax paid in that jurisdiction against the capital gains tax payable in South Africa on the same capital gain, resulting in double taxation.

Proposal

It is proposed that section 6quat of the Act should be clarified to explicitly allow the taxpayer to utilise the full foreign tax credit for the taxes paid on capital gains in the foreign jurisdiction to the extent of the taxes paid in South Africa on the same gains.

Effective date

The proposed amendment will come into operation on 1 March 2025.

3.20. Aligning the section 6quat rebate and translation of net income rule for CFCs

[Applicable provision: Sections 9D of the Act]

Background

Section 9D(6) of the Act stipulates the approach that should be followed in translating the amount of net income of a CFC, from the foreign currency used by the CFC for financial reporting purposes to the South African Rand. It requires the net income of a CFC to be determined in functional currency of that CFC and to be translated into the currency of the Republic at the average exchange rate for the financial year of the CFC. However, qualifying foreign taxes proved to be payable by a CFC are required to be translated to Rand at the average exchange rate for the year of assessment of the resident in which an amount of net income is included in taxable income.

Reasons for change

As stated above, foreign taxes are required to be translated to Rand at the average exchange rate for the year of assessment of a resident in which an amount of net income is included in taxable income. However, the Act requires the amount of net income of the CFC to be translated by applying the average exchange rate for the foreign tax year of the CFC. Therefore, a mismatch arises in the event when the year of assessment of the resident and the foreign tax year of the CFC are different periods.

Proposal

In order to address this anomaly, it is proposed that the Act be amended to align the translation dates in relation to the resident and the inclusion of CFC net income.

Effective date

The proposed amendment will come into operation on 1 January 2025 and apply in respect of foreign tax years of CFCs ending on or after that date

3.21. Refining the definition of 'exchange item' for determining exchange differences

[Applicable provision: Section 24I of the Act]

Background

Broadly, accounting standard IAS 32, specifies that the substance of a financial instrument, rather than its legal form, dictates its classification. IAS 32.18 then provides examples of financial instruments that, although taking the legal form of equity, are liabilities in substance and those that combine characteristics associated with equity instruments and financial liabilities.

At times companies enter into financial arrangements involving cross-currency swaps where interest payments and a principal amount in one currency are exchanged for principal amount and interest payments in a different currency. However, these financial arrangements tend to be complex as they involve cross-currency swaps and preference shares held by a resident company in a non-resident subsidiary. These preference shares are not hybrid equity instruments under section 8E of the Act. For financial reporting purposes by the resident company, the periodic payments in respect of the financial arrangement in relation to the foreign dividends received on the preference shares, interest paid on the cross-currency swap and interest received on the cross-currency swap are disclosed based on its economic substance as a financial asset. This treatment conforms with accounting standard IAS 32.

Reasons for change

The financial arrangement depicted above proves challenging from a tax perspective because it creates a mismatch that results in a tax leakage as the exchange differences on the debt obligation are taxable under section 24I of the Act while the exchange differences in respect of the preference shares are not taxable under section 24I of the Act as there is no exchange item.

Proposal

To address the tax leakage associated with these financial arrangements, it proposed that the definition of 'exchange item' be extended to include shares that are disclosed as financial assets for purposes of financial reporting in terms of IFRS.

Effective date

The proposed amendment will come into operation on 1 January 2025 and applies in respect of years of assessment commencing on or after that date.

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

[Applicable provision: Section 24I of the Act]

Background

In general, section 20 of the Act enables taxpayers to set off their balance of assessed losses carried forward from the preceding tax year against their income if the trading requirement in section 20 of the Act has been met. Any unutilised assessed loss balance may be carried forward to future years of assessment to be set off against future income.

However, a company that does not carry on a trade during a year of assessment forfeits the right to carry forward and utilise its assessed loss from the immediately preceding year of assessment.

In general, section 24I of the Act deals with the income tax treatment of foreign exchange gains and losses on 'exchange items' as well as the premiums or like consideration received or paid in respect of foreign currency option contracts and any consideration paid in respect of foreign currency option contracts.

Reasons for change

Currently, the legislation requires that exchange differences be included or deducted from income and companies are afforded this treatment irrespective of whether they are trading or not. However, where a company suspended its business activities and ceased trading, it forfeits its right to set off its balance of assessed loss brought forward from the previous year of assessment. Therefore exchange losses of previous years off assessment that form part of the assessed loss are forfeited. As a result, the

company continues to be taxed on its foreign exchange gains without taking into account exchange losses forfeited in previous years of assessment as a result of not trading.

Proposal

It is proposed that foreign exchange rules be amended allow for the ring-fencing of foreign exchange losses incurred by a company during any year of assessment that it is not trading and for offsetting against foreign exchange gains in the current and future years of assessment

Effective date

The amendment will come into operation on 1 January 2025 and applies in respect of years of assessment commencing on or after that date

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

[Applicable provisions: New proviso to section 8(2) of the VAT Act]

Background

The definition of 'enterprise' in paragraph (a) of section 1(1) of the VAT Act means, in the case of a vendor, any enterprise or activity which is carried on continuously or regularly by any person in the Republic of South Africa (the Republic) or partly in the Republic and in the course or furtherance of which goods or services are supplied to any other person for a consideration, whether for a profit or not.

Notwithstanding the above, effective from 1 January 2023, where any person is neither a resident of the Republic, nor a registered vendor and that person solely supplies or intends to supply to a resident recipient of the use or the right of use of ships, aircraft, rolling stock or parts directly in connection thereto under a rental agreement, that activity shall (subject to certain conditions), as per proviso (xiii) to definition of 'enterprise' in section 1(1) in the VAT Act, be deemed not to be the carrying of an enterprise, irrespective of whether those goods are supplied for use in the Republic.

Reasons for change

Before the definition of 'enterprise' was amended on 1 April 2021, with the aim of effectively excluding foreign lessors of ships, aircraft and rolling stock from registering

as VAT vendors in the Republic, if certain requirements were met, SARS would issue VAT rulings, under section 72 of the VAT Act, to foreign lessors of ships, aircraft and rolling stock, allowing those lessors not to register for VAT purposes in the Republic.

With the amendments to section 72 of the VAT Act effective 1 January 2022, SARS was no longer able to issue the aforementioned rulings to foreign lessors of ships, aircraft and aircraft engines. This resulted in the foreign lessors of any items not specifically listed in proviso (xiii) to the definition of 'enterprise' in section 1(1) of the VAT Act being required to register for VAT purposes.

With effect from 1 January 2023, the definition of 'enterprise' in section 1(1) of the VAT Act has been amended to further exclude foreign lessors of parts to ships, aircraft and rolling stock (such as aircraft engines), subject to certain requirements. The consequence of this amendment is therefore that foreign lessors of aircraft engines who are registered were now required to deregister for VAT.

Where the foreign lessor was required to de-register due to the introduction or any subsequent amendment to proviso (xiii) to the definition of 'enterprise', section 8(2) of the VAT Act would be triggered. Having regard to the fact that the foreign lessor would not have been entitled to deduct input tax on the importation of the engine into the Republic (see paragraph (cc) of proviso (xiii) to the definition of 'enterprise' in section 1(1) of the VAT Act), it would be incorrect to require the payment of output tax on the ceasing of an enterprise solely as a result of the change in legislation.

Proposal

Previously, foreign lessors of parts of ships, aircraft or rolling stock were required to register for VAT since they were not covered under the proviso (xiii) exclusion in the definition of 'enterprise'. However, the amendment to the VAT Act that was effective from 1 January 2023 implied that such foreign lessors were now required to deregister due to the addition of the words 'or parts directly in connection thereto' to the proviso (xiii) to the definition of 'enterprise' in section 1(1) of the VAT Act. This resulted in an unintended consequence of such vendors now facing an output tax liability under section 8(2) of the VAT Act, which was purely as a result of the legislation being amended. It is proposed that the VAT Act be amended to provide relief from this unintended consequence.

Effective date

The proposed amendment will come into operation on 1 January 2025

3.24. *VAT – Clarifying the VAT treatment of the Mudaraba Islamic financing arrangement*

[Applicable provision: Section 8A of the VAT Act]

Background

Mudaraba contemplates a scenario where funds are deposited with the bank by a client. The bank in turn invests the funds deposited by the client in other Sharia arrangements. The client bears the risk of loss in respect of the funds and any return is divided between the client and the bank as agreed upon at the time of the inception of the contract between the parties. Income received by or accrued to a client in terms of a Mudaraba, as defined in section 24JA, with very specific qualification criteria, is deemed to be interest for income tax purposes. The Mudaraba product is akin to a conventional transaction account or investment product (e.g. a fixed deposit).

Reasons for change

Section 8A of the VAT Act, which addresses Sharia-compliant financing arrangements deals with Murabaha and diminishing Musharaka products but not Mudaraba arrangements. This creates uncertainty as to whether Mudaraba profit share payments amount to consideration for taxable, exempt, or non-supplies for VAT purposes and potential misalignment with section 24JA of the IT Act (as amended) which determines that such amounts are deemed to be interest for income tax purposes. In the case of a conventional finance structure, the supply of credit would be exempt under section 2(1)(f) of the VAT Act. In this regard, interest charged on the said supply of credit would not be subject to VAT whereas any ‘fee’ would be subject to VAT under section 7 of the VAT Act, as the proviso to section 2(1) of the VAT Act takes any fee as consideration out of the exemption.

Proposal

To ensure that there is parity between Sharia-compliant financing arrangements and no unanticipated VAT charge in any Mudaraba product, it is proposed that the return of the profit from this product be exempt from VAT.

Effective date

The proposed amendment will come into operation on 1 April 2025.

3.25. VAT – Clarifying the VAT treatment of supply of services to non-resident subsidiaries of companies based in the Republic

[Applicable provision: Section 1 of the VAT Act: definition of 'resident of the Republic']

Background

The VAT system in the Republic of South Africa (the Republic/South Africa) is destination based. Goods or services consumed in the Republic are subject to VAT at the standard rate. Exports to other countries from the Republic are generally zero-rated and the importation of goods or services into the Republic are generally subject to VAT at the standard rate (all subject to certain exclusions or exceptions).

In terms of section 11(2)(ℓ) of the VAT Act, where services are supplied to non-residents of the Republic, such services are presumed to be consumed outside the Republic and attract VAT at the zero rate, unless the services are supplied directly in connection with fixed or movable property in the Republic at the time the services are rendered, or if the non-resident or any other person to whom the services are supplied is present in the Republic at the time the services are rendered, subject to certain exceptions.

Reasons for change

It is evident that section 11(2)(ℓ) of the VAT Act finds application only to services supplied to persons who are non-residents of the Republic. However, situations arise in the case of foreign subsidiaries of South African companies, where the subsidiary is incorporated in a foreign country and has a fixed and permanent place of business in the foreign country with no presence in the Republic but is nevertheless a 'resident of the Republic' as defined in section 1(1) of the VAT Act. This is due to the fact that this definition makes reference to the definition of 'resident' in section 1 of the Act. Paragraph (b) of the definition in the Act deems a person, other than a natural person, to be a resident of the Republic if it has its place of effective management in the Republic. As such, any service supplied to such foreign subsidiary by the South African company, being a vendor, does not qualify for the zero rate under section 11(2)(ℓ) of the VAT Act, despite the fact that the services may be consumed wholly outside the Republic. Furthermore, because these foreign subsidiaries have no activities in the Republic, they are not conducting an enterprise and cannot register as vendors in the Republic. The effect is that the VAT charged on these supplies becomes a cost to these businesses.

The provisions of section 8(9) and 11(2)(o) of the VAT Act also do not apply because the foreign subsidiary is not a branch of a South African company as envisaged in

paragraph (ii) of the proviso to the definition of ‘enterprise’ in section 1(1) of the VAT Act, but a separate legal entity. This is contrary to the operation of the VAT system which seeks to tax only consumption in the Republic and results in unintended VAT costs in the hands of the foreign subsidiary.

Proposal

In order to correct the unintended consequence explained above, it is proposed that the VAT Act be amended to exclude such foreign subsidiaries from the definition of ‘resident of the Republic’ in section 1(1) of the VAT Act.

Effective date

The proposed amendment will come into operation on 1 April 2025.

3.26. VAT – Reviewing the foreign donor funded project regime

[Applicable provision: Section 50 of the VAT Act]

Background

In terms of section 1(1) of the VAT Act, a foreign donor funded project (‘FDFP’) means a project established in terms of an official development assistance agreement to supply goods or services to beneficiaries, to which the government of the Republic of South Africa (the Republic) is a party.

An implementing agency, as per section 1(1) of the VAT Act, means:

- the government of the Republic in the national, provincial or local sphere; or
- any institution or body established and appointed by a foreign government, as contemplated in section 10(1)(bA)(ii) of the Income Tax Act; or
- any person who has entered into a contract directly with a party contemplated in the above paragraphs to implement, operate, administer or manage an FDFP.

Effective from 1 April 2020, each FDFP is regarded as a separate enterprise and should be registered as a separate branch of the implementing agency’s own VAT registration in terms of section 50(2A) of the VAT Act.

Reasons for change

In practice, a foreign donor may fund a research project through multiple recipients by awarding the funds to a prime recipient and allocating sub-awards to more than one

recipient as subawardees. Applying the law as it stands will lead to multiple VAT registrations concerning the same project. Further, some implementing agencies 'implement, operate, administer or manage' multiple FDFPs and are required to register multiple branches for VAT purposes. Some institutions manage hundreds of FDFPs.

These administrative concerns have been raised by taxpayers, since they are leading to inefficiencies in applications and unnecessary burdens for both taxpayers and SARS.

The establishment of the FDFP is generally only for a set period, for example 3 years, for the project to be completed. Recipients will therefore constantly have to register new projects and deregister projects once completed.

In summary, the FDFP legislation introduced with effect from 1 April 2020 has resulted in an increased administrative burden for recipients of foreign donor funding, which led to additional risk and costs associated with VAT compliance.

The reason for originally requiring separate VAT branch registrations was to limit the risk of abuse of the FDFP provisions. Based on subsequent market research and discussions, it was highlighted that the implementing agency would, by agreement, be required to keep detailed records of all funding received and the manner those funds were expensed or used for each FDFP project separately through a comprehensive coding system. Implementing agencies are therefore able to provide SARS with all the relevant information regarding each FDFP separately. This, together with the fact that an FDFP must still be approved by National Treasury, addresses the previous concerns regarding the risk of abuse and hence, separate branch registrations for each FDFP are not required.

Proposal

To ease the administrative burden on the implementing agents, it is proposed that implementing agents register one branch for VAT purposes that encompasses all FDFPs that such implementing agency is responsible to 'implement, operate, administer or manage'.

Effective date

The proposed amendment will come into operation on 1 April 2025.

3.27. VAT – Prescription period for input tax claims

[Applicable provision: Paragraph (i) of the proviso to section 16(3) of the VAT Act]

Background

In terms of proviso (i) to section 16(3) of the VAT Act, a vendor that is allowed a deduction in respect of a tax period, may deduct an amount from output tax attributable to a later tax period, which ends no later than 5 years from the end of a tax period during which:

- the tax invoice should have been issued under section 20(1) of the VAT Act;
- goods were imported in terms of the Customs and Excise Act No 91 of 1964;
- second-hands goods were acquired or goods were repossessed or surrendered as per section 8(10) of the VAT Act;
- the agent should have issued the statement to the principal as required under section 54(3) of the VAT Act; or
- in any other case, the vendor for the first time became entitled to such deduction, notwithstanding the documentary proof that the vendor must be in possession of in terms of section 16(2) of the VAT Act.

Reasons for change

Taxpayers sometimes find themselves in the position where it is discovered that input taxes that should have been deducted in previous tax periods were not deducted timeously. Considering that the VAT Act permits the vendor a 5-year period within which to adjust its records, it has come to government's attention that there has been a practice whereby the input tax of previous years is claimed in one tax period of a date after the tax period in which the vendor was entitled to the input tax credit.

This practice makes it difficult for vendors to comply as they might lose track of which tax invoices were deducted in the previous tax periods and which were not, which might lead to a risk of double deduction. It is expected of vendors to perform proper reconciliation between the accounting records and the VAT returns in order to ascertain for themselves if the tax invoices were claimed in the proper tax periods. However, this does not often happen in practice.

Proposal

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.

Effective date

The proposed amendment will come into operation on 1 April 2025.

3.28. VAT – Claw-back on irrecoverable debts subsequently recovered

[Applicable provision: Section 22(2) of the VAT Act]

Background

Section 22(1) of the VAT Act makes provision for a vendor to deduct VAT on amounts written off as irrecoverable in respect of taxable supplies, in respect of which the output tax was previously declared on a tax return. In the event that a vendor subsequently recovers any amount previously written-off, section 22(2) of the VAT Act provides for a claw-back to the extent of the VAT so recovered.

Currently, section 22(2) of the VAT Act only allows for a claw-back of a deduction made as referred to in section 22(1) of the VAT Act. However, the introduction of section 22(1A) of the VAT Act in 1997, specifically allows a deduction to the recipient of a transfer of account receivables at face value, on a non-recourse basis, where any amount of such receivable has been written off by the recipient, limited to the amount that the recipient has paid for the face value of the account receivable that was transferred to the recipient.

Reasons for change

Proviso (iv)(aa) to section 22(1) of the VAT Act specifically denies a transferor of an account receivable at face value, on a non-recourse basis, to make a deduction based on the transfer. In terms of the current provisions of the VAT Act, a recipient of an account receivable at face value on a non-recourse basis is entitled to a deduction of the tax amounts written off as irrecoverable. However, the VAT Act does not provide for any claw-back of these deductions on amounts subsequently recovered.

Proposal

It is proposed that the claw-back provided by section 22(2) of the VAT Act should be extended to any tax amount written off by such a recipient, which is subsequently recovered, as envisaged under section 22(1A) of the VAT Act.

Effective date

The proposed amendment will come into operation on 1 April 2025.

3.29. VAT – Supplies by educational institutions to third parties

[Applicable provisions: Sections 8,12(h)(ii) and the insertion of section 40E of the VAT Act]

Background

The supply of educational services by an educational institution is exempt from VAT in terms of section 12(h)(i) of the VAT Act. Section 12(h)(ii) of the VAT Act further exempts from VAT the supplies made by an educational institution solely or mainly for the benefit of its leaners or students of goods or services (including domestic goods and services) that are necessary for and subordinate and incidental to the supply of services referred to in section 12(h)(i) of the VAT Act, if such goods or services are supplied for consideration in the form of school fees, tuition fees or payment for lodging or board and lodging.

The legislation was thought to reflect the policy intent which was that schools were to be excluded from having to account for VAT as the registration of thousands of entities would increase the administrative costs on institutions which are not geared to comply with taxation laws, without any net gain to the Fisc.

Reasons for change

There seems to be two strong opposing interpretations with regards to the application of section 12(h)(ii) of the VAT Act.

The first interpretation is that the supplies made to third parties of goods or services by an educational institution are exempt from VAT in terms of section 12(h)(ii) of the VAT Act. This will result in the educational institution being denied a deduction of input tax on the goods or services acquired for making such supplies. This is based on the fact that where the supplies are mainly (more than 50 per cent) for the benefit of the leaners or students, all such supplies are exempt (even the supplies made to third parties).

The second interpretation is that the subparagraph limits the scope of the exemption to only supplies where a consideration is made in the form of school fees, tuition fees or payment for lodging and boarding. It is highly unlikely that third parties to whom an educational institution made a supply of goods or services would then make a payment of the consideration in the form of school fees, tuition fees or payment for lodging and boarding. This would then mean that supplies made to such third parties would be taxable in terms of section 7(1)(a) of the VAT Act. Taking the above into consideration, the educational institution will be required to account for output tax and be allowed a deduction of input tax on the goods or services acquired in the making of those supplies to the third parties.

Proposal

The VAT treatment of supplies made by educational institutions to third parties is unclear and as such, there have been differing treatment of these supplies. It is proposed that the VAT Act be amended to clarify the policy intention relating to these supplies. The amendment will be made in section 12(h)(ii) of the VAT Act. It is also proposed that since there have been different interpretations of this subsection, transitional rules be introduced under section 40.

Effective date

The proposed amendment will come into operation on 1 January 2025

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

4.1. Two-pots retirement system – Clarification of different aspects

[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’)]

Background

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:

- 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’.
- From 1 September 2024:
  - 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’;
  - members will be able to 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.
  - 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, except for maintenance awards ordered by a court under the Maintenance Act of 1998 which are taxed under section 7(11) of the Act.

In general, when formal emigration through the South African Reserve Bank (SARB) was phased out effective 1 March 2021, it was replaced with the process of ceasing to be a tax resident of South Africa. This meant a change in the trigger event for these types of withdrawals from pension preservation funds, provident preservation funds and retirement annuity funds. Where the trigger event for early withdrawal from these funds used to be changing your status from resident to non-resident from an exchange control perspective, it is now triggered by changing your status to non-resident from a tax perspective. This is because the rule states that to access a withdrawal benefit

before retirement from a pension preservation fund, provident preservation fund or retirement annuity fund, a taxpayer may no longer follow the formal emigration process with the Reserve Bank, but a taxpayer must have been a non-resident for South African tax purposes for an uninterrupted period of at least three years.

However, the 2023 amendments went further and incorrectly required members of pension funds to be subjected to this rule in the vested component.

Reasons for change

The reasons for change stems from:

- 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 to 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'.
- As mentioned above, the cease to be resident requirements should remain applicable to preservation funds and retirement annuity funds and to the retirement components of pension and provident funds. The savings component is excluded because it can be accessed at any time prior to retirement.
- Consequential amendments are needed to cater for an exclusion of the 'savings withdrawal benefit' from a liability for the Skills Development Levy payable and Unemployment Insurance Contributions payable by members.

Proposal

A. Technical considerations with respect to section 37D deductions as outlined in the Pension Funds Act:

It is proposed that:

- various drafting changes be implemented to enhance clarity and precision in the wording to ensure that amounts that are allowed to be deducted from a benefit, in accordance with section 37D (1)(a), (b), (c) or (d)(i) of the Pension Funds Act, are proportionally deducted from each component. The sum of these amounts deducted from each component is deemed to be a lump sum benefit contemplated in paragraph 2(1)(b) of the Second Schedule to the Act. Therefore, this proposal will apply to all three components that is, 'member's interest in the retirement component', 'member's interest in the savings component' and 'member's interest in the vested component'. Please see consequential amendment in the 2024 Draft Taxation Laws Amendment Bill relating to the alignment of the Income Tax Act with amendments made by Pension Funds Amendment Act, 2024 (Act 31 of 2024) as section 37D(1)(d)(iB) of the Pension Funds Amendment Act refers to interim maintenance orders granted by the court in terms of rule 43 of the High Court rules or rule 58 of the Magistrates' Court rules made under section 6 of the Rules Board for Courts of Law Act, 1985 (Act No.1 of 1985

B. Changes concerning emigration and ceasing to be a resident of South Africa:

It is proposed that the policy intent be clarified such that to ensure that the cease to be resident requirements apply to all retirement funds except for the vested components of the pension and provident funds and to all savings components.

As it is longer than 3 and a half years since the cut-off date for the transitional rule for the Reserve Bank emigration process, it is proposed that all transitional rules be removed from the definitions of retirement funds.

C. Intra-fund transfers and directives

It is proposed that in order to simplify the directives system for both administrators and SARS for speedy implementation, the requirement to obtain a tax directive when transferring the seeding amount from the 'vested

component' to the 'savings component' be done away with. A directive is not strictly necessary at this point, as tax is only imposed on withdrawal from the savings component.

In addition, it is proposed that reallocations of amounts between the three components within the same fund is not treated as transfers for income tax purposes and that the requirement to obtain a directive for reallocations between the three components within the same fund be withdrawn.

D. Skills Development Levy and Unemployment Insurance Contributions

It is proposed that consequential amendments be made to these Acts.

Effective date

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

5. NOTICES / REGULATION

5.1. Filing Season for 2024 tax year

28 June 2024 – SARS announced '15 July 2024' as the start of the Filing Season for provisional and non-provisional taxpayers who are required to file a tax return. Auto-assessments for an expanded pool of taxpayers will run from the 1st to the 14th of July 2024.

Taxpayers whose contact details, including an email address and cell phone number, as well as banking details, have changed must update these details on eFiling or the SARS MobiApp to facilitate an easy and seamless Filing Season.

Taxpayers who agree with the auto-assessment do not have to do anything. If a refund is due, it will be paid within 72 hours. If tax is due to SARS, the taxpayer must make the payment by the due date.

If a taxpayer does not agree with the auto-assessment, they should make all applicable changes and file their return the normal way via eFiling or the SARS MobiApp on or before 21 October 2024, the closing date for non-provisional taxpayers.

Filing Season dates:

- Auto-assessment notices: 1 – 14 July 2024
- Individual taxpayers (non-provisional): 15 July 2024 – 21 October 2024

- Provisional taxpayers: 15 July 2024 – 20 January 2025
- Trusts: 16 September 2024 to 20 January 2025

5.2. Filing Season for Individuals

Are your SARS details up to date?

