Issue 74 | 2024
SEPTEMBER

South African Institute of Taxation

Unstructured CPD 150mins

TAX CHRONICLES MONTHLY

Official Journal for the South African Tax Professional

TRUSTS
DISCRETIONARY TRUSTS AND VESTED RIGHTS

VALUE-ADDED TAX
THE CONSTITUTIONAL COURT'S JUDGMENT IN THE *CAPITEC BANK* CASE

REBATES
MEDICAL TAX CREDITS FOR DEPENDANTS

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PREFERENCE SHARE DIVIDENDS

One might assume that all shares are alike and entitled to dividends, but such a presumption could lead to costly oversights. There has been a significant shift regarding preference share dividends for South African tax purposes.

The amendment to section 8EA of the Income Tax Act, 1962 (the Act), effective for years of assessment beginning on or after 1 January 2024, is at the heart of this change.

In essence, this section deems certain dividends to be taxed as income, thereby disqualifying them from the usual dividend exemptions. Previously, the complex requirements of this section, particularly regarding the timing of acquisition of the shares, led to some confusion. In this article, the new rules will be examined, after a closer look has been taken at shares in general.

WHAT IS A SHARE?

Simply put, a share represents ownership of a company. By holding a share, an individual, company, trust, foundation or any other similar entity becomes a shareholder of the respective company. This ownership entitles shareholders to potential rewards, such as dividends. Importantly, when a company raises funds by issuing shares, known as share capital, the Act draws a distinction between equity shares and preference shares.

WHAT IS THE DIFFERENCE BETWEEN EQUITY AND PREFERENCE SHARES?

When comparing equity and preference shares, several key distinctions tend to emerge. Generally, equity shares grant shareholders voting rights, whereas preference shares do not. Additionally, while equity shares are non-redeemable, preference shares can be redeemed. Moreover, preference shares generally take precedence in distributions over equity shares. These are just a few of the differences, with various subtypes adding further complexity to the equation.

WHY DOES THIS DISTINCTION MATTER?

At the heart of the matter lies the fact that the tax treatment of dividends is diametrically opposite to the tax treatment of interest.

Thus, in certain circumstances lenders will be incentivised to inject funds in the form of preference shares even though the substance of the funding arrangement is no different to an interest-bearing loan.

> "In a nutshell, the proviso mandates that the person acquiring shares in the operating company with preference share proceeds must continue to hold the shares in the operating company for so long as the preference shares are still in issue."

EXPLORING THE AMENDMENT TO PREFERENCE SHARE DIVIDENDS

Now that the fundamentals have been established, one can delve into the amendment regarding preference share dividends, effective for years of assessment commencing on or after 1 January 2024.

The amendment pertains to section 8EA and covers both local and foreign dividends. In essence, this section classifies dividends received by persons as income if the share is deemed a "third-party backed share", at any time during the year of assessment. A "third-party backed share" has a lengthy definition (in subsection (1)) but essentially includes preference shares or defined equity instruments where another person guarantees or indemnifies the preference shareholder in the event of a default.

Where this section applies and the dividend is classified as income, the shareholder would not be able to claim any exemption (whether resident or non-resident). Dividends tax would also no longer be applicable as the dividend would be subject to income tax.

To avoid classification as income, preference shares must meet various criteria, including being issued for a "qualifying purpose". This definition (also found in subsection (1)) is quite complex but generally will be met where proceeds are used from the issuing of preference shares to acquire equity shares in an operating company, or to refinance preference shares previously issued for this purpose. To address confusion caused by this definition surrounding the timing of equity share ownership in the operating company, a new proviso to subsection (3) introduces an ownership requirement.

UNPACKING THE AMENDMENT: A NEW PROVISO

In a nutshell, the proviso mandates that the person acquiring shares in the operating company with preference share proceeds must continue to hold the shares in the operating company for so long as the preference shares are still in issue. Failure to comply subjects the dividend to income tax in the hands of the shareholder.

There are situations where the new proviso does not apply, namely, if the dividend comes from selling shares in the operating company, and such dividend is used to redeem the preference share within 90 days of the sale of the shares in that operating company. The proviso also does not apply if an equity share in the operating company is swapped for another listed share under certain arrangements approved by a licensed exchange, as long as these arrangements meet the same standards as those of the JSE Limited.

CONCLUSION

In light of these amendments, it is crucial for shareholders to review existing preference share structures to ensure compliance with tax obligations and optimise financial strategies. If one is a shareholder expecting preference share dividends, seeking professional guidance can help navigate these complexities and maximise one's investment potential.

Regan van Rooy

Acts and Bills

- Income Tax Act 58 of 1962: Sections 1(1) (definition of "equity share"), 8EA(1) (definitions of "preference share", "qualifying purpose" & "third-party backed share") & 8EA(3) (new proviso).

Tags: preference share dividends; equity shares; interest-bearing loan; third-party backed share; qualifying purpose.

AGRICULTURAL INSURANCE PRODUCTS

The judgment in Taxpayer Boerdery v Commissioner for the South African Revenue Service *[2024], serves as a reminder that taxpayers should carefully consider the substance of an arrangement, rather than the form in which it is wrapped.*

The subject of this case was an insurance contract with integrated investment features. The tax court (the TC) disallowed the insurance premiums as a deduction in terms of section 11*(a)* of the Income Tax Act, 1962 (the Act) and upheld the concomitant understatement penalties and interest.

BACKGROUND

Taxpayer Boerdery (the taxpayer) conducts a farming operation from which it derives income from the sale of fruit and vegetables. The dispute turned on the interpretation of a "Multi-Peril Contingency Policy Contract" (insurance contract) concluded between the taxpayer and an insurance company (the Insurer).

The insurance contract requires the taxpayer to pay annual premiums, which would then be credited to a "Special Experience Account" (the experience account). The experience account would also be credited with "notional interest" on the funds invested at the average Absa money market rate less 65 basis points. The amounts in the experience account are reduced by the "Insurer's Margin" of 2.25% of the premiums received and an "Investment Management Fee" of 65 basis points of the funds invested.

The Insurer compensates the taxpayer on the occurrence of defined events during the contract period, where any amount paid to the taxpayer is debited to the experience account. On expiry of the contract period, the Insurer refunds the taxpayer the full balance of the experience account. The taxpayer may, on 30 days' notice, cancel the policy contract in which case the taxpayer will again be refunded the full balance of the experience account.

The annual premium in respect of the 2018 policy was R35 million and the total annual aggregate limit of indemnity was R41.5 million. The annual premium in respect of the 2019 policy was R35.4 million and the total annual aggregate limit of indemnity was R49.5 million. For the 2019 year of assessment, however, the taxpayer only paid R1.99 million as the balance constituted a "roll-over premium".

The taxpayer deducted these premiums in terms of section 11*(a)*. Save for a marginal portion of these amounts, SARS disallowed the deductions on the basis that they did not constitute "expenditure" incurred.

ANALYSIS

While agricultural insurance policies incorporate unique features, the current insurance contract exhibited markers that revealed a different character. In this regard, the TC identified the following:

- The investment management fee is anomalous in the context of a short-term insurance policy. During cross-examination, it was put to an executive of the Insurer (Mr One), testifying for the taxpayer, that this fee was in substance the premium charged to provide the insurance cover. This was particularly compelling given the fact that the "actual" premiums were charged at a rate of 85% of the insurance cover.

- Despite Mr One's suggestion that the "notional interest" did not constitute interest in the ordinary sense, the "notional interest" represented the return on the amount invested with the Insurer.

- The taxpayer is entitled to cancel the contract on 30 days' notice, in which case the Insurer will refund the balance of the experience account. The insurer will in any event refund the balance upon conclusion of the insurance period of 12 months.

As a whole, the arrangement purported to be an insurance contract that permits the investment of pre-tax amounts that would generate a return for the taxpayer, while the amounts invested ranked as a tax deduction to boot.

The TC assessed the features of the contract against the requirements of the general deduction formula under section 11*(a)*:

- It was found that the taxpayer did not "expend" the insurance premiums. Save for the Insurer's margin, the payment of the premiums did not result in a shift in the taxpayer's assets. On the contrary, the premiums established a right in respect of the balance of the experience account.
- Flowing from the preceding, the TC turned to question whether the premiums are of a capital nature. The distinction was drawn between expenditure incurred for purposes of acquiring a capital asset and expenditure which is part of the cost incidental to the performance of the income-producing operations. It was found that the premiums established a right to the balance of the experience account plus income in the form of interest, ie, an income-producing concern. And hence a capital asset.

It was thus held that the taxpayer did not discharge its onus to prove that the premiums ranked for a deduction under section 11*(a)* and the appeal was dismissed.

"The taxpayer deducted these premiums in terms of section 11*(a)*. Save for a marginal portion of these amounts, SARS disallowed the deductions on the basis that they did not constitute 'expenditure' incurred."

DISCUSSION

When pressed to explain why this tax position was adopted, the accountant who filed the taxpayer's return (Mr Tone) testified that he did not actually consider the insurance contract. When asked who had advised the taxpayer to claim the deduction, Mr Tone referred to a roadshow organised by the Insurer to sell the product to farmers and to discussions he had with the Insurer.

The ubiquity of taxpayers in the agricultural industry that may have heeded the tax advice offered by their insurance provider is a matter of speculation. Taxpayers are reminded that they remain responsible for their own tax affairs. Moreover, in the wake of this judgment, taxpayers, and specifically those in the agricultural industry, would be well advised to reconsider the design principles of their insurance coverage and the tax treatment thereof.

Simon Weber & Jean du Toit

ENS

Acts and Bills

- Income Tax Act 58 of 1962: Section 11*(a)*.

Other documents

- Multi-Peril Contingency Policy Contract (insurance contract).

Cases

- *Taxpayer Boerdery v Commissioner for the South African Revenue Service* (IT 45979) [2024] ZATC 5 (20 March 2024).

Tags: agricultural insurance policies; notional interest; capital asset; income-producing operations.

NON-TRADE EXPENSES AND ASSESSED LOSSES

The claiming of expenses and the carry forward of assessed losses by companies that are not carrying on a trade, remain areas of high risk and contain many pitfalls for the unwary.

The term "trade" is broadly defined in section 1(1) of the Income Tax Act, 1962 (the Act), to include, among other things, any profession, business, trade or occupation. However, whether a company is considered to be carrying on a trade is often a contentious issue.

Companies may inadvertently fall outside this definition due to inactivity or reduced business operations, leading to the disqualification of expense claims and assessed losses.

Companies must ensure that expenses claimed in terms of section 11*(a)* read with section 23*(g)* of the Act are incurred in the production of income, are laid out for purposes of trade and are not capital in nature. If a company is not actively trading, expenses might not meet the criterion of being laid out for purposes of trade or may not be in the production of any income, leading to disallowance by SARS.

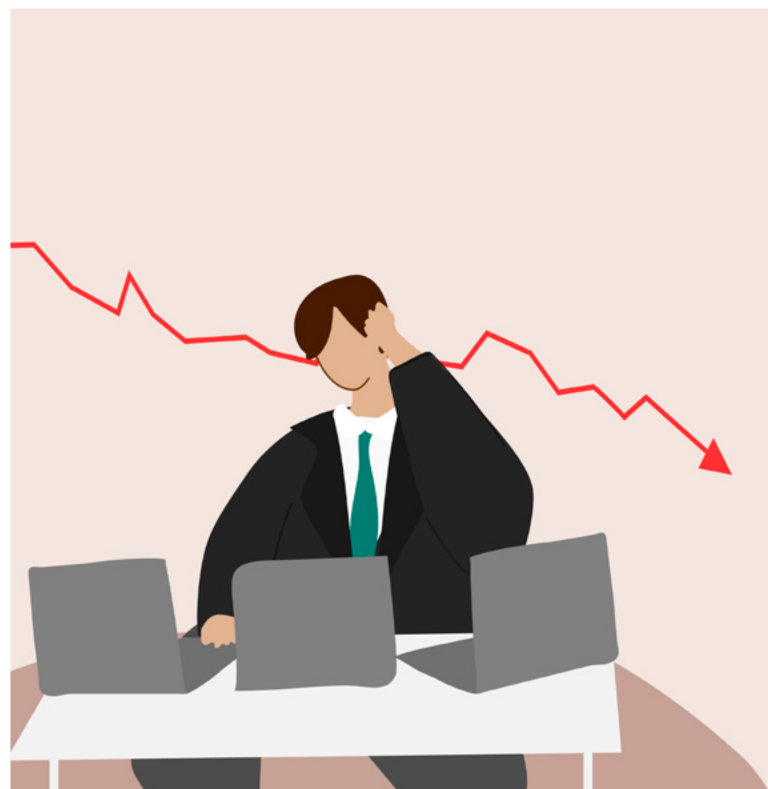
Over the years this issue has led to numerous disputes between taxpayers and SARS and on occasion has ended up in the courts, for example in the case of *Unitrans Holdings Limited v Commissioner for the South African Revenue Service* [2023]. In this case, Unitrans declared in its 2011 tax return that it had earned R34 million in interest income from its subsidiaries. It further claimed an amount of R68 million in interest paid by it to its shareholder.

SARS disallowed the interest claimed in terms of section 24J(2) of the Act because, in its view, the expenditure incurred was not in the conduct of any trade, nor was it incurred in the production of income. Section 24J(2) has similarly worded "production of income" and "trade" requirements as section 11*(a)*. On the facts, the taxpayer lost in the tax court and its appeal to the Johannesburg High Court also failed.

Companies with seasonal or irregular business activities may struggle to demonstrate continuous trade. SARS may disallow expense claims and the set-off of assessed losses carried forward from previous years of assessment if it deems that the company was not trading during certain periods.

