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GENERAL
POST-COMMENCEMENT TAX DEBT IN BUSINESS RESCUE

INTERNATIONAL TAX
CONTROLLED FOREIGN COMPANIES

DEDUCTIONS AND ALLOWANCES
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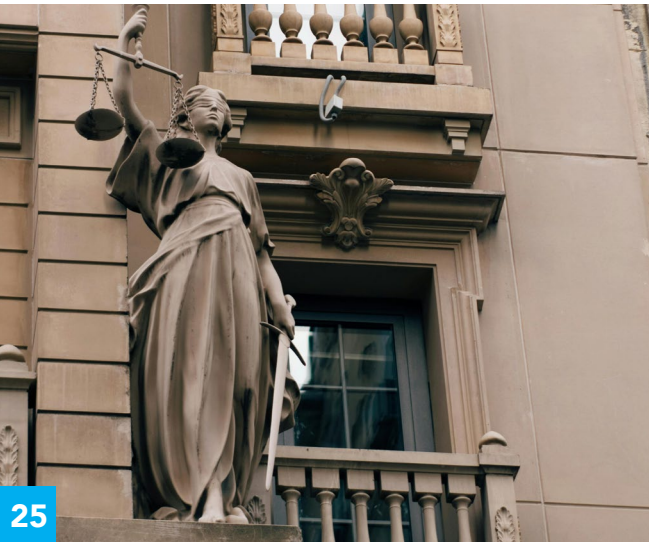

UDZ INCENTIVES AND TRANSFER DUTY ADJUSTMENTS

In the wake of the 2025/26 Budget Speeches, South Africa's property sector has much to celebrate.

The Urban Development Zones (UDZs) as well as adjustments to the transfer duty tables are significant tax incentive benefits available to companies and individuals in South Africa, aimed at promoting urban renewal and development and property investment. This article explores the positive impacts of these measures to the property sector and highlights Treasury's efforts to bolster the market, even amidst the contentious Expropriation Act, 2024.

UDZ INCENTIVES: A HISTORICAL OVERVIEW

The UDZ legislation was first introduced in 2003 under section 13*quat* of the Income Tax Act, 1962 (the Act). This initiative was part of the government's broader strategy to address urban decay and stimulate investment in inner-city areas. Since its promulgation date, the incentive has undergone several extensions, with the most recent extension announced in the 2025/26 Budget Review, prolonging its availability until 31 March 2030. The UDZ tax incentive allows for accelerated depreciation on the costs of buildings within designated zones. For entirely new commercial or residential buildings, investors can claim an accelerated depreciation allowance of 20% of the building cost in the first year, followed by 8% per year over the next ten years. Improvements to existing buildings are eligible for a 20% allowance in the first year and 20% per year for the subsequent four years. In instances where the building or part of a building is purchased directly from a developer, the allowance is available to the purchaser. This extension underscores the government's dedication to maintaining and enhancing urban infrastructure, making it an attractive proposition for property developers and investors.

The incentive has had a profound impact on the property market in South Africa, which is witnessed through the increased attractiveness of inner-city properties for developers and investors – this has encouraged the refurbishment and development of commercial and residential buildings. This in turn supports the creation of affordable housing units and greatly contributes to the revitalisation of previously neglected urban areas.

CONTRASTING UDZ INCENTIVES WITH THE EXPROPRIATION ACT

While the Expropriation Act, 2024, has sparked debate and concern within the property sector, it is important to recognise the contrasting support from Treasury. The Act, which allows for the expropriation of land in the public interest, has raised fears of potential negative impacts on property rights and market stability. However, Treasury's continued backing of UDZ incentives highlights a balanced approach to property sector regulation. This dual approach reflects a balanced strategy to address historical injustices while fostering economic growth and urban renewal.

THE UDZ'S ROLE IN SHAPING URBAN LANDSCAPES

The 2025/26 Budget should provide optimism for South Africa's property sector. The extension of UDZ incentives by five years, to 31 March 2030, and Treasury's unwavering support for infrastructure development paint a promising picture for the future. Despite the complexities introduced by the Expropriation Act, the continued support for the UDZ incentive highlights Treasury's commitment to fostering a vibrant and competitive property sector.

INFLATION ADJUSTMENTS IN TRANSFER DUTY: EFFECTS ON PROPERTY TRANSACTIONS

Transfer duty is a tax levied on the value of any property acquired by any person by way of a transaction or in any other way. For the purpose of transfer duty, property means land and fixtures and includes real rights in land, rights to minerals, a share or interest in a "residential property company" or a share in a share-block company.

As part of the periodic reviews of monetary property values in the transfer duty tax tables, the monetary property thresholds for transfer duty determination will be adjusted upwards by 10 per cent to compensate for inflation. The transfer duty tax rates will remain unchanged.

For a first-time buyer who buys a property of R1,5 million, the savings will be R3 300. On a purchase price of R2 million, a buyer will now pay R7 839 less transfer duty. The 2025/26 Budget reveals a clear intention from Treasury to support the property sector. [*Editors' note*: See clause 1(1) of the Rates and Monetary Amounts and Amendment of Revenue Laws Bill 14 of 2025 and section 2 of the Transfer Duty Act 40 of 1949.]

The pre-and post-adjusted Transfer Duty Tables are illustrated below:

Transfer duty rate adjustments

2024/25		2025/26	
Property value (R)	**Rate of tax**	**Property value (R)**	**Rate of tax**
R1 – R1100 000	0% Property value	R1 – R1 210 000	0% Property value
R1100 001 – R1 512 500	3% property value above R1100 00	R1 210 001– R1 663 800	3% property value above 1 210 000
R1 512 501 – R2 117 500	R12 375 + 6% of property value above R1 512 500	R1 663 801 – R2 329 300	R13 614 + 6% of property value above R1 663 800
R2 117 501 – R2 722 500	R48 675 + 8% of property value above R2 117 500	R2 329 301 – R2 994 800	R53 544 + 8% of property value above R2 329 300
R2 722 501 – R12 100 000	R97 075 + 11% of property value above R2 722 500	R2 994 801 – R13 310 000	R106 784 + 11% of property value above R2 994 800
R12 100 001 - above	1 128 600 + 13% of property value above R12 100 000	R13 310 001 - above	1 241 456 + 13% of property value above R13 310 000

Source: National Treasury

CLOSING THOUGHTS: UDZS AND TRANSFER DUTY

The government's continued support for UDZs and inflationary adjustments to the transfer duty thresholds signals a robust commitment to revitalising urban areas and fostering economic growth.

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Forvis Mazars

Acts and Bills

- Income Tax Act 58 of 1962: Section 13*quat*;
- Expropriation Act 13 of 2024;
- Rates and Monetary Amounts and Amendment of Revenue Laws Bill 14 of 2025 (clause 1(1));
- Transfer Duty Act 40 of 1949: Section 2.

Other documents

- Pre-and post-adjusted Transfer Duty Tables per National Treasury website.

Tags: UDZ tax incentive; transfer duty; real rights in land; transfer duty thresholds.

THISTLE TRUST V C:SARS – THE CONSTITUTIONAL COURT RULES ON THE CONDUIT PRINCIPLE AND THE LAW

On 2 October 2024, after an excruciating delay of eight months, the Constitutional Court finally delivered its judgment in the matter of Thistle Trust v Commissioner, South African Revenue Service *[2025].*

The judgment spans 59 pages and was a majority (6/2) decision with two dissenting judges. By contrast, the SCA's judgment was only 11 pages, which, if anything, illustrates the seriousness with which the apex court approached the matter in dismissing both the appeal and cross appeal.

THE FACTS

The Thistle Trust is a resident discretionary trust and a beneficiary of 10 vesting trusts collectively known as the Zenprop Group (Zenprop). Zenprop is a property developer and property owner. In the course of its business, it frequently buys and sells properties.

In the 2014, 2015 and 2016 years of assessment the vesting trusts disposed of properties which realised capital gains which were passed on to the Thistle Trust, which in turn passed them on to its natural person beneficiaries.

SARS taxed the Thistle Trust on the capital gains, while the beneficiaries of Thistle took them into account in determining their aggregate capital gain or loss.

The issue the court had to decide was whether section 25B of the Income Tax Act, 1962 (the Act), the common law conduit principle and paragraph 80(2) of the Eighth Schedule to the Act supported Thistle's contention that the capital gains should be taxed in the hands of the natural person beneficiaries, or whether the gains were taxable in the Thistle Trust, as contended by SARS.

"The court refused to hear the cross appeal because the matter had not been properly argued in the lower courts and it did not want to be the court of first and last instance over the issue whether the taxpayer had committed a *bona fide* inadvertent error."

"The court then noted that in 1991 the legislature had amended the definition of 'person' in section 1(1) of the Act to include a trust and inserted section 25B."

SARS had imposed a 50% understatement penalty under section 223(1) (Table: iii) of the Tax Administration Act, 2011 (the TAA), on the basis that Thistle had no reasonable grounds for the tax position taken. Thistle argued that no penalties should have been imposed as this was a *bona fide* inadvertent error, and hence excluded under section 222(1) of the TAA. In the SCA judgment [*Commissioner, South African Revenue Service v The Thistle Trust* [2023]] it was stated that SARS had conceded on the penalties, but SARS later disputed this and cross-appealed, contending that this was not a case of a *bona fide* inadvertent error.

Before getting into the arguments, the one aspect that strikes one is the question as to whether this case should even have been about capital gains. Normally, a property developer that "frequently buys and sells properties" is dealing in trading stock and not capital assets. But that issue was not in dispute and no facts were presented which would enable one to express an opinion on it.

THE MAJORITY DECISION

Chaskalson AJ wrote the majority judgment and after setting out the background to the case commenced with an examination of the origin of the conduit principle. He noted that it could be traced back to the Privy Council case of *Syme v Commissioner of Taxes* [1914], which was an Australian case. The United Kingdom's Privy Council used to be the apex court for many Commonwealth countries, including South Africa up to 1950. The court noted that subsequent commonwealth cases emphasised two points regarding the conduit principle:

- First, it was used to identify the taxpayer who was liable to taxation on particular income, namely, the trustee or the beneficiary.
- Secondly, it was used to protect legislative choices in respect of the favourable or prejudicial income tax treatment of particular categories of income.