Make sure everything is up to date for a hassle-free filing experience.

This year from 1 July 2024 SARS will again issue auto-assessments to taxpayers whose tax affairs are less complicated. If a taxpayer is in agreement with your auto-assessment, then there is no need to ‘accept’ the assessment. If a refund is due to you, it will automatically be paid into your bank account.

From 1 July 2024, a taxpayer will be able to check the auto-assessment status here, but wait for the SMS/email notice before you login to eFiling or MobiApp. The auto-assessments on the system are rolled out in batches from 1 to 14 July 2024.

If a taxpayer agrees with the assessment, check if a refund is due or an amount is owe SARS. If a refund is due, then there is nothing more for a taxpayer have to do but to wait for the refund, which a taxpayer can expect within approximately 72 hours, provided the taxpayer’s banking details with SARS are correct. If a taxpayer owes SARS, then payment should be made via eFiling or SARS MobiApp on or before the payment due date. The payment due date of the amount owed to SARS is displayed on the ‘Notice of Assessment’ (ITA34).

If a taxpayer does not agree with the assessment, the taxpayer can access your tax return via eFiling or SARS MobiApp, complete the return, and file it on or before the normal due date for non-provisional taxpayers of 21 October 2024.

What has changed this year?

SARS is continuing its journey towards building its vision of a smart, modern organisation with unquestionable integrity, that is admired by all. It is working hard to make it easy for taxpayers to comply with their legal obligations. The updates for this coming Filing Season are:

Solar rebate

To encourage individuals to invest in clean electricity-generation capacity, the solar energy tax credit was available for one year. It applied to new and unused solar PV panels that were acquired by the individual and brought into use for the first time from 1 March 2023 to 29 February 2024.

The amount of the solar energy tax credit allowed as a deduction to an individual under section 6C was 25% of the cost of the solar PV panels described above, up to a maximum of R15 000.

It should be noted that a deceased estate does not qualify for the solar energy tax credit.

Pro-rata deduction in respect of contributions to Retirement Funds

Section 11F(2)(a) of the Income Tax Act was amended as follows: Where any person's year of assessment is less than 12 months, the amount stipulated in section 11F(2)(a) of the Act used to calculate the allowable retirement contribution deduction (currently R350 000) shall be adjusted. The adjusted amount will bear the same ratio to R350 000 as the number of days in that year of assessment bears to 365 days.

Therefore, if any person's year of assessment is less than 12 months, the allowable retirement contribution deduction (currently R350 000) will be applied pro rata.

Exemption of amounts received or accrued in respect of tax-free investments

Section 12T(4)(a) of the Income Tax Act was amended as follows: Where any person's year of assessment is less than 12 months, the contribution limitation stipulated in section 12T(4)(a) of the Act (currently R36 000), shall be adjusted. The adjusted contribution limitation will apply in aggregate for any year or years of assessment during the 12-month period commencing in March and ending at the end of February of the immediately following calendar year.

Therefore, if any person's year of assessment is less than 12 months, the applicable contribution limitation (currently R36 000) will be applied pro rata.

Deductions in respect of erection or improvement of buildings in Urban Development Zones

Section 13quat of the Income Tax Act, was amended by substituting the following paragraph in subsection (5) for paragraph (c): ‘‘(c) which is brought into use by the taxpayer after 31 March 2025.’’

Therefore, the Income Tax Return (ITR12) form will be amended to extend the allowable deduction until 31 March 2025.

Redesigned deduction in respect of certain machinery, plant, implements, utensils and articles used in production of renewable energy

The redesigned Renewable energy tax incentive under section 12BA will apply to the currently eligible renewable energy sources, with no electricity-generation limits for the duration of this temporary incentive. Certain new and unused assets owned by a taxpayer will qualify if they are used in the generation of electricity. Such assets must have been brought into use by the taxpayer for the first time for purposes of trade on or after 1 March 2023 and before 1 March 2026. Businesses can deduct 125% of the cost incurred with reference to eligible assets, upfront.

Where a taxpayer disposes of an asset on or before 1 March 2026, for which a redesigned renewable energy tax incentive is granted, the amounts deducted (a maximum of 125% of the cost of the asset) will be fully recouped.

ITR12 Form changes – Redesign sections 10(1)(0)(i) and 10(1)(0)(ii): Foreign employment income exemption

SARS has redesigned the section 10(1)(o)(i) and section 10(1)(o)(ii) questionnaire to make it easier for taxpayers to complete the return.

ITR12 Form changes – Beneficial Owner (BO)

For 2024 Filing Season changes, the taxpayer would complete the Details of Partners (excluding yourself) on ITR12 where applicable to align with the Beneficial Owner requirement.

Definition of ‘Beneficial Owner’ as extracted from the Tax Administration Act, 2011:

‘(a) of a company, has the meaning assigned to it by section 1 of the Companies Act, 2008 (Act No. 71 of 2008).

(b) of a partnership, means a natural person who, directly or indirectly, ultimately owns, or exercises effective control of, the partnership, and includes—

(i) every partner, including every member of a partnership en commandite, an anonymous partnership or any similar partnership;

(ii) if a partner in the partnership is a legal person or a natural person acting on behalf of a partnership or in pursuance of the provisions of a trust agreement, the beneficial owner of that legal person, partnership or trust; and

(iii) the natural person who exercises executive control over the partnership; and

(c) of a trust, has the meaning assigned to it by section 1 of the Trust Property Control Act, 1988 (Act No. 57 of 1988);'

BO is crucial for tax administration because it helps ensure transparency and accountability in financial transactions. By identifying the individuals who ultimately benefit from an asset or income, tax authorities can accurately determine tax liabilities and prevent tax evasion, which information may also assist other competent authorities in the investigation of money laundering, and other illicit activities.

Furthermore, BO information facilitates international cooperation and exchange of tax-related information among jurisdictions. This cooperation is crucial in detecting and addressing cross-border tax evasion and ensuring that taxpayers fulfil their obligations in the appropriate jurisdictions.

5.3. Retirement Fund Contribution Deductions - Section 11F(2)(a)

5 August 2024 – Section 11F(2)(a) of the Income Tax Act was amended with effect from 1 March 2024. Where a person's year of assessment is less than 12 months, the maximum amount of the allowable retirement fund contribution deduction may not exceed the prescribed limit (currently R350 000) for all years of assessment within the 12-month period from 1 March of that calendar year to the last day of February in the following year.

The formula to determine the allowable retirement fund contributions is set out in Section 11F of the Income Tax Act. In summary, the allowable deduction is the lesser of the following:

R350 000; or	Section 11F(2)(a)
27.5% of the greater of: • Remuneration (excluding retirement lump sum benefits, withdrawal lump sum benefits and severance benefits); or • taxable income (including passive income and taxable capital gains) but excluding retirement lump sum benefits, withdrawal lump sum benefits and severance benefits and before any s11F and s18A deduction; or	Section 11F(2)(b)
The taxable income (excluding any taxable capital gain and retirement lump sum benefits, withdrawal lump sum benefits and severance benefits) and before any s11F and s18A deduction.	Section 11F(2)(c)

Example : 1

Mr Taxpayer was classified as insolvent on 31 October 2024. For the 2025 years of assessment, the allowable retirement fund contribution deduction (i.t.o s11F(2)(a)) will be applied as follows:

Period of assessment: 1 March 2024 – 31 October 2024

- This assessment applies to Tax Reference Number 1 – the original tax number coded as insolvent and applicable to assessments preceding the date of sequestration
- The allowable retirement fund contribution deduction that was utilised for this assessment is R200 000

Period of Assessment: 1 November 2024 – 28 February 2025

- This assessment applies to Tax Reference Number 3 – Mr Taxpayer’s new tax number applicable to assessments from date of sequestration.
- The retirement fund contribution deduction allowable is R150 000 (i.e. R350 000 less R200 000 utilised in the first ‘period assessment’ that

falls within the same 12-month period from 1 March of that calendar year to the last day of February in the following year).

Note: Tax reference number 2 is an optional tax number registered for the 'insolvent estate' and is managed by the court appointed administrator/trustee. It is applicable to assessments from the date of sequestration until the estate is finalised. Section 11F does not apply to this tax number.

Example: 2

Mr Taxpayer ceased to be a tax resident on 31 July 2024. For the 2025 years of assessment, the allowable retirement fund contribution deduction (i.t.o s11F(2)(a)) will be applied as follows:

Period of Assessment: 1 March 2024 – 31 July 2024

- This applies to Mr Taxpayer's assessment as a South African tax resident
- The allowable retirement fund contribution deduction that was utilised for this assessment is R350 000

Period of Assessment: 1 August 2024 – 28 February 2025

- This applies to Mr Taxpayer's assessment as a non-tax resident
- There will be no retirement fund contribution deduction for this assessment as the allowable amount i.t.o. section 11F(2)(a) was fully utilised in the first period assessment that also falls within the same 12-month period from 1 March of that calendar year to the last day of February in the following year.

5.4. Tax Directives enhancements and tax implications of the two-pot retirement system

2 September 2024 – From 1 September 2024, members of pension funds, provident funds, pension preservation funds, provident preservation funds, and retirement annuity funds (collectively referred to as 'the Funds') will be able to access a portion of their retirement savings in the member's retirement fund as a cash payment while still a member of that fund. Retirement funds will now be split into the following:

- Vested Component:
    - This is the total value of the member’s interest as at 31 August 2024, less 10% of that value, capped at R30 000 to be allocated to the Savings Component as seed capital.
    - The payment of the remaining balance in the Vested Component as a lump sum benefit, before retirement, will not be impacted by the two-pot retirement system.
- Savings Component:
    - One-third of the members retirement fund contributions, will be allocated to the Savings Component. This is in addition to the seed capital amount, which is 10% of the Vested Component, capped at R30,000, whichever is lower.
    - The member can withdraw a minimum of R2000, up to the maximum value available in the member’s Savings Component once every tax year. These withdrawals from the Savings Component are called Savings Withdrawal Benefits.
    - At retirement, the remaining balance in the Savings Component (if applicable) the member can elect to add this to their retirement fund lump sum to be taken in cash.
- Retirement Component:
    - Two-thirds of the members retirement fund contributions will be allocated to the Retirement Component. This component will be used to pay the member a pension or purchase an annuity upon retirement, subject to certain exceptions.
    - This amount cannot be taken as a lump sum if the member terminates membership in the fund before retirement as a result of resignation, dismissal, withdrawal or retrenchment and must be transferred to another fund.

A member, who has already reached the normal retirement age but has not elected to retire, may transfer their retirement fund to another approved pension fund / provident fund when the employer, for example, establishes a new approved pension or provident fund without incurring any tax liability.

The tax directive system and application forms have been enhanced to accommodate requests for the Savings Withdrawal Benefit and for transfers of the Vested Component, Savings Component, and Retirement Component to another fund.

For an overall view, see the new Two-pot retirement system webpage, with FAQs for taxpayers and the Funds, as well as:

- A two-pot retirement system calculator is now available on the SARS website. The calculator will assist pension fund members with an illustrative amount of what they can possibly expect as a payout. All relevant and accurate information must be provided to get a clear estimate of the payout. The same calculator is also available on eFiling, the MobiApp and WhatsApp.
- Request My Tax Number
- Request My Tax Compliance Status
- Verify My Tax Compliance Status
- Tutorial video: Understanding the Two-Pot Retirement system and its tax implications
- Register for Income Tax via:
    - SARS Online Query System (SOQS) – Register for Income Tax
    - WhatsApp on 0800 11 7277

Updated forms for the enhanced Tax Directives process:

- Application for tax directive Gratuities and Two Pot Savings Withdrawal Benefit (IRP3a) Form:
    - Will now allow for the Savings Withdrawal Benefit to be paid out to a member of the Fund
    - The Savings Withdrawal Benefit will be taxed using the annual payment/bonus tax calculation based on the taxpayer's marginal rate of tax. No retirement rates, allowable deductions, exemptions or tax-free amounts will be used in this calculation. Therefore, it is mandatory for the taxpayer to be registered for income tax and can provide the fund with a Tax Reference number (TRN).
    - The IT88L stop order will be attached to the tax directive where the taxpayer has outstanding taxes to be paid over to SARS. The types of

outstanding taxes can include Assessed Tax, Provisional Tax and Administrative Penalties.

- Request for Tax Deduction Directive Pension and Provident Funds (Form A&D):
  - A new Reason *'Involuntary transfer before Retirement [Par 2(1)(c)]'* has been introduced on Form A&D for involuntary transfers to pension or provident funds in addition to the existing reason *'Voluntary transfer before Retirement [Par 2(1)(c)]'.*
  - The Vested Component, Savings Component and the Retirement Component fields have been added to the form to allow for transfers to another fund when these two reasons are selected.
- Request for Tax Deduction Directive Pension and Provident Funds (Form B):

  The following three new tax directive reasons have been added for transfers on or after 1 September 2024:
  - Two Pot-Transfer: All Components Inter-Fund Transfer
  - Two Pot-Divorce Transfer: All Components (Inter-Fund Transfer)
  - Two Pot-Par (eA) Transfer/ Payment: All Components (Inter-Fund Transfer).
- Request for Tax Deduction Directive Retirement Annuity Funds (Form C):

  The following two new tax directive reasons have been added for transfers on or after 1 September 2024:
  - Two Pot-Transfer Prior to Retirement: All Components (Inter-Fund Transfer); and
  - Two Pot-Divorce Transfer: All Components (Inter-Fund Transfer).
- Recognition of Transfer between Approval Funds (Form ROT01):
  - The ROT01 form has been updated to accommodate the new two-pot transfer reasons. The receiving fund will now be able to confirm the receipt of the different components that have been transferred.
  - Handling Discrepancies in Transferred Amounts: If the amount transferred to the receiving fund differs from the amount received for all

the components transferred, and the reason for the discrepancy is the same for all components, the fund can provide a single reason for the variance and indicate that it applies to all components.

- Application by Non-Residents for a Directive for Relief from SA Tax for Pension and SWB (RST01Form):
  - An interim process has been introduced to accommodate non-residents wishing to confirm the application of a Double Taxation Agreement (DTA) on the Savings Withdrawal Benefit income.
  - An individual who is not a tax resident of South Africa and receives income from a South African source may apply for a directive for relief from South African tax on the Savings Withdrawal Benefit. The request should be made under the DTA in place between South Africa and the non-resident's country of residence.
  - The RST01 – *'Application by Non-Resident for a Directive for Relief from South African Tax for Pension, Annuities and 'Savings Withdrawal Benefit'* form has been enhanced to allow non-residents to request relief from South African tax on the payment of the Savings withdrawal Benefit.
  - Once the DTA tax directive has been issued and it is determined that the Savings Withdrawal Benefit is either subject to tax in South Africa or partially subject to tax:
    i. The taxpayer must provide the DTA tax directive to their Retirement Fund.
    ii. The fund administrator must submit a manual IRP3(a) form requesting SARS to issue a manual tax directive (IRP3(e)) giving effect to the DTA tax directive issued.
  - SARS must issue a manual IRP3(e) showing a nil tax amount if the income is not subject to tax in South Africa or a manual IRP3(e) showing the tax amount to be withheld where the income is partially taxable in South Africa.
  - A non-resident who does not qualify for relief from South African tax must follow the standard process, where the Retirement Fund applies for the Savings Withdrawal Benefit on their behalf using the electronic

IRP3(a) form available on eFiling or via Independent Software Vendors (ISV).

6. NOTICES / REGULATIONS

6.1. Trusts filing season opened 16 September 2024

The date for Trusts filing season is 16 September 2024 to 20 January 2025 for provisional and non-provisional taxpayers.

The following enhancements were implemented based on legal and form changes:

- Enhanced deduction for certain machinery, plant, implements, utensils, and articles used in renewable energy production to increase the appeal of the tax incentive by temporarily enhancing the current renewable energy tax incentive in section 12B of the Income Tax Act to encourage greater private investment in renewable energy.
- Urban Development Zone (UDZ): The tax incentive's sunset date has been extended by two years, from 31 March 2023 to 31 March 2025.
- Loans, advances, or credit granted to Trusts by connected persons: The exclusion for acquiring a primary residence has been clarified, including funding for improvements to the residence. The limitations regarding the land on which the primary residence is located now also apply.
- Public Officer: A new question has been added to the form wizard to confirm that the person appointed as a trustee has not been disqualified.
- Donations: The donations questions have been updated to allow the taxpayer to enter up to 20 number of approved organisations, that the Trust donates to.
- Request for Reduced Assessment (RRA02): A new feature has been introduced to manage requests for reduced assessments for companies under section 93 of the TA Act. Taxpayers must complete the Request for Reduced Assessment (RRA02) form, which will generate a case to determine whether they qualify for a reduced assessment.
- Beneficial Ownership: Clarifications have been added to the Beneficial Ownership section to assist in completing information for unnamed beneficiaries.

7. TAX CASES

7.1. C:SARS v Free State Development Corporation (86 SATC 289)

Free State Development Corporation (FSDC) was a registered VAT vendor in terms of the Value-Added Tax Act and it was the official economic development agency for the Free State province.

FSDC was identified by the Department of Trade and Industry (DTI) as a public entity which would further its mandate of developing Special Economic Zones (SEZs) in terms of the Special Economic Zones Act and various agreements and transactions were concluded between FSDC and the DTI.

FSDC, in respect of the amounts paid to it by the DTI in terms of the aforementioned agreements, had submitted VAT 201 returns for the relevant disputed tax periods and had declared the output tax as zero-rated supplies.

SARS had found that FSDC had erroneously claimed that the supplies were zero-rated and had therefore understated output VAT for the disputed tax periods and it therefore raised additional assessments in terms of section 92 of the Tax Administration Act to correct the amount of VAT payable.

SARS had considered FSDC to be a ‘designated entity’ as defined in section 1 of the VAT Act and it concluded that the transactions were subject to the standard VAT rate, because they were supplies in terms of section 7 of the VAT Act or ‘deemed supplies’ in terms of section 8(5) of the VAT Act.

FSDC, on 7 January 2019, had objected to the additional assessments by means of a notice of objection and had contended that the transactions were zero-rated in terms of section 11(2)(t) and section 8(5A) of the VAT Act.

FSDC submitted, having regard to the nature of the transactions between itself and the DTI, that it was a mere conduit for the funds and gained no financial benefit upon which VAT could be levied.

SARS had disallowed the objections in February 2019 and dispute resolution had failed and, in terms of rule 10 FSDC delivered a notice of appeal on 7 March 2019 and the appeal proceeded in the Tax Court.

SARS, in terms of rule 31(2), delivered its statement of ‘the grounds of assessment and opposing the appeal’ and stated that, in terms of section 7(1)(a) of the Act and the definition of ‘supply’, FSDC was liable for payment of VAT at the standard rate, for the

actual supply of goods for consideration, as provided for in the agreements, read with the provisions of section 7 of the Act.

FSDC, in its original statement in terms of rule 32(1), had stated that it was not in dispute that it had rendered services in accordance with the two funding agreements. It, inter alia, had been accountable for management of the funds granted to it, and was to monitor the implementation of the project. There was, however, no reciprocity in the form of a supply of services of a corresponding value, to the funds disbursed by FSDC and such services did not attract VAT and were zero-rated.

FSDC contended that the agreements specifically stated that such proceeds should be used exclusively for the development and advancement of the SEZ and not for itself. It did not derive any financial benefit from the grant as it was just a conduit, which the DTI had employed to realise the objectives of developing the SEZs and the payment was not linked to an actual supply of goods or services.

SARS responded to the rule 32(2) Statement of FSDC, in terms of rule 33 and it contended that FSDC was a ‘designated entity’ and therefore did not enjoy the zero-rating contemplated in section 8(5A) read with section 11 of the VAT Act.

FSDC’s original statement had been based upon advice received from its erstwhile legal advisors and in June 2022 it received a second legal opinion which advised that the transactions were not zero-rated but were, in fact, neither a ‘supply’ nor ‘deemed supply’ in terms of the VAT Act. This led to the quest to withdraw its original statement and to file the amended statement, claiming that there was no ‘supply’ or ‘deemed supply.’ The previous admissions that the transactions fell within the definitions of ‘supply’ and ‘deemed supply’ were legal conclusions made erroneously and it was submitted that the amended statement had been based upon the same facts and transactions, but had reached a different legal conclusion.

FSDC contended that the issue traversed in the amended grounds was covered by the substance of the objection, and it therefore did not contravene rule 10(3).

FSDC denied that it was a ‘designated entity.’ To be defined as a ‘designated entity’ it was necessary to consider whether the supply of goods and services fell within the definition of ‘enterprise’ in terms of the definition set out in para (b)(i) and to establish that the deemed supply was made ‘in the furtherance of an enterprise carried on by that designated entity.’

The court a quo, being the Free State Tax Court (per Musi JP), found that the original statement of grounds of appeal had been based upon an erroneous legal conclusion

and that, on a proper interpretation of rule 10(3) read together with rule 32(3), as a matter of law, FSDC was not precluded from raising a new ground of appeal in its amended statement, in particular when the grounds were, in substance, the same as those stated in the initial objection under Rule 7(1).

SARS appealed against the Tax Court's decision after leave to appeal to the Supreme Court of Appeal was granted by the Tax Court and the appeal turned on whether the Tax Court had been correct in granting an order permitting FSDC to withdraw its statement of grounds of appeal (the original statement) and to file an amended statement of grounds of appeal against additional assessments levied by SARS.

On appeal the question of the appealability of the Tax Court's order was also under scrutiny and SARS contended that the order was appealable because it was wrong whereas FSDC argued that the order was not definitive of the rights of the parties and was thus not appealable.

Judge Weiner held the following:

As to the appealability of the Tax Court's order

(i) That it was trite that, in the ordinary course, to be considered appealable, the order or decision must be 'final in effect, not susceptible of alteration by the court of first instance, definitive of the rights of the parties and the order must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.' (Zweni v Minister of Law and Order 1993 (1) SA 523 (A))

(ii) That FSDC argued that because the order was not definitive of the rights of the parties, and did not dispose of any of the relief claimed in the main proceedings, it did not conform to the principles set out in Zweni and thus was not appealable. The important distinction in the present matter was that the appeal of the Tax Court's order concerned the power of that court to grant an amendment in circumstances where, in SARS' view, it had no such power.

(iii) That in TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd [2023] ZASCA 63 (5 May 2023) the Supreme Court of Appeal held that where a challenge concerned the jurisdiction of a court, and hence the competence of a judge to hear the matter, the decision of the court was considered definitive, and appealable and this was consistent with the principles enunciated in Zweni because the decision as to jurisdiction was considered final. This position was entirely justified because an error as to

jurisdiction, if not subject to appellate correction, would permit the court below to proceed with a matter when it had no competence to do so, rendering what it did a nullity which was plainly an undesirable outcome.

(iv) That, accordingly, the Tax Court's order was appealable because it concerned the Tax Court's powers to grant the order which it did. SARS contended that such powers were lacking in terms of the legislation and the Rules of the Tax Court. Questions of competence are always treated as having a final effect as a lack of competence would vitiate the decision.

As to the basis of the appeal

(v) That the issue at stake was whether the ground of appeal in the amended Rule 32 statement constituted a new ground of objection not previously raised, as provided for in rule 10(3). If it did, then the Tax Court had no jurisdiction to grant the order which it did. In other words, was the ground in the amended statement foreshadowed in the original objection filed in terms of rule 7, as found by the Tax Court?

(vi) That in its application to amend under rule 52(7), FSDC had endeavoured to show that the transactions were neither 'supplies' nor 'deemed supplies' and SARS had opposed the application on the basis that the proposed amendment sought to introduce grounds of appeal which constituted amended grounds of objection against a part of the assessments not previously objected to. SARS submitted that the amended ground of appeal that the amount paid did not constitute a taxable supply, was not a ground of objection relied upon and it had also contradicted FSDC's VAT 201 returns in which it claimed that the supplies were zero-rated.

(vii) That in the present case FSDC had raised the objection in its notice of objection that the payment received was not linked to a supply, but had relied upon an incorrect legal conclusion in claiming that it was zero-rated. It was thus distinguishable from HR Computek (Pty) Ltd v C:SARS 75 SATC 104. In seeking to amend its grounds of appeal, FSDC claimed that the transactions were not subject to VAT because the transactions did not involve a supply. The basis of the objection and the claim for zero-rating were similarly based on the nature of the transactions and the fact that the payments were not linked to an actual supply of goods or services. The amended grounds were thus clearly foreshadowed in the objection. The nature of FSDC's objection to the whole of

SARS' assessment had always been and continued to be the legality of imposing a VAT liability on the transactions under consideration.

(viii) That on a proper interpretation of rule 10(3) read together with rule 32(3), as a matter of law, FSDC was not precluded from raising a new ground of appeal in its amended statement, in particular when the grounds were, in substance, the same as those stated in the initial objection under Rule 7(1). The court therefore concluded that the Tax Court had the power to grant the amendment because the grounds were foreshadowed in the objection.