Proper documentation and evidence of business activities are crucial. Companies failing to maintain comprehensive records may find it difficult to substantiate their trading status and related expense claims.

"Although Interpretation Note 33 provides a lot of assistance to taxpayers needing to know when assessed losses qualify for carry forward, more transparent audit protocols are needed that clearly define the conditions under which SARS may disallow the carry forward of assessed losses."



The complexity of tax laws and regulations, and the frequent amendment thereof, mean that companies without sufficient tax expertise may make errors in their filings. This can lead to disputes with SARS and potential penalties.

SARS Practice Note 31 states that although a person, other than a money-lender who earns interest on capital or surplus funds invested, does not carry on a trade and despite the fact that any expenditure incurred in the production of such interest should not be allowed as a deduction, it is nevertheless SARS' practice to allow expenditure incurred in the production of the interest to the extent that it does not exceed such interest income. [*Editorial Comment*: With effect from 1 January 2025, Practice Note 31 will fall away and be replaced by section 11G.]

Section 20(1) of the Act requires a company to carry on a trade during the current year of assessment in order to be able to set off a balance of assessed loss carried forward from the previous year of assessment against the company's income in the current year.

"It is suggested that the SARS system of carrying forward assessed losses in situations where a company has stopped trading should be revisited, as the current system appears to be unable to deal with the forfeiture of an assessed loss, either at the request of the taxpayer or by way of a decision made by SARS following an audit of the taxpayer's affairs."

An assessed loss is a tax loss that occurs when a company's allowable deductions exceed its income. This loss can generally be carried forward to future tax years to offset future taxable income, thereby reducing future tax liabilities.

The ability to carry forward assessed losses is important for companies, especially in volatile or cyclical industries, as it provides a cushion against future taxable profits.

If a company has earned no income from carrying on a trade in the current year of assessment, SARS' interpretation is that it must be clear that a trade has been carried on in the current year of assessment for the set-off of the assessed loss brought forward to be permitted.

Another consideration to note is that in terms of an amendment to section 20(1)*(a)*, which applies to all companies with financial year-ends ending on or after 31 March 2023, the set-off of the balance of assessed losses carried forward is restricted to the higher of R1 million or 80% of the company's taxable income arising in the current year. This amendment severely affects many companies with accumulated assessed losses and creates yet another tax risk area for such companies.

SARS is currently identifying and conducting audits of companies with large assessed losses. In a recent instance, a company accumulated significant losses and eventually stopped trading during the 2019 year of assessment. However, it continued to incur winding-up administrative expenses during the 2020 and 2021 years of assessment. These expenses were claimed in the relevant returns and were initially allowed as deductions, thereby increasing the assessed loss by the amounts claimed.

Having performed an audit of the company, SARS stated that in its view the company had stopped trading in the 2019 year of assessment and that it should not have claimed any deductions in respect of the administrative expenses incurred during the 2020 and 2021 years of assessment. SARS also stated that since the company had stopped trading, the accumulated assessed loss as at the end of the 2019 year of assessment would be forfeited.

In this case, the company accepted SARS' findings and agreed to additional assessments being issued to it in respect of the 2020 and 2021 years of assessment, disallowing the expenses claimed.

SARS also imposed a 25% understatement penalty in respect of the expenses erroneously claimed. In view of the relatively insignificant amounts involved, the company did not object to the penalties imposed.

When the additional assessments were received, it was noted that the disputed expenses were correctly disallowed for the 2020 and 2021 years of assessment but that the assessed loss from the 2019 year of assessment still reflected on both the additional assessments for the 2020 and 2021 years of assessment. This is regarded as unintentional as SARS had clearly stated in its letter of findings that the 2019 assessed loss would be forfeited.

It is suggested that the SARS system of carrying forward assessed losses in situations where a company has stopped trading should be revisited, as the current system appears to be unable to deal with the forfeiture of an assessed loss, either at the request of the taxpayer or by way of a decision made by SARS following an audit of the taxpayer's affairs.

There are instances where taxpayers may prefer to forfeit their assessed losses, perhaps for strategic reasons or to simplify their tax affairs. However, the current system does not provide a clear mechanism for this. Taxpayers may face prolonged uncertainty if SARS does not have a streamlined process to handle such requests efficiently.

SARS should introduce clear procedures and guidelines for companies wishing to voluntarily forfeit their assessed losses. This should include a straightforward application process and criteria for approval.

Although Interpretation Note 33 provides a lot of assistance to taxpayers needing to know when assessed losses qualify for carry forward, more transparent audit protocols are needed that clearly define the conditions under which SARS may disallow the carry forward of assessed losses. This could include detailed criteria and examples to ensure fairness and consistency.

SARS should improve the communication process between itself and taxpayers regarding the status of assessed losses, particularly following an audit. SARS should ensure that taxpayers are informed in a timely manner and have access to a fair and efficient appeal process.

SARS should preferably update the Tax Administration Act, 2011 to reflect these changes, ensuring that both SARS officials and taxpayers are aware of their rights and responsibilities regarding assessed losses. It should engage with stakeholders, including tax professionals, business associations and legal experts to gather input on the proposed changes and ensure that they address the practical challenges faced by companies.

If a change in the applicable legislation is not considered necessary, SARS should at least amend its eFiling system to allow for a company to indicate that it has stopped carrying on a trade and that it confirms that any assessed loss as at the end of the previous year is forfeited.

By revisiting the policy and implementing these revisions, SARS can create a more efficient and fair system for handling assessed losses, particularly in cases where companies have ceased trading. This would not only benefit taxpayers by providing greater clarity and predictability but also enhance SARS' ability to enforce tax laws effectively.

Regular consultation with tax advisors can help companies navigate the complexities of tax laws. They can provide guidance on the company's trading status and ensure that expenses are claimed only in appropriate circumstances.

Companies should periodically review their tax positions, especially if there are changes in business activities. This proactive approach can help identify and address potential issues before they escalate.

In conclusion, the complexities involved in claiming expenses and carrying forward assessed losses when a company is not actively trading pose significant risks. By understanding the challenges, maintaining thorough documentation, seeking professional advice and ensuring continuous business activity, companies can mitigate these risks and navigate the tax landscape more effectively. Revisiting and possibly revising the current regulations to provide clearer guidelines and more flexibility could also help reduce these risks and provide a fairer system for businesses.

Johann Benadé & James Language

BDO

Acts and Bills

- Income Tax Act 58 of 1962: Sections 1(1) (definition of "trade"), 11*(a)*, 20(1), 23*(g)* & 24J(2);
- Tax Administration Act 28 of 2011.

Other documents

- SARS Practice Note 31.

Cases

- *Unitrans Holdings Limited v Commissioner for the South African Revenue Service*, A3094/2022 [2023] ZAGPJHC.

Tags: carry forward of assessed losses; production of income; assessed losses; understatement penalty; additional assessments.

ISSUE OF BEE SHARES AT NOMINAL VALUE

Corporate taxpayers often face the question of how to increase their broad-based Black economic empowerment (B-BBEE) credentials through equity ownership schemes. While it is important for corporate taxpayers to improve their B-BBEE credentials, funding constraints can sometimes create a challenge from a tax perspective.

In Binding Private Ruling 400 (BPR 400), read together with BPR 343, SARS appears to have kept the door open for a taxpayer to issue shares which have value for a nominal price in order to increase its B-BBEE score without facing donations tax consequences. The details are set out below. Various funding mechanisms exist, from notional vendor funding to simply issuing shares for nominal consideration. Often taxpayers are concerned regarding the manner in which the South African Revenue Service (SARS) will view these funding arrangements, and the option of applying to SARS for a binding private ruling (BPR) can assist with alleviating that concern. In December 2023, another one of these came before SARS in the form of BPR400.

The applicant in BPR400 was a trust established to hold shares in a company (referred to as Company A) which in turn held shares in a listed company (ListCo). The beneficiaries of the applicant were employees of ListCo or other entities within its group, and therefore the applicant was used to facilitate the incentivisation of employees through providing indirect exposure to the economic benefit of holding shares in ListCo.

CORPORATE SOCIAL INVESTMENT TRUST

- ListCo wanted to increase its B-BBEE credentials further. It therefore devised a transaction whereby a corporate social investment trust (CSI trust) would be established to hold an indirect interest in it. The beneficiaries of the CSI trust would all be Black people for B-BBEE purposes, and the CSI trust would hold its interest in ListCo through Company A.

- In order to facilitate this, ListCo (or another company in its group) would make a capital contribution to the applicant, which the applicant would use to subscribe for additional shares in Company A. Company A would then use the subscription proceeds to subscribe for more shares in ListCo. Following this, Company A would then issue shares for nominal consideration to the CSI trust.

- Given that the shares issued by Company A to the CSI trust would have value at the time of issuing, the question with which the applicant approached SARS was whether this would constitute a donation to the CSI trust in terms of section 55 or 58 of the Income Tax Act, 1962 (the Act).

- Section 55 defines a "donation" to be: "any gratuitous disposal of property including any gratuitous waiver or renunciation of a right".

- Section 58 then provides that:

  > "Where any property has been disposed of for a consideration which, in the opinion of [SARS], is not an adequate consideration that property shall … be deemed to have been disposed of under a donation".

- A similar question was dealt with by SARS in BPR 343 in May 2020. In that ruling, the question was whether a company could issue shares to a trust at a discount for purposes of increasing its B-BBEE score. There SARS held that this issuing of shares would neither constitute a donation as defined in section 55 nor a deemed donation as provided for in section 58. One should also bear in mind that the common law definition for a donation, as dealt with in the *Estate Late Welch* judgment in 2002, still applies alongside the definition in section 55.

BPR 400

- In BPR 400, SARS merely ruled that the issuing of shares to the CSI trust for nominal consideration would not give rise to a donations tax liability under section 54 of the Act. Although this is the charging section for donations tax, it does not necessarily mean that by implication SARS ruled that no donation (actual or deemed) would be made by Company A to the CSI trust.

- SARS' ruling in BPR 400 is based on the assumption that the CSI trust is an approved public benefit organisation in terms of section 30 of the Act and on the assumption that no beneficiary of the CSI trust is a connected person in relation to any beneficiary of the applicant.

- Notably, SARS did state in BPR 400 that it would not express a view as to whether the capital contribution made to the applicant (so as to enable the applicant to subscribe for additional shares in Company A) was deductible for tax purposes. In light of the SCA's decision in *Commissioner, SARS v Spur Group Proprietary Limited* [2021], it is possible that contributions made to the applicant would be deductible to the extent that these directly benefitted the ListCo employees.

- BPR 400 appears to indicate that the issue of shares at nominal value to increase a company's B-BBEE credentials can be done without attracting donations tax. It appears to be similar to the decision in BPR 343, where the facts were slightly different but the outcome was similar. As BPRs are specific to an individual taxpayer, it is, however, advisable that taxpayers looking to do this still seek professional advice based on the facts of their specific transaction so as not to fall foul of the donations tax (and other) provisions in the Act.

[*Editorial comment*: Published SARS rulings are necessarily redacted summaries of the facts and circumstances. Consequently, they and articles discussing them should be treated with care and not simply relied on as they appear. Furthermore, a *binding private ruling* has a binding effect *between SARS and the applicant only*, and is published for general information. It does not constitute a practice generally prevailing. A third party may not rely upon a binding private ruling under any circumstances. In addition, published binding private rulings may not be cited in any dispute with SARS, other than a dispute involving the applicant or any co-applicant(s) identified therein.]

"BPR 400 appears to indicate that the issue of shares at nominal value to increase a company's B-BBEE credentials can be done without attracting donations tax. It appears to be similar to the decision in BPR 343, where the facts were slightly different but the outcome was similar."

Nicholas Carroll

Cliffe Dekker Hofmeyr

Acts and Bills

- Income Tax Act 58 of 1962: Sections 30, 54, 55 (definition of "donation" in subsection (1)) & 58.

Other documents

- Binding Private Ruling 343 (Donations tax implications of subscribing for shares at a discount – 14 May 2020);

- Binding Private Ruling 400 (Donations tax implications on the issue of shares at nominal value to enhance BBBEE credentials – 14 December 2023).

Cases

- *Commissioner, South African Revenue Service v Welch's Estate* (A803/2001) [2002] ZAWCHC 44; [2003] (1) SA 257 (C);

- *Commissioner for the South African Revenue Service v Spur Group (Pty) Ltd* [2021] JDR 2530 (SCA).

Tags: broad-based Black economic empowerment (B-BBEE); approved public benefit organisation; connected person.

IMPORTANCE OF SALE DOCUMENTATION

The case of Siyandisa Trading (Pty) Ltd v Commissioner for the South African Revenue Service *[2023] reads like a comedy of errors. A significant lesson that can be learnt from the case is that sale agreements and supporting documentation must be prepared carefully to ensure there is no room for dispute with the South African Revenue Service (SARS).*

The case, which relates to assessments raised on the taxpayer for its 2011 and 2012 years of assessment, primarily looks at a sale agreement concluded between connected parties, Xcel Aviation (Pty) Ltd (Xcel) and the taxpayer, Siyandisa Trading (Pty) Ltd (Siyandisa). Under the agreement the assets making up the business of Xcel, included aircraft, aircraft parts, furniture, computer equipment, tools, and equipment. These assets (comprising capital assets and trading stock) were sold to Siyandisa in return for a sale of 200 (out of a total of 1000) shares of Siyandisa.

The focus of the part of the case to be examined here is the value of the tools and equipment in the light of the contention that section 11*(e)* of the Income Tax Act, 1962 (the Act) applied. The High Court looked at the matter *de novo* (that is, from the beginning) as it was agreed by both the taxpayer and the Commissioner that section 12C, as examined by the tax court, was inapplicable in the circumstances.