The conduit principle was first applied in South Africa in the *Armstrong* [*Armstrong v Commissioner for Inland Revenue* [1938]] and *Rosen* [*Secretary for Inland Revenue v Rosen* [1971]] cases to protect the legislative choice that dividends should retain their exempt status in the hands of beneficiaries. The court noted that this was not an issue in the present matter as trusts were taxed at twice the CGT rate as individuals, and in fact permitting a discretionary trust to attribute a capital gain to a beneficiary where it would be taxed at half the rate appeared to subvert the legislative intent [in paragraph [44]]. Importantly, the court noted the following [in paragraph [45]]:

> "When a taxation statute addressed either of these issues directly, the case no longer became an exercise in applying the conduit principle. Instead, it became an exercise in giving effect to the direct legislative intention expressed in the statute."

The court then noted that in 1991 the legislature had amended the definition of "person" in section 1(1) of the Act to include a trust and inserted section 25B.

It stated in paragraph [46]:

> "Since 1991, questions relating to the taxation of trusts and beneficiaries under the Act have accordingly become questions of the interpretation of the relevant provisions of the Act that deal directly with trusts and beneficiaries. Common law principles relating to the conduit principle may inform these questions of interpretation, particularly where the Act does not expressly regulate the respective tax treatment of trusts and beneficiaries. However, the exercise remains primarily one of statutory interpretation."

The court then rejected the argument that section 25B could apply to capital gains, stating that

> "paragraph 80 addresses itself pertinently to the conduit principle and the liability for taxation on capital gains realised by the sale of assets by a trust. Therefore, it is the specific provision that applies".

It noted, in paragraph [55], that if section 25B overrode paragraph 80, it would be tautologous (saying the same thing twice in different words) and that there was a presumption against tautology in a statute. [See *Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd* [1993].]

> "Paragraph 80 must have been included in the Eighth Schedule for some purpose. It cannot be interpreted as though everything that it provides is to be rendered irrelevant because the pre-existing deeming provision in section 25B overrides paragraph 80."

Before 2008, paragraph 80(2) referred to "where a capital gain arises in a trust". It was amended by the Revenue Laws Amendment Act, 2008, to refer to "where a capital gain is determined in respect of the disposal of an asset by a trust".

In 2007 a tax consultant emailed the author, whilst employed by SARS, regarding the issue of whether a gain could bounce through several trusts. The view of the consultant was that it could not, and a colleague of the author on the Legislative Research Section who had drafted paragraph 80(2) agreed with the consultant. When compiling the first issue of the *Comprehensive Guide to Capital Gains Tax*, the author reflected this view on the basis that "arise" meant "originate". The capital gain thus originated in the trust that disposed of the asset and it was only that trust that was permitted to attribute the capital gain. Nevertheless, it is submitted that paragraph 80(2) could have been clearer.

In the Revenue Laws Amendment Act, 2008, several amendments were made to paragraph 80. These included removing exempt bodies from attribution under paragraph 80(1) and a small clarifying amendment to paragraph 80(3). The opportunity was also taken to amend paragraph 80(2) to more accurately reflect SARS' view that the gain could be attributed only by the trust that disposed of the asset.

The Explanatory Memorandum on the Revenue Laws Amendment Bill, 2008 (the 2008 EM), made it clear that the interpretation that a gain could flow through multiple discretionary trusts was not accepted and the purpose of the amendment was to clarify paragraph 80(2).

The court noted, in paragraph [64], that it was acceptable to consult the 2008 EM to ascertain the purpose of the 2008 amendment. The judgment provides a useful summary of cases in which the courts have relied on explanatory memoranda to ascertain the purpose of legislation.

The only problem, of course, was that the 2008 EM did not actually spell out the policy reason why attribution was restricted to the trust that disposed of the asset. When pressed on the point, SARS' counsel declined to offer any suggestion as to what the purpose might be.

The author does not recall the purpose of the amendment ever being discussed during the drafting process of the amending legislation. If a policy reason was to be provided, this should have been disclosed in the initial EM, the Explanatory Memorandum on the Revenue Laws Amendment Bill, 2001, or if not, in the 2008 EM. It is submitted that the reason for the amendment in 2008 was simply to align paragraph 80(2) with paragraph 80(1). Paragraph 80(1) also permits the capital gain to be attributed only once by the trust that vested the asset in a resident beneficiary. One could of course speculate on policy reasons why paragraph 80 opens the conduit pipe only for the immediate beneficiary. The Constitutional Court suggested it might have been to prevent a capital gain from flowing to another trust having a capital loss available for set-off. [See paragraph [77].] Another reason might be to restrict opportunities for income splitting or to make it easier for SARS to audit a capital gain without going through an extensive tracing exercise. The Davis Tax Committee noted that

> "a substantial risk of non-disclosure arises when income is taxed in the hands of a taxpayer who is different to the taxpayer receiving it or to whom it accrues".
>
> [See Davis Tax Committee's Second and Final Report on Estate Duty, dated 28 April 2016.]

SARS has been addressing the problem of non-disclosure by beneficiaries by introducing the IT3(t) return for trusts which will eventually lead to the beneficiary return being prepopulated.

In the result, the majority decision was that paragraph 80(2) was unambiguous and clear after the 2008 amendment [paragraph [74]].

THE MINORITY JUDGMENT

In the dissenting judgment, Bilchitz AJ stated [in paragraph [94]]:

> "The text, purpose, context and presumptions of statutory interpretation require construing the provision to give full effect to the conduit principle such that capital gains are taxed in the hands of the ultimate beneficiaries."

It is submitted that the dissenting judgment failed to appreciate the effect of including a trust in the definition of "person" in section 1 in 1991. Once a trust became a person for tax purposes, it had to comply with all the normal rules that apply to every other taxpayer. It was now the owner of its own assets and no longer a mere conduit pipe. Any common law conduit principle ceased to exist. It was precisely for this reason that section 25B was inserted into the Act at the same time so that the conduit principle could continue. The question has often been asked why paragraph 80 differs from section 25B. The more pertinent question should be why section 25B differs from paragraph 80, which was the later provision.

The intention when drafting the Eighth Schedule in 2000 was to mirror what happened in section 25B and section 7, subject to certain modifications. One of those differences was that paragraph 80 did not make provision for capital gains to be attributed to non-resident beneficiaries, while section 25B contained no such restriction. Another difference was that section 25B permitted income to flow through multiple trusts, while paragraph 80 allowed attribution only once.

In 2000 SARS' drafting team, of which the author formed part, was under a lot of pressure to finalise the CGT legislation before 1 April 2001 (the original effective date), which was later postponed to 1 October 2001, and a policy decision was taken not to interfere with section 25B. Meanwhile, South Africa had introduced the residence basis of taxation in 2000, and this was one reason why paragraph 80 did not provide for attribution to non-residents. It would be much harder to collect CGT from a non-resident.

Section 25B was finally amended in 2023 to prevent attribution to non-resident beneficiaries. [See section 29 of the Taxation Laws Amendment Act, 2023. The amendment applies to years of assessment commencing on or after 1 March 2024.] It is unclear why paragraph 80(1) and (2) were drafted to block attribution through multiple discretionary trusts. There may well be sound reasons for the policy as suggested, and the policy is hardly absurd. This is simply a policy choice for government. As was stated in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012]

> "Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation ..."

Bilchitz AJ stated that legislation must be rational and non-arbitrary and be construed in a way that is consonant with a legitimate government purpose.

The judge then sought to highlight perceived ambiguities in paragraph 80(2) which would justify the application of the *contra fiscum* rule.

Paragraph 80(2) might not, at the time, have been "a model of clear legal drafting" (to cite Bilchitz AJ), but it was not so bad that its intention could not be discerned. The 2008 amendment at least clarified that under both paragraph 80(1) and (2) the capital gain could be attributed only once. The author states that he would take issue with the judge's comment that the 2008 amendment was intended to distinguish paragraph 80(1) from paragraph 80(2) because the former dealt with the vesting of an asset while the latter dealt with a disposal of an asset. The vesting of an asset is also a disposal under paragraph 11(1)*(d)*.

If SARS and National Treasury take anything away from the dissenting judgment, it is that legislation needs to be clearly explained in detail together with its policy rationale in the EM. This disclosure is not always easy as the full consequences, sometimes unanticipated, of legislation may emerge only years later.

THE CROSS APPEAL

The court refused to hear the cross appeal because the matter had not been properly argued in the lower courts and it did not want to be the court of first and last instance over the issue whether the taxpayer had committed a *bona fide* inadvertent error. [See paragraph [85].] The court observed that the penalties had not been considered by the SCA as SARS had apparently conceded the issue. It also found that SARS had no prospect of discharging the onus of proving that the taxpayer's behaviour fell within section 223(1)(percentage table (ii) ("reasonable care not taken in completing return") & percentage table (iii) ("no reasonable grounds for 'tax position' taken")).

It is submitted that SARS is frequently too zealous in its imposition of penalties. Trying to impose a 50% penalty on what amounted to a question of interpretation over a complex matter is just unreasonable. SARS might have been better served by imposing a 10% penalty for substantial understatement and then arguing that the error in interpretation was not inadvertent. Had the taxpayer wished to be free from all penalties, it should have sought a section 223(3) opinion from a registered tax practitioner. If taxpayers can escape penalties on interpretation issues involving substantial understatement based on a *bona fide* inadvertent error, what is the purpose of section 223(3)?

Even so, it does seem harsh to impose a 10% penalty for a substantial understatement involving an interpretation issue when a taxpayer had reasonable grounds for their tax position taken. In this instance, the taxpayer had sought a senior counsel opinion. It is unclear why Thistle did not raise section 223(3) as a defence, but perhaps the senior counsel was not a registered tax practitioner.

Finally, it would be interesting to know whether the natural person beneficiaries would be able to have the tax they had paid refunded, particularly if their tax assessments had prescribed. Possibly, the exemption from prescription relating to the resolution of a dispute under section 99(2)*(d)* of the TAA could be used to avoid double taxation.

CONCLUSION

It is submitted that the majority decision of Chaskalson AJ was the correct one based on the legislation. It is not always easy to determine the purpose of every piece of legislation. The Constitutional Court must be commended on its judgment, which dealt with a complex area of tax law. It illustrated the importance of having regard to the legislative history of a provision.

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Acts and Bills

- Income Tax Act 58 of 1962: Sections 1(1) (definition of "person"), 7 & 25B; Eighth Schedule: Paragraphs 11(1)*(d)* & 80(1) & (2);
- Tax Administration Act 28 of 2011: Sections 99(2)*(d)*, 222(1), 223(1) (percentage table (ii) ("reasonable care not taken in completing return") & percentage table (iii) ("no reasonable grounds for 'tax position' taken")) & 223(3);
- Revenue Laws Amendment Act 60 of 2008;
- Taxation Laws Amendment Act 17 of 2023: Section 29 (amendment of section 25B of the Income Tax Act, 1962).