(ix) That it was then necessary to consider the Tax Court's discretion in deciding whether to grant the amendment or not. In Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another 1990 (3) SA 547 (A) the court stated that although the decision whether to grant or refuse an application to amend a pleading rested in the discretion of the court, this discretion must be exercised with due regard to certain basic principles and these principles included prejudice to the other party; that the amendment is made in good faith; and that the granting of the amendment will ensure that justice is done in deciding the real issues between the parties.

(x) That the aforementioned discretion must be exercised judicially. If an issue had been foreshadowed in the objection but was not expressly stated, there would be no real prejudice to the other party and the amendment should be granted.

(xi) That applications for amendments seeking to retract incorrectly admitted legal consequences were normally granted by our courts, even on appeal, for 'the law would be prejudiced if cases were to be decided on what parties might, in ignorance, have agreed the law to be.' A court is not even obliged to consider prejudice to the other side in such circumstances.

(xii) That in Paddock Motors (Pty) Ltd v Igesund 1976 (3) SA 16 (A) the court observed at 23F–G that it would be 'an intolerable position if a Court were to be precluded from giving the right decision on accepted facts, merely because a party failed to raise a legal point, as a result of an error of law on his part.'

(xiii) That even if prejudice were to be taken into account, SARS had the opportunity to file a further statement in terms of rule 33, dealing with the amendment. It had the right to reply to any new grounds, material facts or applicable law in FSDC's amended Rule 32 Statement.

(xiv) That SARS admitted that no further evidence was provided by FSDC in seeking the amendment. As FSDC contended, this was because the amendment was based upon a legal conclusion, not a factual scenario. SARS conceded that a court will not, even where admissions are withdrawn, regard itself as being bound by a mistake of law on the part of a litigant. FSDC still bears the onus of proof in terms of section 102 of the TAA to prove that the transactions were not 'supplies' or 'deemed supplies' as defined, and that they did not therefore attract VAT and these issues will be dealt with in the fullness of time.

(xv) That, in any event, any investigations which SARS may have carried out in determining whether the 'supplies' were zero-rated would have encompassed whether there was, in fact, a 'supply' or 'deemed supply' in terms of section 8(5) of the VAT Act. Behind both grounds lies the question as to whether a vatable transaction occurred when FSDC performed in terms of the agreements.

(xvi) That, in appropriate circumstances, a court will carefully scrutinize the substance of a particular transaction to establish its true nature. The amendment will permit the true issue between the parties to be ventilated and this basic principle of tax law is underscored by section 143(1) of the TAA which provides that SARS has a duty 'to assess and collect tax according to the laws enacted by Parliament and not to forgo a tax which is properly chargeable and payable.' This principle must also relate to the corollary – SARS' obligation not to levy taxes which are not payable in terms of the law and this could be the situation if the amendment were not granted.

(xvii) That FSDC had demonstrated that there would be no prejudice to SARS, the amendment was sought shortly after the second legal opinion was received, but more importantly, the granting of the amendment will allow the true legal issues between the parties to be ventilated.

Appeal dismissed with costs including the costs of two counsel where so employed.

7.2. ITC 1973 (86 SATC 303)

The taxpayer was a member of a group of companies that carried on business in the production, export and marketing of fresh fruit products, including table grapes.

The taxpayer fulfilled a marketing role in the group's business activities and, in the main, the company's business was to act as a marketing agent for third party fruit

producers, including some fruit producing companies within the group and its income in that capacity was derived from commissions.

The taxpayer did, however, to a very limited extent, also sometimes purchase fruit from local producers to sell for its own account on the export market.

In 2014 a tripartite agreement was concluded between the taxpayer of the one part, ABC Sustainable Trade Initiative of the second part and XYZ of the third part.

ABC was a foundation running a programme known as the 'Sustainability Initiative' directed at 'accelerating and upscaling viable and sustainable fruit and vegetable production and trade' universally.

XYZ was a prominent European retail business with which the taxpayer and the group of companies of which it was a part had, and still had, an established commercial relationship.

It would appear that the taxpayer's involvement in the tripartite agreement happened on the initiative of XYZ and the evidence suggested that XYZ had assessed that it might enjoy a domestic marketing advantage through being able to offer to its customers produce generated from sources associated with environmental sustainability and social upliftment.

XYZ identified that its customers would be willing to pay a premium on the price of grapes sourced from such producers and that it would be able to recover any outlay on its part in funding production in terms of environmental sustainability and social upliftment initiatives by modestly increasing the prices charged to its customers.

XYZ had identified the group of companies of which the taxpayer was part as a viable partner in the contemplated initiative because it was aware of the group's involvement in socio-economic upliftment. At the time a substantial shareholding in one of the group companies, Newco, was held by a trust established for the benefit and socio-economic upliftment of a number of previously disadvantaged current and former female employees of the group. The trust held 40% of the issued shares in Newco with the remaining 60% being held by T Holdings (Pty) Ltd, of which the taxpayer was a wholly owned subsidiary in the group structure.

XYZ was also conscious, by virtue of its established commercial relationship with the group, of its high standards and reliability. In other words, XYZ regarded the group, including the taxpayer, as a dependable source of supply when it identified it as a worthy participant in the funding venture.

The object of the tripartite agreement was to fund the expansion of Newco's cultivation of export grapes from 100 hectares to 150 hectares of vineyards and it was envisaged that the additional hectarage could yield up to 350 000 cartons of grapes per year and potentially provide a significant boost to the taxpayer's marketing throughput of about 5,5 million cartons to the global market annually.

The benefit foreseen by XYZ from the arrangement was the securing of an increased and dependable supply of grapes for sale in its supermarkets and the contemplated arrangement would also tie in Newco as a component of a well-established group of fruit production and marketing companies with the taxpayer as the so-called 'implementing partner' in terms of the tripartite agreement.

The taxpayer's obligations as the implementing partner under the agreement included ensuring the efficient management of grape production by Newco and the maintenance of quality control to the required standards.

The funding arrangement subsequently incorporated in the tripartite agreement was that a stipulated amount denominated in euros (then equating to approximately R50 million) would be paid to Newco on a non-refundable basis over the term of the agreement and XYZ and ABC would, between them, provide 40% of the funds and the taxpayer would provide the remaining 60%.

The funding from the taxpayer was extended to Newco by way of a grant totalling more than R15 million.

The taxpayer had claimed a deduction in terms of section 11(a) read with section 23(g) of the Income Tax Act in respect of the grant that it had paid to Newco in the amount of R15 320 263 during the 2016 year of assessment.

SARS had disallowed as a deduction the amount of R15 320 263 claimed by the taxpayer as being a grant made to Newco (Pty) Ltd.

SARS had also imposed a penalty in the amount of R730 532, 32 in terms par. 20(1) of the Fourth Schedule to the Income Tax Act for underpayment of provisional tax as a result of an underestimation by the taxpayer of its taxable income in respect of the 2016 year of assessment.

SARS disallowed the deduction claimed by the taxpayer, inter alia, because he had considered the expenditure in issue to be of a capital nature.

The taxpayer had objected to the assessment and after the objection was also disallowed it, appealed to the Tax Court.

The taxpayer's holding company which was also the majority shareholder in Newco had sought professional advice on the tax implications of funding the proposed project.

The tax advisers had proposed that the taxpayer 'be the [group] entity to advance the grant' and they had motivated their proposal by saying that the taxpayer '…was involved in the business of marketing and exporting the fresh fruit products from South Africa to the various overseas markets and in order for its business to operate successfully [the taxpayer] needed to satisfy the requirements of its overseas customers in respect of their need for fresh fruit products. The granting of funds by [the taxpayer] to Newco will enable Newco to increase its production capabilities. The grant will therefore in our opinion be closely aligned with the business operations of [the taxpayer] and therefore in the production of income and for the purposes of its trade.'

The tax advisers also expressed the view that the funding by the taxpayer would be 'no more than part of the costs incidental to the performance of the income earning operations of [the taxpayer's] business and therefore a revenue nature expense.'

The issue for the court to determine was whether the taxpayer's expenditure in the form of the grant to Newco was properly to be characterised as being revenue or capital in nature.

Judge Binns-Ward held the following:

(i) That the Income Tax Act does not define the difference between revenue and capital expenditure, and it has been remarked in countless judgments that drawing the distinction is often a difficult undertaking. Various pointers that assist in the characterisation exercise have been identified in the jurisprudence, some of which will be mentioned later in this judgment, but it has long been appreciated that none of them is of itself decisive or necessarily pertinent. In each case determining the character of the expenditure has to be done with close regard to the facts peculiar to the outlay under consideration. The burden of proof in establishing that the expenditure in question was deductible was on the taxpayer, see section 102 of the Tax Administration Act.

(ii) That the taxpayer contended, relying on CIR v VRD Investments (Pty) Ltd 55 SATC 368, that the grants in issue would ultimately be intended to assist it in its income producing operations and thereby making its business more profitable. Furthermore, the taxpayer considered that as the expenditure would not result in it acquiring a permanent asset or right, or change its 'income earning structure', it would not be of a capital nature.

(iii) That the taxpayer's obligations as implementing partner under the tripartite agreement included the 'implementation and coordination' of the project to expand the area of Newco's cultivated production and 'management' including overseeing the application of the funds provided by it, ABC and XYZ. The agreement recorded that XYZ foresaw sales of 10.5 million punnets of grapes from the group during the project period and one of the objects of the project was the production in sales to XYZ. The established mode by which XYZ imported grapes from South Africa when the project was conceived and agreed upon was through the agency of the taxpayer.

(iv) That it was relevant to have regard to the taxpayer's grant payments of more than R15 million to Newco in each of the 2015 and 2016 tax years in the overall context of the company's financial situation. In the taxpayer's 2015 year of assessment, the contribution of R15 759 371 was more than double the taxpayer's net profit before tax. The quantum of the contributions, seen in proportion to the taxpayer's asset base as well as its net income, would not have made commercial sense for the taxpayer had there been a mere hope, rather than an effective reality, that it would be assured on an ongoing basis of getting the marketing business to be generated from Newco's increased production.

(v) That the contextually identifiable object of the expenditure was therefore to create or materially expand a source or foundation for future income in the long term. In this court's judgment, that points strongly towards its character being capital in nature. The court's view of the enduring benefit to the taxpayer contemplated by the tripartite agreement found support in the declared view of XYZ concerning the 'long term/exit strategy' that 'the long-term relationship with XYZ gives.'

(vi) That hindsight revealed that all of Newco's production had subsequently been placed with the taxpayer for export as agent. From these factors it had to be inferred that there was much more than a mere hope on the part of the taxpayer that it would become the exporter of Newco's fruit. It must have appeared practically certain to the taxpayer's board of directors at the time they committed it to the contribution expenditure, that the company would be the exporter of Newco's fruit, and the exporter of as much of it as it chose, for at least as long as the taxpayer and Newco remained sister companies.

(vii) That the court considered that the taxpayer's tax advisers' invocation of VRD Investments, supra, in support of their opinion that the expenditure would be of a revenue character was misplaced. The facts in that case were materially distinguishable from those in the current matter. Unlike the position in the current matter, the expenditure incurred in VRD Investments, supra, was to improve the income earning efficiency of the taxpayer's business rather than to establish a source of additional income for the business.

(viii) That the court referred to CIR v George Forest Timber Co Ltd 1 SATC 20 where it was held that money spent in creating or acquiring an income-producing concern must be capital expenditure as it was invested to yield future profit and while the outlay did not recur, the income did. There was a great difference between money spent in creating or acquiring a source of profit and money spent in working it. The one was capital expenditure, the other was not. Similarly in British Insulated and Helsby Cables Ltd v Atherton [1926] AC 205 it was stated that when an expenditure was made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, there was very good reason for treating such an expenditure as properly attributable not to revenue but to capital.

(ix) That in the court's view the facts of the current matter made this case comparable with ITC 1110 29 SATC 169 which was referred to and distinguished by the Supreme Court of Appeal in Palabora Mining Co Ltd v SIR 35 SATC 159. In ITC 1110 the court held that the expenditure in question constituted an improvement of the taxpayer's income earning structure and therefore an additional asset, the cost whereof was not deductible.

(x) That in the present case but for the taxpayer's contribution the expansion of the vineyard would not have taken place in the foreseeable future, but once expanded consequent upon the taxpayer's expenditure, all indications were that it would, as intended, provide the latter with a long-term assured source of additional income and, in a relevant sense, the expenditure effectively added to the income-producing structure of the taxpayer's business.

(xi) That what happened in terms of the tripartite agreement entailed a very material outlay by the taxpayer to a fellow subsidiary for the latter to create a vineyard for the production of grapes for the taxpayer to market. The expenditure was incurred by the taxpayer to create or acquire a source of additional income, not to work an existing source of income.

(xii) That, in the result, SARS did not err in disallowing the taxpayer's expenditure of the grant in issue as a deduction in terms of section 11(a) of the Income Tax Act.

(xiii) That the under-estimation penalty imposed in terms of par. 20 of the Fourth Schedule to the Income Tax Act was to be remitted in whole.

(xiv) That the taxpayer's liability to pay interest in terms of section 89quat of the Income Tax Act was confirmed as the underpayment in issue did not occur in the sort of circumstances posited by section 89quat(3) and there was therefore no basis for SARS to waive the interest.

Appeal dismissed.

7.3. ITC 1974 (86 SATC 319)

The taxpayer was a private company that had determined its payroll taxes for each of the one-month periods from April 2019 until February 2021.

SARS had conducted a verification into the taxpayer's PAYE affairs and thereafter had issued it with internal revised notices of assessment in respect of its payroll taxes for the aforementioned periods.

The revised assessments resulted from a dispute pertaining as to whether the taxpayer was entitled to claim Employment Tax Incentive ('ETI') allowances in terms of the Employment Tax Incentive Act ('the ETI Act') which had resulted in an approximate total tax liability of R2 296 574.69, excluding interest and penalties.

SARS had disallowed an amount of R873 605.86 in respect of the disputed tax periods.

The taxpayer had disputed the revised assessments and had objected thereto on 27 September 2021 which was disallowed by SARS on 12 October 2021.

The taxpayer then appealed against the disputed assessments on 12 November 2021.

The taxpayer and SARS elected not to refer the dispute to alternative dispute resolution proceedings in terms of rule 10(2)(e) and rule 13(2).

Consequently, SARS' Rule 31 Statement of grounds of assessment and opposing appeal was due within 45 days from 12 November 2021, that being 15 February 2022.

The taxpayer, on 13 May 2022, after the expiry of the 45 days, then delivered a notice in terms of rule 56(1)(a) to SARS.

The aforementioned notice informed SARS that it was to be afforded a further 15 days from the date of the notice to remedy its failure to file the Rule 31 Statement.

However, the 15-day period expired on 3 June 2022 and the taxpayer, as it was entitled to do in terms of rule 56(1)(b), informed SARS that it would apply to the Tax Court for a final order in terms of section 129(2)(b) of the Tax Administration Act 28 of 2011 upholding its appeal against the assessments.

The taxpayer duly filed its application in terms of rule 56(1)(b) on 6 July 2022 in which it sought an order for its appeal against the assessments in respect of its payroll taxes to be upheld in terms of rule 56(2)(a).

SARS filed his Rule 31 Statement on 31 August 2022, being 133 business days after 15 February 2022.

The issue for determination before the court was whether SARS had established 'good cause' in terms of rule 56(2)(a) in order to avoid an order under section 129(2) of the Tax Administration Act.

Tax Court Rule 56(2)(a) provided at the relevant time:

> '(2) The tax court may, on hearing the application–
>
> (a) in the absence of good cause shown by the defaulting party for the default in issue make an order under section 129(2);'

The taxpayer contended that SARS' explanation for the delay was insufficient, was incomplete and failed to cover the entire period of delay and was not reasonable and hence had failed to show good cause why default judgment should not be granted in its favour.

SARS contended that the taxpayer had been unable to show that a clear employer and employee relationship had existed between the parties and that the purported employees did not meet the hours worked criteria since they were full time students. Moreover, the alleged employees did not work for the taxpayer, but they were merely receiving accredited education in the form of study courses through an accredited learning institution.

Judge Slinger held the following:

(i) That there was no exhaustive definition of what constituted 'good cause.' Each case must depend on its own facts and the court can only deal with each application on its merits and decide in each case whether good cause had been shown.

(ii) That the court in Van Wyk v Unitas 2008 (2) SA 472 (CC) reiterated that the standard for considering a condonation application were the interests of justice. The facts and circumstances of each case would determine whether it would be in the interests of

justice to grant condonation. Factors relevant to this enquiry would include the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, if any, the reasonableness of the explanation of the delay and the prospects of success.

(iii) That, consequently, Van Wyk v Unitas, supra, was not authority for the submission that only the degree of the delay and the sufficiency or insufficiency of the explanation for such delay may be considered when determining whether good cause had been established or not.

(iv) That in Madinda v Minister of Safety and Security 2008 (4) SA 312 (SCA) the court found that good cause looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. It may include prospects of success, the reasons for the delay, the sufficiency of the explanation offered, the bona fides of the applicant, and any contribution by other persons or parties to the delay and the applicant's responsibility therefor.

(v) That the court in the present matter then turned to consider whether good cause had been established which may justify the refusal to grant default judgment in the taxpayer's favour.

(vi) That SARS had admitted that there had been no adequate explanation for the delay in furnishing his Rule 31 Statement and that his communication with the taxpayer was not what it should have been. It seemed as if this matter simply slipped through the cracks, and that it was only after the notice had been delivered in terms of rule 56(1)(a) that it received the necessary attention.

(vii) That SARS, in opposing the application for default judgment, pleaded that there were disputes of fact on the papers with regard to the proper compliance with the provisions of the ETI Act and therefore the court could not make a finding regarding the merits of the case based on the papers currently placed before it and hence it would be in the interests of justice to allow him to present further evidence in order to assail the taxpayer's grounds of appeal on the merits.

(viii) That it was not disputed on the papers before the court that SARS, on more than one occasion, had requested the taxpayer to submit documentation and information with regard to whether the taxpayer's employees had qualified for the allowance for purposes of the ETI Act in order to enable it to claim the disputed ETI allowances but the taxpayer had failed and/or refused to furnish same.

(ix) That, in addition, the provisions of rule 7(2)(b)(iii) also obliged the taxpayer to file the documents required to substantiate the grounds of objection that it had not previously delivered to SARS for purposes of the disputed assessment but it had failed to do so without explanation.

(x) That if SARS' grounds of assessment and grounds for opposing the taxpayer's appeal were to be upheld, it would show that the taxpayer had fraudulently claimed allowances in terms of the ETI to which it was not entitled. As the taxpayer had elected not to meaningfully engage with the merits of the matter, SARS' grounds of assessment stood largely undisputed at this stage.

(xi) That, in respect of prejudice, the only prejudice which the taxpayer would suffer if default judgment were not granted in its favour would be the delay to have its appeal against SARS' assessment timeously finalised. Should default judgment be granted, the doors of the court would be closed to SARS and it would be deprived of the opportunity to test the veracity of the taxpayer's assessment claims.

(xii) That the overriding consideration when determining good cause was the interests of justice. The interests of justice do not only relate to what is in the interests of the parties but also what, in the opinion of the court, is in the public interest.

(xiii) That, as a result of the ETI's objectives and the nature of SARS' grounds for opposing the taxpayer's appeal, it would be in the public interest for the matter to be fully ventilated and for the veracity and/or lawfulness of the ETI allowances claimed by the taxpayer to be determined.

(xiv) That, accordingly, SARS had shown good cause why default judgment should not be granted.

(xv) That, in regard to the costs of the application, the taxpayer had submitted that the appropriate scale of costs for which SARS was liable would be on an attorney and client scale. As a result of the manner in which SARS had dealt with this matter, the court was of the view that the appropriate costs order should be on an attorney-client scale.

Application dismissed.

7.4. ITC 1975 (86 SATC 329)

The taxpayer had an appeal pending before the Johannesburg Tax Court against an assessment issued by SARS.

The present matter concerned two interlocutory applications brought before the court at the behest of SARS.

The first was an application to amend SARS' pleadings, being its Rule 31 Statement of Grounds of Assessment and opposing the appeal and, in particular, attempting thereby to introduce a higher understatement penalty.

SARS motivated the increase in the understatement penalty to 125% as the facts would show that the taxpayer had consistently and without any reasonable explanation misrepresented the facts in such a manner as to establish a case for 'gross negligence' as contemplated in item (v), column 4 of the Understatement Penalty Percentage table in section 223 of the Tax Administration Act 28 of 2011.

The second was an application for the discovery of additional documents in terms of rule 36(6) of the rules promulgated under section 103 of the Tax Administration Act.

Rule 31(3) provided at the relevant time that SARS may not include in the statement a ground that constitutes a novation of the whole of the factual or legal basis of the disputed assessment or which required the issue of a revised assessment.

Rule 36(6) provided at the relevant time that if either party believed that, in addition to the documents disclosed, there were other documents in possession of the other party that may be relevant to a request under subrule (1) or (2) or the issues in appeal, as the case may be, that have not been discovered, then that party may give notice of further discovery within 10 days of the discovery under subrule (4).

Both applications were inter-related and for this reason the Tax Court heard them at the same time and dealt with them in the same judgment.

At issue in the main appeal was an assessment that was issued to the taxpayer, who was a businessman and the sole director and shareholder in a number of firms.

The taxpayer had opposed both interlocutory applications and neither party had made any concessions to the other.

Two issues motivated the difference in approach of the parties in this matter. The first was SARS' scepticism of the taxpayer's version that he had made good faith errors in respect of the loan accounts of one of his entities, Company A, and hence they had to

be rewritten, rendering what was taxable in his hands no longer so. The second was the taxpayer's belief that SARS wanted to resurrect the opportunity to subject him to an audit de novo.

Judge Manoim held the following:

As to the application to amend SARS' Rule 31 Statement

(i) That the taxpayer raised no serious objection to certain of the amendments proposed by SARS and in regard to those the court considered that the amendments in issue improved the pleadings by clarifying SARS' position and the taxpayer benefitted from the clarity.

(ii) That, however, the taxpayer strongly objected to the second aspect of the amendments which related to SARS' request to introduce a higher understatement penalty of 125% constituting gross negligence on the part of the taxpayer.

(iii) That SARS had motivated its amendment on the ground that if the taxpayer was found to have altered his financials on the facts given then the concealment was worthy of a higher level of penalty for the understatement.

(iv) That SARS' motivation was to be rejected as this was not a new aspect to the case brought on by the court's decision in August 2022 to refuse SARS' then application to have the case referred back to it for reconsideration and assessment. This had always been SARS' position and it had not motivated sufficiently for why the amendment should be made now.

(v) That, furthermore, given the prejudice that would be suffered by the taxpayer this amendment could not be allowed at this stage of the proceedings.

As to the application to discover further documents

(vi) That in an appeal the Tax Court is confined to ordering discovery in terms of the Tax Court rules only. Hence that court was limited to considering the application before it in terms of rule 36(6) and not in terms of the definition of 'relevant material' contained in section 1 of the Tax Administration Act read with section 3 of that Act.

(vii) That there was a distinction between the powers that SARS exercised qua investigator and the rights that it had to discovery as a litigant in an appeal. In terms of the former, given that these were investigative powers, it was

understandable that these powers were wide. However, the same latitude was not accorded to SARS as a litigant in an appeal and, for this reason, the right to discovery was to be determined by the normal standard applied to a litigant in accordance with the Tax Court's rules.

(viii) That on an examination by the court of SARS' document requests it found that certain documents requested exceeded the discovery rights of the litigant including those which related to financial information of the taxpayer in foreign jurisdictions or those which had not been shown to be relevant to the current dispute.

(ix) That, however, SARS' request for discovery of certain journal entries was, in the court's view, relevant to the issues in dispute as contemplated in para [26] of the taxpayer's Rule 32 Statement of grounds of appeal. SARS placed in dispute the explanations given by the taxpayer that these entries were errors and referred to the so-called four versions given to SARS by the taxpayer. Whilst the taxpayer had denied that he had given four versions, this was a fact in issue to be determined in the appeal and hence relevant for discovery purposes.

(x) That SARS had relied on the case of GB Mining and Exploration SA (Pty) Ltd v C:SARS 76 SATC 347 to support its contention that in cases where a taxpayer contended that its financial statements had contained incorrect information which SARS ought not to have relied upon, evidence of supporting documentation would have to be submitted. The journal entries sought by SARS were examples of such supporting documentation and SARS was entitled to seek their discovery.

(xi) That in regard to a request by SARS for correspondence between the taxpayer and his accountants, the court noted that some of this information may be relevant but the way the request was framed was overbroad and would require the discovery of much irrelevant documentation because it contained no restrictions as to content and to duration. What might have been relevant was any correspondence between them regarding the reconstruction of the financial statements during the period when the error was realised and when it was corrected but the court was reluctant to rewrite this request in this manner as it would amount to more than a pruning of the request but a rewrite and for this reason this request was also, as presently framed, refused.

Application upheld in part and dismissed in part.

Each party to bear its own costs.

7.5. *Jordi v C:SARS (84 SATC 337)*

Appellant (Jordi) was a trustee and beneficiary of the Janad Trust and the latter held shares in Rappa Holdings.