The facts provided by the court indicate that, under the sale agreement, the purchase price for the sale of the business was the aggregate of the ongoing liabilities in respect of leased and financed assets and R36 211 367. This was attributed to the sale assets being the tax value of the fixed assets at the effective date and the sellers' book value for the tools and equipment and furniture. The latter were reflected in the 2011 annual financial statements of Xcel at the value of R25 143 639, being the amount at which they were acquired from another connected person, its only shareholder, in 2007. The accuracy of this latter amount remained an unresolved query throughout the Siyandisa case, as SARS contended that the value was inflated.

Siyandisa contended that SARS had allowed the R25 million to be depreciated in Xcel since the acquisition of the tools, equipment and furniture, such that the book value of the tools and equipment by the date of their purchase by Siyandisa was R11 666 667 and that this thus represented their market value. It was on this amount that Siyandisa claimed depreciation allowances (20%) for its 2011 and 2012 tax years and these were the amounts that were in dispute.

Unfortunately, the sale agreement did not include a list of the items making up the tools and equipment and the taxpayer did not provide a detailed list to SARS as it conducted its audit. Consequently, the job of verifying the values of each of the items was not possible. In the grounds of appeal the taxpayer did eventually provide a full list, setting out each item with values attributed. However, these were values of new items (per a third-party supplier) as at March 2020 and not second-hand items in 2011, as, it was contended by the taxpayer, second-hand values for 2011 were unavailable.

SARS thus contended that the value was inflated and, since the transaction was between connected persons which required the price to be arm's length, it disallowed the full depreciation claim.

At this juncture it is appropriate to pause and make a couple of observations: The first is that it may seem unduly harsh that SARS disallowed the full depreciation allowance, but one should bear in mind that it had no credible information to formulate an alternative amount and thus had little choice but to do so. The onus, of course, is on the taxpayer to prove the amount and this seemed to remain in dispute.

The second observation is that one could ask why SARS bothered to query the issue at all, since surely the seller, Xcel, would have no further tax depreciation claims in respect of the assets (or were the value to be found to be less it would suffer a recoupment) ie, could there really be any loss to the fiscus? On this latter point, again, one can hardly blame SARS – firstly, it must view each taxpayer separately (it is clear that none of the corporate rules were applied here). Secondly, if the prior purchase values by Xcel were ultimately found to be incorrect, then SARS might have lost its opportunity to challenge Siyandisa's purchase values if it had not been done before – SARS therefore really had no choice.

Witness testimony added little and assertions that SARS had accepted the value of the tools, equipment and furniture in Xcel and that the amounts were not disputed (denied by SARS) or that SARS should rather have applied the anti-avoidance provisions of the legislation (not previously raised) did not assist the taxpayer's case. As indicated at one point by the taxpayer's counsel, the ultimate question was whether, on a balance of probabilities, the value presented by the taxpayer could be accepted.

"taxpayers must ensure that they have the necessary information or documentation readily available when requested by SARS to substantiate the arm's length price of an asset and the inclusion of any amount in the determination of the value of an asset"

The court felt not and the Judge (Van der Schyff) concluded:

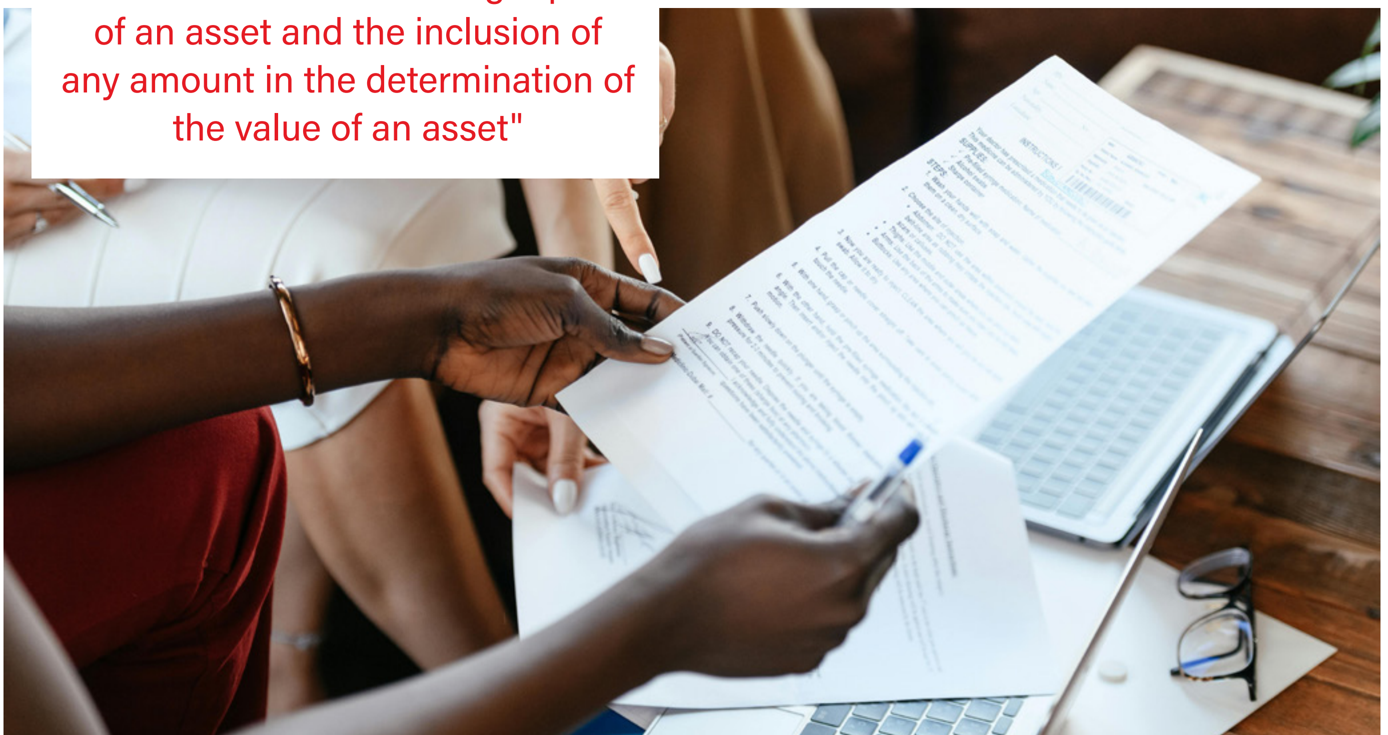
Nothing prevents parties, *inter partes*, from agreeing that tools and equipment are sold as a consignment or package, without an individual value being attributed to individual items. Where the purchaser, particularly where a transaction was concluded between related parties, however, wants to utilise the tax benefits provided for in 11*(e)* of the Act, the purchaser must ensure that its house is in order in that it is able to prove that the items were purchased at market value.

The Judge also referred to Binding General Ruling 7 (Issue 4), issued in February 2021 (Issues 1 and 2 were in 2011 and 2012, so the BGR was relevant – something the Judge should perhaps have mentioned) which, the Judge advises, reiterates to taxpayers that

> "taxpayers must ensure that they have the necessary information or documentation readily available when requested by SARS to substantiate the arm's length price of an asset and the inclusion of any amount in the determination of the value of an asset".

The appeal was thus dismissed.

It is somewhat mystifying that cases like Siyandisa ever see the light of day. There have been numerous cases throughout the history of tax in South Africa that have stressed the need for sale agreements to properly specify what assets (in detail) are being sold from one party to another and the value attributable to each asset, which must be capable of being supported even when the parties are not connected, but more importantly when they are. The case of *CIR v Niko* [1940] and the case of *Eveready (Pty) Limited v Commissioner, South African Revenue Service* [2012] (both of which dealt with the value of trading stock purchased from a connected party) come immediately to mind.



In the *Niko* case, Niko sold (in 1936) businesses he previously carried on, into a company. The sale agreement set out the list of assets being sold. The value and nature of the trading stock at the time of the taxpayer ceasing to trade was the matter under dispute, as the taxpayer contended that the proceeds from the sale of a business as a going concern were entirely capital and that no amount could be taxed as revenue in nature pertaining to trading stock. If it were to be taxed, the value was then at issue. The case referred to the New Zealand case of *Doughty v Commissioner of Taxes* [1927] and the Rhodesian case of *Liquidator, Rhodesia Metals Ltd v Commissioner of Taxes* [1938].

The former case, which was found to be distinguishable from *Niko's* scenario, held that a sale of assets, including trading stock, by a partnership to a company was a "slump sale" and thus there was no taxable amount (the full proceeds being capital in nature – one should bear in mind capital gains tax did not exist in those days). In the latter case, in the agreement for the sale of the going concern, no detail was given as to the nature of the assets or the price allocation. Nevertheless, the court made an apportionment of the purchase price to the various assets in order to determine the taxable value pertaining to mining claims. The court likened *Niko's* scenario to the *Rhodesia Metals* case and stated that the case was "more strongly in favour of the Commissioner" as there was a clear allocation to the trading stock.

In the *Eveready* case, there was a sale of business (in 2003), including trading stock, to Eveready by a group company – Gillette. Eveready contended that the sale agreement indicated that the value of the trading stock acquired was nil (no value was given) such that there would be no profit to tax in Gillette and the value of the opening trading stock would thus need to be determined for purposes of section 22(4) of the Act. Eveready duly deducted an amount of R103 532 179 as opening stock. SARS disagreed that the stock was bought for no value and placed a value of R21 562 918 on it.

The court analysed the sale agreement and the distribution of the final full purchase price between the assets (immoveable property, other fixed assets and intangibles) was set at R80 million with the final working capital figure (pertaining to receivables less payables and trading stock) only to be ascertained once the accounts were finalised. It established that, despite the fact that the trading stock was not indicated as having a value, the allocation of assets and liabilities indicated that it clearly did have a value. (It chose not to provide the value but held against Eveready leaving it to the taxpayer and SARS to finalise the determined value).

Some special income tax court cases are also in point: *ITC 108* [1928], in which the court made an allocation of the purchase price; *ITC 429* [1939], in which the appellants were entitled to apportion the purchase price; and *ITC 1235* [1975] (at 236), in which the parties allocated R1 to a plantation. The court held that the agreement was fictitious and not a real agreement and accepted the Commissioner's valuation.

These older cases thus already warn of the need to be careful with sale agreements and supporting documentation for values of assets and the *Siyandisa* case simply reiterates the moral of the story once again: Ensure that sale agreements are properly prepared and supported.

SAIT ASA: June 2023

Adjunct Associate Professor Deborah Tickle

Acts and Bills

- Income Tax Act 58 of 1962: Sections 11*(e)*, 12C & 22(4).

Other documents

- Binding General Ruling 7 (Issue 1) – (*Wear-and-tear or depreciation allowance* – 11 April 2011);
- Binding General Ruling 7 (Issue 2) – (*Wear-and-tear or depreciation allowance* – 2 November 2012);
- Binding General Ruling 7 (Issue 4) – (*Wear-and-tear or depreciation allowance* – 9 February 2021).

Cases

- *Siyandisa Trading (Pty) Ltd v Commissioner for the South African Revenue Service* (A201/2021) [2023] ZAGPPHC 126 (26 July 2023);
- *CIR v Niko* [1940] AD 416, 11 SATC 124;
- *Eveready (Pty) Limited v Commissioner, South African Revenue Service* [2012] JDR 0500 (SCA), 74 SATC 185;
- *Doughty v Commissioner of Taxes* [1927], A.C. 327 (New Zealand);
- *Liquidator, Rhodesia Metals Ltd v Commissioner of Taxes* [1938] AD 282, 9 SATC 363;
- *ITC 108* [1928] 3 SATC 343 (U);
- *ITC 429* [1939] 10 SATC 355 (SR);
- *ITC 1235* [1975] 37 SATC 233 (T) at 236.

Tags: sale agreements; third-party supplier; trading stock.

DISTRIBUTIONS FROM FOREIGN SUBSIDIARIES

Where a South African resident receives a distribution from a foreign subsidiary, the classification of such a distribution is crucial to determine the tax implications thereof in the hands of the said resident.

The same enquiry is relevant in a multi-national group where a "controlled foreign company" (CFC), as defined in section 9D(1) of the Income Tax Act, 1962 (the Act), receives a distribution from a foreign subsidiary (which may or may not be a CFC).

Essentially, it should be determined whether the distribution by the foreign subsidiary constitutes a "foreign dividend" or a "foreign return of capital", as such terms are defined in section 1(1) of the Act.

In broad terms, if the distribution constitutes a "foreign dividend", it should be exempt from income tax in the hands of the recipient in terms of the so-called participation exemption in section 10B(2) of the Act, *inter alia*, where –

- the recipient (alone or together with a "connected person" (as defined in section 1(1)) holds at least 10% of the "equity shares" (as that term is defined in section 1(1)) and voting rights in such foreign company;
- the recipient is a foreign company and the dividend is paid or declared by a company which is tax resident in the same jurisdiction. This exemption is relevant to a CFC which receives or accrues a foreign dividend; or
- the foreign dividend is declared in respect of a share which is listed on the JSE Limited.

The above exemptions are subject to various provisos not listed here.

If the distribution constitutes a "foreign dividend", paragraph 43A of the Eighth Schedule to the Act comes into play. This provision, in certain circumstances, applies to deem certain dividends (including foreign dividends as defined) received to be additional proceeds upon the disposal of shares by a company. In particular, if the distribution is a foreign dividend, and the requirements of this provision are met, such foreign dividend would for example be required to be added to the proceeds upon a subsequent disposal of the shares in the foreign company that paid the foreign dividend.