Other documents:

- *Comprehensive Guide to Capital Gains Tax* (published by SARS);
- Explanatory Memorandum on the Revenue Laws Amendment Bill, 2001;
- Explanatory Memorandum on the Revenue Laws Amendment Bill, 2008;
- Davis Tax Committee's *Second and Final Report on Estate Duty*, dated 28 April 2016;
- IT3(t) return for trusts.

Cases

- *Thistle Trust v Commissioner, South African Revenue Service* [2025] (1) SA 70 (CC); 87 SATC 103 (2 October 2024) [paragraphs 44, 45, 46, 55, 64, 74, 77, 85 & 94];
- *Commissioner, South African Revenue Service v the Thistle Trust* [2023] (2) SA 120 (SCA); 85 SATC 347;
- *Syme v Commissioner of Taxes (Vic)* [1914] UKPCHCA 6; [1914] AC 1013; (1914) 18 CLR 519;
- *Armstrong v Commissioner for Inland Revenue* [1938] AD 343; 10 SATC 1;
- *Secretary for Inland Revenue v Rosen* [1971] (1) SA 172; 32 SATC 249;
- *Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd* [1993] (4) SA 110 (A); 55 SATC 198 at 204;
- *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] (4) SA 593 (SCA); [2012] ZASCA 13.

Tags: resident discretionary trust; aggregate capital gain or loss; understatement penalty; bona fide inadvertent error; conduit principle; non-resident beneficiaries; substantial understatement; natural person beneficiaries.

TAX DUE DILIGENCE IN M&A TRANSACTIONS

The intricacies of South Africa's tax environment and the stringent enforcement policies of the South African Revenue Service (SARS) present challenges that can undermine the success of mergers and acquisitions (M&A) transactions.

However, a tax due diligence (Tax DD) can help mitigate risks by identifying potential exposures, ensuring compliance, and unlocking tax efficiencies that contribute to the transaction's overall value.

This article explores the importance of Tax DD in M&A, sector-specific tax considerations, the critical treatment of grants and incentives, and common pitfalls with actionable recommendations to address them effectively.

WHY A TAX DD IS CRUCIAL IN M&A TRANSACTIONS

In any M&A transaction, understanding the tax position of the target company is a cornerstone of informed decision-making. The Tax DD process provides the buyer with a clear picture of potential tax exposures, compliance gaps, and optimisation opportunities. This enables buyers to make strategic decisions regarding the transaction's pricing, structure, and risk allocation.

One of the primary objectives of a Tax DD is to identify and quantify hidden tax liabilities that may not be disclosed in the target company's financial statements. These liabilities could include unpaid income taxes, VAT discrepancies, customs duty exposures, or payroll tax irregularities. Undisclosed liabilities can result in significant financial penalties, interest charges, or reputational damage for the acquiring entity post-deal.

Beyond liabilities, a Tax DD validates the target company's tax assets. These assets could range from deferred tax balances to carry forward assessed losses, government grants, and tax incentives.

Ensuring that these assets are accurately calculated and remain usable post-acquisition is critical to protecting the transaction's value. Additionally, a thorough tax DD process also identifies inefficiencies in the target's tax strategies and provides recommendations for minimising future tax exposure and reducing current tax risk.

KEY INDUSTRY-SPECIFIC TRENDS IN SOUTH AFRICA'S M&A LANDSCAPE

South Africa's M&A activity spans a diverse range of industries, each presenting unique opportunities and challenges from a tax perspective.

Technology and telecommunications

- The technology sector in South Africa has seen substantial M&A activity, driven by the need for innovation, digital transformation, and market consolidation. Companies in this sector face complex tax issues related to the classification and amortisation of intangible assets such as software and patents. Transfer pricing is another critical area, particularly for multinational entities engaging in intercompany licensing agreements. VAT compliance on digital services also poses challenges, especially for cross-border transactions.

Energy and renewables

- The energy sector, particularly renewables, is experiencing rapid growth, fuelled by the government's commitment to sustainability and programmes like the Renewable Energy Independent Power Producer Procurement Programme (REIPPPP). M&A transactions in this sector often involve significant capital investments, requiring careful analysis of capital allowances, carbon tax liabilities, and green energy incentives. A Tax DD in this sector also evaluates the impact of environmental levies and depreciation allowances on the transaction's financial outcomes.

Mining and resources

- South Africa's mining sector, while mature, remains a cornerstone of the economy. M&A transactions in this industry often focus on cost reduction and operational efficiency. Tax DD in mining is particularly challenging due to the sector's exposure to mining royalties, transfer pricing issues for intercompany services, and the tax implications of rehabilitation liabilities. Additionally, VAT refunds on exported minerals and the impact of the Mineral and Petroleum Resources Royalty Act, 2008, are critical considerations.

- Another critical yet often overlooked aspect is the diesel rebate system for mining companies. The South African government provides diesel rebates to qualifying mining operations to mitigate fuel costs. However, incorrect claiming or historical non-compliance can create significant liabilities for an acquirer. Any discrepancies in the amount of the rebate claimed can result in clawbacks, penalties and/or interest being levied, ultimately affecting the financial viability of the transaction.

Healthcare

- The healthcare sector has become a focal point for private equity investments, driven by rising demand for healthcare services and the need for specialised facilities. Tax DD in this sector often focuses on VAT implications for healthcare services, customs duties on imported medical equipment, and withholding taxes on cross-border licensing arrangements. Ensuring compliance with SARS regulations on these aspects is essential to avoid exposure to additional tax and penalties.

Retail and consumer goods

- Shifting consumer preferences and the growth of e-commerce are reshaping the retail landscape in South Africa. M&A transactions in this sector typically involve complex supply chains, necessitating a detailed review of VAT compliance, customs duties, and excise taxes. Tax DD also evaluates the tax implications of integrating legacy systems and processes in post-deal operations.

THE COMPLEXITIES OF GRANT TREATMENT IN M&A TRANSACTIONS

Government grants and incentives often form a significant component of a company's tax position, particularly in sectors such as manufacturing, renewable energy, and technology. Mismanagement or misclassification of these grants during an M&A transaction can result in substantial financial and tax exposure.

From an income tax perspective, grants are categorised as either revenue or capital in nature. The classification depends on the purpose of the grant and its intended use. Misclassification can result in tax disputes or adjustments post-transaction. The VAT implications also require careful consideration.

Compliance with grant conditions is another critical aspect. Many grants come with stringent requirements, such as job creation targets or specified uses for the funds. Non-compliance can trigger clawbacks, creating liabilities for the acquiring entity.

COMMON TAX PITFALLS IN M&A TRANSACTIONS AND RECOMMENDATIONS

Historical tax compliance gaps are one of the most common issues uncovered during Tax DD, often stemming from non-compliance with SARS regulations. To address this, it is crucial to conduct a detailed review of the target company's tax history, including filings, payments, and SARS assessments, for a minimum of five years. Reconciling SARS statements of account with the company's financial records helps ensure accuracy and identify potential discrepancies early.

Cross-border tax risks present additional challenges, especially for multinational entities exposed to transfer pricing adjustments or permanent establishment risks. A comprehensive review of intercompany pricing policies is essential to ensure alignment with OECD guidelines and South African regulations. Evaluating applicable tax treaties can further help to minimise the risk of double taxation.

Failing to consider the tax implications of transaction structuring, whether as an asset purchase or share acquisition, can lead to avoidable tax exposure, particularly regarding CGT, transfer duty and VAT. It is also essential to assess any corporate restructures within the past 6 years, 2 years, or 18 months, depending on the applicable provisions, as these may carry future tax consequences.

CONCLUSION

A Tax DD is an essential component of successful M&A transactions, particularly in a complex environment like South Africa. It helps to identify potential tax leakages within the target business and formulate warranties and indemnities for inclusion in the sale and purchase agreement (SPA). This adds immense value to clients by protecting them from unforeseen losses when acquiring or selling a business. Tax due diligence provides an acquirer with a comprehensive understanding of the seller's tax processes, thereby facilitating a smoother integration with the newly acquired business.

It lays the foundation for seamless post-transaction integration by identifying synergies, harmonising tax processes, and mitigating risks that could disrupt operations.

In a rapidly evolving M&A landscape, companies that prioritise comprehensive and industry-specific tax due diligences are better positioned to navigate risks, maximise value, and achieve long-term success. For South African businesses, meticulous tax planning and due diligence are not just best practices – they are strategic imperatives.

Engaging tax specialists early in the process allows for a tailored evaluation of the transactions, ensuring that the deal is optimised and any future tax risks are mitigated through remedial actions or covered by suitable indemnities and warranties.

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Acts and Bills

- Mineral and Petroleum Resources Royalty Act 28 of 2008.

Tags: mergers and acquisitions (M&A) transactions; tax due diligence (tax DD); payroll tax irregularities; deferred tax balances; Renewable Energy Independent Power Producer Procurement Programme (REIPPPP); diesel rebate system; withholding taxes on cross-border licensing arrangements.

ARE RAISING FEES SIMILAR TO INTEREST?

The Cape Town Tax Court, in a judgment handed down on 13 January 2025 (IT 76795, Taxpayer Trust v Commissioner for the South African Revenue Service*), considered whether raising fees are finance charges which are similar to interest and, therefore, tax-deductible on the same basis as interest.*

The tax dispute centred on the tax deductibility of raising fees incurred by the taxpayer when it financed and refinanced the acquisition of some of its business assets. As part of the funding arrangements, an entity within the lender's group of companies charged a raising fee calculated as a percentage of the loan capital, which had to be paid in one lump sum as a precondition for the lender advancing the loan capital.

The taxpayer claimed a deduction for the raising fees paid on the basis that they met the definition of "interest", which includes any finance charges similar to normal interest. Taxpayers are eligible to claim a deduction for amounts which meet the definition of "interest" in section 24J(1) of the Income Tax Act, 1962, even if the amounts are capital in nature, provided only that the expense is incurred in the course of carrying on a trade and in the production of income.

The definition of "interest" used to include finance charges "related" to interest, but this was amended to include only finance charges "similar" to interest. The amendment was presumably in response to the judgment of the Supreme Court of Appeal in *Commissioner, South African Revenue Service v South African Custodial Services (Pty) Ltd* [2012], in which the phrase "related finance charges" was given a broad interpretation to include a variety of payments related to a finance transaction, including payments which are clearly dissimilar to interest, such as legal fees relating to the transaction.