Jordi was also employed by Rappa Holdings and had served on its board as a technical director during the period 1988 to 2010. It was during his employment that the Janad Trust had acquired its shares in Rappa Holdings.

Jordi's relationship with Mr Moss, who also held shares in Rappa Holdings through the Rynic Trust, broke down and Jordi ceased to be employed by Rappa Holdings in October 2010. He was bound by a restraint of trade for a period of twelve months and ceased being a director of Rappa Holdings in June 2011.

Following Jordi's resignation, Rappa Holdings, Jordi and the Janad Trust were involved in protracted litigation which resulted in a settlement agreement being concluded on 23 April 2015 between the trustees of the trusts and Rappa Holdings.

On the same date a share repurchase agreement was concluded between the trustees of the Janad Trust and Rappa Holdings which was subject to certain suspensive conditions which in essence were that Rappa Holdings would pay the Janad Trust the amount of R160 million and R60 million to Jordi in consideration of a restraint of trade agreement.

The restraint of trade agreement between Jordi and Rappa Holdings was also concluded on 23 April 2015 and provided the undertaking by Jordi not to compete with companies which were subsidiaries of Rappa Holdings for a period of five years and acknowledged that Jordi had been a key employee of the company and had been exposed and had access to certain confidential information.

The agreement further provided that Rappa Holdings was to pay Jordi the sum of R60 million 'in settlement of the consideration payable in terms of the Restraint Agreement'.

Jordi, following receipt of the R60 million consideration for the restraint of trade, paid in terms of the restraint of trade agreement, declared to SARS and paid an amount of R8 million as capital gains tax in his first provisional tax return.

Jordi had declared the amount of R60 million as a capital receipt in his Income Tax Return (ITR12) at the end of the year of assessment.

According to Jordi, he had declared the amount of R60 million as a capital gain since he had received a directive issued on behalf of SARS by an employee, Mr Van Vuuren, and he submitted that the consideration for the restraint of trade constituted a capital receipt and was subject to capital gains tax rather than normal income tax.

SARS did not agree with the categorisation of the payment as a capital gain and accordingly adjusted it to be gross income falling within the definition of 'gross income' contained in s 1(cB) of the Income Tax Act and taxed him accordingly.

SARS disallowed Jordi's objection to the aforementioned adjustment and, aggrieved by this decision, Jordi filed an appeal to the Tax Court.

The Tax Court, being the court *a quo*, (see ITC 1965 (2022) 85 SATC 331 per Molahlehi J) held that it was clear, when applying the facts in this case to section 1(cB) of the Income Tax Act, that Jordi had received the payment of R60 million from Rappa Holdings in his personal capacity and the payment had been in consideration of a restraint of trade imposed on Jordi by virtue of his employment, thus bringing the restraint of trade within the sphere of section 1(cB)(ii) of the Act.

The court *a quo* further imposed understatement penalties in terms of sections 222 to 223 of the Tax Administration Act and section 89*quat* interest on the underpayment.

Jordi thereafter noted an appeal against the Tax Court judgment to a full bench of the Gauteng Local Division, Johannesburg.

The issue for determination in this appeal was whether the Tax Court had erred in holding that there had been a causal link between the restraint of trade payment and Jordi's past employment or the holding of office with Rappa Holdings and its affiliated companies.

Jordi contended that he was entitled to have the amount of R60 million paid to him in consideration of the restraint of trade agreement assessed as a capital gain as the restraint had not been imposed as a result of his employment, but rather was predominantly causally linked to the sale of shares and not the past employment and the holding of office of Jordi.

Jordi further contended that the Tax Court had wrongly found that the 10% understatement penalty imposed by SARS was justified in the circumstances.

Judge Strydom held the following:

<u>As to condonation and reinstatement of the appeal</u>

(i) That Jordi had brought an application for an order that his late or deficient compliance with the provisions of Rules 49(5) and (6) of the Uniform Rules of Court be condoned and for an order that the appeal be reinstated to the extent that the appeal might have lapsed.

(ii) That the court had to decide the condonation application together with the merits of the appeal as the prospects of success on appeal was one of the considerations to be taken into account by the court.

(iii) That the approach adopted by a court in determining an application for condonation, in the context of reinstatement of an appeal, was well-established. Tritely, an acceptable explanation must be given in all cases, not only for the delay in noting the appeal but also, where applicable, for any delay in seeking condonation. The party seeking condonation must therefore make out a case for good cause, and a full, detailed and accurate account of the causes of delay and their effects must be furnished to enable the court to understand clearly the reasons and then, in the exercise of the court's discretion, to assess the reasons for failure to comply with the rules.

(iv) That in the court's view there existed a reasonable prospect of success in the appeal and it was satisfied that Jordi had demonstrated good cause for the grant of condonation for various non-compliances, and for the reinstatement of the appeal which had technically lapsed.

<u>As to the merits of the appeal</u>

(v) That the determination of the appeal hinged on the interpretation of par. (cB) in the definition of 'gross income' contained in section 1 of the Income Tax Act, which included: 'Any amount received by or accrued to any natural person as consideration for any restraint of trade imposed on that person in respect of or by virtue of (i) employment or holding of any office; or (ii) any past or future employment or the holding of an office'.

(vi) That par. (cB) contained three elements that must be satisfied: the first element was that the amount received or accrued should be as consideration for a restraint of trade. The second element was that the restraint of trade should have been imposed on a person, and, lastly, the imposition should be in respect of or by virtue of employment or holding of any office, past, present or future. 'In respect of' or 'by virtue of' connoted a causal relationship should be present

between the imposition of the restraint of trade and the employment or holding of an office.

(vii) That what a decision in this matter really boils down to is what the reason or reasons for imposing the restraint of trade on Jordi was or were some four years after he no longer was employed by or held a directorship with Rappa Holdings.

(viii) That for purposes of a decision in this matter, section 1(cB) requires a causal link between the restraint of trade which was imposed and the past employment or holding of office of Jordi. In the court's view this section does not limit the causal link only to employment or the holding of office of the person receiving a consideration in terms of the restraint of trade. Nothing in the section can be interpreted to limit the causal link to a dominant reason. What is required is a nexus between the consideration received in terms of the restraint and the employment or holding of office.

(ix) That it cannot be doubted that the Settlement Agreement, Sale of Shares Agreement and the Restraint of Trade Agreement are interlinked and were concluded at the same time. This, however, in my mind, did not mean that the Restraint of Trade Agreement was only entered into because of a suspensive condition in the Sale of Shares Agreement.

(x) That the Sale of Shares Agreement might have been the triggering event for concluding the Restraint of Trade Agreement at that time as, upon the sale of the shares Jordi had no longer a reason to protect the value of his previously held shares. The question remains, however, why was the restraint of trade necessary? Because Jordi had the know-how which he had acquired many years before being brought into the business or whether through his employment and directorship, which stretched over many years, he had obtained confidential information which he could use as a springboard to compete with Rappa Holdings and its subsidiaries?

(xi) That the answer to the aforementioned questions was to be found in the wording of the terms of the Restraint of Trade Agreement itself. It stipulated in some detail what Rappa Holdings wanted to protect and a protectable interest can be discerned from this. 'Confidential information' was defined to mean the know-how and techniques of the subject companies; the method and mode by which Rappa Resources and Nama conducted their respective businesses;

client lists and client connections of these companies and the names of business connections of them.

(xii) That the Restraint of Trade Agreement was an agreement that was signed by Jordi himself, whereby he agreed with the terms thereof. To argue that the dominant reason why he entered into the Restraint of Trade Agreement was by virtue of the Sale of Shares Agreement was not sustainable.

(xiii) That the reason for a restraint of trade is to protect the value of a business. The value of a business is protected by avoiding that a person with confidential information uses such information to compete against a business. A proprietary interest is sought to be protected through a restraint of trade. This proprietary interest may be vested in confidential information such as trade secrets, methods of conducting the business, customer lists and contacts. This was why it became necessary for Rappa Holdings to protect itself against Jordi, as was stated in the Restraint of Trade Agreement. He obtained such confidential information and was in a position to effectively compete against the Rappa businesses if he was free to do so. This confidential information was obtained by Jordi as a result of his employment and/or directorship.

(xiv) That, during many years of employment and as a director, Jordi would have obtained a far deeper know-how of the business of Rappa Holdings and its subsidiaries and that is what he acknowledged in the Restraint of Trade Agreement.

(xv) That, accordingly, the finding of the court a quo was correct that the money paid to Jordi under the Restraint of Trade fell within the definition of 'gross income' with reference to section 1(cB) of the Income Tax Act 58 of 1962. The Restraint of Trade was imposed in respect of or by virtue of his past employment and holding of office. The causal nexus had been established and the payment made was thus income and not of a capital nature.

<u>As to the understatement penalty imposed</u>

(xvi) That section 102(2) of the Tax Administration Act placed the burden on SARS of proving the facts upon which it relied for the imposition of an understatement penalty. The court a quo found that Jordi was liable for an understatement penalty on the ground that it had rejected Jordi's submission that it had relied on a tax directive from SARS to the effect that the payment in question was a receipt of a capital nature.

(xvii) That SARS had initially disputed the authenticity of the directive, having suggested that it was a forgery on the part of Jordi. However, it later transpired through the discovery of a contemporary file note in the possession of SARS that it recorded that Jordi had been directed to make payment on the basis that the amount received was a capital gain. Moreover, a senior SARS official had confirmed the authenticity of the file note, having been its author and the court on appeal confirmed its authenticity.

(xviii) That considering that the onus was on SARS to have proven its entitlement to impose an understatement penalty, the court a quo had misdirected itself to have found that Jordi had made a misrepresentation when the request for a directive was made. Moreover, evidence was lacking to have made such a finding.

(xix) That the version of Jordi that he in fact received the directive in question should have been accepted by the court a quo and, this being the case, the understatement of gross income came about for an acceptable reason. If a taxpayer received such a directive, he or she, or even a tax practitioner, will be acting bona fide to declare income on the basis of the directive, unless such a finding was clearly unsustainable.

(xx) That, accordingly, the 10% understatement penalty should be remitted and Jordi's relevant assessment be altered.

The appeal to be reinstated.

Appeal partially upheld to the extent that the understatement penalty was remitted, and the costs order made against Jordi is set aside.

Each party to pay their own costs in the court a quo and on appeal.

7.6. Capitec Bank Limited v C:SARS (84 SATC 369) - CC

Capitec as part of its business, lent money to unsecured borrowers.

When Capitec lends money it charges interest and initiation and service fees and in the case of unsecured loans, and based on loans with duration of 36, 60 and 84 months, the fees made up between about 5% and 13% of the total consideration it received from the borrower, the rest being interest.

Capitec did not charge VAT on interest and did not claim input tax deductions attributable to the charging of interest, whereas it did charge VAT on the fees it levied and it claimed input tax deductions attributable to the charging of fees.

Capitec, in order to protect itself against the risk that unsecured borrowers might be unable to repay loans upon retrenchment or death, took out insurance and in terms of the policies issued by these insurers, the 'insured' was Capitec and the 'insured life' was a Capitec borrower meeting certain criteria. The 'insured event' was 'the retrenchment or death of an insured life.' The policy specified, among other things, the premiums payable by Capitec to the insurer and the policy benefits payable by the insurer to Capitec on the happening of an insured event.

In turn, Capitec's standard unsecured lending contract with its customers made provision for 'loan cover' but did not charge fees for the provision of loan cover.

Capitec, in arriving at the VAT payable by it in its VAT return for November 2017, deducted an amount of R71 520 812 which was the 'tax fraction' of the full amount that it had paid to customers as loan cover in terms of its standard unsecured lending contract and which deduction Capitec claimed to be entitled to make by virtue of section 16(3)(c) of the Value-Added Tax Act.

Capitec, during the VAT period from November 2014–2015 had received payouts and had made corresponding payments in respect of the loan cover in the amount of R582 383 753, 66 and had claimed R71 520 812 as an input tax deduction in terms of section 16(3)(c) of the VAT Act which constituted the tax fraction of the total insurance payouts recovered by Capitec from its insurers and which it used to settle the outstanding loans owed by its customers or their deceased estates in the event of their retrenchment or death.

Section 16(3)(c) of the VAT Act provided *inter alia* that there could be deducted from the output tax of a vendor:

> '(c) an amount equal to the tax fraction of any payment made during the tax period by the vendor to indemnify another person in terms of any contract of insurance: Provided that this paragraph…shall only apply where the supply of that contract of insurance is a taxable supply.'

SARS had disallowed the notional input tax deduction as claimed by Capitec in its November 2017 VAT return and which it gave effect to by issuing an additional assessment on 15 February 2018 on the ground that Capitec did not qualify for the deduction in terms of section 16(3)(c) of the VAT Act and SARS had additionally also

levied a 10% late payment penalty for the resultant understatement of Capitec's VAT liability.

Following SARS' disallowance of Capitec's objection it noted an appeal to the Tax Court (see ITC 1945 (2020) 83 SATC 454 per Sievers AJ).

The Tax Court had found in favour of Capitec and had upheld the appeal on the basis that the provision of loan cover gave Capitec a competitive and marketing advantage which advanced its lending business in which both interest and fees were earned. The provision of the loan cover was thus made in the course and furtherance of an 'enterprise' that involved the making of taxable supplies and hence the requirements of section 16(3)(c) of the VAT Act were satisfied.

SARS then appealed to the Supreme Court of Appeal (see C:SARS v Capitec Bank Ltd 85 SATC 311) against the Tax Court's order, replacing the latter order with one dismissing Capitec's appeal to the Tax Court with costs and confirmed SARS' assessment.

The Supreme Court of Appeal held, *inter alia*, that the clear and unambiguous terms of the loan contract indicated that the customer was to receive loan cover from Capitec free of charge, i.e. no consideration was received by Capitec in respect of its supply of the loan cover and in the absence of a consideration the supply of the loan cover did not qualify as an 'enterprise' as envisaged in section 1 of the VAT Act. Moreover, the court held that Capitec had made an exempt supply of credit available to its customers which was not deductible and all other activities involved in doing so were incidental to the supply of credit and hence the tax fraction of the loan cover payouts did not qualify for deduction in terms of section 16(3)(c) of the VAT Act.

Capitec then, applied for leave to appeal the judgment of the Supreme Court of Appeal to the Constitutional Court which granted the leave sought.

On appeal Capitec submitted *inter alia* that the Supreme Court of Appeal had erred in finding that the provision of the loan cover was made exclusively in the furtherance of making exempt supplies. The single supply of credit was a mixed supply, partly exempt and partly taxable. Moreover, the provision of loan cover was not gratuitous as it was linked to the provision of credit, for which interest and fees were charged. Even if the supply of the loan cover was for no consideration, that was not conclusive. The loan cover was nevertheless supplied in the course or furtherance of the business of providing credit, and part of that business was the non-exempt 'enterprise' of providing credit in return for taxable fees.

Capitec contended in the alternative that if the court were to find that there was a statutory basis for apportionment, it requested that the matter be referred back to SARS for further examination and assessment.

SARS supported the reasoning of the Supreme Court of Appeal and submitted that the supply of the loan cover was made in the course of the exempt activity of supplying credit.

SARS also relied on the Supreme Court of Appeal's conclusion that the loan cover was provided for no consideration and was thus not a 'taxable supply'. Hence the tax fraction of the loan cover payments made by Capitec did not qualify for deduction under section 16(3)(c), because the supply of the loan cover had not constituted a 'taxable supply' or alternatively was in respect of an exempt supply.

Judge Rogers held the following:

As to jurisdiction and leave to appeal

(i) That the threshold questions before the court, as always, were whether the matter engaged the Constitutional Court's jurisdiction and, if so, whether it was in the interests of justice to grant leave to appeal.

(ii) That if these threshold questions were answered affirmatively, the following issues arose on the merits:

- was the loan cover provided free of charge?
- If so, did this lead to the conclusion that the provision of the loan cover was not a 'taxable supply'?
- if the answers to questions (a) and (b) led to the conclusion that the provision of the loan cover could in principle be a taxable supply, was it made exclusively in the course or furtherance of an exempt activity?
- if the loan cover was not made exclusively in the course or furtherance of an exempt activity, but partly in the course or furtherance of the 'enterprise' activity of earning taxable fees, did it matter that the unpaid fees were 'capitalised' by being debited to the borrower's account and that the loan cover related to the total indebtedness of the borrower?
- if the answer to question (d) was not dispositive against Capitec, did section 16(3)(c) of the VAT Act entitle Capitec to a deduction of the full amount contemplated in that section, even though the loan cover was

also provided in the course or furtherance of the exempt activity of earning interest?

- if the answer to question (e) was no, was Capitec entitled to raise the question of apportionment, having not pleaded this in the Tax Court?
- if Capitec was entitled to raise apportionment, did section 17 of the VAT Act apply and, if not, was there any other basis for apportionment?
- what was the relevance, if any, of the policies issued by the insurers and their VAT treatment?

(iii) That the case had been conducted on the basis that the loan cover involved the supply by Capitec to the borrower of a 'contract of insurance' for purposes of section 16(3)(c). No argument to the contrary had been advanced and the court expressed no opinion on the matter. For purposes of this case, the court had to proceed on the basis that the loan cover involved the supply of a contract of insurance.

(iv) That Capitec had invoked the general jurisdiction conferred on the court by section 167(3)(b)(ii) of the Constitution. In terms of that provision, the court may decide a matter that 'raises an arguable point of law of general public importance which ought to be considered' by this court.

(v) That this case raises several points of law of general public importance. These include, among others, the correct characterisation of supplies made free of charge; the legal significance, if any, of the fact that unpaid fees, the earning of which would ordinarily be an 'enterprise' activity, have been capitalised; the proper interpretation of section 16(3)(c) in circumstances where the supply of an insurance contract is made in the course or furtherance of an activity which is partly exempt and partly of an 'enterprise' character; and whether apportionment in any form was available in such circumstances. These questions transcend Capitec's interests and indeed the interests of banks. They are also arguable, as will appear.

(vi) That the importance of the questions and Capitec's prospects of success were weighty factors in favour of granting leave to appeal. There were no factors militating against granting leave, which should thus be granted.

As to the merits

(vii) That, as to the relevance and VAT treatment of the policies issued by the insurers, the policies issued by the insurers and Capitec's provision of loan

cover to the borrowers were separate contracts. Capitec could have obtained insurance against the risk of default by its customers without providing loan cover to the borrowers; and, conversely, Capitec could have provided loan cover to the borrowers without taking out insurance from the insurers (indeed, a small part of the loan cover was not matched by insurance).

(viii) That no questions of interpretation of the insurance policies or the loan cover clause had been debated in the litigation. If such questions had arisen, the loan contract could not have been interpreted with reference to the insurance policies, because the borrowers were not parties to the insurance policies and there was nothing to show that they ever saw the policies.

(ix) That the Supreme Court of Appeal had erred in finding the VAT treatment of the insurance policies to be relevant. That question had not been raised by the parties themselves and the question as to how the insurers and Capitec in fact dealt with the policies for VAT purposes could have been the subject of evidence, had it been relevant.

(x) That, as to whether the loan cover had been provided free of charge, it was no doubt so that Capitec would not have provided loan cover to its unsecured borrowers unless the interest and fees it expected to earn from the provision of credit to the borrowers covered all its costs, including the cost of premiums payable to the insurers, and left a satisfactory return on capital. Economically, therefore, one might say that the provision of the loan cover was not 'free.' However, the contracts with the borrowers were explicit in stating that there was no charge for the loan cover. This was seemingly done by Capitec to ensure compliance with the National Credit Act. In these circumstances, it was not permissible to allocate some unspecified part of the interest and fees as a notional charge for providing the loan cover, even if it were possible to find a rational basis for doing so. The court thus considered that the case must be approached on the basis that the loan cover was provided free of charge.

(xi) That as to whether a free-of-charge supply was disqualified from being a 'taxable supply', the court noted that a 'taxable supply' was a supply as contemplated in section 7(1)(a) of the VAT Act. The supply contemplated in section 7(1)(a) was the supply by a vendor of goods or services 'in the course or furtherance of any enterprise' carried on by the vendor. Section 7(1)(a) did not itself impose a requirement that the supply must be for consideration. In

order, however, for the supply to fall within the scope of section 7(1)(a), it must be supplied in the course or furtherance of an 'enterprise.'

(xii) That the definition of 'enterprise' required that the enterprise or activity must be 'carried on continuously or regularly' and must be one in the course or furtherance of which goods or services are supplied to another person 'for a consideration, whether or not for profit.' It expressly included any enterprise or activity carried on in the form of a commercial or financial concern.

(xiii) That the definition of 'enterprise' did not require that all goods or services supplied in the course of that activity must be supplied for a consideration. The requirement was that the activity must be one in which goods or services are supplied for a consideration. It was not unusual for a for-profit business to supply some goods or services free of charge. The business may do so for marketing or advertising purposes. A retailer may offer shoppers an extra item free if a purchase was made or may hand out free samples to shoppers. A business may offer prizes to lucky customers. The goods thus supplied are undoubtedly supplied by the vendor in the course or furtherance of the enterprise, even though they are supplied free of charge.

(xiv) That, contrary to the Supreme Court of Appeal's view, section 10(23) of the VAT Act was relevant. It provided that, save as otherwise provided in section 10, 'where any supply is made for no consideration the value of that supply shall be deemed to be nil.' The VAT Act thus envisaged that a supply may be made for no consideration. The Supreme Court of Appeal was right that section 10(23) cannot convert a non-taxable supply into a taxable supply, but that was because section 10(23) was not concerned with whether the supply was taxable or non-taxable; that was determined by other factors. What section 10(23) made clear was that any supply, whether taxable or non-taxable, may be a supply for no consideration, and it was then assigned a value of nil for any purposes relevant to the VAT Act.

(xv) That what flowed from this was that if a vendor, in order to advance the interests of its enterprise in which goods were sold for consideration, offered shoppers a free item as a marketing ploy, the free item, although it was a taxable supply, had a nil value, and so the VAT on that supply in terms of section 7(1)(a) was also nil. It is nevertheless important for such items to be classified as taxable supplies, because on this depended the vendor's right to deduct, as input tax, the VAT it had to pay in acquiring the goods which it supplied free of charge. In

terms of section 17(1), the vendor was only entitled to a deduction as input tax to the extent that such goods were consumed, used or supplied 'in the course of making taxable supplies.'

(xvi) That it followed that Capitec's supply of the loan cover was not disqualified from being a 'taxable supply' merely because it was supplied free of charge, and the Supreme Court of Appeal erred in finding otherwise.

(xvii) That the Tax Court and the Supreme Court of Appeal referred in their judgments to SARS' Interpretation Note 70, as did the parties in argument. Although the conclusion that the present court had reached was consistent with Interpretation Note 70 in both its 2013 and 2021 iterations, it was unnecessary for the court to express a view as to what use if any may be made of such Notes when interpreting fiscal legislation, outside of the provisions of the Tax Administration Act dealing with a 'practice generally prevailing.'

(xviii) That, as to whether the loan cover was supplied exclusively in the course or furtherance of an exempt activity, Capitec did not contend that the free loan cover was offered exclusively in relation to the 'enterprise' activity of earning taxable fees. Capitec recognized that, by providing free loan cover, it was making its overall credit offering more attractive, the credit offering being one in which Capitec earned exempt interest and taxable fees. Capitec's argument was that this mixed character did not affect the extent of the deduction to which it was entitled in terms of section 16(3)(c) of the VAT Act and that was a separate question.

(xix) That in order to determine whether the loan cover was an exempt, taxable or mixed supply, it was the purpose of Capitec's provision of the loan cover to its borrowers that was important and the evidence on that question was clear. The conclusion reached by the court was that the loan cover was a mixed supply made in the course and furtherance of Capitec's exempt activity of lending money for interest and its enterprise activity of lending money for fees. These were not in truth separate activities; there was a single activity of lending money for consideration which consisted of both interest and fees. Nevertheless, the proviso to section 2(1) of the VAT Act compelled one to treat the single activity as consisting of two notional components, the one an exempt activity, the other an 'enterprise' activity.

(xx) That, as to the capitalisation of fees, the Supreme Court of Appeal's reasoning on capitalisation, and SARS' support of that reasoning, were misdirected. The

argument was that the fees, once capitalised, constituted further credit, and the loan cover covered the borrower's full indebtedness, including the capitalised fees – in other words, that the loan cover simply covered the capital indebtedness, which may include credit advanced by capitalising fees.

(xxi) That even if that analysis were sound, why would it make a difference? The question that has to be answered, in terms of section 16(3)(c), was whether the supply of the loan cover to borrowers was a taxable supply. That depended on whether it was made in the course or furtherance of an enterprise and that depended, in turn, on whether the activity, in the course or furtherance of which the supply was allegedly made, qualified as an 'enterprise' and, if so, whether as a fact the supply was made in the course or furtherance of that enterprise.

(xxii) That the precise legal character of the borrower's debt in respect of which the loan cover indemnified the borrower tells one nothing about whether Capitec's activity was an 'enterprise' and whether the loan cover was offered in the course or furtherance of that enterprise. The question was not what benefit the borrower obtained from the free cover, but why Capitec conferred the benefit of free cover on the borrower.