If the distribution constitutes a "foreign return of capital", the recipient of the distribution will be required to reduce its base cost in respect of the shares in the foreign company by the amount of the distribution received (assuming such shares are held as capital assets). If the foreign return of capital exceeds the base cost of the recipient thereof, then a capital gain will be realised. However, such capital gain may be disregarded where the recipient

holds (alone or together with a group company) at least 10% of the equity shares and voting rights in the foreign company and holds such interest for at least 18 months before the distribution.

If the distribution is equal to or less than the recipient's base cost, then this would not have any immediate tax implications. However, this may potentially have adverse capital gains tax implications for the recipient upon future disposal of the shares if a capital gain is realised on such disposal (as its base cost will have been reduced by an amount equal to its current base cost).

It is clear from the above that the nature of a distribution by a foreign company gives rise to vastly different tax implications and it is thus crucial to make a determination with reference to the pertinent definitions and to be able to support the tax treatment of the distribution.

In this regard, a "foreign dividend" is, most relevantly, any amount that is paid or payable by a foreign company in respect of a share in that foreign company where that amount is treated as a dividend or similar payment by that foreign company for the purposes of the laws relating to –

- tax on income on companies of the country in which that foreign company has its place of effective management; or
- companies of the country in which that foreign company is incorporated, formed or established, where the country in which that foreign company has its place of effective management does not have any applicable laws relating to tax on income (subject to certain exclusions not relevant to the facts under consideration).

A "foreign return of capital" is defined as being any amount that is paid or payable by a foreign company in respect of a share in that foreign company where that amount is treated as a distribution or similar payment (other than an amount that constitutes a foreign dividend) by that foreign company as contemplated in the first or second bullet above. Excluded is any amount so paid or payable to the extent that the amount so paid or payable is deductible by that foreign company in the determination of any tax on income of companies of the country in which that foreign company has its place of effective management.

"It is thus important to engage with professional advisors in the relevant foreign country to obtain their input and advice as to how the distribution is treated in such country as envisaged in these definitions in order to determine the nature of the distribution."

These definitions thus require, firstly, a determination of the country where the foreign company making the distribution has its place of effective management (which is a factual enquiry and is a separate topic for another day) and, secondly, how such distribution is treated under the income tax laws of such country and where there are no applicable income tax laws in the country of effective management, under the corporate laws of the country where the foreign company was established (notably as opposed to the country where the foreign company is effectively managed).

It is thus important to engage with professional advisors in the relevant foreign country to obtain their input and advice as to how the distribution is treated in such country as envisaged in these definitions in order to determine the nature of the distribution. On the face of it, this is a fairly simple enquiry but depending on the manner in which the income tax or company laws in the relevant foreign country are formulated, a straightforward answer may not always be forthcoming, which can leave the taxpayer in a difficult position. For example, certain jurisdictions do not specifically distinguish between distributions in the manner envisaged in these definitions and this then leads to difficulties in classifying a distribution and thus determining the appropriate South African tax implications for the recipient.

It is therefore advisable to consider and check this aspect prior to a distribution by a foreign company and to obtain formal advice in this regard to support the tax treatment of the distribution in the hands of the recipient of such distribution, should this aspect be queried at any stage. This is not only relevant to residents who received distributions from their offshore subsidiaries, but also to residents who receive distributions in respect of their shares in other foreign companies (which may or may not be CFCs).

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Acts and Bills

- Income Tax Act 58 of 1962: Sections 1(1) (definitions of "connected person", "equity share", "foreign dividend" & "foreign return of capital"), 9D(1) (definition of "controlled foreign company") & 10B(1); Eighth Schedule: Paragraph 43A.

Tags: foreign subsidiary; controlled foreign company (CFC); foreign dividend; foreign return of capital; connected person; equity shares; place of effective management.

GLOBE PILLAR 2 RULES IN SOUTH AFRICA

An important development in tax in South Africa is the release by National Treasury of the Draft Global Minimum Tax Bill and the Draft Global Minimum Tax Administration Bill. These Draft Bills were released for public comment on 21 February 2024 and seek to give effect to the Pillar 2 proposals of the Organisation for Economic Co-operation and Development (OECD) in South Africa.

Pillar 2 is known as the global minimum tax. Broadly stated, it aims to ensure that for large multinational enterprises (MNEs) within scope, a minimum effective corporate tax rate of 15% applies in each jurisdiction in which the MNE operates. The threshold size of MNE for the purpose of the rules is a consolidated turnover of at least €750 million in the consolidated annual financial statements, in at least two of the four immediately preceding financial years in relation to the tested year. Since this translates to roughly R15.3 billion at current exchange rates, there are not many South African headquartered MNEs to which the rules will apply. However, the rules will also potentially apply to locally resident subsidiaries of MNEs that are within scope, wherever headquartered – for instance, to local subsidiaries of a non-resident headquartered MNE which is within scope, of which there are many.

The Draft Global Minimum Tax Bill is short – only 11 pages – and essentially seeks to bring the Global Anti-Base Erosion (GLoBE) Model Rules, as set out in the document titled "*Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS*", together with its related Commentary, Administrative Guidance and Safe Harbours into South African tax law without modification, except that South Africa has chosen not to apply the Undertaxed Payments Rule, and the Bill contains various permitted elections and clarifications. It seeks to legislate a so-called "ambulatory" as opposed to a "static" approach as it provides that changes in the GLoBE Rules, Commentary, Administrative Guidance and Safe Harbours over time will automatically be brought into our law. The document containing the GLoBE Model Rules was approved by the Inclusive Framework of the OECD on 14 December 2021 and was endorsed by more than 135 countries. While South Africa is not currently a full member of the OECD, it is a member of the Steering Group of the Inclusive Framework.

The rules are extremely complex and therefore reporting thereon will be a costly endeavour for any enterprises that are within scope. Because South Africa's corporate income tax rate is 27%, at first blush it may appear that any locally resident subsidiaries of MNEs headquartered elsewhere will fall outside of any additional charge to tax, since they will already have been subject to tax in South Africa at an effective rate of more than 15%. However, South Africa has various tax incentives and incentive regimes that may conceivably lower the effective tax rate payable to lower than 15%. For example, the research and development (section 11D of the Income Tax Act, 1962) incentive, the oil and gas taxation regime, the gold mining formula regime and the Special Economic Zones incentive regime. In any event, even if the effective tax paid in South Africa is more than 15%, a GLoBE Information Return will need to be submitted to SARS annually in respect of Domestic Constituent Entities of MNE groups that are within scope.

The Draft Global Minimum Tax Bill is proposed to be effective for fiscal years commencing on or after 1 January 2024. However, an 18-month period is granted for the filing of the first required returns and payment. This therefore means that the fiscus would only start collecting any tax payable in terms of the rules, from 30 June 2026 onwards. The 2024 Budget included an estimated revenue take of R8 billion from the proposals in the 2026/27 fiscal year. This is a very difficult amount to estimate and no details of the calculation were supplied; however, it is likely to be an insignificant amount of revenue compared to the total Budget tax revenue.

"It is evident that the GLoBE Rules are complex and that they will substantially increase the compliance costs of MNEs. However, it should be borne in mind that the majority of the MNEs operating in South Africa that are within scope of the rules will also become subject to the same reporting framework in other jurisdictions in which they operate, including their headquarter jurisdiction."

The Draft Global Minimum Tax Bill seeks to impose tax at two possible levels: in terms of an income inclusion rule (IIR) and a domestic minimum top-up tax (DMTT). The IIR will, in essence, apply to those relatively few MNEs that are headquartered in South Africa and that are within scope. It will require tax to be topped up to an effective rate of 15 per cent, in respect of jurisdictions in which the MNE operated and where the effective rate of tax payable in that jurisdiction was lower than 15 per cent. This tax will be payable to SARS (not the jurisdiction in which the tax rate was lower than 15 per cent). The DMTT will apply in situations where the effective tax rate payable by a MNE in respect of its South African profits is lower than 15 per cent and makes all South African constituent entities of such an MNE jointly and severally liable for topping up such tax to an effective rate of 15 per cent. If South Africa did not impose a DMTT, any top-up tax in respect of the South African profits would be lost to South Africa, as it would be imposed under the IIR in the jurisdiction in which the MNE is headquartered (and paid by the MNE to its headquarter jurisdiction).

The OECD summarises the steps involved in the application of the GLoBE Rules as follows. Terms in capital letters have defined meanings in the GLoBE Rules:

Step 1: Identification of groups within scope and the location of each constituent entity within the group. This step consists of the following sub-steps:

- Identification of MNE Groups that are within scope;
- Identification of Constituent Entities;
- Removal of Excluded Entities; and
- Identification of the location of each Constituent Entity.

The term "Constituent Entity" comprises all entities included in a group and permanent establishments. The latter are treated as separate Constituent Entities from the Main Entity and of any other Permanent Establishment of the Main Entity. Governmental Entities, International Organisations, Non-profit Organisations, Pension Funds and Real Estate Investment Vehicles are excluded in that they are not subject to the operative provisions of the GLoBE Rules. However, their revenue is taken into account for purposes of the €750 million revenue test and the exclusion does not extend to the ownership interests of the Excluded Entities in other Constituent Entities. Entities are regarded as being located in the jurisdiction in which they are tax resident.

Step 2: Determination of the income of each constituent entity under the GLoBE Rules. This consists of the following sub-steps:

- Determination of Financial Accounting Net Income;
- Adjustment of Financial Accounting Net Income or Loss to GLoBE base; and
- Allocation of GLoBE Income or Loss to Permanent Establishments or Flow-through Entities, if necessary.

The starting point for determining GLoBE income is the net income or loss that is used for preparing consolidated financial statements of the ultimate parent entity prior to the elimination of intra-group items. Therefore "taxable income" as defined in the Income Tax Act, 1962 is not the starting point. This net income or loss is adjusted for various book-to-tax differences that are considered justified on policy grounds, for example, dividends are excluded where this would result in double counting of previously taxed income and illegal payments are disallowed as deductions. International Shipping Income is also excluded.

Step 3: Determination of the taxes attributable to the income of constituent entities. This consists of the following sub-steps:

- Identification of Covered Taxes;
- Adjustment of Covered Taxes for temporary differences and prior year losses;
- Allocation of Covered Taxes as necessary; and
- Accounting for post-filing adjustments.

Again, the starting point for determining Covered Taxes is the current tax expense accrued for financial accounting purposes, with various adjustments. An adjustment is made to Covered Taxes by way of the Total Deferred Tax Adjustment, to take temporary differences and prior year losses into account for GLoBE purposes. Covered Taxes are allocated to other Constituent Entities in situations such as taxes levied on controlled foreign company net income, withholding taxes and tax in respect of a Permanent Establishment or Tax Transparent Entity. Special rules apply when there is an adjustment to tax liability for a prior year, for example as a result of a tax audit or the filing of an amended return to correct an error.

Step 4: Calculation of the effective tax rate of all constituent entities located in the same jurisdiction and determination of the resulting top-up tax. In cases where an MNE is subject to an effective tax rate below 15% in any jurisdiction, this step sets out the mechanism for calculating the top-up tax payable in respect of that low tax jurisdiction. Essentially, the Covered Taxes calculated on a jurisdictional basis are divided by the GLoBE Income calculated on a jurisdictional basis to give the Jurisdictional Effective Tax Rate. A Substance-Based Income Exclusion – an excluded routine return on tangible assets and payroll – is subtracted from the jurisdictional GLoBE Income. The resulting amount is then multiplied by the 15 per cent minimum rate less the Jurisdictional Effective Tax Rate. After subtracting any Qualified Domestic Minimum Top-up Tax that may be levied by the jurisdiction in terms of the Pillar 2 rules, the result is the Jurisdictional Top-up Tax. For example, where the Jurisdictional Effective Tax Rate for South Africa amounts to less than 15 per cent, in terms of our DMTT rules, Top-up Tax would be payable in South Africa. The Jurisdictional Top-up Tax is allocated to the Constituent Entities in the Low Tax Jurisdiction that have GLoBE Income for the fiscal year (and in proportion to such income), which determines which entities trigger a charge to Top-up Tax under step 5.

A *de minimis* exclusion applies in cases where the MNE has an Average GLoBE Revenue that is less than €10 million and an Average GLoBE Income or Loss that is either a loss or less than €1 million, computed on a three-year average basis. An envisaged on-going development relates to safe-harbours, to limit the compliance and administrative burden for aspects of an MNE's operations that are likely to be taxable at or above 15 per cent on a jurisdictional basis.

Step 5: Imposition of the Top-up Tax under the IIR or Undertaxed Payments Rule (UTPR) in accordance with the agreed rule order. It is worth noting that South Africa has chosen not to apply the UTPR charging provisions. As mentioned earlier, the IIR will potentially apply to MNEs that are headquartered in South Africa. In such cases, the Parent Entity that is liable for the Top-up Tax under the IIR must be determined as well as the amount of Top-up Tax to be paid by the Parent Entity.

It is evident that the GLoBE Rules are complex and that they will substantially increase the compliance costs of MNEs. However, it should be borne in mind that the majority of the MNEs operating in South Africa that are within scope of the rules will also become subject to the same reporting framework in other jurisdictions in which they operate, including their headquarter jurisdiction. Unfortunately, it is difficult to share National Treasury's optimism, as expressed in the 2024 Budget Review, that the implementation of these rules in South Africa will "bolster" the corporate tax base. Indeed, it seems unlikely that South Africa will collect a significant additional amount of fiscal revenue from this source, relative to its total corporate fiscal collections.

"The starting point for determining GLoBE income is the net income or loss that is used for preparing consolidated financial statements of the ultimate parent entity prior to the elimination of intra-group items."

Adjunct Associate Professor David Warneke

BDO

Acts and Bills

- Draft Global Minimum Tax Bill (released for public comment on 21 February 2024);
- Draft Global Minimum Tax Administration Bill (released for public comment on 21 February 2024);
- Income Tax Act 58 of 1962: Sections 1(1) (definition of "taxable income") & 11D.