"The raising fees were found to be similar to interest in that they were determined with reference to the size of the loan capital and for the benefit of the loan capital, because without the taxpayer agreeing to pay the raising fees, the taxpayer would not have obtained the finance."

In *ITC 1963* 85 SATC 246, a dispute about whether raising fees constituted "related finance charges" prior to the amendment of the definition of "interest", the taxpayer was successful in its argument that raising fees were indeed "related finance charges" and thus deductible as "interest" for tax purposes.

The January 2025 tax court judgment is the first to consider the meaning of the new phrase "similar finance charges", and it did so in the context of raising fees. The court conducted an interpretative exercise and concluded that this exercise entails a determination of the meaning embedded in the text as "the most compelling and coherent account the interpreter can provide", which is considered following a unitary approach taking into account the text, context and purpose of the provision in question.

The court held that since the definition of "interest" describes the term as "interest or similar finance charges", one should interpret it to mean something which is an alternative to interest, and something other than interest. The court further explained that the word "similar" does not mean identical to but rather requires the finance charges to bear a relevant resemblance to interest (ie, characteristics which make it similar).

The court considered the elements of distinction and similarity between raising fees and interest.

SARS argued that raising fees must have the fundamental characteristics of common law interest, but the court disagreed and held that SARS seemed to conflate the meaning of "similar" and "same".

Another point on which SARS sought to distinguish the raising fees was that they were separate and distinct from the interest because they were incurred before the effective dates of the funding agreements. The court held that the timing was not a relevant dissimilarity between interest and raising fees, as it did not change the nature of the raising fee charges.

SARS also argued that the raising fees differed from interest in that the payment of the raising fees was an upfront condition to the loan capital being advanced, whereas the interest was payable on future dates subsequent to the advance of the loans. The court held that this argument was premised on the incorrect notion that interest was paid for the use of the loan capital when, in fact, they were loans for consumption.

Perhaps linked to the previous point, SARS further pointed out that the raising fees were not compensation for the use or benefit of the loan money because the fees had to be paid before the taxpayer would receive the benefit of the loans. The court disagreed on the basis that the raising fees formed part and parcel of the compensation which the taxpayer had to give for the loans – without payment of the raising fees the taxpayer would not have had the benefit of the loan capital.

With reference to an argument by SARS that, although the raising fees were expressed as a percentage of the loans, they were not fixed with reference to the time value of money and/or the capital outstanding at any point during the term of the loans, the court held that SARS seems to appreciate that the fact that a percentage fee charged is a similarity, but in also requiring the fee to take into account the time value of money or the capital outstanding from time to time is to incorrectly elevate the meaning of "similarity" to "sameness".

SARS argued that the raising fees were consideration for arranging the loans and not for the use of the loans, but the court's take on that was that it demonstrates the close proximity or association between the raising fees and the loans and is indicative of a relevant similarity between interest and raising fees.

The fact that interest was paid periodically and raising fees once-off was held not to be a relevant dissimilarity. The court considered that the same "interest" definition was used for "hybrid interest" (which is not fixed with reference to the time value of money/ interest rate). Therefore, the fact that raising fees were once-off lump sum payments (ie, not determined with reference to the time value of money) did not make them dissimilar to "interest" (as defined). Rather, the raising fees were found to be similar to interest in that they were determined with reference to the size of the loan capital and for the benefit of the loan capital, because without the taxpayer agreeing to pay the raising fees, the taxpayer would not have obtained the finance. Consequently, the obligation to pay the raising fees was considered part and parcel of the financing agreements, similar to the obligation to pay interest on the loan capital.

For these reasons, the court concluded that the most compelling and coherent interpretation was that the raising fees in question were "interest or similar finance charges", as envisaged by section 24J(1) and that such an interpretation would "not yield an unbusinesslike and unwieldy result".

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Werksmans Attorneys

Acts and Bills

- Income Tax Act 58 of 1962: Section 24J(1) (definition of "interest").

Cases

- *Taxpayer Trust v Commissioner for the South African Revenue Service* IT 76795 (Cape Town Tax Court: 13 January 2025);
- *Commissioner, South African Revenue Service v South African Custodial Services (Pty) Ltd* [2012] (1) SA 522 (SCA);
- ITC [1963] 85 SATC 246.

Tags: raising fees; finance charges; interest; related finance charges; similar finance charges.

MINING TAX DEDUCTIONS

The Supreme Court of Appeal (SCA) has delivered a significant judgment in Sishen Iron Ore Company (Pty) Ltd v Commissioner for the South African Revenue Service *[2025], providing clarity on the deductibility of mining-related expenditures under the Income Tax Act, 1962 (the Act).*

The case addressed whether various relocation costs, legal expenses, and infrastructure expenditures incurred by Sishen Iron Ore Company (Pty) Ltd (SIOC) were deductible from its taxable income.

The judgment underscores key principles on capital vs revenue expenditure, special mining deductions, and the interpretation of section 36(11), which is critical for the mining industry and taxpayers involved in capital-intensive operations. Whilst the outcome of the case is welcomed, the SCA may have caused unnecessary confusion regarding the interplay between section 11*(a)* and section 15*(a)* read with section 36(11). This point will be looked at below.

SIOC, a major iron ore miner in the Northern Cape, operates under a mining right granted in terms of the Mineral and Petroleum Resources Development Act, 2002 (the MPRDA). The dispute with the South African Revenue Service (SARS) arose over deductions claimed for the 2012 to 2014 tax years relating to –

- the relocation of Dingleton township – a neighbouring residential area that had to be moved to comply with mining safety legislation;
- the relocation of mining-related infrastructure (Sishen Western Expansion Project (SWEP)) – essential to access ore deposits;
- legal costs associated with the relocation of Dingleton residents; and
- the relocation of a 66kV power line, which supplied electricity to mine equipment.

SARS disallowed these relocation costs, arguing that they were of a capital nature and did not qualify under the special mining deductions provisions of section 15*(a)* read with section 36(7C) and (11). In addition, SARS disallowed the legal expenditure on the basis that it was not incurred in the production of income. SARS also imposed understatement penalties and interest arising from the disallowed deductions.

"The SCA upheld SARS' disallowance of the legal costs incurred in relation to advising the Dingleton residents on relocation."

The SCA, in partially upholding SIOC's appeal and dismissing SARS' cross-appeal in part, made the following determinations:

RELOCATION OF DINGLETON AND SWEP: DEDUCTIBLE UNDER SECTION 15*(a)* READ WITH SECTION 36(11)*(e)* OF THE ACT

The relocation costs were held to be deductible under section 15*(a)* read with section 36(11)*(e)*, which allows deductions for "expenditure incurred in terms of a mining right" other than for infrastructure or environmental rehabilitation. The court found that relocation was necessary for SIOC to exercise its mining right optimally and was an integral part of the mining process. Without it, SIOC would not be able to mine the area effectively and would be in breach of its mining work programme (MWP) under the MPRDA. SARS had argued that these costs were incurred due to statutory compliance rather than for mining purposes. However, the court disagreed, dismissing SARS' "artificial" reasoning, stating that mining rights and work obligations must be viewed holistically – the relocations were required by law, but they also enabled continued mining operations. Importantly, the court clarified that the term "infrastructure" in section 36(11)*(e)* refers to infrastructure owned by the taxpayer, not third-party infrastructure. Since the relocated SWEP infrastructure remained the property of Transnet, Eskom, and other third parties, the section 36(11)*(e)* exclusion relating to infrastructure and environmental rehabilitation did not apply.

LEGAL COSTS: NOT DEDUCTIBLE UNDER SECTION 11*(c)* OF THE ACT

The SCA upheld SARS' disallowance of the legal costs incurred in relation to advising the Dingleton residents on relocation. Section 11*(c)* allows for the deduction of legal expenses only where they arise in the ordinary course of a taxpayer's trade. To better understand the court's decision one must be mindful that the legal advice was obtained by the Dingleton residents, but the legal costs were paid by SIOC. On that basis the court held that the purpose of the legal expenditure was to provide the Dingleton residents with legal advice, concluding that it was not for the benefit of SIOC, but rather for the Dingleton residents. SIOC's trade is that of mining and not to provide legal assistance to Dingleton; the expense was therefore not incurred directly, or naturally, to earn or produce SIOC's income (ie, there was an insufficient close *nexus* to the production of income in its trade). The court's conclusion and decisions are based on the fact that SIOC failed to discharge its burden of proving that the legal costs were incurred in the production of its income.

66KV POWER LINE RELOCATION: DEDUCTIBLE UNDER SECTION 36(11)*(a)* OF THE ACT

The relocation of the 66kV power line was found to be integral to the mining process, as it provided electricity to mine equipment. The court ruled that the power line qualified as "mine equipment" under section 36(11)*(a)*, thereby making the expenditure deductible. Other than stating that a wide meaning must be ascribed to the term "mine equipment", the court did not proceed to analyse and pronounce on the exact meaning of the term. This would have been valuable given the absence of recent judicial interpretation. The only useful case that has considered this term is *Union Government v Nourse Mines Ltd* [1912], which also interpreted

the term widely. Therefore, while there is agreement that the relocation of the 66kV power line qualifies as mine equipment, a more explicit judicial pronouncement on its meaning would have provided greater interpretive certainty. The court also held that even if not considered mine equipment, the expenditure would still be deductible under section 11*(a)* as an ordinary revenue expense, given that the power line had to be continuously moved to new locations as mining progressed.

UNDERSTATEMENT PENALTIES AND INTEREST SET ASIDE

The understatement penalties imposed by SARS were set aside by the tax court as being unjustified. SARS abandoned the cross appeal in respect of the understatement penalties at the hearing, therefore it was not necessary for the SCA to consider the issue of understatement penalties. The interest charged under section 89*quat*(2) on the additional tax liability was referred back to SARS for reconsideration, with the court noting that SARS must reconsider whether the tax shortfall may have arisen due to circumstances beyond SIOC's control.