(xxiii) That once one had concluded, as the court did, that the free loan cover was offered in the course and furtherance of Capitec's lending business of earning exempt interest and taxable fees, one knew what had to be known. The loan cover was offered at the time Capitec concluded its loan contract with the borrower and it was then that the purpose of the supply of the loan cover was established.

(xxiv) That it was nevertheless important to emphasise that unpaid fees debited by Capitec to borrowers' accounts did not lose their character as fees, any more than the debited interest loses its character as interest. It was precisely for this reason that 'capitalised' interest is still interest for purposes of the in duplum rule. The debits in respect of interest and fees were clearly identified as such in the loan statements which Capitec issued to the borrowers.

<u>As to the extent of the deduction permitted by section 16(3)(c) and apportionment</u>

(xxv) That there were four possibilities where the supply of a contract of insurance was a mixed supply made in the course or furtherance simultaneously of an exempt activity and an 'enterprise' activity:

- that the vendor was entitled to deduct the tax fraction of the full amount of payments made in terms of the insurance contract;
- that the vendor was entitled to no deduction at all;
- that the vendor could claim the tax fraction of a portion of the payments made in terms of the insurance contract, invoking the apportionment provisions of section 17 of the VAT Act; or
- that the vendor could claim the tax fraction of a portion of the payments made in terms of the insurance contract, invoking an apportionment implicit in section 16(3)(c) of the VAT Act, interpreted in the context of the scheme of the VAT Act as a whole.

(xxvi) That both SARS and the Supreme Court of Appeal took the view that, if the loan cover had a mixed character (something they rejected for other reasons), (c) was the correct answer, namely apportionment in terms of section 17 of the VAT Act. But SARS argued and the Supreme Court of Appeal held that section 17 apportionment was not available in this case because Capitec had not pleaded it.

(xxvii) That there was no question of a portion of VAT which Capitec paid out to suppliers being deductible as 'input tax.' Section 16(3)(c) was a special tailor – made deduction in the case of the supply of a contract of insurance. <u>The amount which the vendor could deduct in terms of section 16(3)(c) was not 'input tax.'</u> Paragraph (c), with which the court was concerned, did not describe the deduction as 'input tax' nor would that be an apt term to describe the deductible amount in question.

(xxviii) That since the wording of the VAT Act did not permit an answer in terms of (c) above, this left the possibility of (d), apportionment on some other basis. Section 16(3)(c) required that the supply of the contract of insurance should be a taxable supply in order to qualify for deduction. In the light of the proviso to section 2(1) of the VAT Act, the lawmaker required one to view the supply of the contract of insurance as partly a taxable supply and partly an exempt supply. The scheme of the VAT Act, in circumstances such as the present, thus itself suggested an apportionment.

(xxix) That the fact that the VAT Act made no explicit provision for apportionment in this situation was not dispositive against apportionment. In the court's view a similar approach to that taken in the Supreme Court of Appeal in CIR v Rand

Selections Corporation Ltd 20 SATC 390 and CIR v Nemojim (Pty) Ltd 45 SATC 241 was mandated in the context of section 16(3)(c) where the insurance contract was supplied only partly as a taxable supply. Section 72(1) of the VAT Act could perhaps be called in aid to support this approach.

As to Capitec's failure to plead apportionment

(xxx) That the next question was whether Capitec's failure to plead apportionment should result in it being deprived of any deduction at all. When Capitec had sought a deduction in full, SARS should have responded that it would permit a partial deduction, and it should have sought from Capitec the information required to determine a partial deduction. It was not correct for SARS to have disallowed the deduction in full.

(xxxi) That Capitec, having lodged an objection, in terms of Rule 7 of the Tax Court Rules, against the whole of the disallowance, appealed to the Tax Court against the whole of the dismissal of its objection. Capitec's failure to advance an alternative objection against only a part of the disallowance would not have precluded it from including this alternative in its appeal to the Tax Court. What the Tax Court Rules preclude is the raising of a new ground that constitutes a new objection against a part or amount of a disputed assessment that was not objected to under Rule 7. Since Capitec had objected to the whole of the disputed assessment, the alternative would not have involved an attack on a part of the assessment to which objection had not previously been taken.

(xxxii) That Capitec should nevertheless have pleaded the alternative, but the question was whether it should now be penalised for its failure to have done so. This judgment concludes that SARS should not have disallowed the objection in full. SARS, as an organ of state subject to the Constitution, should not seek to exact tax which is not due and payable.

(xxxiii) That the fact that the evidence was not sufficient to enable the court itself to make the apportionment did not stand in the court's way. In terms of section 129(2) of the Tax Administration Act, the Tax Court may, on appeal to it, confirm an assessment or decision; or order the assessment or decision to be altered; or refer the assessment back to SARS for further examination and assessment; or make an appropriate order in a procedural matter. This court can now make the order that the Tax Court should have made. This could include referring the assessment back to SARS for further examination and assessment, with a view to determining an appropriate apportionment.

(xxxiv) That, on the face of it, the appropriate apportionment would be based on the proportion that the taxable fees bore to the total consideration. The evidence pointed to the likelihood that this could be determined accurately and with relative ease. In the court's view, therefore, the matter should be remitted to SARS.

The following order was made:

- The late filing of the application for leave to appeal was condoned.
- Leave to appeal was granted.
- The appeal succeeded to the extent set out below.
- The orders of the Tax Court and Supreme Court of Appeal were set aside.
- The assessment for Capitec's November 2017 value-added tax period was remitted to SARS for examination and assessment in accordance with the principles set out in the judgment.
- The parties must bear their own costs in the Tax Court.
- Capitec must pay SARS' costs in the Supreme Court of Appeal, including the costs of two counsel.
- The parties must bear their own costs in the Constitutional Court.

7.7. *ITC 1976 (84 SATC 398)*

SARS had issued a letter of finalisation of audit findings on 6 March 2018 for the 2012 to 2015 years of assessment in which additional income tax assessments had been issued to the taxpayer for the 2012 to 2015 years of assessment.

The taxpayer had subsequently lodged two separate objections, one relating to SARS' decision to re-open its 2012 year of assessment after three years had elapsed in terms of section 99(1)(a) of the Tax Administration Act and the other relating to the specific amounts or parts of the 2013 to 2015 years of assessment.

The taxpayer's objections were disallowed and consequently it lodged an appeal, and each appeal was allocated its own case number.

The prescription appeal was allocated case number IT 25162, the second objection dealing with the penalty against the 2012 year of assessment was allocated case

number IT 24870 and the third appeal dealing with the 2015 assessment was allocated case number IT 25166.

The taxpayer, in its Rule 32 Statement of grounds of appeal, purported to dispute capital gains amounts raised in the 2012 year of assessment and thereby had introduced a new ground of appeal which had not been objected to previously in the initial grounds of objection.

The taxpayer had raised initial objections in respect of capital gains amounts in its 2013 to 2015 years of assessment as well as prescription and the penalty for the 2012 year of assessment.

SARS contended that the taxpayer's conduct in this regard brought it into conflict with the provisions of rules 10(3) and 32(3) of the Rules of the Tax Court.

Rule 10(3) provided that:

> 'The taxpayer may appeal on a new ground not raised in the notice of objection under Rule 7 unless it constitutes a new objection against a part or amount of the disputed assessment not objected to under Rule 7.'

Rule 32(3) provided that:

> 'The appellant may include in the statement a new ground of appeal unless it constitutes a ground of objection against a part or amount of the disputed assessment not objected to under rule 7.'

The above rules are the amended rules that came into effect on 10 March 2023.

The taxpayer submitted that it was clear from the objection letter to its 2012 assessment that its objection to the prescription determination was also an objection to the capital gains amounts in the assessment. It stated that the ground of objection relied upon in respect of the capital gains was prescription.

The taxpayer further submitted that its objection based on prescription was an objection to the whole of the 2012 assessment and was not limited to any part of the assessment, nor was it limited to any amount embodied in the assessment.

SARS submitted that the taxpayer had not initially objected to the capital gain amount in its 2012 year of assessment.

The issue to be determined by the court was whether the taxpayer, in respect of its objection to the capital gains raised by SARS in its 2012 year of assessment, could be allowed to rely on the grounds raised in its objections to the consolidated assessments

for the years 2013–2015 in which it had specifically objected to the various amounts or parts of the assessment.

Judge Bam held the following:

(i) That on the question of the taxpayer's Rule 32 Statement, in which it purported to appeal a ground against an amount or part of the assessment that had not been objected to in the 2012 year of assessment, the court first considered the case of Computek v C:SARS 75 SATC 104 where the facts mirrored to some degree the facts of the present case and where the Supreme Court of Appeal stated, *inter alia*, that the taxpayer 'in its notice of objection read together with the letter that accompanied it….did not object to the capital amount….and it follows that not having raised an objection to the capital assessment in its notice of objection, the taxpayer was precluded from raising it on appeal before the Tax Court.'

(ii) That in ITC 1912 80 SATC 417 the court stated, inter alia, that 'what is prohibited is for a taxpayer to appeal against a portion of the assessment in respect of which no objection was ever raised. For example, if an objection was raised to the penalties imposed but not the VAT portion of the assessment, an appellant is not permitted, through the guise of an appeal, effectively to raise a subsequent objection to the VAT portion.'

(iii) That the ratio from the two cases referred to above was decisive of the question raised by the taxpayer in this case in its second prayer to its Notice of Motion. Although it may not have been clear, the simple import of the second prayer was that the taxpayer, in respect of its 2012 appeal, be allowed to rely on the grounds raised in the 2013 to 2015 years of assessment, where it specifically objected to the various amounts or parts of the assessment.

(iv) That it was plain from the cases discussed that the taxpayer was not allowed to appeal against an amount or part of the assessment, in respect of which no objection had been raised.

(v) That each one of the transactions and facts that gave rise to the capital gains of R8.5 million assessed by SARS in the 2012 year of assessment were individually assessed and ought to have been individually and specifically objected to, but which was not done by the taxpayer.

(vi) That, with reference to the ratio in First South African Holdings (Pty) Ltd v C:SARS 73 SATC 221, an assessment is not merely a mathematical

computation of the globular amount, but a determination of one or more items or amounts and it was to those parts or amounts that the taxpayer was enjoined to specifically object against, as set out in Rule 7 of the Tax Court Rules.

(vii) That, in any event, the assessment pertaining to the 2012 year of assessment, that is in so far as the merits were concerned, had become final in terms of section 100 of the Tax Administration Act. An assessment becomes final where no objection has been made (section 100(1)(b)). The court also referred to C:SARS v Airports Company South Africa 85 SATC 1 where the Supreme Court of Appeal confirmed this principle and stated at par. [23] that 'to permit amendments to an objection would unjustifiably undermine the principles of certainty and finality referred to in C:SARS v Brummeria Renaissance (Pty) Ltd and Others 69 SATC 205 which underpin a revenue authority's duty to collect taxes.'

(viii) That, accordingly, the taxpayer was not entitled to rely, in respect of its 2012 year of assessment, on the grounds of appeal in its Rule 32 Statement for the consolidated 2013 to 2015 years of assessment and hence the application could not succeed.

Application dismissed with costs.

7.8. ITC 1977 (84 SATC 406)

The taxpayer had conducted business as shaft sinkers in various mines in South Africa and was registered as a vendor for Value-Added Tax (VAT).

The taxpayer had employed a number of persons, some of whom were based at its head office and others were employed at mines in the country where they were deployed to carry out projects relating to the taxpayer's construction activities.

The taxpayer, as the employer, provided its employees deployed outside of the head office with accommodation at or near the different construction sites.

The taxpayer paid the accommodation expenses of the employees and did not recoup such expenditure from the employees.

The total amount incurred by the taxpayer for accommodation and meals was R38 680 683.01, and in submitting its VAT returns for the relevant tax periods it claimed input

tax deductions in the sum of R21 185 611.20 in respect of their head office employees and the sum of R17 495 071.81 in respect of their project specific employees.

SARS thereafter issued additional assessments in the amount of R38 680 683.01 thereby rejecting the taxpayer's claim for input tax deductions and further imposed understatement penalties, late payment penalties as well as interest for the tax period June 2012 to August 2016.

The taxpayer, after its failed objection and dispute resolution, appealed to the Johannesburg Tax Court against the findings and determination by SARS of the VAT payable by it in respect of the relevant tax period.

At the commencement of the hearing SARS conceded the input tax claim in respect of the taxpayer's head office employees and this left only the issue of the project specific employees to be determined by the court.

The first issue in dispute was whether the taxpayer was entitled to claim input tax in respect of the expenses that it had incurred to provide accommodation and meals to its employees.

The second issue was whether SARS was entitled to impose an understatement penalty of 10%.

SARS contended that the taxpayer was claiming input tax on items prohibited by section 17(2)(a)(ii) of the Value-Added Tax Act 89 of 1991.

Section 17 of the Act dealt with permissible deductions in respect of input tax and section 17(2)(a) set out what may not be claimed as input tax by a vendor. The section expressly prohibited certain expenses from inclusion by a vendor as input tax and it provided, *inter alia*, that a vendor shall not be entitled to deduct any amount of input tax 'in respect of goods or services acquired by such vendor to the extent that such goods or services are acquired for the purposes of entertainment..'

The definition of 'entertainment' in section 1 of the Act provided as follows:

> ' the provision of any food, beverages, accommodation, entertainment, amusement, recreation or hospitality of any kind by a vendor whether directly or indirectly to anyone in connection with an enterprise carried on by him.'

Judge Makume held the following:

<u>As to the taxpayer's expenses incurred to provide accommodation and meals</u>

(i) That it was not disputed by SARS that the expenses in respect of which input tax was claimed by the taxpayer was for accommodation and meals in respect of project specific employees and further that those expenses were actually incurred by the taxpayer.

(ii) That section 17(2)(a) of the Act sets out what may not be claimed as input tax by a vendor and it provides that a vendor is prohibited from deducting input tax in respect of goods or services acquired by such vendor to the extent that such goods or services are acquired for the purposes of 'entertainment' and the definition of 'entertainment' in section 1 of the Act includes 'the provision of any food, beverages, accommodation…'

(iii) That proviso (i)(bb) to section 17(2)(a) provides that the deduction of input tax is not prohibited on entertainment expenses where the goods or services are acquired for making taxable supplies of entertainment in the ordinary course of an enterprise which supplies entertainment to any employee of the vendor to the extent that such taxable supplies of entertainment are made for a charge which covers all direct and indirect costs of such entertainment.

(iv) That *in casu* it was correct that the taxpayer was not in the hospitality entertainment business and hence section 17(2)(a)(i)(bb) was not applicable on the facts of this case and hence the taxpayer was excluded from claiming the benefit as provided for in the proviso (i)(bb).

(v) That in AB (Pty) Ltd v C:SARS heard in the Johannesburg Tax Court (judgment handed down in Case No VAT 1015 per Mali AJ on 29 September 2014) the taxpayer was similarly a company that specialised in the sinking of shafts in the mining industry and also provided accommodation and meals for its employees whilst working on a project. In that case SARS had similarly disallowed the taxpayer's input tax deductions relating to accommodation and meals expenses incurred by it when executing its contracts at various mines on the ground that the accommodation and meals constituted 'entertainment'.

(vi) That in AB (Pty) Ltd v C:SARS, supra, the court held that the taxpayer's provision of food and accommodation to its contract employees constituted 'entertainment' as envisaged in the Act and was therefore not deductible as input tax.

(vii) That this matter was on all fours with the decision in AB (Pty) Ltd v C:SARS, *supra*, and the appeal in the present case was accordingly dismissed.

As to the understatement penalty

(viii) That sections 221 and 223(3) of the Tax Administration Act sketch two scenarios. Firstly, for the taxpayer to be absolved from paying the understatement penalty it must prove a *bona fide* inadvertent error and, secondly, if the taxpayer failed to prove that, then SARS will only remit the understatement penalties if the taxpayer proves and places itself squarely within the jurisdictional requirements of section 223(3), being that the taxpayer had made a full disclosure of any arrangements and/or that the taxpayer had acted upon an opinion obtained from a tax practitioner.

(ix) That the taxpayer had submitted that the understatement had occurred as a result of a '*bona fide* inadvertent error' in that the VAT returns were compiled by personnel employed in its different divisions and its finance department had been assured by its internal audit department that input tax under the circumstances described *in casu* was claimable. Moreover, the taxpayer's external auditors did not raise any concern about the taxpayer claiming input tax in respect of the provision of meals and accommodation for employees.

(x) That the Tax Administration Act did not define what a '*bona fide* inadvertent error' was and both parties had referred the court to the judgment by Boqwana J in ITC 1890 79 SATC 62 where the learned judge considered the meaning of that phrase and stated at para [45] of the judgment that 'a *bona fide* inadvertent error has to be an innocent misstatement by a taxpayer on his or her return resulting in an understatement while acting in good faith and without the intention to deceive.'

(xi) That all the relevant facts put together amount to a bona fide inadvertent error on the part of the taxpayer and in the circumstances the taxpayer's treatment of claiming input tax in respect of their project specific employees, whilst an understatement, was not done with the intention to deceive.

(xii) That, accordingly, the taxpayer was entitled to an order that SARS remit the 10% understatement penalty.'

7.9. Candice-Jean Poulter v C:SARS (86 SATC 415)

Candice-Jean Poulter (Ms Poulter) had come on appeal to a full bench of the High Court from a decision of a Tax Court confirming the original assessment of her taxable

income for the 2018 year of assessment and ordering her to pay SARS' costs on the scale as between attorney and client, including the fees of two counsel.

The Tax Court's orders were made without hearing Ms Poulter who did not attend the proceedings in that court, or her father, Mr Gary Van der Merwe, who had sought audience there as Ms Poulter's authorised representative.

The Tax Court held that Mr Van der Merwe, who was not a legal practitioner, was not entitled to appear in the Tax Court.

Ms Poulter's counsel argued *inter alia* that the Tax Court had been misdirected in holding that Mr Van der Merwe, whose authority to do so was vouched by a power of attorney given by Ms Poulter, was not entitled to appear on her behalf in that forum.

The Tax Court, relying on the judgments of the SCA in C:SARS v Candice-Jean Van der Merwe 85 SATC 10 and a full court in this Division in C:SARS v Poulter In re: Poulter v C:SARS [2022] ZAWCHC 206, held that Mr Van der Merwe, who was not a legal practitioner, was not entitled to appear in the Tax Court.

C: SARS v Candice-Jean Van der Merwe, *supra*, was a matter in which Mr Van der Merwe had applied to appear on his daughter's behalf in the SCA in an appeal from the High Court in another of her tax disputes with SARS and the appeal court there held that he did not have the right to appear on her behalf in 'a court of law.' The SCA on appeal did not deal with the question whether a layperson could represent a taxpayer in proceedings in the Tax Court.

Section 33 of the Legal Practice Act provided *inter alia* that no person other than a practising legal practitioner who has been admitted and enrolled as such in terms of this Act may, in expectation of any fee, commission, gain or reward appear in any court of law or before any board, tribunal or similar institution in which only legal practitioners were entitled to appear and that no person could, in expectation of any fee, commission, gain or reward, directly or indirectly, perform any act or render any service which in terms of any other law may only be done by an advocate, attorney, conveyancer or notary, unless that person is a practising advocate, attorney, conveyancer or notary, as the case may be.

Ms Poulter's counsel contended that this provision supported Mr Van der Merwe's right to appear on behalf of Ms Poulter provided that he did so without expectation of being compensated for doing so.

SARS argued that section 33 underscored the correctness of her contention that Mr Van der Merwe was not on any account entitled to appear in the Tax Court, which she submitted was a 'court of law'.

Section 166 of the Constitution identifies the courts of law in our judicial system. In order to be characterised as a court of law, the Tax Court would therefore need to qualify as an institution within the ambit of section 166(e), namely 'any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts'.

Judge Binns-Ward held the following:

(i) That section 33 of the Legal Practice Act was not a model of statutory draftmanship. It prohibited anyone who was not a legal practitioner from appearing for or acting for another or drafting documents for use by another in legal proceedings for reward or in expectation of reward, which might on the face of it be understood to allow a right of appearance by non-practitioners provided they exercised it free of charge.

(ii) That it was clear enough, however, on a contextual consideration, that section 33 was indeed a generally prohibitory one, as contended by SARS' counsel. It did not, by prohibiting appearances by laypersons for reward, afford them a general warrant to appear in any forum provided that they did not do so for reward.

(iii) That, thus, section 33 did not afford a layperson a right to represent a company in a court of law that he otherwise did not possess merely because he acted without reward or the expectation of reward.

(iv) That section 33 was concerned with prohibiting persons who were not legal practitioners from acting as if they were legal practitioners and it was not directed at giving laypersons rights of appearance that they did not already enjoy

(v) That section 33 was of interest, however, because of its employment, in subsection (1), of the term 'court of law', a concept that would be considered later in this judgment. Section 33 was of application to Van der Merwe's right of appearance in the Tax Court only if that court was a 'court of law' or if there was a statutory provision limiting the right of representative appearance in the Tax Court to legal practitioners.

(vi) That whether the Tax Court possesses the discretionary power to permit lay representation in the course of regulating its own procedures depended on whether it was a superior court within the common law's understanding of the concept, i.e. a court with inherent jurisdiction to regulate its process and procedure and develop the common law. Such courts were undoubtedly 'courts of law.' The Tax Court is certainly not one of the courts to which section 173 of the Constitution applied.

(vii) That in A (Pty) Ltd and Another v C:SARS ITC 1806 68 SATC 117 [2005] ZATC 18 the Tax Court had to determine whether it was within the jurisdictional competence of a Tax Court to rule on the constitutional compatibility of a statutory provision and in doing so the learned judge held that the Tax Court was not 'a court of similar status' to the High Court within the meaning of section 166(e) or section 172(2)(a) of the Constitution. The court in the present matter agreed with that conclusion and with the reasons given in the judgment for arriving at it. In the present court's view the learned judge's conclusion in the Tax Court necessarily also implied that the Tax Court was not a superior court in the relevant sense. That narrowed the enquiry in the current matter to whether a Tax Court was nevertheless a court of law. The Tax Court in A (Pty) Ltd was not concerned with that question.

(viii) That, turning then to the question whether the Tax Court was 'a court of law' within the meaning of that term used in C:SARS v Van der Merwe, *supra*, or section 33 of the Legal Practice Act. No authority was cited by either side that was directly in point on the question. In Minister of the Interior and Another v Harris and Others 1952 (4) SA 769 (A) at 787G Schreiner JA observed that 'it is not easy to draw a clear line of demarcation between tribunals which are and those which are not Courts of Law.' The relevant South African jurisprudence, consistently with the English and Commonwealth cases, seemed to suggest that the basis for demarcation was the predominant character of the institution's functions.

(ix) That as will be apparent from what is said elsewhere in this judgment concerning the narrowly defined jurisdiction of the Tax Court, which, on substantive matters, was to ultimately determine a taxpayer's liability for assessed taxes, Lord Radcliffe's observations in Society of Medical Officers of Health v Hope (Valuation Officer) [1960] AC 551 (HL) seemed to the court to be in point. They served to demonstrate why, as discussed later in this

judgment, our jurisprudence classified the Tax Court's statutory predecessor, the Special Tax Court, as 'a court of revision' and not 'a court of law'.

(x) That section 166 of the Constitution identified the courts of law in our judicial system. The Tax Court was plainly not a court referred to in section 166(a) to (d) of the provision. In order to be characterised as a court of law, the Tax Court would therefore need to qualify as an institution within the ambit of section 166(e), namely 'any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts'.

(xi) That, being mindful of the reasoning in the cases reviewed in the preceding section of this judgment, they assisted in the proper construction of section 166(e) of the Constitution. It supported the conclusion that the provision's words 'any other court established or recognised in terms of an Act of Parliament' denoted any other court intended by Parliament to be part of the country's 'judicial system'. They did not pertain to a tribunal intended to serve an administrative purpose, even if it was labelled as a 'court' by the legislation in terms of which it was established, and even if, in fulfilling its administrative role, it was required to act judicially.

(xii) That such an interpretation was compatible with the separation of powers between the legislative, executive and judicial branches of government that was reflected in the constitutional framework. It was also supported by the section's subheading, 'Judicial system' and its setting in Chapter 8 of the Constitution, which was concerned with 'Courts and Administration of Justice.' Chapter 8 was quite discrete in its subject matter from the chapters concerned with the establishment and functioning of the legislative and executive branches of government. As its title predicted, it was devoted solely to the establishment and workings of the judicial arm of government and the administration of justice.

(xiii) That the proposition that the Tax Court would need to be part of the constitutionally created 'judicial system' to be properly characterised as a court of law also found support in the reasoning of the Constitutional Court in Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2008 (2) SA 24 (CC), of its conclusion that the CCMA is not a court of law.

(xiv) That as will be demonstrated when the court comes to review the Tax Court's statutory context, the Tax Court functions as a body of ultimate assessment in

terms of the TA Act. Stepping into the shoes of SARS for that purpose, it fulfilled an administrative function directed at achieving one of the important goals of the Act, namely the correct assessment and recovery of taxes.