Other documents

- Global Anti-Base Erosion Model Rules (GLoBE Model Rules);
- *Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS;*
- *Commentary, Administrative Guidance and Safe Harbours;*
- 2024 Budget Review.

Tags: Pillar 2; multinational enterprises (MNEs); Global Anti-Base Erosion (GLoBE) Model Rules; income inclusion rule (IIR); domestic minimum top-up tax (DMTT); taxable income; Total Deferred Tax Adjustment; Substance-Based Income Exclusion; Undertaxed Payments Rule (UTPR).

INTERPRETATION OF SECTION 4(2) OF THE MINERAL ROYALTY ACT

In the case of Richards Bay Mining (Pty) Ltd v Commissioner for the South African Revenue Service *[2024], the High Court deliberated on two pertinent questions of law. The taxpayer sought a declaratory order from the High Court relating to the proper interpretation of section 4(2) of the Mineral and Petroleum Resources Royalty Act, 2008 (the Royalty Act), and, whether, in the determination of an extractor's mineral royalty liability, all unrefined mineral resources transferred by the same extractor should be aggregated or determined on a mineral-by-mineral basis.*

The Commissioner for the South African Revenue Service (SARS) raised a point *in limine* objecting to the High Court's jurisdiction to hear the matter on the basis that section 105 of the Tax Administration Act, 2011 (the TAA) ousted such jurisdiction. The court was therefore required to address the issue of jurisdiction before considering the main issue.

JURISDICTION

In broad strokes, section 105 of the TAA provides that a dispute of an "assessment" or "decision" by SARS described in section 104 of the TAA is to be heard by the tax court unless a High Court otherwise directs. SARS contended that section 105 confers exclusive jurisdiction to the tax court in all tax-related matters, and therefore is an ouster of the High Court's jurisdiction. The High Court acknowledged that section 105 has been the subject of scrutiny by the courts and that there are conflicting approaches by the courts.

In November 2023, the Supreme Court of Appeal (SCA) in *Lueven Metals (Pty) Ltd v Commissioner for the South African Revenue Service* [2023] refused to issue a directive in terms of section 105 in an application for declaratory relief in circumstances similar to this case. The judgment in the *Lueven Metals* case followed a procession of precedents handed down by the SCA in 2023 (see *Commissioner for the South African Revenue Service v Rappa Resources (Pty) Ltd* [2023] and *United Manganese of Kalahari (Pty) Ltd v Commissioner for the South African Revenue Service* [2023]). These cases are, however, all pending before the Constitutional Court and therefore suspended. As such, it was not for the court in *Richards Bay* to resolve the divergent decisions. Instead, the court applied itself, independently of the decisions pending before the Constitutional Court, to section 105 in applications for declaratory relief.

The court held that inherently section 105 acknowledges that a High Court may entertain a disputed assessment or a decision – going against the grain of the suspended legal precedents of the SCA on section 105. The court held that the High Court has inherent jurisdiction regardless of whether there is a disputed assessment or decision, relying on the confirmation of the Constitutional Court that jurisdiction is to be determined by the pleadings (see *Transnet (SOC) Limited v Total South Africa (Pty) Limited and Another* [2022]). In that respect, the court held that the issue for consideration per the taxpayer's notice of motion was declaratory relief relating to the proper interpretation of section 4(2) of the Royalty Act and not a decision concerning an "assessment" or "decision" by SARS. Importantly, the court relied on the judgments of the Constitutional Court in *Barnard Labuschagne Incorporated v South African Revenue Service and Another* [2022] and *Metcash Trading Limited v Commissioner for the South African Revenue Service and Another* [2001]), the latter of which held that the Constitution of the Republic of South Africa, 1996 confers the power on the High Court to grant declaratory relief and make any order that is just and equitable and that there is a strong presumption against any ouster or curtailment of any court's jurisdiction. As such, the court held that section 105 of the TAA did not find application in the present instance and the court dismissed SARS' point *in limine*.

DECLARATORY RELIEF ON THE INTERPRETATION OF SECTION 4(2) OF THE ROYALTY ACT

Section 4(2) of the Royalty Act provides for the percentage to be applied in the calculation of an extractor's mineral royalty liability in respect of unrefined mineral resources extracted by that extractor. The case concerned the interpretation of the said section, particularly the question as to whether the words "mineral resources" in section 4(2) should be taken to mean each mineral resource individually (as contended by SARS) or to encompass an aggregated approach for all mineral resources extracted by the extractor (as contended by the taxpayer).

The court held that, in the context of the Royalty Act as a whole, the legislature applied the singular form of mineral resources where so intended (eg, sections 1, 2, 3, 6 and 6A of the Royalty Act). For example, section 6 applies the singular form as it requires an individual approach to each mineral resource for the purpose of establishing the tabulated condition of each particular mineral resource in Schedules 1 and 2 to the Royalty Act. Conversely, the legislature intentionally referred to mineral resources in the plural form in sections 4 and 5 of the Royalty Act as it was intended that one overall mineral royalty applicable to the extractor of the ore body which may contain multiple minerals mined in a single mining operation as part of a single extraction exercise be calculated. So, too, may it not be practicable to allocate the capital and operational expenditure incurred in such exercise to each individual mineral resource. It therefore followed that the change in the meaning of the wording in section 4(2) was intentional (see *Van Zyl v Auto Commodities (Pty) Ltd* [2021]).

The court therefore held that a single percentage is to be calculated (ie, only one royalty rate) in respect of all unrefined mineral resources transferred by an extractor. SARS' contention that the calculation be performed by adopting a mineral-by-mineral or category-by-category approach was therefore rejected.

IMPACT

The court's decision marks a significant victory for the mining industry as it clarifies the approach to calculating mineral royalties in a manner that could reduce the financial burden on companies that extract multiple types of mineral resources. The judgment not only resolves the dispute at hand but also sets a precedent that will guide the calculation of mineral royalties in South Africa moving forward, ensuring a clearer and more equitable framework for both the mining industry and the government.

Although the High Court judgment accords with Constitutional Court precedent on declaratory orders, it is a departure from recent SCA precedent (which is being appealed to the Constitutional Court and thus suspended) and confirms that section 105 of the TAA does not serve as an automatic ouster of the High Court's inherent jurisdiction in granting declaratory relief. While SARS has petitioned to the SCA for leave to appeal, it marks a refreshing turn in recognising taxpayers' constitutionally entrenched rights to approach the High Court in tax-related matters in certain instances.

Andries Myburgh, Ntebaleng Sekabate & Emile Cronje

ENS

Acts and Bills

- Mineral and Petroleum Resources Royalty Act 28 of 2008: Sections 1, 2, 3, 4 (with specific emphasis on subsection (2)), 5, 6 & 6A; Schedules 1 & 2;
- Tax Administration Act 28 of 2011: Sections 104 & 105;
- Constitution of the Republic of South Africa, 1996.

Cases

- *Richards Bay Mining (Pty) Ltd v Commissioner for the South African Revenue Service* (2023-045310) [2024] ZAGPPHC 275 (26 March 2024);
- *Lueven Metals (Pty) Ltd v Commissioner for the South African Revenue Service* (728/2022) [2023] ZASCA 144 (8 November 2023);
- *Commissioner for the South African Revenue Service v Rappa Resources (Pty) Ltd* (1205/2021) [2023] ZASCA 28; 2023 (4) SA 488 (SCA); 85 SATC 517 (24 March 2023);
- *United Manganese of Kalahari (Pty) Ltd v Commissioner for the South African Revenue Service* (1231/2021) [2023] ZASCA 29; 85 SATC 529 (24 March 2023);
- *Transnet SOC Limited v Total South Africa (Pty) Limited and Another* (CCT 114/21) [2022] ZACC 21; 2022 JDR 1944 (CC); 2023 (3) BCLR 333 (CC) (21 June 2022);
- *Barnard Labuschagne Incorporated v South African Revenue Service and Another* (CCT 60/21) [2022] ZACC 8; 2022 (5) SA 1 (CC); 2022 (10) BCLR 1185 (CC); 84 SATC 351 (11 March 2022);
- *Metcash Trading Limited v Commissioner for the South African Revenue Service and Another* (CCT3/00) [2000] ZACC 21; 2001 (1) SA 1109 (CC); 2001 (1) BCLR 1 (CC) (24 November 2000);
- *Van Zyl v Auto Commodities (Pty) Ltd* (279/2020) [2021] ZASCA 67; [2021] 3 All SA 395 (SCA); 2021 (5) SA 171 (SCA) (3 June 2021).

Tags: mineral royalty liability.

MEDICAL TAX CREDITS FOR DEPENDANTS

With the increasing cost of living, taxpayers often find themselves in the unenviable position of having to fund the medical expenses of family members such as a parent, grandparent, sibling, uncle, aunt or cousin. Sometimes these family members may belong to their own medical scheme but cannot afford the contributions, or they may not even belong to a medical scheme and require assistance with their medical bills.

The two medical tax rebates for which taxpayers can potentially qualify are the medical scheme fees tax credit (section 6A of the Income Tax Act, 1962 (the Act)) and the additional medical expenses tax credit (section 6B).

Central to both sections is the definition of "dependant" in section 6B(1). It reads as follows:

> " '**dependant**' means—
>
> *(a)* a person's spouse;
>
> *(b)* a person's child and the child of his or her spouse;
>
> *(c)* any other member of a person's family in respect of whom he or she is liable for family care and support; or
>
> *(d)* any other person who is recognised as a dependant of that person in terms of the rules of a medical scheme or fund contemplated in section 6A(2)*(a)*(i) or (ii),
>
> at the time the fees contemplated in section 6A(2)*(a)* were paid, the amounts contemplated in paragraph *(a)* and *(b)* of the definition of 'qualifying medical expenses' were paid or the expenditure contemplated in paragraph *(c)* of that definition was incurred and paid;"

Besides a taxpayer's spouse and child, other family members are potentially catered for in paragraphs *(c)* and *(d)* of the above definition. SARS notes that "the phrase 'any other member of a person's family'" includes relations by blood, adoption or marriage. LAWSA [The dependant's action vol 14(1) 3 ed in paragraph 99] notes that parents and their children have a reciprocal duty of support, while grandparents have a right to support from grandchildren but only if their own children are dead or unable to support them. A brother or sister can claim support from their siblings but only if their parents are unable to provide support. The duty of support generally does not extend as far as cousins, step-parents and step-children [step-children are catered for in paragraph *(b)* of the definition of dependant, which includes the child of a person's spouse] and between in-laws (for example, a parent-in-law and brother- or sister-in-law. But the courts have cast the net wider in some circumstances. For example, in one case the court awarded damages to an aunt whose nephew had been killed in a car accident as their relationship was like that of mother and son. [See *Road Accident Fund v Mohohlo* [2018].]

As for paragraph *(d)*, the person must be a dependant as defined in the rules of –

- a medical scheme registered under section 24(1) of the Medical Schemes Act, 1998; or
- a fund which is registered under any similar provision contained in the laws of any other country where the medical scheme is registered.

Products provided by short- or long-term insurers such as gap cover and medical insurance do not qualify for the tax credits, since they are not a medical scheme registered under the Medical Schemes Act. SARS notes that certain bargaining councils established under section 27 of the Labour Relations Act, 1995 would also not qualify unless they were registered under the Medical Schemes Act. [See SARS' *Guide on the determination of medical tax credits* (Issue 16), dated 27 June 2024 (in 2.2.3).]

Exactly who can qualify as a dependant for purposes of a medical scheme would depend on the rules of the particular scheme.

The final outdented paragraph of the definition contains a timing rule which requires that the person referred to in paragraphs *(a)* to *(d)* qualify as a dependant at the time the medical scheme contributions or other qualifying medical expenses for that person were paid or, in the case of prescribed physical or disability expenditure, were incurred and paid.

"Taxpayers can potentially claim a tax credit under section 6A or section 6B for their qualifying dependants. But the quantum of the section 6B credit will greatly favour those who are 65 years or older, under 65 and disabled or under 65 and have a disabled spouse or child."

Example	Result
Jack and Jill married on 31 July 2023. Jack had incurred medical expenses of R8 000 for Jill on 30 June 2023 but paid them only on 31 August 2023.	Jack will be able to claim the expenses as Jill was a spouse at the time the expenses were paid.
John divorced Karen on 31 July 2023. He had incurred R10 000 of medical expenses for Karen before divorce but the expenses were paid on 5 August 2023.	John will be unable to claim the expenses as Karen was not a spouse at the time the expenses were paid.
Daniel is Jane's minor son from a prior marriage. Before she married Piet, Piet had paid Daniel's medical expenses.	Piet will be unable to claim the expenses as Daniel was not Piet's child or a child of his spouse at the time the expenses were paid.
Alfred added his mother-in-law, Olive, as a dependant to his medical fund on 31 October 2023. He had paid her medical expenses on 15 October 2023.	Alfred will be unable to claim the expenses as Olive was not a member of his medical scheme when the expenses were paid.

MULTIPLE PERSONS PAYING MEDICAL SCHEME FEES

Sometimes multiple persons share the cost of the medical scheme fees of a family member who is a dependant in relation to them. In this situation each contributor will be entitled to a share of the medical scheme fees tax credit. They do not themselves have to be a member of a medical scheme but can contribute to the medical scheme of which the dependant is a member.

EXAMPLE – MULTIPLE PERSONS CONTRIBUTING TO THE MEDICAL SCHEME FEES OF A FAMILY MEMBER

FACTS:

Edward (80) is a member of the ABC Medical Scheme. His annual membership fees amount to R70 000. His two sons Ben and Ted each contribute R35 000 to the scheme as Edward can no longer afford the fees. Neither Ben nor Ted belongs to a medical scheme.