THE INTERPLAY BETWEEN SECTION 11*(a)* AND SECTION 15*(a)* READ WITH SECTION 36(11) OF THE ACT

The SCA's reasoning regarding the interplay between section 11*(a)* and section 15*(a)* read with section 36(11), appears to be misconstrued and in contradiction with its own previous judgment in *Palabora Mining Company Ltd v Secretary for Inland Revenue* [1973] (confirmed by *Armgold/Harmony Freegold Joint Venture (Pty) Ltd v Commissioner, South African Revenue Service* [2012]). The SCA in the *Sishen Iron Ore Company (Pty) Ltd v Commissioner for the South African Revenue Service* [2025] case held that section 23B(3) mandates that, where both section 11*(a)* and a special deduction provision apply, the special deduction must be claimed first before considering section 11*(a)* and proceeded with its analysis on this basis. This conclusion, however, appears to be problematic for several reasons.

Section 36(11) merely ascertains the amount and scope of "capital expenditure". The actual deduction mechanism is contained in section 15*(a)*, which provides for deductions "in lieu of" certain other sections – but crucially, section 11*(a)* is not included in this list. The SCA previously in *Palabora Mining* affirmed that the existence of a capital expenditure definition under section 36(11) does not preclude the possibility of the expenditure qualifying for deduction under section 11*(a)*, and that section 15*(a)* read with section 36 does not override the application of section 11*(a)*.

The purpose of section 23B is to prohibit double deductions in circumstances where an amount may qualify as a deduction under two or more provisions of the Act. This is evident from the heading of section 23B and from the wording of section 23B(1). However, the question arises whether section 23B(3) dictates the order in which an expense must be claimed *vis-à-vis* if the expense qualifies for a deduction under section 11*(a)* as well as any other provision of the Act. It would appear that the SCA's interpretation of section 23B(3) is that this section in fact does prioritise the special deduction over the general deduction. However, it does not appear from the reading of the judgment that the SCA considered that impact of its previous decision in the *Palabora Mining* case on the interplay of section 11*(a)* with section 15*(a)* read with section 36, namely that section 15*(a)* does not override section 11*(a)*. This, it is submitted, creates an unnecessary uncertainty in terms of the ordering of deductions that qualify as a deduction under both section 11*(a)* and section 15*(a)* read with section 36.

The distinction between claiming a deduction of expenditure under section 11*(a)* versus section 15*(a)* read with section 36(11) is very important due to the differing restrictions and limitations imposed by these provisions. If expenditure is deductible under section 11*(a)*, it is not subject to the ring-fencing provisions of section 36(7E) and (7F), which limit the extent to which capital expenditure may be deducted against mining income. Conversely, if the expense is claimed under section 15*(a)* read with section 36(11), it falls outside the scope of the assessed loss limitation in section 20. The classification of an expense therefore has important implications for a taxpayer, reinforcing the necessity of correctly determining the applicable deduction provision.

A further critique of the SCA's reasoning is its acceptance that section 15*(a)* read with section 36 applies only to expenditure of a capital nature. This arguably contradicts its previous decision in the *Palabora Mining* case, which specifically held that the definition of "capital expenditure" in section 36(11) does not mean that it must be regarded as expenditure of a capital nature within the meaning of section 11*(a)*.

CONCLUSION

Whilst the SCA may have left itself open to some criticism in its reasoning as detailed above, it is submitted that the SCA came to the correct conclusion, namely that the relevant expenditure is deductible. Whether it is in terms of section 11*(a)* or section 15*(a)* read with section 36(11), it remains deductible.

Taxpayers engaged in mining operations must take cognisance of the principles laid down in this case and carefully assess how these apply to their specific circumstances. Given the court's approach to the interplay between section 11*(a)* and section 15*(a)* read with section 36(11), taxpayers must ensure that deductions are claimed in a manner that aligns with the statutory framework to maximise their tax benefits while mitigating potential disputes with SARS. A correct and strategic application of these provisions is essential to avoid unnecessary limitations on deductions and to ensure compliance with the Act.

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Acts and Bills

- Income Tax Act 58 of 1962: Sections 11*(a)* & *(c)*, 15*(a)*, 23B(1) & (3), 36(7C), (7E), (7F) & (11)*(a)* & *(e)* & 89*quat*(2);
- Mineral and Petroleum Resources Development Act 28 of 2002.

Cases

- *Union Government v Nourse Mines Ltd* [1912] TPD 924; 43 SATC 178 (ITC 1913); 80 SATC 455;
- *Palabora Mining Company Ltd v Secretary for Inland Revenue* [1973] (3) SA 819 (A); [1973] SATC 159 (A);
- *Armgold/Harmony Freegold Joint Venture (Pty) Ltd v Commissioner, South African Revenue Service* [2013] (1) SA 353 (SCA);
- *Sishen Iron Ore Company (Pty) Ltd v Commissioner for the South African Revenue Service* [2025] JDR 0933 (SCA).

Tags: mining-related expenditures; capital-intensive operations; special mining deductions provisions; understatement penalties; capital expenditure.

ENHANCED EMPLOYMENT TAX INCENTIVES

The employment tax incentive (ETI) was introduced on 1 January 2014 in terms of the Employment Tax Incentive Act, 2013, to help incentivise South African employers to employ young people and provide skills and experience to young South Africans who are unemployed and possibly discouraged from finding employment opportunities.

The incentive was originally only expected to be implemented until 1 January 2017 but has been extended so that it can be utilised up until 28 February 2029.

The ETI allows an employer to reduce their monthly employment costs by reducing the amount of the monthly PAYE due to SARS, to the extent that remuneration is being paid to qualifying employees.

The main criteria for a qualifying employee include:

- The employee needs to be older than 17 and not older than 29 years of age at the end of the month in which the employment tax incentive is claimed; or the employee can be of any age, where an employer is carrying on a trade in a special economic zone;
- The employee needs to hold a South African ID card or be in possession of an asylum seeker permit; and
- The total monthly wages of an employee must not exceed R 6 500 per month.

For each qualifying employee, an employer is able to claim an ETI deduction for a maximum of 24 months, with the incentive amount being dependent on the employee's total wages and whether the qualifying employee was employed after inception of the ETI programme on 1 October 2013.

Currently the ETI calculation formula is set out as follows:

Where an employee's monthly wages are less than R2 000, an incentive at a rate of 75% of the monthly wages will be calculated for the first 12 months and 37.5% for the second 12 months.

The maximum incentive of R1 500 for the first 12 months applies to wages between R2 000 and R4 500 with an amount of R750 being applicable to the second 12 months.

For wages from R4 500 to R6 000 for the first 12 months the incentive will be calculated as R1 500 less 75% of R4 500 less the monthly wages, with the formula being amended to an amount of R750 less 37.5% of R4 500 less the monthly wages.

In the national budget address given by the Minister of Finance on 12 March 2025, it was proposed that with effect from 1 April 2025, the above remuneration bands would be adjusted to compensate for the adjustment in the minimum wage. The ETI calculation has been adjusted so that employers will be able to claim the incentive at a rate of 60% of wages below R2 500, where such wage minimums are allowed due to existing exemptions. In addition, the maximum incentive of R1 500 applies to employees earning between R2 500 and R5 500 per month. The maximum remuneration ceiling has been increased from R6 500 to R7 500. [*Editors' note*: The proposal referred to above was confirmed in the budget address by the Minister on 21 May 2025.]

It is encouraging to see that this incentive is still being used to encourage employment within South Africa and that the incentive is being adjusted to compensate for the changes to the minimum wage. This will hopefully lead to more economic growth as skills and employment opportunities are provided to people who may otherwise have remained discouraged and marginalised.

As a secondary effect of the incentive, an employer is also motivated to remain compliant in all aspects of their tax affairs including the submission of any returns and the payment of outstanding tax debt, as the ETI can only be utilised in the months in which an employer is completely tax-compliant.

"The incentive was originally only expected to be implemented until 1 January 2017 but has been extended so that it can be utilised up until 28 February 2029."

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Acts and Bills

- Employment Tax Incentive Act 26 of 2013.

Tags: employment tax incentive (ETI); special economic zone.

POST-COMMENCEMENT TAX DEBT IN BUSINESS RESCUE

SARS' enforcement rights with respect to post-commencement tax debt in business rescue is the pertinent question that the High Court of South Africa, KwaZulu-Natal, Pietermaritzburg had to consider in the recent landmark judgment of JBSA Props (Pty) Ltd and Another v Commissioner for South African Revenue Service and Others *[2025] (10 January 2025).*

BRIEF OVERVIEW OF THE FACTS

Wilmeg Investments (Pty) Limited (Wilmeg) went into business rescue in May 2020. Wilmeg continued operating and conducting its business throughout the period during which it was in business rescue. Wilmeg generated VAT liabilities that were declared in VAT returns throughout the period that it was in business rescue, but these VAT liabilities remained unpaid to SARS (whether before or after the approval of the business rescue plan).

After Wilmeg emerged from business rescue, a dispute arose between Wilmeg and SARS when Wilmeg claimed that VAT liabilities generated during business rescue were effectively extinguished/compromised under the business rescue plan. In particular, Wilmeg contended that the effect of the adopted business rescue plan was that the claim of SARS for post-commencement VAT (ie, VAT liabilities which arose after the commencement of the business rescue proceedings) had allegedly been extinguished, "by virtue of section 152(4) of the Companies Act 71 of 2008 read with section 154".

Wilmeg contended that SARS' failure to attend the meeting of creditors and SARS' failure to vote in favour or against the business rescue plan signified its agreement and consent to the plan's terms, including the VAT treatment.

Wilmeg essentially sought an order that SARS be interdicted from pursuing the post-commencement VAT debt it claimed from Wilmeg.

SARS vehemently maintained that the business rescue plan of Wilmeg did not formally extinguish post-commencement VAT liabilities. SARS argued that it had not consented to the business rescue plan's provisions regarding its claims and had also not been consulted before the plan's approval. SARS further denied that it "acquiesced to the discharge, either in whole or in part, of the debt owing to it" by Wilmeg.

The central issue in the matter was whether Wilmeg could establish that its obligations to pay VAT generated by its trading during the course of business rescue were compromised in terms of the adopted business rescue plan.

THE RELEVANT PROVISIONS OF THE COMPANIES ACT 71 OF 2008

The cornerstone of Wilmeg's argument was section 152(4) of the Companies Act, 2008 (the Companies Act), which reads as follows:

> "A business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the company's securities, whether or not such a person –
>
> *(a)* was present at the meeting;
>
> *(b)* voted in favour of adoption of the plan; or
>
> *(c)* in the case of creditors, had proven their claims against the company."

Furthermore, Wilmeg relied on section 154 of the Companies Act, which provides as follows:

> "(1) A business rescue plan may provide that, if it is implemented in accordance with its terms and conditions, a creditor who has acceded to the discharge of the whole or part of a debt owing to that creditor will lose the right to enforce the relevant debt or part of it.
>
> (2) If a business rescue plan has been approved and implemented in accordance with this Chapter, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan."