(xv) That the Tax Court is a creature of statute and provision for its establishment was made in terms of section 116 of the TA Act. It was accordingly established by the President, not directly by the TA Act. It was, however, arguable on a purely textual predicate that it was a court 'recognised in terms of an Act of Parliament' within the meaning of section 166(e) of the Constitution.That a Tax Court had jurisdiction to decide appeals in terms of section 107 of the TA Act and may determine any procedural questions arising in respect of such appeals. Those characteristics on the face of it, and in isolation, satisfied the qualifying criteria in section 166(e) of the Constitution, but they were insufficient by themselves to answer the question whether what has been established by the Act of Parliament in question was indeed a court within the state's judicial system, i.e. a 'court of law'.

(xvi) That the Tax Board fulfilled exactly the same dispute resolution functions as a Tax Court. The differences between the two are that the Tax Board's jurisdiction was restricted to matters in which the tax in dispute in issue concerned a lesser amount, and the proceedings before the Board were less formal and not a matter of record. Any party dissatisfied with the outcome of proceedings before the Tax Board can require the dispute to be adjudicated afresh before a Tax Court.

(xvii) That the provisions of the TA Act concerning the establishment and composition of the Tax Court and the Board and the nature of their functions appeared to the court to be in all material respects a reiteration of those that formerly applied in respect of the tax courts (colloquially called the 'Special Income Tax Court') and the Tax Board established in terms of Part 111 of Chapter 3 of the Income Tax Act 58 of 1962 prior to the repeal of that Part by the TA Act.

(xviii) That in CIR v City Deep Ltd 1 SATC 18 the Appellate Division stated that the Special Income Tax Court established under the 1917 Income Tax Act 'though a competent court to decide the issues between the parties, is not a court of law.' The characterisation does, however, appear to have been accepted in subsequent cases where it was explained that the Special Income Tax Court was a 'court of revision' rather than an ordinary court of appeal.

(xix) That in Metcash Trading Limited v C:SARS and Another 63 SATC 13 the Constitutional Court discussed the role of the Special Income Tax Court in terms of the closely comparable provisions of the VAT Act and Kriegler J, writing for the court, stated that challenges to SARS' actions before the Special Court or Board were not appeals 'in the forensic sense of the word.' They were proceedings in terms of a statutory mechanism specially created for the reconsideration of this particular category of administrative decisions – and appropriate corrective action – by a specialist tribunal.

(xx) That all of the characteristics of the Tax Court, assessed in the light of the jurisprudence reviewed earlier, impelled the conclusion that its function was essentially that of an administrative tribunal. The fact that it had been established as a 'court' and that it was called upon to discharge its functions in a judicial manner and appropriately constituted to be able to do so do not negate its role essentially as an administrative-decision maker. That role positioned the Tax Court outside the judicial system provided for in section 166 of the Constitution and confirmed that Tax Courts are not courts of law.

(xxi) That jurisprudence was to the effect that the Tax Court was a 'court of revision' and not a 'court of law.' This meant that the judgments referred to concerning representation by duly authorised laypersons had no application to appearances by such persons in the Tax Court and it also meant that the provisions of the Legal Practice Act also did not apply, save to the extent that the legislation regulating the Tax Court might make them applicable.

(xxii) That it was necessary therefore to consider whether the legislation regulating the establishment and operation of the Tax Court made any provision excluding the ability of a taxpayer to be represented there by a person who was not a legal practitioner with right of appearance in the courts of law.

(xxiii) That, prior to its deletion, with effect from 18 December 2017, section 125(2) of the TA Act provided that 'the appellant or the appellant's representative may appear at the hearing of an appeal in support of the appeal' and there was no limitation on whom Ms Poulter might appoint as 'representative.' It seemed to the court that the deletion of the provision did not make any practical difference to the position that obtained prior to its deletion.

(xxiv) That, as mentioned, there was nothing in the regulations to suggest that the references in them to a taxpayer's representative must be interpreted as being limited to a person admitted as a legal practitioner. Experience tells that in the

past taxpayers have often been represented in proceedings before a Tax Court by an accountant or similarly qualified tax practitioner rather than a legal practitioner and the deletion of section 125(2) of the TA Act did not alter the thitherto obtaining position, and evidently was not intended to.

(xxv) That it was evident therefore that the Tax Court had misdirected itself in refusing to entertain Mr Van der Merwe's appearance as the taxpayer's representative at the hearing of the appeal.

(xxvi) That the ambit of the current appeal made the Tax Court's failure to hear Mr Van der Merwe a justiciable question before this court.

(xxvii) That a finding by this court in the course of its ratio decidendi that a taxpayer was entitled to be represented in proceedings before the Tax Court by a lay representative was a judgment in rem and consequently binding not only on the parties to the current proceedings but on all parties to appeals in the Tax Court. It was declaratory of the law and accordingly it overrode the effect of the ruling wrongly made at an earlier stage of the appeal in that court that purported to preclude Mr Van der Merwe from representing Ms Poulter.

(xxviii) That for all the aforegoing reasons, the appeal must succeed and the order of the Tax Court granting judgment against Ms Poulter must be set aside.

Appeal was upheld with costs.

Order made by the Tax Court in terms of Rule 44(7) of the Rules made in terms of section 103 of the TA Act was set aside.

Ms Poulter's appeal to the Tax Court in terms of s 107 of TA Act was remitted to that court for hearing de novo on a date to be determined by the Registrar of the Tax Court.

7.10. Sasol Chevron Holdings Ltd v C:SARS[1] (86 SATC 456)

Sasol Chevron Holdings Ltd (Sasol Chevron) was a foreign joint venture company that was not resident in South Africa.

Sasol Chevron in 2014 had purchased certain movable goods from Sasol Catalyst, a division of Sasol Chemical Industries (Pty) Ltd, for exportation from South Africa to

[1] Constitutional Court

Nigeria. In line with the applicable statutory and regulatory framework, the goods were supplied to Sasol Chevron on what was known as an 'ex-works' and 'flash title' basis.

Consequently, the goods were delivered by Sasol Catalyst to a warehouse at the Durban Harbour, a designated commercial port for the purpose of the Export Regulations, from where they were sold to Sasol Chevron and then immediately on-sold to Escravos Gas-to-Liquids Project (Escravos), a joint venture operating in Nigeria, for export to Nigeria. The goods were specially manufactured for Escravos and could not be used in any other application.

It was the initial sale agreement that was under the spotlight in these proceedings. Sasol Catalyst issued VAT zero-rated invoices to Sasol Chevron dated 20 August 2014, 22 September 2014, 22 October 2014, 24 November 2014 and 2 December 2014, respectively. Sasol Catalyst, being the vendor, elected to supply the goods to Sasol Chevron at the VAT zero rate. That being the case, the VAT consequences of the transaction were governed by Part Two – Section A of the Export Regulations.

Regulation 8 prescribed procedures for a vendor who elects to supply movable goods at the zero rate to a qualifying purchaser, where the goods are initially delivered to a harbour in South Africa before being exported.

Regulation 8 must be read with Regulation 15(1)(a), which provides that, in order to qualify for a VAT zero-rating, the goods must be exported within 90 days from the date of the tax invoice. For various reasons Sasol Chevron did not export the goods within 90 days of the date of the tax invoices, as required by the Export Regulations. The goods were ultimately exported on 24 April 2015. Accordingly, Sasol Catalyst, was, by operation of Regulation 8(2) of the Regulations, required to levy value-added tax at the standard rate of 14% on the supply of the goods to Sasol Chevron as prescribed in terms of section 7(1) of the VAT Act.

Sasol Catalyst, by letter dated 30 January 2015, applied to the SARS for a binding private ruling in terms of section 41B of the VAT Act, read with section 79 of the TA Act, to extend the period for the exportation of the goods from South Africa as contemplated in section 11(1)(a)(ii) of the VAT Act read with Regulation 15(1) in respect of the invoices issued by Sasol Catalyst to Sasol Chevron. This letter was followed by another, dated 18 March 2015, in which a further extension was requested.

On 30 June 2015 Sasol Catalyst issued new and revised tax invoices in substitution of those previously issued, in which VAT was levied at a standard rate.

Sasol Chevron paid the VAT levied by Sasol Catalyst and the goods were, in the interim, exported on 24 April 2015.

On 6 July 2015 Sasol Catalyst applied to SARS in terms of section 44(9) of the VAT Act for the extension of the period within which to submit an application to the VAT Refund Authority (VRA) for a refund of the VAT paid in respect of Sasol Catalyst's revised tax invoices.

In a comprehensive letter dated 7 November 2016 to Sasol Catalyst's attorneys, SARS responded to Sasol Catalyst's request and declined the application for an extension of the 90-day period envisaged in Regulation 15(1)(a) for the exportation of the goods sold in terms of the tax invoices issued in August, September and October 2014. This was because Sasol Catalyst did not submit a timeous written application in terms of Regulation 15(2)(f)(i). However, SARS acceded to Sasol Catalyst's request in relation to the tax invoices issued in November and December 2014.

Undaunted by this setback, Sasol Catalyst made further representations to SARS to 'reconsider the application by [Sasol Chevron] to submit the application for a refund of the South African VAT paid by [Sasol Chevron] on the goods sold by Sasol Catalyst.'

However, in a letter dated 6 December 2017, SARS was not prepared to budge and reiterated its unwavering stance that Sasol Chevron was not entitled to a refund of the value-added tax levied on the supply of the movable goods sold to Sasol Chevron.

Further correspondence was exchanged between the parties, culminating in a letter dated 26 March 2018 from SARS to Sasol Chevron in which SARS reaffirmed its previous stance, consistent with what it had earlier communicated to Sasol Catalyst's attorneys in its letter of 7 November 2016 and provided the reasons therefore.

For Sasol Chevron, SARS had provided its reasons in the correspondence dated 26 March 2018 and, therefore, that date was the relevant one for the purposes of the calculation of the 180-day period provided for in section 7(1) of PAJA.

For SARS the date from which the 180-day period commenced was 7 November 2016 when the decision was conveyed to Sasol Chevron in a VAT ruling and that any subsequent communication with Sasol Chevron were simply reiterations of the reasons given on that date.

In regard to the meaning of the word 'institute' in section 7(1) of PAJA, Sasol Chevron contended that the word's ordinary grammatical meaning entailed issuance only while SARS contended that 'institute' entailed both issuance and service on the respondent.

Section 7(1) of PAJA provided that any proceedings for judicial review in terms of section 7(1) of the Act had to be instituted without unreasonable delay and not later than 180 days after the date on which any proceedings instituted in terms of internal remedies had been concluded or where no such remedies existed, after the person concerned had been informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

Sasol Chevron, on 21 September 2018, had instituted a review application in the High Court under PAJA seeking, inter alia, an order to review and set aside SARS' decision of 6 December 2017 to the effect that it was not entitled to a VAT refund, as envisaged by section 11(1)(a)(ii)(bb) read with Regulation 6 of Part 1 of the Export Regulations.

It was common cause between the parties that the review application papers had been served on SARS on 25 September 2018.

In the High Court SARS raised a preliminary objection to the review application and contended that, absent an application for an order that the 180-day period be extended in terms of section 9 of PAJA, the review application fell to be dismissed on the ground that Sasol Chevron had not complied with section 7(1) of PAJA without consideration of the merits of the review application itself.

It was common cause that Sasol Chevron had not brought any application for the extension of the 180-day period in terms of section 9 of PAJA.

The High Court dismissed the preliminary objection raised by SARS regarding the expiry of the 180-day period provided for in section 7(1) of PAJA and thereafter proceeded to determine the substantive merits of the review and then reviewed and set aside the administrative decision.

SARS then appealed the decision of the court a quo with its leave to the Supreme Court of Appeal where the appeal hinged entirely on the question whether or not Sasol Chevron's review application had been instituted within the 180-day period prescribed in section 7(1) of PAJA.

The Supreme Court of Appeal (see C:SARS v Sasol Chevron Holdings Ltd 85 SATC 216) held that Sasol Chevron's review application had been instituted outside the 180-day period prescribed in section 7(1) of PAJA. The inevitable consequence of this was that absent an application in terms of section 9(2) of PAJA, the High Court should have dismissed the review application for want of compliance with the prescripts of section 7(1) as it had no power to enter into the substantive merits of the review and, therefore,

whether or not the impugned decision was unlawful 'no longer matters'. Rather, it became 'validated' by the unreasonable delay.

The Supreme Court of Appeal confirmed that the time period within which to institute a review application starts to run from the date on which the reasons for the administrative action became known to Sasol Chevron. It further held that the decision sought to be reviewed and the reasons therefor were communicated to Sasol Chevron on 6 December 2017, which was the date from which the 180-day period began running and, consequently, the review application had been instituted outside of the 180-day period prescribed in section 7(1) of PAJA.

Sasol Chevron then appealed to the Constitutional Court and the issues to be determined there were:

- Did Sasol Chevron bring its review application within the period of 180-days stipulated by section 7(1)(b) of PAJA and, relatedly, when was an application 'instituted' for purposes of PAJA?
- On a proper application of the Export Regulations, was Sasol Chevron entitled to an extension of time within which to claim a refund of the VAT levied on a supply of export goods?

Judge Theron held the following:

<u>As to jurisdiction and leave to appeal</u>

(i) That PAJA gives effect to section 33 of the Constitution and it followed that matters relating to its interpretation and application will be constitutional matters.

(ii) That, further, the interpretation of the VAT regime as it pertained to export goods was an arguable point of law of general public importance. The VAT regime affects all exporters of goods and is therefore of general public importance. More broadly, the manner in which SARS collected tax revenue is a matter of concern to all citizens. The issue is also arguable, as evidenced by the High Court's interpretation of the applicable legislation which diverged from SARS' practice in terms of the Export Regulations.

(iii) That it was thus in the interests of justice to grant leave to appeal.

As to the 180-day period stipulated by section 7(1)(b) of PAJA

(iv) That the court had to determine whether Sasol Chevron brought its review application within the period of 180 days stipulated by section 7(1)(b) of PAJA. The reasoning of the Supreme Court of Appeal was unassailable and was endorsed by the Constitutional Court.

(v) That SARS' letter of 26 March 2018 was no more than a recapitulation of the position that SARS had consistently adopted since 2016. The letter itself made explicit reference to the earlier decision – termed the ruling – made on 6 December 2017, as were virtually all the subsequent letters from SARS to Sasol Chevron. SARS' letter of 6 December 2017, in turn, made reference to the ruling made on 7 November 2016 in which the background facts were comprehensively set out, Sasol Chevron's request summarised, the relevant statutory framework set out and, finally, the decision – supported with comprehensive reasons-was articulated.

(vi) That the Supreme Court of Appeal, relying on Aurecon South Africa (Pty) Ltd v City of Cape Town 2016 (2) SA 199 (SCA), held that section 7(1) of PAJA did not provide that an application must be brought within 180 days after Sasol Chevron became aware that the administrative action was tainted by irregularity. On the contrary, it provided that the clock starts to run with reference to the date on which the reasons for the administrative action became known or ought reasonably to have become known to an applicant.

(vii) That in a letter dated 6 December 2017 SARS explained that the refund was denied because, in his view, Sasol Chevron was not entitled to a refund of the VAT levied on the supply of goods as it had not exported the goods within the time required by Regulation 15(1)(a) and SARS had not granted an extension of this period. This explanation was given in response to a request for an extension of the time within which to make the application and with reference to the earlier reasons furnished.

(viii) That the reasons provided by SARS as to why Sasol Chevron was not entitled to a refund were set out in paragraphs one to three of the letter. These reasons were sufficient for the purposes of PAJA. Based on the content of SARS' letters of 7 November 2016 and 6 December 2017, Sasol Chevron was in a position to formulate an objection, and it did not need the further explanation that was furnished in the 26 March 2018 letter. The 26 March 2018 letter did not contain new reasons – it was an elaboration of the reasons given on 6 December 2017.

(ix) That if this court were to hold that the 180 days in section 7(1) of PAJA only begins to run when a reviewing party is satisfied with the reasons given to it, this would enable parties – especially well-resourced parties – to indefinitely extend the period in section 7(1) by simply requesting additional reasons. This would be counterintuitive to the purpose of section 7(1), which was to promote certainty regarding the lawful status of administrative decisions.

(x) That, accordingly, the reasons for the administrative action were known or ought reasonably to have been known to Sasol Chevron from 6 December 2017, and so the 180-day period began to run from that date and Sasol Chevron's review application had been instituted outside the 180-day period prescribed in section 7(1)(b) of PAJA.

(xi) That the finding by the court in relation to section 7(1)(b) of PAJA was dispositive of the matter and it was thus unnecessary to adjudicate the remaining issues in the matter.

Appeal dismissed with costs.

8. INTERPRETATION NOTES

8.1. Deduction for energy efficiency savings – No. 95 (Issue 3)

This Note provides guidance on the deduction for energy efficiency savings under section 12L read with the Regulations.

In response to South Africa ranking as one of the top 20 contributors of greenhouse gas emissions in the world, the government voluntarily announced during the 2009 United Nations Climate Change Conference in Copenhagen and confirmed in Paris in 2015 that it would act to significantly reduce domestic greenhouse gas emissions.

Government has thus proposed a carbon tax policy to encourage behavioural change towards cleaner low-carbon technologies. As a complementary measure, government has introduced environmental-related tax incentives to address concerns related to global warming and energy security.3 One such an incentive is section 12L, which allows a qualifying taxpayer to claim a deduction for most forms of energy efficiency savings that result from activities performed in the carrying on of any trade and in the production of income. The deduction can create or increase an assessed loss.

For years of assessment commencing on or after 1 March 2015, the rate at which the deduction is calculated is 95 cents per kilowatt hour or kilowatt hour equivalent of energy efficiency savings.

Section 12L became effective on 1 November 2013 and applies to years of assessment ending before 1 January 2026 (see 4.3.4 for further details).

Section 12L provides for a deduction calculated on the savings achieved from the implementation of more energy-efficient methods while conducting a trade. In claiming the deduction, regard should be had to:

- the Regulations and the standard;
- the method of calculating the baseline and the energy savings in multi-year activities;
- registration requirements;
- certificates that have to be obtained from SANEDI for each activity and year of assessment;
- exclusions and limitations; and
- the effective date of section 12L.

8.2. Public benefit organisations: The provision of funds, assets or other resources to any association of persons – No. 98 (Issue 2)

This Note provides guidance on:

- a conduit PBO providing funds, assets or other resources to an association of persons carrying on PBA 10(iii) in Part I, in South Africa;
- the requirement imposed under section 30(3)(f) on a conduit PBO providing funds to an association of persons; and
- the meaning of 'association of persons'.

The Ninth Schedule to the Act lists the PBAs, which is divided into:

- Part I comprising a number of PBAs approved by the Minister for purposes of the approval as a PBO under section 30; and

- Part II comprising a limited number of PBAs approved by the Minister for purposes of the approval under section 18A.

A PBO may itself conduct the PBAs or it may provide funds, assets or other resources to enable other approved PBOs, institutions, boards or bodies exempt under section 10(1)(cA)(i) or the national, provincial or local sphere of government contemplated in section 10(1)(a)4 to carry on these PBAs.

Subparagraph (iii) was included in PBA 10 to enable informal community projects to receive funding. A conduit organisation approved by SARS as a PBO may therefore provide funds, assets or other resources in the manner contemplated in PBA 10 in Part I to any association of persons carrying on one or more PBAs, with the exception of PBA 10 in Part I, in South Africa.

This Note focuses on the provision of funds, assets or other resources to an association of persons carrying on PBA 10(iii) in Part I, in South Africa.

A conduit PBO may provide funds, assets or other resources to an informal voluntary association of persons contemplated in PBA 10(iii) in Part I. SARS must be satisfied, in the case of any conduit PBO providing funds to any such association of persons, that such conduit PBO has taken reasonable steps to ensure that the funds are used for the purpose for which those funds have been provided, which is to carry on one or more PBAs in Part I (other than PBA 10 in Part I) in South Africa.

A conduit PBO not carrying on its sole or principal object, which is to provide funds, assets or other resources as contemplated in PBA 10(iii) in Part I, may forfeit approval as a PBO under section 30(5).

8.3. Income tax exemption: Water services provider – No. 133

This Note provides guidance on the interpretation and application of the definition of "water services provider" in section 1(1) for purposes of the exemption of the receipts and accruals of a qualifying water services provider from normal tax under section 10(1)(t)(ix).

The Bill of Rights in the Constitution guarantees everyone the right to access to sufficient water. It is the responsibility of the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. To give effect to this constitutional responsibility, the Water Services Act was promulgated.

Every water services authority under the Water Services Act has a duty to all consumers or potential consumers in its area of jurisdiction to progressively ensure efficient, affordable, economical, and sustainable access to water services. The Water Services Act, amongst other things, provides for the monitoring of water services and intervention by the Minister or by the relevant Province9 to ensure that every water service institution complies with:

- all applicable national standards prescribed under that Act;
- all norms and standards for tariffs prescribed under that Act; and
- every applicable development plan, policy statement or business plan adopted under that Act.

To assist a water services provider to fulfil its obligations under the Constitution and the Water Services Act, section 10(1)(t)(ix) of the Income Tax Act exempts the receipts and accruals of any water services provider from normal tax provided certain requirements are met. This Note considers the requirements of the definition of "water services provider" to qualify for this exemption. The reporting obligations of a qualifying water services provider under the Act and the TA Act are also considered.

This Note provides general guidelines and considers the broad principles of the

legislation. In conclusion:

- any person meeting the requirements of the definition of "water services provider" in section 1(1) will be exempt from the payment of income tax under section 10(1)(t)(ix);
- the receipts and accruals of a water services provider are fully exempt from the payment of income tax under section 10(1)(t)(ix);
- the exemption is not subject to the discretion or approval of SARS;
- a water services provider bears the onus of proving163 that it complies with the requirements of the definition of "water services provider" and must retain the necessary supporting evidence;
- a water services provider must comply with any reporting requirements SARS may determine; and
- a water services provider is potentially exempt from other taxes such as transfer duty, dividends tax, securities transfer tax, skills development levies

and capital gains tax.

8.4. *Exercise of discretion to extend the period to lodge an objection and appeal – No. 15 (Issue 6)*

This Note provides guidance on the considerations that a senior SARS official will take into account when exercising a discretion to extend the prescribed period for lodging an objection under section 104(4) or an appeal under section 107(2).

A taxpayer who is aggrieved:

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

may object to and appeal against those assessments or decisions.

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

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

A senior SARS official may, within prescribed limits, extend the period prescribed in the rules within which an objection or appeal must be lodged if satisfied that reasonable grounds exist for the delay.

The objection and appeal procedures, contained in the TA Act and the rules, apply to any dispute under, amongst others, the following tax Acts5 administered by the Commissioner:

- Diamond Export Levy Act
- Diamond Export Levy (Administration)
- Employment Tax Incentive Act
- Estate Duty Act
- Income Tax Act
- Mineral and Petroleum Resources Royalty Act
- Mineral and Petroleum Resources Royalty (Administration) Act
- Securities Transfer Tax Act

- Securities Transfer Tax Administration Act
- Skills Development Levies Act
- Tax Administration Act
- Transfer Duty Act
- Unemployment Insurance Contributions Act
- Value-Added Tax Act

The Customs and Excise Act 91 of 1964 contains its own provisions relating to dispute resolution.6

An objection against an assessment or decision must be lodged within 80 business days of the date of assessment or decision unless the taxpayer requested reasons for the assessment or decision in which case the period runs from a later date. Similarly, an appeal against the disallowance of an objection must be lodged within 30 business days after delivery of the notice of disallowance of the objection.

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

- 30 business days if satisfied that reasonable grounds exist for the delay in lodging the objection; and
- between 31 business days and three years if satisfied that exceptional circumstances exist which gave rise to the delay in lodging the objection.

No extension can be granted for:

- a delay of more than three years from the date of assessment or decision; or
- grounds of objection that are based wholly or mainly on a change in the practice generally prevailing at the date of assessment or decision.

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

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

8.5. The meaning of reserve fund under section 23(e) of the Income Tax Act

This Note considers the meaning of "reserve fund" for purposes of section 23(e) of the Income Tax Act.

The general deduction formula under the Act to determine a person's taxable income derived from carrying on any trade consists of a positive test in section 11(a) as well as a negative test in section 23. These two sections must be read together in order to determine whether a taxpayer will be entitled to a general deduction. Section 23(e) prohibits specifically any deduction relating to income carried to any reserve fund or capitalised in any way.

It is a common practice for businesses to establish a reserve fund for future costs and financial obligations. It further is generally accepted accounting practice to create a provision for contingent or anticipated liabilities. A reserve fund can be set up in various ways in an attempt to exclude it from the ambit of section 23(e).

This Note considers the meaning of reserve fund for purposes of section 23(e). There are further provisions in the Act that allow for the deduction of a reserve in certain circumstances which are not considered in this Note.

Under section 23(e), the deduction of any income carried to any reserve fund or capitalised in any way is prohibited. The creation of such reserves is not expenditure actually incurred in the production of income.