RESULT:

For the 2024 year of assessment the medical fees tax credit for a single person is R364 × 12 = R4 368. Ben and Ted must share the credit as follows: R35 000/R70 000 × R4 368 = R2 184. Edward is not entitled to a medical scheme fees tax credit as he did not pay any fees.

What would have happened had Ben been a member of his own medical scheme? In such event, he would have a section 6A credit for his own membership of R364 plus half the credit for his dependant father (R364/2 = R182), giving him a total credit of R546 × 12 = R6 552.

A taxpayer can, depending on the rules of the particular medical scheme, include a family member as a dependant on their own medical scheme, and in such event the taxpayer will simply claim the credit in accordance with section 6A(2). For example, Hildegard (unmarried) has included her mother as a dependant on her medical scheme. For the 2024 year of assessment, she will be entitled to a section 6A credit of R728 per month (taxpayer plus one dependant).

THE ADDITIONAL MEDICAL EXPENSES TAX CREDIT

Any medical expenses paid on behalf of a dependant must fall within the definition of "qualifying medical expenses" in section 6B(1). In summary, the definition encompasses –

- fees paid to specified registered medical professionals, including for medicines supplied by them;
- hospitals and nursing homes as well as registered nursing staff;
- prescription medicines;
- similar services and medicines incurred outside South Africa; and
- prescribed disability or physical impairment expenditure.

"Any medical expenses paid on behalf of a dependant must fall within the definition of 'qualifying medical expenses' in section 6B(1)."

In order to qualify, the expenditure must –

- not be recoverable (for example, from a medical scheme or insurer);
- have been paid during the year of assessment (not sufficient to merely have been incurred); and
- be for the person or his or her dependant.

DISABLED PERSONS

Physical impairment or disability expenditure necessarily incurred and paid by the taxpayer for a dependant must comply with the list of qualifying physical impairment or disability expenditure prescribed by SARS dated 1 March 2020, which applies to the 2021 and subsequent years of assessment.

The term "disability" is defined in section 6B(1) as follows:

> " '**disability**' means a moderate to severe limitation of any person's ability to function or perform daily activities as a result of a physical, sensory, communication, intellectual or mental impairment, if the limitation—
>
> *(a)* has lasted or has a prognosis of lasting more than a year; and
>
> *(b)* is diagnosed by a duly registered medical practitioner in accordance with criteria prescribed by the Commissioner;"

The criteria prescribed by the Commissioner are set out in the ITR-DD form (Confirmation of diagnosis of disability), last updated 4 July 2023, which must be completed by the relevant specialist. The form needs to be completed every ten years when the disability is permanent or every year when it is temporary.

Thus, any taxpayers wishing to claim disability expenses under section 6B for a dependant will have to ensure that they have a completed ITR-DD form and that any disability expenditure appears on the prescribed list of qualifying physical impairment or disability expenditure.

Of course, it is one thing to have qualifying medical expenditure for a dependant who has a disability but quite another to translate that expenditure into a rebate. The conversion of expenditure into a rebate occurs under section 6B(3). Two categories of persons receive preferential treatment under that provision, namely –

- a person who is 65 years or older on the last day of the year of assessment; and
- a person who has a disability or when that person's spouse or child has a disability.

These persons are able to convert the qualifying expenditure to a rebate by multiplying it by 33,3%.

Any other person will receive far less favourable treatment. Firstly, their qualifying expenditure that does not exceed 7,5% of taxable income is simply forfeited. Secondly, the balance of the expenditure is multiplied by a lower percentage of 25%. This category of persons would include a person under the age of 65 who is not disabled and whose spouse or child is not disabled. Thus, if you are not disabled, under 65 and are funding the medical expenses of a disabled dependant who is not your spouse or child, your tax credit under section 6B will be much lower. Thus, for example, John is 65 and has taxable income of R1 million and spends R100 000 on qualifying medical expenses for his disabled mother. John will be able to claim a section 6B tax credit of R100 000 × 0,333 = R33 300.

By contrast, Sally, aged 60, also has taxable income of R1 million and spends R100 000 on qualifying medical expenses for her disabled father. She will be entitled to a section 6B tax credit of only R6 250. In other words, 7,5% of R1 million = R75 000, which will not qualify, and the balance of R25 000 (R100 000 – R75 000) is multiplied by 0,25.

CONCLUSION

Taxpayers can potentially claim a tax credit under section 6A or section 6B for their qualifying dependants. But the quantum of the section 6B credit will greatly favour those who are 65 years or older, under 65 and disabled or under 65 and have a disabled spouse or child. The rest should not expect much help from the fiscus.

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Acts and Bills

- Income Tax Act 58 of 1962: Sections 6A & 6B (definitions of "dependant", "disability" and "qualifying medical expenses" in subsection (1));
- Medical Schemes Act 131 of the 1998: Section 24(1);
- Labour Relations Act 66 of 1995: Section 27.

Other documents

- Rules of a medical scheme registered under section 24(1) of the Medical Schemes Act 131 of the 1998;
- The Law of South Africa (LAWSA) [Damages (Volume 14(1) – Third Edition) *The dependant's action* in paragraph 99];
- SARS' *Guide on the determination of medical tax credits* (Issue 15) (dated 27 June 2023 (in 2.2.3));
- ITR-DD form (*Confirmation of diagnosis of disability*) (last updated 4 July 2023).

Cases

- *Road Accident Fund v Mohohlo* [2018] (2) SA 65 (SCA).

Tags: medical scheme fees tax credit; additional medical expenses tax credit; dependant; disability; qualifying expenditure.

BONA FIDE INADVERTENT ERRORS

This article first appeared in the October 2023 edition of Accountancy SA's – Integritax Journal (www.accountancysa.org.za/integritax/)

There are very few golden tickets in the Tax Administration Act, 2011 (the TAA). The *bona fide* inadvertent error is one. The existence of such an error allows taxpayers to escape understatement penalties which range between 10% and 200% of the tax properly payable. This article considers some of the meanings ascribed to this crucial term, including two recent taxpayer-friendly pronouncements by the Supreme Court of Appeal (SCA).

Different courts have in the past given different meanings to the term *bona fide* inadvertent error. The Cape Town Tax Court in *ITC 1890* 79 SATC 62 (4 November 2016) described it as "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". This interpretation was deemed "not very helpful" by the Port Elizabeth Tax Court in *ITC 1948* 84 SATC 110 (11 December 2019) as it failed to give meaning to the word "inadvertent", this being an essential element of the kind of error apparently singled out by the legislature as excusable.

Since understatement penalties seek to punish blameworthy behaviour (of the kind listed in the understatement penalty percentage table), the latter case described a *bona fide* inadvertent error as "an honest mistake in the tax return of a taxpayer that occurred notwithstanding the maintenance of procedures reasonably adopted to avoid such errors". The court reasoned that an error could not be inadvertent (and therefore excusable) if the taxpayer was guilty of any of the blameworthy behaviours listed in the table, such as reasonable care not taken in completing a return, gross negligence or intentional tax evasion. Since the taxpayer did not show that it had taken reasonable steps to detect obvious errors made by its accountant in the completion of the return, the court rejected the taxpayer's contention that the understatement arose from a *bona fide* inadvertent error. Arguably, the taxpayer did take reasonable steps by seeking the expert advice of its accountant on the change in accounting policy and also tasking that same accountant with the completion of the relevant return; however, the court took a narrower view.

An even narrower view was proposed by SARS in its *Guide to Understatement Penalties* (Issue 2 – dated 18 April 2018), which sought to limit *bona fide* inadvertent errors to only certain typographical errors, those being so-called "properly involuntary ones".

The word "inadvertent" was specifically used by the legislature and should add something in its own right to the term *bona fide* inadvertent error. However, a narrow view of this term (especially to the extent previously suggested by SARS) seems at odds with the purpose of the provision read in the context of the understatement penalty regime, which seeks to punish blameworthy behaviour according to the level of blameworthiness (and surely honest mistakes are generally not blameworthy). Furthermore, the legislature could easily have specified "purely involuntary typographical errors" (which it notably did not do) if this was indeed the only intended target of the provision.

"The view that SARS must establish the absence of a *bona fide* inadvertent error before imposing an understatement penalty is not shared by all."

Two recent judgments of the SCA seemed to follow a broad approach to interpreting the term *bona fide* inadvertent error and found in favour of the taxpayer on that aspect. In *CSARS v The Thistle Trust* 85 SATC 347, handed down by the SCA towards the end of 2022 (in which the court found in SARS' favour on the merits), SARS surprisingly conceded (and the SCA agreed) that the taxpayer's reliance on a tax opinion in adopting a certain tax position was a *bona fide* inadvertent error. Although the findings of the court in this case appear to be open to criticism, this concession is somewhat of a breakthrough for taxpayers who have relied on advice that turned out to be incorrect. [*Editorial Note*: It is noted that the case (*Thistle Trust v Commissioner for the South African Revenue Service*, CCT 337/22) was heard by the Constitutional Court (CC) on 8 February 2024 but that judgment is still pending.]

In February 2023, the SCA in Commissioner for the *South African Revenue Service v Coronation Investment Management SA (Pty) Ltd* [2023] also found in SARS' favour on the merits and in following *Thistle* yet again excused the taxpayer from understatement penalties based on a *bona fide* inadvertent error. The taxpayer in *Coronation* also alleged to have acted on expert tax advice but opted not to disclose the contents thereof to SARS. SARS wanted the court to infer from this non-disclosure that the tax opinion did not support the tax position adopted by the taxpayer, and that the error could therefore not have been *bona fide* or inadvertent. The SCA found this allegation by SARS purely speculative and insufficient to attribute *mala fides* to the taxpayer. [*Editorial Note*: It is noted that judgment was handed down by the CC on 21 June 2024 in the case C*oronation Investment Management SA (Pty) Limited v Commissioner for the South African Revenue Service* [2024], although the CC, having found in the taxpayer's favour on the merits, did not decide the penalty issue.]

The outcome in the SCA case of *Coronation* serves as a reminder that SARS bears the onus of proving the facts on which an understatement penalty is based (unlike most cases in which the taxpayer bears the onus). Therefore, in seeking to impose understatement penalties, it is up to SARS to discharge the onus of proving that the error was not a *bona fide* inadvertent error rather than the taxpayer having to prove that it was. For this reason, the outcome in *Coronation* is welcomed, although it is unfortunate that the court did not delve into the interpretational difficulties presented by the error having to be inadvertent as well as *bona fide.*

The view that SARS must establish the absence of a *bona fide* inadvertent error before imposing an understatement penalty is not shared by all. See, for instance, *ITC 1959* 85 SATC 35 [2022] handed down by the Johannesburg Tax Court in February 2022. Although the TAA does not specify what is meant by "the facts on which SARS based the imposition of an understatement penalty" (which SARS bears the burden of proving), it is submitted that these "facts" include the behaviour category relied on by SARS as well as the absence of a *bona fide* inadvertent error. Once SARS has made a *prima facie* case for the imposition of an understatement penalty, the taxpayer may face an evidentiary burden to overcome; however, this does not detract from the fact that the overall burden of proof rests with SARS. The outcome in *Coronation* seems to indicate that the SCA shares this view.

Although certain courts have in the past taken a narrow view of *bona fide* inadvertent errors, as noted above, two recent judgments handed down by the SCA seem to favour a broader interpretation. This should come as welcome news to taxpayers who may otherwise have faced steep penalties.

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Acts and Bills

- Tax Administration Act 28 of 2011.

Other documents

- *Guide to Understatement Penalties* (Issue 2 – dated 18 April 2018).

Cases

- *ITC 1890* 79 SATC 62 (4 November 2016);
- *ITC 1948* 84 SATC 110 (11 December 2019);
- *CSARS v The Thistle Trust* (516/2021) [2022] ZASCA 153; 2023 (2) SA 120 (SCA); 85 SATC 347 (7 November 2022);
- *Commissioner for the South African Revenue Service v Coronation Investment Management SA (Pty) Ltd* (1269/2021) [2023] ZASCA 10; [2023] 2 All SA 44 (SCA); 2023 (3) SA 404 (SCA); 85 SATC 413 (7 February 2023);
- *Coronation Investment Management SA (Pty) Ltd v Commissioner for the South African Revenue Service,* CCT 47/23 [2024] ZACC 11 (21 June 2024);
- *ITC 1959* 85 SATC 35 (9 February 2022).

Tags: *bona fide* inadvertent error; understatement penalties; intentional tax evasion.

TAX INDEMNITY INSURANCE

Taxpayers have multiple tax risk management options at their disposal when entering into complex transactions with each option having its own advantages and disadvantages. The complexity of the transaction and level of assurance required are often determinative when it comes to selecting the appropriate tax risk management option.

The most common tax risk management option is to obtain an opinion from an independent SARS-registered tax practitioner and, to a lesser extent, an Advance Tax Ruling (ATR) from the South African Revenue Service (SARS).

An opinion obtained from an independent SARS-registered tax practitioner is the cheapest tax risk management option and provides the taxpayer with protection against the imposition of an understatement penalty and potentially also underestimation penalty in the event of SARS assessing the taxpayer on the particular transaction on a basis contrary to what is outlined in the opinion. Certain requirements must, however, be satisfied for the understatement penalty protection to apply. The first set of requirements are that the taxpayer must have fully disclosed the transaction to SARS by no later than the date on which the return incorporating the transaction is due and that the opinion must have been issued to the taxpayer by no later than such date. The second set of requirements relate to the qualities of the opinion and require that it be based upon a full disclosure of the specific facts and circumstances in respect of the transaction and that it confirms that the taxpayer's position is more likely than not to be upheld in the event of the matter proceeding to court.