THE COURT'S FINDINGS

At the outset, the court highlighted the crucial difference between section 154(1) and (2). Subsection (1) speaks to any debt owing to a creditor (whether pre- or post-commencement). Subsection (2) deals only with debts owed before the commencement of business rescue.

The court stated that both section 154(1) and (2) deal with the loss of a right to enforce a debt. However, the automatic loss of the right dealt with in section 154(2) is confined to pre-commencement debts. Approval of the plan brings about that all pre-commencement creditors lose the right to enforce their pre-commencement claims "except to the extent provided for in the business rescue plan". A creditor does not have to accede or agree to that outcome. It is imposed on a creditor even in the face of objection. Section 152(4) is to that effect.

On the other hand, the court emphasised that section 154(1) operates quite differently. It applies to a specific creditor who has acceded to the discharge of the whole or part of a debt owed to the creditor by the company. The scope of its operation is not confined to pre-commencement debts. Accordingly, if a creditor accedes to the discharge of the whole or part of a post-commencement debt, the business rescue plan may provide that, if it is duly implemented, the creditor will lose the right to enforce that debt or the relevant part of it.

The court held that the inevitable conclusion must be that a business rescue plan may not provide that a creditor loses the right to enforce in whole or in part a post-commencement debt if the creditor has not acceded to the discharge of that debt in whole or in part.

Importantly, the court went on to consider the interplay between sections 154 and 152(4). The court highlighted that section 152(4) deals generally with the provisions of a business rescue plan. It renders all the provisions of an approved business rescue plan binding on all creditors and all holders of the company's securities, irrespective of whether any of those persons do not support the plan. The section deals only with the enforceability of an approved plan. It says nothing about the content of a plan.

"The court concluded that there was no room for a contention that SARS tacitly acceded to the compromise of the post-commencement tax debt which had accrued."

The court went on to explain that section 154 of the Companies Act serves a different purpose. It addresses the permissible content of a plan on the crucial issue of debt enforcement. Section 154(2) allows a business rescue plan to provide for the deprivation of a creditor's right to enforce its claim (in full or in part) against a company. But this deprivation of a creditor's right to enforce a debt through the compulsion exerted by a vote in favour of a plan is expressly confined to pre-commencement debts. Otherwise, the loss of a right to enforce a debt can only be included in a business rescue plan if the affected creditor accedes to such a measure. Section 154(1) is to that effect.

The court found that such provisions, which regulate what may lawfully be made part of a business rescue plan, do not contradict the general provision of section 152(4), that an adopted business rescue plan is binding.

In the result, the court stated that a proposed business rescue plan which depends for its viability on a compromise of post-commencement debts is futile unless all the affected post-commencement creditors accede to the compromise required of them under the plan.

The court emphasised that at least some overt act must be performed by the creditor in order to convey that it accedes to the discharge of a post-commencement debt owed to it. In this case, there was no evidence of any such act, or of any verbal expression of agreement, on the part of SARS.

The court pointed out that what section 154(1) requires is that the creditor should have acceded to the discharge of the debt; not that it should have acquiesced in the discharge of the debt. The court held that there was no room for a contention that there was acquiescence in this case. Neither does section 154(1) create an obligation to express dissent. It does not provide that a creditor who fails to object shall be taken to have acquiesced in the discharge of its claim.

It was common cause that at the time that the business rescue plan was to be voted upon, Wilmeg owed a post-commencement VAT debt to SARS. Section 154(1) required SARS to accede to the compromise of that debt if it was to be rendered unenforceable and discharged in terms of the business rescue plan.

The court concluded that there was no room for a contention that SARS tacitly acceded to the compromise of the post-commencement tax debt which had accrued. SARS' failure to object to the business rescue plan did not constitute consent to waive post-commencement VAT liabilities.

The court ruled that there could in law be no compromise of the claim against Wilmeg for post-commencement VAT in circumstances where SARS neither consented to nor acceded to the discharge of its VAT claims. The court found that, on the evidence placed before it, SARS had not acceded to that compromise, and the purported compromise was therefore invalid. Wilmeg's application was accordingly dismissed, and costs were awarded in SARS' favour.

CONCLUSION

This judgment highlights key legal and practical principles regarding the treatment of tax debts during business rescue.

In particular, the judgment makes it clear that a VAT liability arising during the business rescue is not compromised in terms of an adopted business rescue plan, unless SARS has specifically acceded or consented to the discharge of its VAT claims. Without a legally binding compromise, tax debts remain enforceable, and SARS is empowered to proceed with collections on the outstanding amounts.

Notably, the court examined the important distinction between pre- and post-commencement debts. Section 154(2) automatically extinguishes pre-commencement debt, unless the business rescue plan states otherwise. However, post-commencement debts can only be compromised if the relevant creditor explicitly agrees to it under section 154(1).

This judgment underscores the limited scope of debt compromise in business rescue without creditor consent. A creditor cannot lose its right to enforce a post-commencement debt if it has not explicitly "acceded" to the discharge of that debt in whole or in part.

This judgment makes it critically clear that a company in business rescue cannot bury its head in the sand, under the guise of business rescue, to make a post commencement tax debt disappear without active engagement with and participation by SARS.

Kylene Weyers

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Acts and Bills

- Companies Act 71 of 2008: Sections 152(4) & 154(1), (2) & (4).

Cases

- *JBSA Props (Pty) Ltd and Another v Commissioner for South African Revenue Services and Others* (5009/2023P) [2025] ZAKZPHC 3; 2025 JDR 0237 (KZP) (10 January 2025).

Tags: debts owed before the commencement of business rescue; pre-commencement creditors; pre- and post-commencement debts.

SARS INTEREST RATE REDUCTIONS

TAX, VAT, FRINGE BENEFITS, LOANS, DONATIONS TAX AND DIVIDENDS TAX

It is important to remember that interest and penalties paid to SARS are not deductible expenses for income tax purposes. On the other hand, interest received from SARS is fully taxable (after deducting the current initial exemption of R23 800 per annum (R34 500 if you are 65 or older) for all local interest income earned by natural persons).

- **Income tax, provisional tax, dividends tax, etc**

Payable to SARS on short payments of all such taxes (other than VAT): 11.00% per annum with effect from 1 May 2025 (was 11.25% per annum with effect from 1 March 2025).

Payable by SARS on refunds of tax (where interest is applicable): 7.00% per annum with effect from 1 May 2025 (was 7.25% per annum with effect from 1 March 2025).

If the refund is made after a successful tax appeal or where the appeal is conceded by SARS, the interest rate is 11.00% per annum with effect from 1 May 2025 (was 11.25% per annum with effect from 1 March 2025).

- **VAT**

Payable to SARS on late payments: 11.00% per annum with effect from 1 May 2025 (was 11.25% per annum with effect from 1 March 2025).

Payable by SARS on VAT refunds after prescribed period: 11.00% per annum with effect from 1 May 2025 (was 11.25% per annum with effect from 1 March 2025).

- **Fringe benefits**

Official interest rate for loans to employees below which a deemed fringe benefit arises: 8.50 % per annum with effect from 1 February 2025 (was 8.75% per annum with effect from 1 December 2024). See below for details of historical changes.

- **Dividends tax**

Official interest rate for loans (designated in rands) to shareholders below which the interest on such loans can be deemed to be dividends on which dividends tax is payable: 8.50% per annum with effect from 1 February 2025 (was 8.75% per annum with effect from 1 December 2024). See below for details of historical changes.

- **Donations tax**

Loans to trusts by connected natural persons with interest charged at rates below the official rate create a deemed donation subject to donations tax at 20% on the interest forgone each year.

- **Penalties**

The amount of penalties for late payments (where applicable) are substantial (at least 10%) and are in addition to interest charged.

FRINGE BENEFITS, LOANS, DONATIONS TAX AND DIVIDENDS TAX – INTEREST RATES

- If inadequate interest is charged to an employee (including working directors) on loans (other than for the purpose of furthering their own studies) in excess of R3 000 from their employer (or associated institution), tax on the fringe benefit may be payable.

  Unless interest is charged at the "official" rate or greater, the employee is deemed to have received a taxable fringe benefit calculated as being the difference between the interest actually charged and the interest calculated at the "official" rate.

  For employees' tax purposes, the amount of the tax benefit must be calculated as accruing to the employee with reference to whenever interest is payable; if not regularly, then on a monthly basis for monthly paid employees, weekly for weekly paid employees, etc.

- Subject to a number of exceptions, distributions of income and capital gains from a company / close corporation are normally subject to dividends tax at the flat rate of 20%. Loans or advances to or for the benefit of a shareholder / member will be deemed to be dividends but only to the extent that interest is not charged on the loan at the "official" rate (or market-related rate in the case of foreign currency loans) and to the extent that fringe benefits tax is not payable on an interest-free (or subsidised-interest) loan where the shareholder is an employee.

  It is not the amount of the loan but the interest not charged which is deemed to be a dividend. Relevant low-interest loans are accordingly subject to dividends tax payable by the company and only in respect of the interest benefit.

- Loans to trusts by connected natural persons (or through relevant companies – preference shares can apply as well as loans) with interest charged below the official rate create a donation subject to donations tax at 20% (25% if cumulative lifetime donations of the donor amount to more than R30m) on the interest forgone each year.

- With effect from 1 March 2011, the official rate has been defined as the rate of interest equal to the South African "repo rate" plus 1%. For foreign currency loans, the rate is the equivalent of the foreign "repo rate" plus 1%. The South African repo rate currently stands at 7.5% per annum (with effect from 1 February 2025).

"The amount of penalties for late payments (where applicable) are substantial (at least 10%) and are in addition to interest charged."

THE "OFFICIAL" RATE OF INTEREST OVER THE PAST FIVE YEARS

With effect from	*Rate per annum*
1 February 2020	7.25%
1 April 2020	6.25%
1 May 2020	5.25%
1 June 2020	4.75%
1 August 2020	4.50%
1 December 2021	4.75%
1 February 2022	5.00%
1 April 2022	5.25%
1 June 2022	5.75%
1 August 2022	6.50%
1 October 2022	7.25%
1 December 2022	8.00%
1 February 2023	8.25%
1 April 2023	8.75%
1 June 2023	9.25%
1 October 2024	9.00%
1 December 2024	8.75%
1 February 2025	8.50%

Kent Karro

Crowe

Tags: deductible expenses; connected natural persons; official rate; donations tax; taxable fringe benefit; low-interest loans; preference shares; repo rate.