Reserve funds are normally separate accounts or highly liquid assets controlled by the taxpayer and which allows the taxpayer easy access to the funds to settle contingent liabilities or anticipated expenditure and losses. Provision made by taking out a policy from a third party to cover contingent liabilities in which all control to the funds is managed by the third party may also be disqualified from deduction as it may fall within the ambit of a reserve fund as envisaged by section 23(e) if, for example, the taxpayer still has access to the funds. The facts of each case would need to be considered carefully.

A policy taken out from a third party to provide for future expenses or contingent liabilities should be distinguished from an insurance policy taken out to cover certain specified contingencies or events. An insurance policy taken out from a third party may not be affected by section 23(e) because it is not a reserve fund as expenditure for the payment of the policy premium will actually have been incurred such as provided for under section 12M

9. BINDING PRIVATE RULING

9.1. Expenditure incurred in respect of environmental conservation – No. 404

This ruling determines the tax consequences pertaining to land to be declared a nature reserve.

In this ruling references to sections are to sections of the Income Tax Act applicable as at 4 March 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 37C; and
- section 37D.

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

The Applicant: A resident company

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

Future expansion needs necessitate the development of a portion of trade premises owned and operated by the Applicant. The environmental impact assessment process identified, amongst others, the destruction of existing wetlands because of the planned development. To mitigate this environmental impact, the Applicant purchased another property (the Property) and has undertaken to create a wetland offset on a portion of the Property. The Property is located in the local vicinity of the Applicant's trade premises; it is not adjacent to or across the road from the Applicant's trade premises.

The Applicant agreed to apportion the Property for urban development and a nature reserve. An agreement between the Applicant, the local metropolitan municipality and the Department of Fisheries, Forestry and Environment in accordance with section 20 or section 23 of the National Environmental Management: Protected Areas Act 57 of 2003 (NEMPA) as well as a 99-year endorsement on the Property's title deed specifying the portion declared a nature reserve, will be required. The proposed biodiversity management agreement between the Applicant and the local metropolitan municipality will have a duration of at least five years as provided for in section 44 of the National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA). The local metropolitan municipality will be responsible for the management of the declared land and the Applicant will fund the maintenance costs of the declared land. The

Applicant will not have a right of use over the portion of the land to be declared a nature reserve.

The Applicant will apportion the market and municipal values as well as the purchase price of the Property based on the ratio of the size of the declared land over the total size of the Property.

Conditions and assumptions

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

Ruling

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

- The expenditure incurred in respect of the acquisition of the portion of the Property to be declared a nature reserve under the relevant provisions of NEMPA, will be deductible under section 37D(2), commencing in the year the land becomes declared.
- The expenditure to be incurred in respect of historic and future improvements (excluding borrowing and financing costs) effected to the portion of the Property to be declared a nature reserve under the provisions of NEMPA, will qualify for deduction under section 37D(2), commencing in the year the land becomes declared.
- The cost of expenditure to be incurred in respect of environmental conservation and maintenance undertaken in terms of the agreement entered into under the provisions of NEMBA, on the portion of the Property to be declared a nature reserve under the relevant provisions of NEMPA, will meet the requirements of section 37C(1).

9.2. Third-party backed shares and hybrid interest – No. 405

This ruling determines whether cumulative redeemable preference shares (preference shares) will be issued for a qualifying purpose and whether they will constitute third-party back shares. The funds raised from the issue of the preference shares will be advanced as a loan and the ruling determines whether the return received in respect of the loan will be regarded as hybrid interest.

In this ruling references to sections are to sections of the Income Tax Act applicable as at 20 March 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 8EA(1), (2) and (3);
- section 8FA(1) and (2);
- section 10(1)(k);
- section 24J(1) - definition of 'interest'; and
- section 64F.

Parties to the proposed transaction

The Applicant: A listed resident company

The Co-Applicant: A resident company that is a wholly-owned subsidiary of the Applicant and the issuer of the preference shares

The Target: A non-resident operating company

Description of the proposed transaction

The Applicant purchased equity shares (the Target Shares) in an operating company. The purchase price together with additional fees relating to their acquisition was funded with debt.

In order to settle the debt incurred to acquire the Target Shares, the Co-Applicant will issue preference shares to the preference shareholders. The preference shareholders will be entitled to preferred dividends calculated at an agreed rate, on the respective issue prices of the preference shares and will be payable at agreed intervals. The preference shares will be redeemable more than three years after their issue date. The Applicant or a wholly-owned subsidiary will guarantee the Co-Applicant's obligations (both actual and contingent) under the preference shares.

The Co-Applicant will lend the funds derived from the issue of the preference shares to the Applicant who will, in turn, apply the funds to settle the debt incurred by it to acquire the Target Shares.

The loan made by the Co-Applicant to the Applicant will accrue interest from time to time in an amount equal to the dividends actually paid to the Applicant by the Target in respect of the Target Shares.

The Applicant will be expected to make capital repayments on the loan equal to the redemption price of the preference shares which would be required to be redeemed by the Co-Applicant on the respective redemption dates of the preference shares.

Conditions and assumptions

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

- Dividends paid by the Target are not determined with reference to an interest rate or the time value of money.
- The debt incurred by the Applicant was used solely for the purpose of acquiring the Target shares (which includes the additional fees relating to their acquisition).

Ruling

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

- The interest payable by the Applicant to the Co-Applicant will constitute 'hybrid interest' as defined in section 8FA(1).
- In terms of section 8FA(2), the interest will be deemed to be a dividend in specie and must be treated as a dividend in specie for normal and dividends tax purposes.
- Since the proceeds of the issue of the preference shares will be applied by the Applicant to settle debt incurred by it to acquire the Target Shares, the preference shares will be issued (by the Co-Applicant) for a 'qualifying purpose' as defined in section 8EA, provided that the Target is an operating company at the time of the receipt or accrual of any dividend in respect of those preference shares.
- Although the preference shares will be subject to an enforcement right in the form of a guarantee issued by the Applicant or a wholly owned subsidiary, section 8EA(3) will apply and the enforcement right exercisable against the-Applicant must accordingly be disregarded in determining whether the preference shares are third party backed shares.
- On the issue date of this ruling, the preference shares will not constitute third-party backed shares, as defined in section 8EA.

9.3. *Treaty relief: Supplementary pension fund payments – No. 406*

This ruling determines that Belgium has the taxing rights to amounts to be received by or accrue to South African (SA) residents under Belgium's supplementary pensions system.

In this ruling references to sections are to sections of the Income Tax Act applicable as at 25 March 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 10(1)(gC); and
- paragraph 2 of Article 18 of the Treaty.

Parties to the proposed transaction

The Applicant: A resident natural person

The Co-Applicant: A resident natural person

Description of the proposed transaction

The Applicant and Co-Applicant (the Applicants) are residents. They are consultants of an SA company (SA Co). SA Co is a wholly-owned subsidiary of a foreign company

The Applicant is a non-executive director (not an employee or consultant) of a company resident in Belgium (Belgium Co).

The Co-Applicant was a non-executive director (not an employee or consultant) of Belgium Co. She resigned towards the end of 2023.

When working outside of SA, the Applicants' services were rendered mostly (approximately 80%) for Belgium Co and its non-SA subsidiaries. The remaining 20% of services rendered were related to SA Co.

Belgium has a supplementary pensions system which is aimed at supplementing its social security pensions system.

In order to supplement the Applicants' social security pensions payable by the Belgian state, Belgium Co entered into an agreement with an insurance company to provide supplementary pension benefits for all its directors (the Pension Plan) including the Applicants. The Pension Plan is governed by specific legislation in Belgium aimed at supplementing the social security pensions system of Belgium.

Upon reaching the retirement age of 65, the Applicants propose to each elect to withdraw a lumpsum from the Pension Plan. Each lumpsum will be taxable at an effective rate of 17.655% under Belgium law.

Conditions and assumptions

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

Ruling

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

- Section 10(1)(gC) will not apply to payments that will be received by or accrue to the Applicants in terms of the Pension Plan.
- Paragraph 2 of Article 18 of the Treaty will apply in respect of payments to be received by or accrue to the Applicants from the Pension Plan. The payments will be taxable only in Belgium.

9.4. Generation and supply of renewable energy – No. 407

This ruling determines the deductibility of expenditure to be incurred by a company installing photovoltaic solar energy plants on lessors' premises to be used by the Applicant to supply solar electricity to companies within the same group of companies as the Applicant in terms of power purchase agreements (PPAs).

In this ruling, references to sections are to sections of the Income Tax Act applicable as at 26 March 2024. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the Act.

Parties to the proposed transaction

The Applicant: A resident company

The Group: A global group of companies with a South African footprint

The Subsidiaries: Resident companies that are subsidiaries within the same group of Companies as the Applicant

Description of the proposed transaction

The group operates from various facilities in cities across South Africa. These facilities are leased on long-term leases by companies within the group including the Applicant. Each of the Subsidiaries occupies an identifiable area of each facility.

The supply authority currently supplies electricity to a system of transformers and sub-transformers within each of the facilities. In addition, generators supply electricity to the system of internal transformers in the facilities when the electricity supply from the supply authority fails. The buildings within the facilities are each equipped with a Building Management System (BMS) measuring the electricity consumed by each area of the building. Each such area is allocated to the operating subsidiary that occupies it and the group can, therefore, accurately determine the electricity distributed to and used by each subsidiary in the facility.

The group intends to utilise the enhanced incentive for renewable energy and therefore intends to install a solar photovoltaic (PV) system at each of the facilities.

The Applicant will acquire, own, maintain and operate the solar systems, which will be standardised and installed in such a manner that it can be removed without damaging the asset or the property upon which it is installed.

The key features of the systems will be the following:

- PV solar panels will be installed on the roofs of the buildings and will generate electricity and supply this to the facility.
- The AC Island will also be supplied electricity by the supply authority and existing generators.
- The AC Island will act as a gateway from the various sources of electricity and provide electricity to the system of transformers, which will also include new transformers to accommodate the increased capacity.
- The AC Island will be connected to a battery energy storage system (BESS) with sufficient storage capacity to supply the facility with electricity for approximately 2 to 2,5 hours.
- The AC Island ensures a consistent and uninterrupted supply of electricity when the supply authority fails. This is essential to the group as the shutdown and startup of equipment causes significant damage to equipment, when the transformers transition to the generators when the supply authority fails.
- The electricity will be distributed through the existing distribution board and BMS. As a result, the group will be able to accurately measure how much electricity is used by each area and, therefore, each operating entity.
- Metering will occur throughout the system, whereby components are monitored, and production of electricity tracked. Meters already in use for

invoicing purposes will be retained and used for measuring electricity usage for purposes of billing.

- Included in the total cost, is an amount which will be assigned to the BMS upgrade. This amount will be used for additional meters and cabling, the upgrade of the BMS electrical module, the purchase (setup and configuration) of the reporting module, as well as the addition of new meters, hierarchies, control points, etc.
- The above components, except for the electrical module of the BMS, will consist of new and unused components. The BMS electrical module will potentially be upgraded.

The system that will be installed at each of the facilities will consist of the following:

- PV Panels, Mounting Structure and Walkways/Catladders;
- Inverters, Chargers and Inverter Enclosure;
- Cabling and Connectors, Cable Management, Switchgear and Metering;
- Low Voltage ('LV') Switchgear, LV Cabling and MV Reticulation;
- Transformers;
- Batteries; and
- Containers.

The Applicant will use some of the electricity that is generated and will sell the remaining electricity to the other subsidiaries at a rate that will ensure the Applicant realises an arm's length margin from the electricity sold. The Applicant will, therefore, supplement its existing business activities with the sale of electricity and is expected to realise a profit from the sale of electricity over the life of the system.

The Applicant intends to sell the electricity at an agreed-upon fee consisting of a direct component (actual energy consumption for the month by the recipient, expressed in kilowatt-hours (kWh), multiplied by an applied reduced percentage of the prevailing monthly average tariff rate as provided by the supply authority) and an indirect component (representing a recovery of day-to-day costs of operating the system).

<u>Conditions and assumptions</u>

This binding private ruling is made subject to the condition and assumption that the Applicant and each of the landlords at the respective facilities have the intention that

the Applicant will remain the owner of the components of the solar system, once installed.

Ruling

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

- The Applicant will be entitled to a deduction under the provisions of section 12BA, in respect of the following new and unused components of the solar systems which are brought into use in the generation of electricity before 1 March 2025:
  - PV Panels, Mounting Structure and Walkways/Catladders;
  - Inverters, Charge Controllers and Inverter Enclosure;
  - Cabling and Connectors, Cable Management, Switchgear, Metering;
  - LV Switchgear, LV Cabling, MV Reticulation;
  - Transformers;
  - Batteries; and
  - Containers;
- Any cost relating to the maintenance and/or upgrade of existing infrastructure is specifically excluded from the deduction under section 12BA; and
- The costs pertaining to new and unused components that are applied to measurement of electricity consumption by the subsidiaries (for billing purposes) are specifically excluded from the deduction under section 12BA.

9.5. Corporate restructuring using section 42 of the Act – No. 408

This ruling determines the tax consequences of a corporate restructuring involving the disposal of shares in terms of section 42 of the Act.

In this ruling references to sections and paragraphs are to sections of the relevant Act and paragraphs of the Eighth Schedule to the Income Tax Act applicable as at 25 March 2024. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the relevant Act.

This is a ruling on the interpretation and application of:

- the Act:

- ➢ section 1(1) – definitions of 'contributed tax capital' and 'trading stock';
- ➢ section 24BA;
- ➢ section 40CA;
- ➢ section 41(1);
- ➢ section 42;
- ➢ paragraph 1 – definition of 'capital asset'; and
- ➢ paragraph 20(1)(a).

- the STT Act:
  - ➢ section 1 – definitions of 'taxable amount' and 'transfer';
  - ➢ section 2;
  - ➢ section 3; and
  - ➢ section 8(1)(a)(i).

Parties to the proposed transaction

The Applicant: A resident company

Company A: A resident company

Company B: A resident company

Company C: A resident company

Description of the proposed transaction

The Applicant and Company A are investment holding companies.

The Applicant holds all the shares in Company B.

The Applicant and Company A hold shares in Company C as capital assets.

For what the Applicants advise are commercial reasons, the Applicant and Company A propose to hold their investments in the shares of Company C through a single entity namely, Company B.

The proposed steps for implementing the restructuring are as follows:

- The Applicant and Company A will raise preference share funding.
- The Applicant and Company A will apply the preference share funding raised to subscribe for equity shares in Company B.
- Company B will raise preference share funding.
- Company B will apply the preference share funding to acquire shares in Company C.
- The Applicant and Company A will each dispose of their shares held in Company C to Company B in exchange for equity shares in Company B using section 42 of the Act. At the end of this transaction step Company B will hold more than 25% of the shares in Company C.

Conditions and assumptions

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

- The market values of the Company C shares to be disposed of by the Applicant and Company A in terms of section 42 will exceed the base costs of the shares as contemplated in item (aa) of the definition of 'asset-forshare transaction' in section 42(1)(a)(i).
- The shares to be issued by Company B to the Applicant and Company A in terms of section 42 will each constitute an 'equity share' as defined in section 1(1).

Ruling

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

- The subscription prices to be paid by the Applicant and Company A, respectively, for the acquisition of shares in Company B, will constitute the base costs of the shares for the Applicant and Company A as contemplated in paragraph 20(1)(a) of the Eighth Schedule.
- The contributed tax capital of Company B will increase by the aggregate subscription amounts paid by the Applicant and Company A as contemplated in paragraph (b) of the definition of 'contributed tax capital' in section 1(1).

- The purchase price paid by Company B for the acquisition of shares in Company C will be the base costs of the shares as contemplated in paragraph 20(1)(a).
- The disposals of Company C shares by the Applicant and Company A to Company B will each meet the requirements of an 'asset-for-share transaction' in paragraph (a) of that definition in section 42(1). The provisos to:
  - the definition of 'asset-for-share transaction' in paragraph (a)(ii) of section 42(1);
  - section 42(2)(b)(ii); and
  - section 42(3A),

  will apply to the Applicant, Company A and Company B so that:
  - the requirement that Company B must acquire the Company C shares as capital assets (in paragraph (a)(ii) of the definition of 'asset-for-share transaction') will not apply;
  - Company B will not acquire the Company C shares from the Applicant and Company A at their historical base costs but will acquire market value base costs in the shares in terms of section 40CA(a). Section 42(2)(b)(ii) will not apply to the transaction; and
- the contributed tax capital in Company B for the issue of equity shares to the Applicant and Company A will be determined in terms of paragraph (b)(ii) of the definition of 'contributed tax capital' in section 1(1) as the market value of the equity shares to be issued to the Applicant and Company A. Section 42(3A) will not apply to determine Company B's contributed tax capital.
- Section 42(2)(a)(i)(aa), (a)(ii)(aa) and (c) will apply to the Applicant and Company A.
- Section 24BA will not apply to the Applicant, Company A and Company B.
- The purchase of shares in Company C by Company B will be subject to securities transfer tax (STT) in accordance with section 2(1) of the STT Act.
- There will be no STT payable on the issue of shares by the Applicant, Company A and Company B.

- The exemption in section 8(1)(a)(i) of the STT Act will apply in respect of the transfer of shares in Company C by the Applicant and Company A to Company B in terms of section 42.

Additional Note

This ruling does not cover the application of any general anti-avoidance provisions to the proposed transaction.

9.6. Acquisition by public benefit organisation of forfeited share incentive scheme shares – No. 409

This ruling determines income tax and securities transfer tax consequences for a public benefit organisation acquiring forfeited share incentive scheme shares.

In this ruling references to sections and paragraphs are to sections of the relevant Act and paragraphs of the Eighth Schedule to the Act applicable as at 23 April 2024.

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

This is a ruling on the interpretation and application of:

- the Act:
  - section 10(1)(cN; and
  - paragraph 63A of the Eighth Schedule.
- the STT Act:
  - section 1 – definition of 'transfer'; and
  - section 8(1)(d).

Parties to the proposed transaction

The Applicant: A resident wholly-owned subsidiary of Company A Company A: A resident company listed on the JSE and the holding company of the Employer companies

Employer companies: The Applicant and the other operating companies within the Company A group of companies that employ the eligible employees who will participate in the proposed employee share incentive scheme

Participants: The eligible employees of the Employer companies that will take part in the proposed share incentive scheme Trust A: A charitable trust approved as a public benefit organisation under section 30(3) of the Act established to carry out public benefit activities on behalf of the group companies

Description of the proposed transaction

The Applicant is the main employer company within the Company A group of companies and the administrator of Company A's share incentive schemes. The Applicant intends to implement a new share incentive scheme for the benefit of eligible employees of the Employer companies. The main objective of the proposed share incentive scheme is the protection and enhancement of the Employer companies' businesses and their income. This will be achieved by incentivising the eligible employees to be efficient, productive and remain in the group's employ.

The practical implementation of the new share incentive scheme is summarised as follows:

- The Employer companies will make proposals to the remuneration committee recommending a rand value of shares in Company A to be awarded to the eligible employees ('award shares'), subject to the terms and conditions set out in an award letter and the share incentive scheme rules. Once the eligible employee accepts the terms and conditions of the scheme, he or she will become a Participant in the share incentive scheme and will be entitled to a prescribed number of shares in Company A, the number to be determined with reference to the volume weighted average market price.
- The Applicant will provide a list of all the Participants who qualify for shares and the respective rand values of the award shares to its stockbroker that will administer each Participant's securities account. The stockbroker will calculate the number of award shares to be bought and allocated to the Participants' accounts.
- The stockbroker will aggregate the total incentive scheme purchase value of the award shares and devise an appropriate trading strategy to acquire the award shares. The stockbroker requires between three and ten days to purchase the full quantity of the award shares. The stockbroker will buy the required quantity based on its trading plan for each of the respective trading days. The award shares will be purchased throughout the trading day to achieve the targeted volume weighted average market price.

- The award shares will be purchased and deposited in an allocation account of the stockbroker. At the end of each trading day, the award shares will be allocated to each Participant based on the proportional allotment, and the-quantities allocated will be rounded to the nearest whole number.

  The award shares will be subject to the following terms and conditions:

  - The Participants will not be entitled to dispose of the award shares within a 3-year period from the settlement date, and only after the lapse of the 3-year period will the award shares vest in a Participant ('vesting date');
  - If a Participant is a 'good leaver' as set out in the scheme rules, such participant will either:
    - be entitled to retain the award shares which may only be disposed of from vesting date; or
    - the vesting date will be accelerated, and the Participant will become entitled to dispose of the award shares immediately in certain circumstances as set out in the scheme rules.
  - If a Participant is a 'bad leaver' as set out in the scheme rules, such Participant will be obliged to forfeit the award shares for no consideration in favour of Trust A.
  - When the abovementioned restriction ceases to have effect and a Participant becomes entitled to dispose of the award shares, the Participant may elect that a portion of the award shares be disposed of in order for the Employer company to settle the employees' tax obligation that may arise.

Trust A will acquire the forfeited award shares under the share incentive scheme for no consideration. After acquisition Trust A will dispose of the forfeited award shares in the market as soon as is practically possible, irrespective of whether the share price has increased or decreased from the time of acquisition. The reason for the disposal of the award shares is solely to convert the forfeited award shares acquired into cash to be utilised by Trust A to carry out its public benefit activities.

Conditions and assumptions

This binding private ruling is made subject to the additional condition and assumption that Trust A remains an approved public benefit organisation under section 30(3) of the Act.

Ruling

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

- The receipt by or accrual to Trust A of the forfeited award shares will be exempt from normal tax under section 10(1)(cN) of the Act.
- Any capital gain realised by Trust A on the disposal of the forfeited award shares must be disregarded under paragraph 63A of the Eighth Schedule to the Act.
- The transfer of the forfeited award shares to Trust A will be exempt from securities transfer tax under section 8(1)(d) of the STT Act.

9.7. Disposal by a controlled foreign company of equity shares in a foreign company – No. 410

This ruling determines the income tax and capital gains tax consequences on the disposal by a controlled foreign company (CFC) of an investment in a foreign company.

In this ruling references to sections and paragraphs are to sections of the Act and paragraphs of the Eighth Schedule to the Act applicable as at 12 June 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 9H(3)(b) and (5); and
- paragraph 64B.

Parties to the proposed transaction

The Applicant: A company incorporated outside South Africa (SA) but a resident of South Africa

Company A: A CFC (as defined in section 9D(1)) of the Applicant

Company B: A foreign company

Description of the proposed transaction

Company A holds 50.1% of the issued shares in Company B, a widely held corporation. The other shareholders of Company B are all third parties in relation to Company A. The participation of Company A in the shares in Company B is not limited to a specified amount in respect of dividends or capital. In consequence the shares held by Company A in Company B are regarded as "equity shares" as defined in section 1(1). No value of any assets of Company B is attributable to assets directly or indirectly located, issued or registered in SA. Consequently, the shares held by Company A in Company B also do not constitute an interest contemplated in paragraph 2(2).

The Applicant's group will dispose of its interest in Company B. It is envisaged that Company A (and the third-party shareholders) will dispose of their shares in Company B to a third-party purchaser (the Purchaser) in return for a combination of cash and shares.

The Purchaser holds 100% of the shares in Merger Sub 1 and Merger Sub 2. These entities are incorporated to facilitate the proposed transaction. The Purchaser, Merger Sub 1 and Merger Sub 2 are not SA residents. They are also not CFCs or "connected persons" in relation to Company A or any other entity in the Applicant's group. Neither the Purchaser, nor Merger Sub 1, nor Merger Sub 2 formed part of the same group of companies as Company A at any time during a period of 18 months prior to the proposed transaction.

The proposed transaction will be structured as a merger governed by the foreign law applicable in the jurisdiction of the Purchaser. In this regard, even though the disposal of shares in a private company may in principle also be structured as a simple sale and purchase of shares, it is the norm in that jurisdiction to use the merger construct when the target company has many dispersed shareholders, as is the case of Company B.

In particular, structuring the transaction as a merger provides the buyer with certainty that the buyer is acquiring 100% of the issued shares in the target company. A sale-and-purchase structure does not provide this certainty, as the buyer will never know whether or not all of the outstanding shares of the target company would actually be acquired. In the foreign jurisdiction the merger may be completed with just the approval of a majority of the shareholders of Company B, much like a scheme of arrangement in South Africa. In contrast, a share purchase requires each and every shareholder to agree to the terms of the transaction and sign a purchase agreement. Therefore, unlike a merger, a single shareholder of Company B could functionally block the entire

transaction by refusing to sell its shares. Further, even if all shareholders wanted to participate in the sale transaction, the logistics required to identify and contact everyone (and the risk that some will inadvertently be missed) make simple share purchases functionally impossible if there are a large number of shareholders, as is the case with Company B. In these circumstances, a merger is the only realistic option.