Therefore, if a taxpayer obtains an opinion adhering to the above requirements and SARS assesses the taxpayer on the particular transaction in a manner that is contrary to what was outlined in the opinion, the taxpayer will only be required to settle the additional taxes, interest and possibly also the percentage-based penalty resulting from the additional assessment. In this case, the understatement penalty must be waived. The opinion, therefore, effectively acts as insurance against the imposition of an understatement penalty on the particular transaction. There is, however, a school of thought holding that the understatement penalty cannot be waived where it is imposed in respect of "impermissible avoidance arrangements" which refer to cases where SARS successfully invokes the General Anti-Avoidance Rule (GAAR) in sections 80A to 80L of the Income Tax Act, 1962 or its corollary for value-added tax (VAT) purposes in section 73 of the Value-Added Tax Act, 1991. [The validity of this school of thought becomes questionable when regard is had to the findings in two recent cases handed down by the Supreme Court of Appeal, namely *Commissioner for the South African Revenue Service v Coronation Investment Management* [2023] and *CSARS v The Thistle Trust* [2023].] Proponents of this school of thought, therefore, hold that an opinion obtained from an independent SARS-registered tax practitioner adhering to the above requirements does not provide any protection against the standard 75% understatement penalty imposed in respect of "impermissible avoidance arrangements".

An ATR is issued by SARS to a particular taxpayer to provide certainty on the tax implications resulting from a transaction that the taxpayer proposes to undertake, but has not yet undertaken. An ATR is, however, only binding on SARS and the applicant(s) thereto and cannot be relied upon by other taxpayers. The only material difference between an ATR and an opinion obtained from an independent SARS-registered tax practitioner is that SARS is bound by the tax implications outlined in the ATR issued to the applicant(s) whereas the opinion has no binding effect on SARS. The level of assurance provided by an ATR is, therefore, substantially better than what is provided by an opinion as the applicant(s) has absolute certainty that the tax payable on the transaction is per the principles outlined by SARS in the ATR. The risk of SARS imposing any additional tax, understatement and percentage-based penalties and/or interest on the transaction down the line is, therefore, completely mitigated by obtaining an ATR.

The ATR system does, however, have certain drawbacks, including that (i) SARS and the taxpayer do not always agree on the tax implications in respect of the proposed transaction; (ii) the costs involved in obtaining an ATR are usually double the cost of an opinion as both the tax advisor and SARS charge fees for their time spent on the matter; and (iii) SARS is by law precluded from issuing an ATR on certain issues such as, *inter alia*, the application of the GAAR and the substance over form principle. Taxpayers who are entering into transactions that are potentially susceptible to attack under the GAAR (usually Merger and Acquisition (M&A) transactions) are, therefore, unable to mitigate their exposure to additional tax, the standard 75% understatement penalty and interest in the event of SARS assessing them under the GAAR. These *lacunae* can, however, be filled by tax indemnity insurance.

Tax indemnity insurance, which is predominantly provided by non-resident insurers, provides cover to a taxpayer against the risk of SARS assessing the taxpayer on a particular transaction in a manner contrary to what is outlined in the professional tax advice obtained by the taxpayer. The taxpayer is generally able to arrange cover not only for any additional tax on the particular transaction, but also for the interest, understatement and percentage-based penalties and defence costs. Tax risks of up to R10 billion can be insured and the cover is usually grossed-up to take into account the tax that must be paid by the taxpayer on the receipt of the policy benefits, should the risk materialise. The cover period is typically seven years and can be increased up to ten years.

The underwriting process usually entails the taxpayer obtaining an opinion from an independent SARS-registered tax practitioner which is then sent to the South African insurance broker (which acts as intermediary between the taxpayer and the non-resident insurer), together with full details of the transaction and the relevant agreements. The insurer then assesses and, if acceptable, insures the risk against the payment of an upfront lump sum premium by the taxpayer. The lump sum premium is based on the risk and total cover required by the taxpayer and can be as low as 3% of the total cover required by the taxpayer. The tax indemnity insurance option is the most expensive tax risk management option given the insurance premium and the requirement for the taxpayer to obtain independent tax advice. It is, however, the only tax risk management option that provides the taxpayer with complete protection against the risk of SARS assessing the particular transaction under the GAAR and/or in a manner inconsistent with what is outlined in the opinion obtained by the taxpayer. In this regard, the taxpayer will still be liable for the additional tax, the standard 75% understatement penalty (in a GAAR case), possibly the percentage-based penalty and interest in the event of SARS assessing the taxpayer under the GAAR. The taxpayer will, however, receive the insurance payout to enable it to settle its legal costs and the final tax liability.

Almost any type of tax risk can be covered by tax indemnity insurance including, *inter alia,* the following:

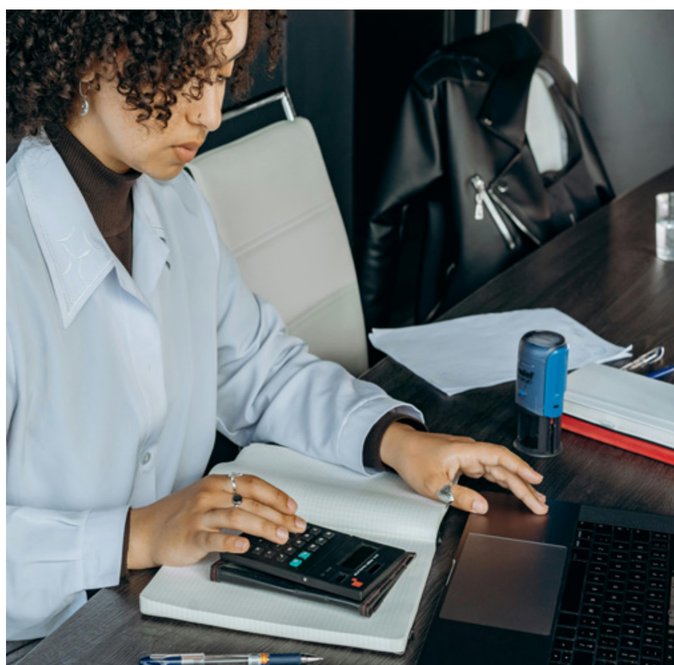
- The GAAR and substance over form principle;
- The application of any specific anti-avoidance rule;
- The disallowance of reduced South African withholding tax rates under an applicable double tax agreement as a result of the application of the principal purpose test and/or beneficial ownership test;
- Transfer pricing adjustments;
- Employees' tax and employment tax incentive adjustments; and
- Valuation disputes.

Taxpayers obtaining tax indemnity insurance must carefully consider the tax implications in respect of the insurance. The payment of the insurance premium might require the insured to reverse charge VAT at 15% where the insurance cover relates to an M&A transaction. Further, the receipt of the policy benefits will result in tax implications for the taxpayer depending on the nature of the insured transaction. Lastly, exchange control approval must be obtained for the payment of the insurance premium which, in some cases, might require the taxpayer to obtain approval from the Financial Sector Conduct Authority.

The table below provides a summary of the main features of the three tax risk management options considered in this article.

	Opinion	ATR	Tax indemnity insurance
Must additional tax be paid if SARS assesses taxpayer?	Yes	N/A – SARS cannot assess taxpayer contrary to positions outlined in ATR	Yes
Must understatement penalty be paid if SARS issues an additional assessment?	No, unless the understatement penalty is issued in respect of an "impermissible avoidance arrangement"	N/A – SARS cannot assess taxpayer contrary to positions outlined in ATR	Yes
Must percentage-based penalty be paid if SARS issues an additional assessment?	Possibly	N/A – SARS cannot assess taxpayer contrary to positions outlined in ATR	Yes
Must interest be paid if SARS issues an additional assessment?			Yes
Cost	Lowest	Twice the amount of an opinion	Most expensive
When must the tax risk management option be obtained?	Can be after implementation of transaction but must be prior to due date of return incorporating the transaction	Before the implementation of the transaction	Can be after implementation of transaction but ideally prior to due date of return incorporating the transaction

In conclusion, each of the above tax risk management options represents an arrow in the quiver to effectively manage tax risks, based on the complexity of the transaction and level of assurance required by the taxpayer. Tax indemnity insurance provides unique benefits when it comes to insuring the tax risks associated with M&A transactions; this is why its popularity as a tax risk management tool is increasing.



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Acts and Bills

- Income Tax Act 58 of 1962: Sections 80A to 80L;
- Value-Added Tax Act 89 of 1991: Section 73.

Cases

- *CSARS v The Thistle Trust* (516/2021) [2022] ZASCA 153; 2023 (2) SA 120 (SCA); 85 SATC 347 (7 November 2022);
- *Commissioner for the South African Revenue Service v Coronation Investment Management SA (Pty) Ltd* (1269/2021) [2023] ZASCA 10; [2023] 2 All SA 44 (SCA); 2023 (3) SA 404 (SCA); 85 SATC 413 (7 February 2023).

Tags: Advance Tax Ruling (ATR); understatement penalty; General Anti-Avoidance Rule (GAAR); impermissible avoidance arrangements; percentage-based penalties; independent SARS-registered tax practitioner; substance over form principle; tax indemnity insurance.

DISCRETIONARY TRUSTS AND VESTED RIGHTS

The rise of the discretionary family trust has long seemed inevitable. It appears to provide unparalleled commercial and fiscal flexibility to achieve multi-generational wealth transfer, asset protection, estate planning and other objectives.

While family trusts with vested rights for beneficiaries with particular needs do have their place, beneficial owners generally believe that a discretionary family trust, in combination with an appropriate letter of wishes, allows them to adapt to changes in circumstances and to have peace of mind about access to trust assets when required. This may be achieved without compromising income splitting and other benefits associated with an elective flow-through tax dispensation.

Unsurprisingly, the regulatory and fiscal tide seems to have turned against trusts, particularly, discretionary trusts.

THE CHANGING FISCAL LANDSCAPE

In South Africa, initiatives to impose onerous tax treatment on trusts and their beneficiaries have become an established trend.

- Trusts have historically been taxed at the maximum personal tax rate on income and the highest rate on capital gains.
- In 2013, the National Treasury proposed to restrict the flow-through principle and that distributions of capital gains by a trust to natural persons would in future be taxed at income tax rates and not at capital gains tax rates; however, these proposals were not enacted.
- In 2015, the Davis Tax Committee recommended that:
    - All distributions by offshore trusts to SA resident beneficiaries should be taxed as income and;
    - Local trusts should be taxed as separate taxpayers at a flat rate of tax. This would have meant that the conduit principle for local trusts would be removed so that the income of local trusts could no longer be taxed in the hands of beneficiaries or the donor at individual marginal tax rates as opposed to the higher flat rate of tax in the trust.

Fortunately, these proposals were not implemented.

- In 2016, anti-avoidance measures were introduced that treat the interest benefit on low-interest or interest-free loans provided by or at the instance of natural persons to trusts and certain companies related to trusts as a deemed donation.
- In 2018, amendments were made to disregard the participation exemption under certain circumstances, to preclude tax-free capital distributions by offshore discretionary trusts out of dividends that would have been exempt had the trust been a South African tax resident.
- In 2021, the anti-avoidance rules relating to the funding of trusts and related companies by low-interest or interest-free loans were extended to preference share funding.
- Late in 2023, the conduit principle was terminated for distributions of income by local trusts to non-resident beneficiaries. Existing legislation does not cater for the application of the conduit principle to capital gains that are vested in non-resident beneficiaries by local trusts.

REGULATORY CHANGES

Internationally, transparency of beneficial ownership of trusts increased significantly following the introduction of the Common Reporting Standard and the resulting Automatic Exchange of Information between various revenue authorities around the world.

The South African Revenue Service (SARS) has introduced detailed disclosure requirements to record the beneficial owners of trusts to comply with the Financial Action Task Force requirements.

Trustees are also obliged to lodge and keep up-to-date records of the beneficial ownership of the trusts of which they are trustees, and to record comprehensive data regarding beneficial ownership of trusts with The Master of the High Court.

FUNDING CHALLENGES

Trusts are generally funded by donations or loans. Both methods involve tax costs for a South African resident funder.

Donations by South African residents are subject to donations tax of 20% or 25% to the extent that donations in aggregate exceed R30m (subject to an annual exemption of R100 000 donated by natural persons). In addition, capital gains tax (CGT) may apply to a donation of assets that fall within the CGT net.

As indicated above, the interest benefit of low-interest or interest-free loans to trusts is subject to deemed donations or, in the case of cross-border loans to a connected person, transfer pricing provisions. Interest earned on interest-bearing loans constitutes the gross income of a South African resident lender.

In addition, attribution rules may tax income and capital gains attributable to donations and non-arms-length loans in the hands of the donor.

VESTED RIGHTS IN RESPECT OF TRUSTS

In the current dynamic tax and regulatory environment, providing certain vested rights to beneficiaries may offer unique solutions.

The potential to create a hybrid trust instrument which has both discretionary and vested features makes the structuring opportunities particularly attractive. In this scenario, vested rights can co-exist within the framework of a discretionary trust.

Historically, vesting trusts have often been regarded as less effective than discretionary trusts for reasons such as tax inflexibility, the inclusion of vested rights as property for estate duty purposes and the exposure of vested rights to creditors.

Beneficial owners are beginning to reassess the apparent drawbacks of vested rights compared to potential funding and other benefits.

For example, while vested rights may indeed be exposed to creditors, it must be recognised that the rights of the creditor remain subject to the terms of the trust instrument. This opens the door for creating an instrument that provides protection without having to rely on the non-vesting of some of the rights of beneficiaries.