CONTROLLED FOREIGN COMPANIES

This article is not about the Coronation *cases on what constitutes the "primary operations" of the foreign business establishment of a controlled foreign company (CFC), other than to say that a detailed review of those cases (from the tax court [*ABCDE SA Proprietary Limited v Commissioner for the South African Revenue Service *[2021]] to the Supreme Court of Appeal [*Commissioner for the South African Revenue Service v Coronation Investment Management SA (Pty) Ltd *[2023]] and, finally, the Constitutional Court* [Coronation Investment Management SA (Pty) Limited v Commissioner for the South African Revenue Service *[2024]] illustrates how complex applying the CFC legislation can be.*

This article is rather designed to equip readers with some information that might help them not to fall into some of the other pitfalls.

The first stop on the journey is determining whether a CFC, as defined in section 9D of the Income Tax Act, 1962 (the Act), exists in the first place. This determination is fairly simple if a South African (SA) tax resident holds 100% of the equity shares and voting rights in a company incorporated and effectively managed outside South Africa, but the determination can become somewhat blurred when the position is not so clear-cut.

First, one has to be sure that the entity qualifies as a "foreign company", ie, a company (this is defined in the Act and is broader than what one understands in the narrow sense and also excludes a protected cell company) that is not SA tax resident.

According to the definition of "resident" in section 1(1) of the Act, an SA tax resident company is one that has been incorporated in South Africa or is effectively managed here, unless the company is deemed to be tax resident elsewhere by virtue of the application of a double tax agreement (DTA). Thus, even if a company was incorporated outside South Africa, it may be an SA tax resident if its place of effective management [refer to Interpretation Note 6 (Issue 3) issued by the SA Revenue Service in June 2023] is in South Africa. Assuming a DTA does not determine that the company's residence is elsewhere, an SA registered or effectively managed company will need to be registered for tax in South Africa and pay tax here on its worldwide income. The CFC definition is then irrelevant for that company.

Assuming then that the company is a foreign company, the next step in the CFC journey is to determine whether the foreign company is a "controlled foreign company" as defined in section 9D. This contemplates a company in which more than 50% of the "participation rights" (also a defined term) or more than 50% of the voting rights are, directly or indirectly, held by persons that are SA tax residents, regardless of whether they are connected.

In determining whether these requirements are satisfied for a non-SA tax resident listed company, holdings and/or voting rights of less than 5% that are held directly or indirectly by a person or jointly with connected persons, are ignored. This makes perfect sense because even if a significant percentage of the holding is by many unconnected South Africans, it would be unlikely that they would control the company.

"Participation rights" contemplate the right to participate in the benefits (not voting rights) attaching to a share *or,* where no one can be ascertained to have such benefits, the right to exercise voting rights. The benefits thus essentially contemplate rights to income and capital. This definition is important not only to determine if a CFC exists but also to determine what proportion of the "net income" of the CFC must be attributed to the SA resident holder of the participation rights.

So, let the assumption be that there is no listed or headquarter company involved. The reference to voting rights as an alternative to participation rights in the definition of CFC can mean that even where there are no participation rights, a CFC can exist. Take, for example, the situation in which equity shares (unlimited rights to income and capital) in a foreign company are held by foreign individuals or an offshore trust, but 100% of the voting rights are held by SA tax resident individuals.

Interestingly, based on the definition of CFC, the foreign company will constitute a CFC because more than 50% of the voting rights are held by SA tax resident persons.

At this point the definition of "participation rights" (in section 9D(1)) has not needed to come into play. However, when one turns to the question of what must be attributed to the SA tax resident shareholders in respect of the CFC, the participation rights become important. As indicated above, this definition determines the extent of the "net income" to attribute to the SA tax resident. Assuming that none of the exemptions or exclusions apply, the "net income" for this purpose must be determined based on what the CFC's taxable income amount would be for its financial year, using the SA tax legislation applied to the CFC's income and expenses as if the CFC is an SA tax resident under prescribed circumstances.

Applying the definition of participation rights to the example given, since there is someone with participation rights, being the offshore shareholder(s), the voting rights are not relevant to determine the SA participation rights. Hence, despite being a CFC, the holders of the voting rights are not required to attribute any of the "net income" determined for the CFC in their SA tax returns. They are also not required to provide any information to the SA Revenue Service under section 72A of the Act.

What if, in the above example, no one held any rights to the income or capital benefits or no one could be determined? This could arise when there is an entity that might fall within the definition of "company" that is tax resident offshore, but it has no shares as such, that is, no rights to income or capital. An example of such an entity might be a foundation in certain instances (this would need to be determined in each case). Then, the second part of the participation rights definition would apply, referring to voting rights. The SA residents (assume two of them each holds 50% of the voting rights) would each need to include 50% of the "net income" determined in relation to the CFC's income and expenses, in their tax returns. They would also need to complete the relevant disclosure documentation required in terms of section 72A of the Act (IT10B) for submission to the SA Revenue Service.

"Since IFRS 10 has its own criteria for determining what it considers to be control, the foreign companies that become CFCs as a consequence of this part of the definition may bear no resemblance to those that fall into the 'participation rights' or 'voting rights' requirements."

Consider another example: SA tax residents have 100% of the voting rights of the foreign company, one has 5% of the equity shares (income and capital) and another has 20%. The remaining equity shares (75%) are held by offshore shareholders. The company is a CFC per the CFC definition (as more than 50% of the voting rights are held by SA tax residents). SA tax residents also hold 25% of the participation rights. Since anyone (together with connected persons) holding less than 10% of the participation rights and less than 10% of the voting rights need not attribute any amount, it would be important to determine the voting right percentage of the 5% shareholder and also whether they are connected to any other voting or equity shareholder (either in South Africa or not) to establish if any attribution is needed.

For the 20% shareholder, the attribution percentage is clear, that is, assuming that none of the exemptions apply (eg, the foreign business establishment exemption or high-tax exemption) and that the "net income" calculation does not result in a loss, they must include 20% of the CFC's "net income", as calculated, in their taxable income.

If the shareholder of the foreign company is an SA tax resident company, before even examining the voting rights and rights to benefits in the income and capital of the CFC, the determination as to whether there is a CFC might be determined by the accountants. The final part of the definition of CFC includes in its net any foreign company where an SA tax company is required to include some or all of the foreign company's net income in its consolidated income under IFRS 10.

Since IFRS 10 has its own criteria for determining what it considers to be control, the foreign companies that become CFCs as a consequence of this part of the definition may bear no resemblance to those that fall into the "participation rights" or "voting rights" requirements.

Action 3 of the Organisation for Economic Cooperation and Development's Report on Countering Base Erosion and Profit Shifting deals with CFCs and it recommended this IFRS inclusion to ensure that companies held by offshore trusts which have domestic companies as beneficiaries can be pulled into the net if they are consolidated for accounting purposes. The amount that the SA resident company has to include in its tax return as CFC "net income" is determined with reference to the percentage of the income included in the local company's accounts for purposes of the consolidation. It is this percentage that is applied, as the "participation rights" percentage, to the "net income" amount.

This article has touched only the tip of the "iceberg" when it comes to understanding the CFC legislation in section 9D of the Act. The aim has been to demonstrate that the complexity of the provisions arises right from the start (that is, in determining whether there is a CFC, and, if so, if there are participation rights that could give rise to attribution) even before getting to the exclusions and exemptions that our case law (*Sasol (Sasol Oil Proprietary Limited v Commissioner for the South African Revenue Service* [2019]) and *Coronation*) has covered so far.

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Acts and Bills

- Income Tax Act 58 of 1962: Sections 1(1) (definition of "resident"), 9D(1) (definitions of "controlled foreign company" & "participation rights"), 10B & 72A.

Other documents:

- Interpretation Note 6 (Issue 3) *(Resident – place of effective management (companies)*);
- *Report on Countering Base Erosion and Profit Shifting* (Organisation for Economic Cooperation and Development): Action 3.

Cases

- *ABCDE SA Proprietary Limited v Commissioner for the South African Revenue Service* (24596) [2021] ZATC 19; 84 SATC 251 (17 September 2021);
- *Commissioner for the South African Revenue Service v Coronation Investment Management SA (Pty) Ltd* [2023] (3) SA 404 (SCA); (1269/2021) [2023] ZASCA 10 (07 February 2023);
- *Coronation Investment Management SA (Pty) Limited v Commissioner for the South African Revenue Service* [2024] (6) SA 310 (CC); [2024] ZACC 11;
- *Sasol Oil Proprietary Limited v Commissioner for the South African Revenue Service* [2018] ZASCA 153; 81 SATC 117 (9 November 2018); [2019] 1 All SA 106 (SCA).

Tags: primary operations; foreign business establishment; controlled foreign company (CFC); voting rights; participation rights; non-SA tax resident listed company.

CONSTITUTIONAL COURT ON SECTION 105 OF THE TAX ADMINISTRATION ACT

INTRODUCTION

In a series of recent rulings, the Constitutional Court of South Africa (CC) has addressed significant tax disputes involving the Commissioner for the South African Revenue Service (SARS) and various corporate entities.

These cases, which were heard together due to overlapping legal questions, primarily revolve around the interpretation and application of section 105 of the Tax Administration Act, 2011 (the TAA). These rulings are crucial for taxpayers and tax practitioners as they clarify certain aspects of procedural fairness, the appropriateness of declaratory relief, and the factors relevant to granting section 105 directions. The TAA, which came into force on 1 October 2012, introduced a uniform regime for objecting to and appealing assessments and decisions made by SARS. Section 105 stipulates that a taxpayer may only dispute an assessment or decision described in section 104 in proceedings under Chapter 9 unless a High Court otherwise directs. This provision ensures that tax disputes are primarily resolved in the tax court, with the High Court serving as an exception when a direction is granted. The cases under review (which were heard jointly) include *United Manganese of Kalahari (Pty) Limited, Rappa Resources (Pty) Limited, Forge Packaging (Pty) Limited, Absa Bank Limited and United Towers (Pty) Limited*, and *Lueven Metals (Pty) Limited.* The CC's judgment is cited as *United Manganese of Kalahari (Pty) Limited v Commissioner for the South African Revenue Service and four other cases (CCT 94/23; CCT 98/23; CCT 66/23; CCT 72/24; CCT 320/23)* [2025] ZACC 2 (31 March 2025). Each case involves taxpayers seeking review or declaratory relief, raising questions about whether they were entitled to pursue such relief in the High Court, having regard to section 105 of the TAA.