Company B has more than 50 shareholders, which may be grouped into 18 distinct corporate groups. Negotiating a share purchase agreement with 18 different parties would impose significantly greater transaction costs as compared to a merger, and even render it impossible if one of the 18 parties opposed the transaction. Of the 18 shareholder groups, Company A holds 50.1% of the voting power. An additional 38.5% of the total voting power is held by five groups, all of whom have signed voting and support agreements committing to support the transaction with the Purchaser. Thus, these six parties are able to approve the merger, acting alone. This is a significant advantage, as the Purchaser can acquire 100% of Company B without the risk of minority shareholders blocking the transaction.

Under the merger construct, the mechanics of the transaction are broken down into separate sub-steps and are set out below. Note that all the steps happen sequentially on the same day and are interdependent.

- Step 1 – The First Merger: Merger Sub 1 will merge with Company B. Company B will be the surviving company and Merger Sub 1's existence will be terminated automatically. The Company B shares held by Company A and the third parties will be cancelled by Company B following their conversion in the hands of Company A to the right to receive the per share merger consideration (being a combination of cash and shares to be issued by The Purchaser to Company A and the third parties). Consequently, Company B will become a wholly-owned subsidiary of the Purchaser.
- Step 2 – The Second Merger: Company B will merge with Merger Sub 2, with Merger Sub 2 being the surviving company and Company B's existence automatically terminated.
- Step 3 – Payment of Consideration: The Purchaser will pay the per share merger consideration to Company A and the third parties (in the form of cash and shares in the Purchaser).

The result is that the Purchaser will hold all the shares in Merger Sub 2, which is the surviving entity encompassing the Company B business. In addition to the cash

consideration, Company A will hold less than 10% of the issued shares in the Purchaser, with the third-party investors in Company B and the original shareholders of the Purchaser holding the balance. Company B (and its subsidiaries) will therefore cease to be CFCs in relation to the Applicant. The rights held by the Purchaser comprising the Merger Sub 2 shares after the implementation of the proposed transaction will be identical to the rights held by Company A comprising the Company B shares prior to the proposed transaction.

Conditions and assumptions

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

- Company A's portion of the per share merger consideration will equal or exceed the market value of Company A's 50.1% shareholding in Company B; and
- Company A has held at least 10% of the shares and voting rights in Company B for a period of 18 months or longer and will continue to do so until the proposed transaction is implemented.

Ruling

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

- Company A will be regarded as having disposed of its shares in Company B "to" the Purchaser for purposes of paragraph 64B(1)(b);
- Immediately after the proposed transaction, the shareholders of the Purchaser and any company in Company A's group of companies are not "substantially the same" for purposes of paragraph 64B(1)(b)(iii)
- The participation exemption in paragraph 64B(1) will apply to the Company A's envisaged disposal of its shares held in Company B to the Purchaser, resulting in any capital gain (or capital loss) arising from the disposal to the Purchaser being disregarded; and
- As a result, section 9H(5) will apply to the proposed transaction and will have the effect that the section 9H(3)(b) deemed disposal of all Company B's assets (including those held by any CFC held directly or indirectly by Company B) is not applicable when Company B (and any such CFC of Company B) ceases to be a CFC as a result of the proposed transaction.

10. BINDING CLASS RULING

10.1. Award of listed shares under a share scheme – No. 90

This ruling determines income tax and securities transfer tax consequences for employer companies of a proposed share incentive scheme.

In this ruling references to sections and paragraphs are to sections of the relevant Act and paragraphs of the Fourth and Eighth Schedule to the Income Tax Act applicable as at 23 April 2024. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the relevant Act.

This is a ruling on the interpretation and application of:

- the Act:
    - section 8C;
    - section 10(1)(k)(i);
    - section 11(a), read with section 23(g);
    - section 23H;
    - section 56;
    - section 58;
    - paragraph 2 of the Fourth Schedule;
    - paragraph 11A of the Fourth Schedule; and
    - paragraph 35 of the Eighth Schedule
- the STT Act:
    - section 1 – definition of 'transfer'

<u>Class</u>

The class members to whom this ruling will apply are the Employer companies and Participants.

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

The Applicant: A resident wholly-owned subsidiary of Company A

Company A: A resident company listed on the JSE and the holding company of the Employer companies

Employer companies: The Applicant and the other operating companies within the Company A group of companies that employ the eligible employees who will participate in the proposed employee share incentive scheme

Participants: The eligible employees of the Employer companies that will participate in the proposed share incentive scheme

Trust A: A trust approved as a public benefit organisation under section 30(3) of the Act established to carry out public benefit activities on behalf of the group

Description of the proposed transaction

The Applicant is the main employer company within the Company A group of companies and the administrator of Company A's share incentive schemes. The Applicant intends to implement a new share incentive scheme for the benefit of eligible employees of the Employer companies. The main objective of the proposed share incentive scheme is the protection and enhancement of the Employer companies' businesses and their income. This will be achieved by incentivising the eligible employees to be efficient, productive and remain in the group's employ.

The practical implementation of the new share incentive scheme is summarised as follows:

- The Employer companies will make proposals to the remuneration committee recommending a rand value of shares in Company A to be awarded to the eligible employees ('award shares'), subject to the terms and conditions set out in an award letter and the share incentive scheme rules. Once the eligible employee accepts the terms and conditions of the scheme, he or she will become a Participant in the share incentive scheme and will be entitled to a prescribed number of shares in Company A, the number to be determined with reference to the volume weighted average market price.

- The Applicant will provide a list of all the Participants who qualify for shares and the respective rand values of the award shares to its stockbroker that will administer each Participant's securities account. The stockbroker will calculate the number of award shares to be bought and allocated to the Participants' accounts.

- The stockbroker will aggregate the total incentive scheme purchase value of the award shares and devise an appropriate trading strategy to acquire the award shares. The stockbroker requires between three and ten days to purchase the full quantity of the award shares. The stockbroker will buy the required quantity based on its trading plan for each of the respective trading days. The award shares will be purchased throughout the trading day to achieve the targeted volume weighted average market price.
- The award shares will be purchased and deposited in an allocation account of the stockbroker. At the end of each trading day, the award shares will be allocated to each Participant based on the proportional allotment, and the quantities allocated will be rounded to the nearest whole number.

  The award shares will be subject to the following terms and conditions:

  - The Participants will not be entitled to dispose of the award shares within a 3-year period from the settlement date, and only after the lapse of the 3-year period will the award shares vest in a Participant ('vesting date');
  - If a Participant is a 'good leaver' as set out in the scheme rules, such participant will either:
    - be entitled to retain the award shares, which may only be disposed of from vesting date; or
    - the vesting date will be accelerated, and the Participant will become entitled to dispose of the award shares immediately in certain circumstances as set out in the scheme rules.
  - If a Participant is a 'bad leaver' as set out in the scheme rules, such Participant will be obliged to forfeit the award shares for no consideration in favour of Trust A.
  - When the abovementioned restriction ceases to have effect and a Participant becomes entitled to dispose of the award shares, the Participant may elect that a portion of the award shares be disposed of, in order for the Employer company to settle the employees' tax obligation that may arise.

Trust A will acquire the forfeited award shares under the share incentive scheme for no consideration. After acquisition Trust A will dispose of the forfeited award shares in

the market as soon as is practically possible, irrespective of whether the share price has increased or decreased from the time of acquisition. The reason for the disposal of the award shares is solely to convert the forfeited award shares acquired into cash to be utilised by Trust A to carry out its public benefit activities.

Conditions and assumptions

This binding class ruling is not made subject to any conditions and assumptions, save as stipulated in the proviso below.

Ruling

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

- The Employer companies may deduct the expenditure incurred to acquire the award shares under section 11(a), read with section 23(g) of the Act.
- Section 23H(1) of the Act will apply to the amount deductible under section 11(a), read with section 23(g), in respect of the expenditure incurred to acquire the award shares.
- The Employer companies will be obliged to withhold employees' tax under the Fourth Schedule upon the vesting of the award shares, if any gain is determined in terms of section 8C(2) of the Act.
- Securities transfer tax will be imposed once on the acquisition by the stockbroker of the award shares in the market, provided that those shares are allocated to the Participants' share accounts by the close of business on the date of the transaction.
- The award shares will constitute 'restricted equity instruments' for purposes of section 8C of the Act, and therefore:
    - On delivery of the award shares to the Participant, the Participant will not be required to include the value of the award shares in his or her income in that year of assessment.
    - Only upon the restrictions ceasing to have effect or the Participant disposing of the award shares (whichever is the earlier), will the Participant be required to include any gain determined under section 8C(2) in his or her income.

- Upon the disposal of the forfeited award shares to Trust A for no consideration, no gain will be determined by the Participant under section 8C, and no capital gain or loss will be determined by the Participant under the Eighth Schedule to the Act.

- Any dividend received by or accruing to the Participants will be exempt from normal tax and the exceptions in paragraphs (dd), (ii), (jj) and (kk) of section 10(1)(k)(i) will not apply.
- The forfeiture of the award shares by the Participants in favour of Trust A for- no consideration will not be subject to donations tax.

11. BINDING GENERAL RULING

11.1. Meaning of the expression 'substantially the whole' – No. 20 (Issue 4)

For the purposes of this BGR:

- 'association' means any 'entity' as defined in section 30B(1), which has been approved by SARS under section 30B(2);
- 'PBO' means a 'public benefit organisation' as defined in section 30(1), which has been approved by SARS under section 30(3);
- 'recreational club' means a 'recreational club' as defined in section 30A(1), which has been approved by SARS under section 30A(2);
- 'SBFE' means a 'small business funding entity' as defined in section 1(1), which has been approved by SARS under section 30C(1);

Purpose

This BGR provides clarity on the interpretation of the expression 'substantially the whole' as referred to in –

- section 10(1)(cN)(ii)(aa)(B);
- section 10(1)(cO)(ii)(bb);
- section 10(1)(cQ)(ii)(aa)(B);
- section 30B(2)(b)(iv), (vi) and (ix);

- section 30C(1)(d)(v) and (viii);
- paragraph 63A(b) of the Eighth Schedule;
- paragraph 63B(1)(b) of the Eighth Schedule; and
- section 9(1)(c) of the Transfer Duty Act.

Background

The expression 'substantially the whole' was introduced in the revised tax system for PBOs in 2000 to achieve a more supportive fiscal environment and to give effect to the proposals and recommendations by the Katz Commission set out in the Ninth Interim Report. In considering comparative international law with regard to trading activities conducted by non-profit organisations (NPOs) the Ninth Interim Report stated that it was significant that :

> 'the United States' federal tax law exempts profits derived from a business which is 'substantially related' to a NPOs tax-exempt purposes. Substantially related in this context means that the conduct of the business activity must have a significant causal relationship to the achievement of a tax-exempt purpose. Thus, for the conduct of a trade or business from which a particular amount of gross income is derived to be exempt from taxation, the production or distribution of the goods or the performance of the services from which the gross income is derived must contribute importantly to the accomplishment of the organisations' exempt purposes.'

The Ninth Interim Report stated further that the:

> 'United Kingdom Revenue Practice is to accept ancillary trades provided they are 'small in absolute terms and the turnover of that part of the trade is less than 10 per cent of the turnover of the whole trade' '.

The expression 'substantially the whole' has also been introduced into legislation dealing with:

- the exemption from normal tax of a recreational club;
- the exemption from normal tax of an SBFE;
- the requirements for approval as an association;
- the requirements for approval as an SBFE;

- capital gains tax affecting PBOs and SBFEs; and
- transfer duty affecting PBOs and institutions, boards or bodies contemplated in section 10(1)(cA)(i).

The expression 'substantially the whole' is used in various sections although not defined in the Act.

Discussion

The exemption from normal tax of public benefit organisations, recreational clubs, and small business funding entities

A PBO, recreational club, and SBFE is allowed to carry on integral and directly related business undertakings or trading activities within certain parameters, while at the same time ensuring that the sole or principal object of:

- a PBO remains the carrying on of public benefit activities (PBAs);
- a recreational club remains the provision of social and recreational amenities or facilities for its members; and
- an SBFE remains the provision of funding for small, medium, and micro-sized enterprises.

The receipts and accruals derived by any of the aforementioned entities from any integral and directly related business undertaking or trading activity will be exempt from normal tax to the extent that 'substantially the whole' of such undertaking or activity is directed towards the recovery of cost.

The requirements for approval as an association

Section 30B sets out the conditions and requirements that an 'entity' as defined in section 30B(1) must comply with to obtain and retain approval as an association for its receipts and accruals to be exempt from normal tax under section 10(1)(d)(iii) or (iv).

SARS must approve an entity for the purposes of section 10(1)(d)(iii) or (iv) if the constitution or written instrument under which it has been established, amongst other things, provides that substantially the whole of its:

- funds will be used for the sole or principal object for which it has been established;

- activities will be directed to the furtherance of its sole or principal object and not for the specific benefit of an individual member or minority group; and
- funding will be derived from its annual or other long-term members or from an appropriation by the government of the Republic in the national, provincial or local sphere.

The requirements for approval as a small business funding entity

Section 30C sets out the conditions and requirements that an SBFE must comply with to obtain and retain approval as an SBFE for certain of its receipts and accruals to be exempt from normal tax under section 10(1)(cQ).

SARS must approve an SBFE for the purposes of section 10(1)(cQ) if the constitution or written instrument under which it has been established, amongst other things, provides that substantially the whole of its:

- funds will be used for its sole or principal object for which it has been established;and
- activities will be directed to the furtherance of its sole or principal object.

Capital gains tax

Public benefit organisations

A PBO must disregard any capital gain or capital loss determined on the disposal of an asset if substantially the whole of the use of that asset by that PBO on and after valuation date was directed at:

- a purpose other than carrying on a business undertaking or trading activity; or
- carrying on a business undertaking or trading activity that qualifies for exemption under section 10(1)(cN)(ii)(aa), (bb) or (cc).

Small business funding entities

An SBFE must disregard any capital gain or capital loss determined on the disposal of an asset if substantially the whole of the use of that asset by that SBFE was directed at:

- a purpose other than carrying on a business undertaking or trading activity; or
- carrying on a business undertaking or trading activity that qualifies for exemption under section 10(1)(cQ)(ii)(aa), (bb) or (cc).

Transfer duty

To qualify for exemption from the payment of transfer duty under section 9(1)(c) of the Transfer Duty Act, the whole property, or substantially the whole of the property acquired by a PBO or institution, board or body contemplated in section 10(1)(cA)(i) must be used for purposes of carrying on any PBAs.

If at any time subsequent to the acquisition of property that has qualified for the exemption from transfer duty the whole or substantially the whole of the property is used for a purpose other than for carrying on any PBA, transfer duty will become payable.

Ruling

Strictly interpreted, SARS regards the expression 'substantially the whole' to mean 90% or more.

However, since PBOs, recreational clubs, associations and SBFEs operate in an uncertain environment making proper planning difficult, SARS will accept a percentage of not less than 85% for purposes of:

- section 10(1)(cN)(ii)(aa)(B)
- section 10(1)(cO)(ii)(bb)
- section 10(1)(cQ)(ii)(aa)(B)
- section 30B(2)(b)(iv), (vi) and (ix)
- section 30C(1)(d)(v) and (viii)
- paragraph 63A(b) of the Eighth Schedule
- paragraph 63B(1)(b) of the Eighth Schedule
- section 9(1)(c) of the Transfer Duty Act

The percentage must be determined using a method appropriate to the circumstances.

12. GUIDES

12.1. Guide on Income Tax and the Individual – 2023/24

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

The guide deals with the following:

- When is an individual liable for income tax?
- What is a year of assessment for an individual?
- What are some of the different kinds of income that an individual can be taxed on?
- Do all individuals have to register as taxpayers and submit income tax returns?
  - Registration
  - Submission of income tax returns
    - Individuals required to submit an income tax return
    - Individuals not required to submit an income tax return
  - Filing an income
    - Auto-assessment process
    - How to obtain an income tax return
    - Pre-populated income tax return
- To whom is the income tax payable?
- When is income tax payable?
- What is employees' tax?
- What proof does an employee have of employees' tax deducted from his or her earnings?
- What is provisional tax?
  - Who qualifies to be a provisional taxpayer?
  - When is provisional tax due?

How much provisional tax must be paid?

What happens on assessment?

Penalties

Administrative non-compliance penalties

Understatement penalties

Interest

Objections and appeals

When and how to lodge an objection

When and how to lodge an appeal

Criminal offences

12.2. Guide on the Determination of Medical Tax Credits (Issue 16)

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

Expenditure of a personal nature is generally not taken into account in determining a taxpayer's income tax liability, under South Africa's tax system. One of the notable exceptions relates to medical expenditure. South Africa is aligned with the practice in many other countries of granting tax relief for medical expenditure.

There are a number of reasons that tax systems provide such relief. One of the reasons is that serious injury or illness can present taxpayers with disproportionately high medical bills in relation to income, which can be difficult to meet. The resulting hardship affects a number of economic areas for taxpayers, including the ability to settle obligations to the fiscus, such as a tax bill.

Historically, South Africa utilised a deduction system to facilitate tax relief for medical expenditure. Allowances, subject to certain limits, were permitted to be deducted from income for contributions to medical schemes, as well as for out-of-pocket medical expenditure.

In 2012, tax relief for medical expenditure began a phased-in conversion from a deduction system to a tax credit system. The reason for the change was to eliminate vertical inequity relating to medical contributions: those at higher marginal tax rates

received a larger reduction of tax payable than those on lower marginal rates, in respect of the same amount of medical expenditure. The purpose of the change was to spread tax relief more equally across income groups, thus bringing about horizontal equity – those who pay equal values for medical expenditure receive absolute equal tax relief.

A tax credit system differs from a deduction system in that, instead of permitting a deduction of the medical allowance against a taxpayer's income, the relief is granted as a reduction in tax payable. It therefore operates as a tax rebate.

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

- A medical scheme fees tax credit (MTC) that applies in respect of qualifying-contributions to a medical scheme.
- An additional medical expenses tax credit (AMTC) that applies in respect of other qualifying medical expenses.

The application of the AMTC system falls into three categories:

- Taxpayers aged 65 years and older.
- Taxpayer, his or her spouse or his or her child is a person with a disability.
- All other taxpayers.

In order to qualify for the AMTC in the '65 years and older' category, the taxpayer must be 65 years or older on the last day of the relevant year of assessment or, had he or she lived, would have been 65 years or older on the last day of the relevant year of assessment.

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

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

12.3. Tax exemption guide for Small Business Funding Entities – Income Tax

This guide provides general guidance on the approval of small business funding entities under section 30C of the Income Tax Act and partial taxation of its receipts and

accruals under section 10(1)(cQ) of the Act.
The guide deals *inter alia* with the following:

Approval requirement

Application procedure

Type of entity qualifying for approval

Sole or principal object

Funding

Small, medium or micro-sized enterprises

Founding document

Prescribed requirements

Basic exemption

Partial taxation

Beneficiary of a trust

13. DRAFT GUIDES

13.1. Draft guide to income tax benefits in special economic zones

This guide provides general guidance on the special income tax treatment in special economic zones (SEZs). The guide is restricted to the application of the SEZ legislation as it relates to the income tax incentives applicable to such zones. It does not consider the value-added tax and customs incentives available to qualifying companies operating within an SEZ.

The South African government introduced the IDZ regime in 2003 as a means of promoting investment, growth and job creation in the South African manufacturing sector, as well as to promote the development of the regions demarcated as IDZs. The main focus of the IDZ regime was to attract foreign direct investment and to promote the exportation of value-added commodities. Some of the tax incentives provided to taxpayers under the IDZ regime included:

- relief from customs duty and VAT; and
- additional allowances on the cost of any manufacturing asset used in an industrial policy project under section 12I.

The developments in national economic policies and strategies, as well as the formation of the trade coalition between Brazil, Russia, India, China and South Africa (BRICS) led to a policy review of the IDZ regime in 2007. The main limitation of the IDZ regime was that an IDZ could only be designated adjacent to a sea port or international airport, which led to the exclusion of other regions in the Republic that had industrial potential but did not meet the requirements of an IDZ. Other challenges experienced with the IDZ regime identified by the DTI can be summarised as follows:

- Lack of coordinated planning arrangements
- Insufficient guidance related to governance arrangements
- Dependence on government funding
- Lack of targeted investment promotion measures
- Insufficient marketing and inadequate coordination across government agencies

This policy review by the DTI created the foundation for the creation of SEZs. The DTI's policy on the development of SEZ describes SEZs as follows:

> 'Special Economic Zones are geographically designated areas of a country set aside for specifically targeted economic activities, supported through special arrangements (which may include laws) and support systems that are often different from those that apply in the rest of the country.'

The DTI's 'Special Economic Zones Tax Incentive Guide' states the SEZs intend to:

- expand the focus of strategic industrialisation to cover diverse regional development needs and context;
- provide a clear, predictable and systematic planning framework for the development of a wider array of SEZs to support industrial policy objectives, the Industrial Policy Action Plan, National Development Plan and the National Growth Plan;
- clarify and strengthen governance arrangements, and expand the range and quality of support measures beyond the provisions of infrastructure; and
- provide a framework for predictable financing to enable long-term planning.

The SEZ Act was introduced to, amongst others, provide for the designation, promotion, development, operation and management of SEZs. The SEZ Act defines4 an SEZ. According to this Act an SEZ is an economic development tool to promote

national economic growth and export by using certain support measures to attract targeted foreign and domestic investments and technology. The purpose of establishing an SEZ includes:

- facilitating the creation of an industrial complex, having strategic national economic advantage for targeted investments and industries in the manufacturing sector and tradable services;
- developing infrastructure required to support the development of targeted industrial activities;
- attracting foreign and domestic direct investment;
- providing the location for the establishment of targeted investments;
- enabling the beneficiation of mineral and natural resources;
- taking advantage of existing industrial and technological capacity;
- promoting integration with local industry and increasing value-added production;
- promoting regional development;
- creating decent work and other economic and social benefits in the region in which it is located, including the broadening of economic participation by promoting small, micro and medium enterprises and co-operatives, and promoting skills and technology transfer; and
- the generation of new and innovative economic activities.

It was announced in the 2012 Budget Review that certain tax incentives would be considered for the SEZs. A company that meets the requirements may qualify for a special taxation dispensation.

13.2. Draft guide on the allowances and deductions relating to assets used in the generation of electricity from specified sources of renewable energy

This draft guide provides general guidance on the tax incentives available for the generation of electricity from specified sources of renewable energy under section 12B(1)(h) and (i), the enhanced form of this deduction under section 12BA and the deduction under section 12U for amounts actually incurred on the construction of any

road, the erecting of any fence and a foundation or supporting structure designed for such a fence as well as on the cost of the improvements to any road, fence or foundation or supporting structure that are used for the generation of electricity from specified sources of renewable energy.

South Africa, as a party to the United Nations Framework Convention on Climate Change, aims to reduce greenhouse gas emissions and to incentivise investments in low carbon, clean energy by, amongst others, promoting investment in renewable energy projects. Given the favourable climate in the country, South Africa is rich in possibilities when it comes to renewable energy initiatives, which include various sources such as solar energy, wind power, biomass or hydro power, to generate electricity. These sources of energy are preferable to the use of fossil fuels such as coal or crude oil which, when burned to produce energy, cause harmful greenhouse gas emissions.

In order to promote investment in renewable energy technologies and potentially reduce South Africa's dependency on coal, various tax incentives have been introduced in the form of deductions and accelerated capital allowances. Section 6C, section 12B(1)(h) and (i), section 12BA and section 12U were introduced with the intention of promoting the generation of electricity from specified sources of renewable energy.

Section 12B(1)(h), section 12BA and section 12U provide an incentive relating to the generation of electricity from specified sources of renewable energy.

A taxpayer may potentially claim a deduction under section 12B(1)(h) or section 12BA on the cost of assets acquired for the purpose of trade to be used in generating electricity from wind power, photovoltaic or concentrated solar power, hydropower or biomass. In specified circumstances foundations and supporting structures are deemed to be part of the asset and will also qualify for the deduction under these sections. Under section 12B, the costs of the improvements made to these assets as well as improvements to the supporting structures or foundations deemed to be part of the asset, are also deductible.

The assets under section 12B(1)(h) and supporting structures or foundations are generally deductible commencing in the year of assessment that the asset is first brought into use at a rate of 50:30:20 per cent over a three-year period. The cost of the asset used in photovoltaic solar energy to generate electricity not exceeding one megawatt is deductible in full in the year that such asset is brought into use for the first time.

The cost of the improvements to the assets referred to in section 12B(1)(h) are deductible in the same manner provided for under section 12B(2) provided the improvement is used during the year of assessment as contemplated in section 12B(1)(h), that is, 100% if the improvement is to an asset brought into use to generate photovoltaic solar energy which does not exceed one megawatt otherwise over a three-year period at a rate of 50:30:20.

The incentive under section 12BA is an amount equal to 125% of the cost incurred by the taxpayer for the acquisition of the asset and applies to qualifying new and unused assets brought into use for the first time on or after 1 March 2023 but before 1 March 2025.

A deduction may be claimed under section 12U on the cost incurred of any road, fence and foundation or supporting structures specifically designed for such fence relating to certain qualifying renewable energy projects. Improvements to those assets may also be deductible under this section.

14. 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.