Careful structuring of the terms of the relevant vested rights in the trust may enable funding of the trust through a contribution that does not constitute a donation for donations tax purposes.

This outcome not only precludes donations tax but also becomes the defence against the application of the attribution rules to resultant income and capital gains derived by the trust.

Of course, careful planning is required to achieve a contribution that remains outside the ambit of a donation yet does not fall within the provisions that would treat it as an interest-bearing instrument. Should this requirement be overlooked and a contribution to a trust constitutes an interest-bearing arrangement, a funder may well have to face tax liabilities without any cash flow to fund the tax.

Even if the above guidelines and requirements are observed, a beneficial owner may be concerned about the estate duty impact of such vested rights. This enquiry must be addressed bearing in mind that donations (in this case to a trust) would constitute deemed property for estate duty purposes and that a loan to a trust constitutes property. The challenge is to structure an arrangement that achieves the above-mentioned objectives and mitigates the estate duty exposure of the funder.

It should be noted that contributions made by a resident to an offshore trust which exceeds R10 million, where such resident has or acquires a beneficial interest in the offshore trust, are reportable to SARS within 45 business days. Consideration should be given to when the relevant resident acquires such beneficial interest in the offshore trust. This may not be at the time that the relevant contribution is made to such trust.

CONCLUSION

The changing environment of an increasing fiscal clamp-down on trusts may well spur a new generation of vested rights in respect of trusts that could challenge the perceived axiomatic superiority of purely discretionary family trusts.

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ENS

Tags: discretionary family trust; offshore trusts; local trusts; low-interest or interest-free loans; Financial Action Task Force; beneficial ownership; interest-bearing loans; hybrid trust instrument.

THE CONSTITUTIONAL COURT'S JUDGMENT IN THE *CAPITEC BANK* CASE

The deduction of value-added tax (VAT) is a fundamental principle of the operation of the VAT system. If a vendor who makes taxable supplies is denied the right to deduct VAT, then it distorts the operation of the VAT system and results in a cascading of the tax.

The Constitutional Court handed down its judgment (*Capitec Bank Limited v Commissioner for the South African Revenue Service* [2024]) on 12 April 2024 in the VAT appeal by Capitec Bank (Capitec) against a judgment of the Supreme Court of Appeal (SCA). In *Commissioner, South African Revenue Service v Capitec Bank Ltd* [2022], the SCA previously held that Capitec was not entitled to any VAT deduction in respect of payments made under loan cover which Capitec provided to customers for no consideration.

Although the Constitutional Court judgment does not result in a substantial win for Capitec, it addresses and clarifies various important VAT principles. It is invigorating to see a judgment, which was penned by Justice Rogers, that provides such clarity on various complex VAT principles in the context of the operation of the VAT system.

THE ISSUE IN DISPUTE

Capitec provides unsecured loans to its clients in return for which it receives interest, service fees, and a once-off initiation fee. The interest is exempt from VAT, whereas the fees are subject to VAT. To make its credit offering more attractive, Capitec provides free loan cover to clients with unsecured loans, in the event of their death or retrenchment.

Capitec sought to deduct VAT on the payments it made to cover the outstanding loans of clients who were retrenched or who passed away. Capitec made the deduction in terms of section 16(3)*(c)* of the Value-Added Tax Act, 1991 (the VAT Act) on the basis that the loan cover comprised "insurance" as defined in the VAT Act, and that the insurance cover comprised a taxable supply.

The South African Revenue Service (SARS) disallowed the deduction and contended that the payments made by Capitec did not qualify for a deduction under section 16(3)*(c)* because the supply of the loan cover did not constitute a "taxable supply". This was on the basis that the loan cover was provided for no consideration, or alternatively, the loan cover was provided in respect of an exempt supply, being the provision of credit.

The tax court found in favour of Capitec and held that the loan cover was provided in the course and furtherance of Capitec's taxable enterprise and that the loan cover promoted the entire enterprise of Capitec, which included the making of taxable supplies.

The SCA overturned the tax court's judgment and essentially held that because the provision of credit is an exempt financial service, the loan cover was supplied in the course of making an exempt supply and no VAT was therefore deductible by Capitec.

Capitec then lodged an appeal with the Constitutional Court. The Constitutional Court considered and clarified several important principles.

SUPPLY FOR NO CONSIDERATION

The Constitutional Court recognised that the definition of "enterprise" in section 1(1) of the VAT Act requires a regular or continuous activity involving the supply of goods or services for consideration. However, the court stated that the definition does not require that all goods or services supplied in the course of that activity must be supplied for consideration.

The Constitutional Court clarified that contrary to the SCA's view, the provisions of section 10(23) of the VAT Act were applicable in Capitec's circumstances. Section 10(23) provides that where a supply is made for no consideration, the value of the supply is deemed to be nil. It agreed with the SCA that section 10(23) cannot convert a non-taxable supply into a taxable supply, but section 10(23) makes it clear that any supply, whether taxable or non-taxable, may be a supply for no consideration, in which case it is assigned a value of nil.

The Constitutional Court explained that, where an enterprise sells goods for consideration and provides a free item to customers as a marketing ploy, it is still important to classify the item as a taxable supply to enable the vendor to deduct VAT thereon as input tax.

Relying on the UK case of *Commissioners for HM Revenue and Customs v Tesco Freetime Ltd* [2019], the court held 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 that the SCA erred in finding otherwise.

EXEMPT SUPPLY

The SCA held that the provision of credit by Capitec was an exempt financial service, that only a minor component of its business generated taxable fees, and that the loan cover was supplied in the course of making an exempt supply.

The Constitutional Court stated that, to determine whether the loan cover was an exempt, taxable, or mixed supply, the purpose of Capitec's provision of the loan cover to its borrowers was important. The evidence by Capitec that the free loan cover was provided because it made Capitec's loan offering to unsecured borrowers more attractive, was undisputed and accepted. The free loan cover advanced Capitec's business of lending money to unsecured borrowers, from which it earned exempt interest and taxable fees.

The Constitutional Court held 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. The court confirmed that the provision of credit is a single activity and that in terms of the proviso to section 2(1) the activity has two components, the one being an exempt activity and the other an "enterprise" activity.

NATURE OF OUTSTANDING DEBT

The SCA stated in its judgment that the fees charged for the provision of credit, if not paid immediately, become capitalised and are then added to the outstanding loan, which renders them exempt. If a debit order was returned unpaid, Capitec automatically extended additional credit to the borrower in the amount of the unpaid instalment, which was a separate supply of credit. It is on this basis that the SCA ruled that because the loan cover related exclusively to this additional supply of VAT-exempt credit, the loan cover was supplied in the course of an exempt supply.

However, the Constitutional Court confirmed the judgment in *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)* [1998], where the SCA ruled that the amounts debited to a customer's account do not lose their character as capital, interest and fees.

"The Constitutional Court held 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."

This is important because, had the judgment of the SCA been upheld that "new" credit was provided when a debtor defaults, no relief would then be claimable on the fees on which VAT was accounted for, when the fee component of the debt was written off as irrecoverable. In any event, the court held that the benefit that the borrower obtained from the free cover was not relevant, but rather why Capitec provided the free loan cover.

EXTENT OF A PERMITTED DEDUCTION

The VAT system operates on the basis that where a vendor makes taxable supplies, the vendor is entitled to deduct the total amount of VAT incurred on goods or services acquired for use, consumption, or supply in the course of making such taxable supplies. Where a vendor makes both taxable and exempt supplies, the vendor is only entitled to deduct VAT to the extent that the vendor makes taxable supplies.

The Constitutional Court took a practical approach in this case. It stated that there are four possible outcomes where the loan cover, being the supply of a contract of insurance, comprises a mixed supply made in the course or furtherance simultaneously of an exempt activity and an "enterprise" activity:

- the vendor is entitled to a full deduction of the tax fraction of the payments made;
- the vendor is not entitled to any deduction;
- a portion of the tax fraction of the payments made may be deducted in terms of section 17(1); or
- the vendor may deduct a portion of the tax fraction of the payments made, invoking an apportionment implicit in section 16(3)*(c)* in the context of the scheme of the VAT Act as a whole.

The Constitutional Court stated that because the enterprise activity of Capitec (being the fee-earning component) was only 5% to 13% of the whole, the rest being exempt from VAT, it would disturb the operation of the VAT system to allow Capitec a full deduction of the tax fraction of the payments made. The same would apply if no deduction was allowed. Importantly, in this regard, the court stated that SARS, as an organ of the state subject to the Constitution, should not seek to exact tax that is not due and payable.

Although the application of section 17(1) would have yielded the desired result, section 17(1) only applies to "input tax" whereas a deduction under section 16(3)*(c)* is not "input tax" as defined. Accordingly, the VAT legislation does not allow for an apportionment under section 17(1) for payments made as contemplated by section 16(3)*(c)*.

In considering certain income tax authorities, including *Commissioner for Inland Revenue v Rand Selections Corporation Ltd* [1956] and *Commissioner for Inland Revenue v Nemojim (Pty) Ltd* [1983], the Constitutional Court held that apportionment in the context of section 16(3)*(c)* is mandated. Furthermore, Capitec should not be penalised for the fact that it did not plead apportionment in its appeal in the tax court.

THE JUDGMENT

The Constitutional Court held that Capitec was entitled to a deduction of a portion of the tax fraction of the payments made under the loan cover provided, to the extent that it related to the fee-earning enterprise activities of Capitec. The matter was referred back to SARS to determine an appropriate apportionment method to be applied.

COMMENTS

Although the judgment is not the outcome that Capitec sought, the allowing of a VAT deduction to the extent that Capitec makes taxable supplies is in accordance with the operation of the VAT system and cannot be faulted. The effort that the Constitutional Court made to clarify and apply complex VAT principles in the context of the VAT Act is refreshing, and it is hoped that SARS and our lower courts will follow suit.

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Cliffe Dekker Hofmeyr

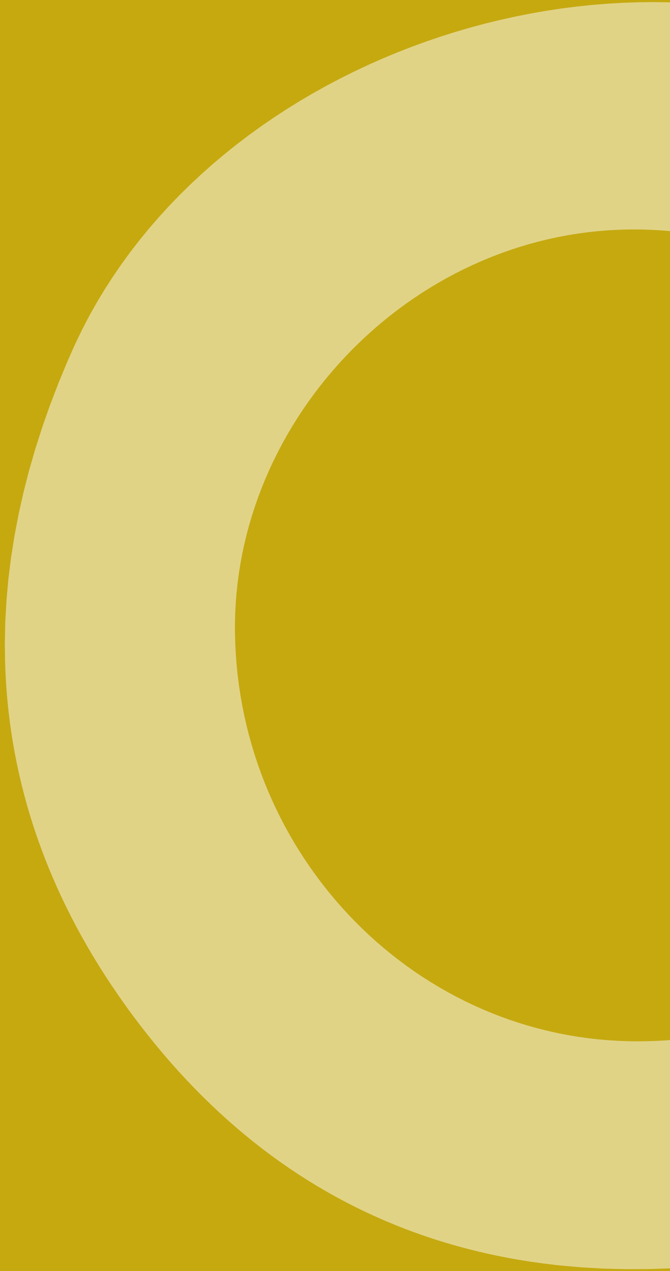
Acts and Bills

- Value-Added Tax Act 89 of 1991: sections 1(1) (definitions of "enterprise", "input tax", "insurance" & "taxable supply"), 2(1) (specific reference to the proviso to this subsection), 10(23), 16(3)*(c)* & 17(1).

Cases

- *Commissioner, South African Revenue Service v Capitec Bank Ltd* (94/2021) [2022] ZASCA 97; [2022] (6) SA 76 (SCA);
- *Capitec Bank Limited v Commissioner for the South African Revenue Service* (CCT 209/22) [2024] ZACC 1 (12 April 2024);
- *Commissioners for HM Revenue and Customs v Tesco Freetime Ltd* [2019] UKUT 18 (TCC); [2019] STC 1188;
- *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)* (205/96) [1997] ZASCA 94; 1998 (1) SA 811 (SCA); [1998] 1 All SA 413 (A); (14 November 1997);
- *Commissioner for Inland Revenue v Rand Selections Corporation Ltd* [1956] (3) SA 124 (A);
- *Commissioner for Inland Revenue v Nemojim (Pty) Ltd* [1983] (4) SA 935 (A).

Tags: taxable supply; enterprise; VAT-exempt credit; free loan cover; exempt supplies; input tax.



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