The CC's judgment, comprising a finding in each case based on principles outlined, provides clarity on the interpretation and application of section 105, emphasising the importance of procedural fairness, the appropriateness of declaratory relief, and the factors relevant to granting section 105 directions. This article will provide an overview of these cases, with a specific focus on the *Absa Bank* portion of the judgment. The *Absa Bank* case involved complex transactions and the application of the general anti-avoidance rules (GAAR), raising significant legal questions suitable for determination by the High Court. The article will highlight the key legal principles, the court's reasoning, and the implications for taxpayers and tax practitioners ensuring a comprehensive understanding of the recent developments in tax law.

RELEVANT PROVISIONS GOVERNING OBJECTIONS AND APPEALS

The TAA, in section 1, defines "assessment" as the determination of the amount of a tax liability or refund. There are four types of assessments identified and defined under the TAA: original, additional, reduced, and jeopardy assessments.

Section 91 of the TAA outlines that an original assessment can either be a self-assessment, where the taxpayer determines their tax liability, or a first assessment made by SARS. Furthermore, section 92 mandates that SARS must issue an additional assessment if it is satisfied that the original assessment does not reflect the correct application of tax law, thereby correcting any prejudice to SARS or the fiscus.

PROCEDURES FOR OBJECTIONS AND APPEALS

Taxpayers who are aggrieved by an assessment can object to it under section 104 of the TAA, read with rule 7 of the dispute resolution rules promulgated under section 103 of the TAA (the Rules). Rule 7 allows for objections to be lodged within 80 days after the date of assessment. Prior to the Rules being amended in March 2023, the period was 30 days after the date of assessment. SARS is then required to notify the taxpayer of the allowance or disallowance of the objection within 60 days after the objection has been lodged, or within 45 days if additional substantiating documents were requested under rule 8.

If the objection is disallowed, taxpayers have the right to appeal against the assessment under section 107. This section must be read with rule 10 of the Rules, which prescribes a 30-day period for lodging appeals following the disallowance of the objection. Depending on the amount in dispute, the appeal will be to the tax court or tax board. At appeal stage, it is also possible that SARS and the taxpayer first attempt to resolve the dispute through alternative dispute resolution. Although the TAA has been amended to allow for alternative dispute resolution at objection stage, these provisions have not yet come into effect.

The appeal must specify in detail the grounds for disputing the basis of the decision to disallow the objection.

SUMMARY OF THE CASES CONSIDERED

United Manganese of Kalahari (Pty) Limited v Commissioner for the South African Revenue Service (CCT 94/23)

In this case, United Manganese of Kalahari (UMK) challenged additional assessments issued by SARS based on transfer pricing adjustments. UMK argued that SARS should have afforded it the opportunity to comment on the "Second Thesis" (ie, a certain view taken by SARS regarding connected person relationships) before issuing the additional assessments; UMK alleged that there was procedural unfairness due to SARS' failure to issue a revised audit findings letter in terms of section 42(2)*(b)* of the TAA. UMK sought review and declaratory relief in the High Court, including a section 105 direction and a section 7(2) exemption under the Promotion of Administrative Justice Act, 2000 (PAJA). The High Court dismissed UMK's application, stating that a section 105 direction was necessary and that the alleged procedural unfairness could be addressed through the tax appeal process. The Supreme Court of Appeal (SCA) upheld the High Court's decision, emphasising that UMK had not made out a case for a section 105 direction. The CC found that UMK needed a section 105 direction to pursue the review and declaratory relief, and that the procedural issues raised could be adequately addressed through the tax appeal process.

"The CC's judgment, essentially comprising rulings in five cases, provided significant clarity on the procedural and substantive aspects of tax dispute resolution in South Africa."

Rappa Resources (Pty) Limited v Commissioner for the South African Revenue Service (CCT 98/23)

Rappa Resources sought to review additional VAT assessments issued by SARS, alleging procedural irregularities and bad faith. Rappa contended that SARS had acted irrationally and with an ulterior purpose, targeting a taxpayer with "deep pockets". Rappa also argued that the audit was conducted improperly and for an ulterior purpose to delay VAT refunds. The High Court granted Rappa's amendment to include a prayer for a section 105 direction but postponed consideration of that prayer, ruling that it should be heard together with the main review. The SCA upheld the High Court's decision, stating that Rappa had not made out a case for a section 105 direction and that the tax court could adequately address the taxpayer's concerns through its curative powers. The CC found that Rappa needed a section 105 direction to pursue the review and that the issues raised could be resolved through the tax appeal process.

Forge Packaging (Pty) Limited v Commissioner for the South African Revenue Service (CCT 66/23)

Forge Packaging challenged additional assessments related to the disallowance of deductions and the imposition of understatement penalties. Forge argued that SARS had not given adequate reasons for disallowing the assessed loss and reducing the taxable loss to nil. Forge also contended that SARS had not invited it to make representations before imposing the penalties. The High Court refused to grant a section 105 direction, striking the review from the roll and ordering Forge to pay SARS' costs. The court found that Forge's review application was premature and that the issues could be resolved through the tax appeal process. The CC upheld the High Court's decision, emphasising that the taxpayer's concerns could be addressed through the tax appeal process.

Absa Bank Limited and United Towers (Pty) Limited v Commissioner for the South African Revenue Service (CCT 72/24)

This case involved complex transactions and the application of the general anti-avoidance rules (GAAR) in sections 80A to 80L of the Income Tax Act, 1962 (the Act). Absa Bank and United Towers challenged the GAAR assessments issued by SARS, which recharacterised tax-exempt preference share dividends as taxable interest, resulting in additional tax and understatement penalties. The High Court granted a section 105 direction, finding that the legal questions raised by the taxpayers were suitable for determination by the High Court. The court's decision underscores the importance of addressing pure points of law through judicial review when appropriate. After SARS successfully appealed the High Court's decision to the SCA, the taxpayers appealed to the CC, which upheld the High Court's decision, emphasising the need to resolve complex legal questions through judicial review.

Lueven Metals (Pty) Limited v Commissioner for the South African Revenue Service (CCT 320/23)

Lueven Metals sought declaratory relief regarding the interpretation of section 11(1)*(f)* of the Value-Added Tax Act, 1991, before any assessments were issued. Lueven argued that its sales of fully refined gold bars to Absa should be zero-rated, and that the phrase "which has not undergone any manufacturing process other than" referred only to processes undertaken by the vendor. The High Court found that section 105 did not apply in the absence of an assessment and that the legal question was suitable for declaratory relief. The court dismissed Lueven's application, stating that the interpretation of section 11(1)*(f)* was not a marginal case and that declaratory relief was not warranted. The CC found that Lueven did not need a section 105 direction and that the legal question was suitable for declaratory relief.

Overview of the *Absa Bank* portion of the judgment

Background

The case of *Absa Bank Limited and United Towers (Pty) Limited v Commissioner for the South African Revenue Service* involved complex transactions and the application of the GAAR. Between 2013 and 2015, Absa concluded four subscription agreements to acquire preference shares issued by PSIC Finance 3 (RF) (Pty) Limited (PSIC3). Absa received tax-exempt dividends on these preference shares. The transactions were introduced to Absa by the Macquarie Group, and Absa concluded related agreements with entities in Macquarie, including a right to put the preference shares to Macquarie in certain circumstances and an obligation by Macquarie to make up any shortfall in Absa's anticipated returns on the shares, including any shortfall arising if the dividends were taxed contrary to expectation.

In May 2018, SARS notified Absa that it would be conducting an audit into the tax treatment of the preference shares. SARS sought information from Absa, which was provided, and also obtained information from other persons.

On 13 November 2018, SARS issued a notice in terms of section 80J of the Act (80J notice), setting out its intention to apply the GAAR and the reasons for proposed GAAR assessments for Absa's 2014 to 2018 tax years. Absa responded to the section 80J notice, but SARS disagreed with Absa's contentions and refused the request to withdraw the notice. Subsequently, SARS issued GAAR assessments, recharacterising the tax-exempt preference share dividends received by Absa as taxable interest, resulting in additional tax and understatement penalties.

High Court review

Absa sought review and declaratory relief in the High Court, challenging the GAAR assessments. The High Court held that the section 80J notices were reviewable in terms of the legality principle, while the notices of assessment were reviewable in terms of PAJA. The High Court considered whether there was a factual dispute regarding Absa's knowledge of the transactions involving PSIC4, D1 Trust, and Macquarie Bank Limited (MBL). SARS argued that it was entitled to test the veracity of Absa's claim of ignorance through discovery and cross-examination in the tax court. However, the High Court rejected this argument, stating that SARS had assessed on the basis that the tax was due despite Absa's ignorance, and it was not open to SARS to seek a chance to prove that Absa did have knowledge. On the merits, the High Court upheld Absa's argument on the alleged party error, finding that there was no factual basis to allege that Absa was anything more than an investor in preference shares and that no scheme reaching Absa was established. The High Court also accepted Absa's case on the alleged tax benefit error, applying the "but for" test to determine whether a tax liability had been avoided. The High Court granted Absa leave to pursue the review, set aside the Commissioner's refusal to withdraw the section 80J notices, set aside SARS' letters of assessment, and ordered SARS to pay costs, including the costs of two counsel.

SCA judgment

SARS appealed to the SCA, which delivered judgment on 29 September 2023. The SCA held that the section 80J notices themselves had no adverse effect or impact and were not reviewable. Regarding section 105, the SCA referred to the SCA judgment in *Rappa* and stated that the High Court could only exercise jurisdiction in exceptional circumstances. The SCA found that the High Court had not exercised its discretion properly and that the two alleged errors involved factual disputes rather than pure questions of law.

CC judgment

The CC decided that the SCA had misdirected itself in holding that the two alleged errors involved disputed facts. The CC held that the applicants were raising errors of law emerging from SARS' own statement of the facts in the section 80J notices and assessment letters. The CC confirmed that the High Court's decision to entertain the application on its merits was correct and granted leave to appeal. The remaining issues in the appeal were left for later determination, and the respondent was ordered to pay the applicant's costs of opposing the application for leave to cross-appeal.

KEY LEGAL PRINCIPLES

Section 105 of the TAA is a pivotal provision that governs the forum for disputing assessments or decisions made by SARS. Initially, section 105 stated that a taxpayer could not dispute an assessment or decision in any court or other proceedings except in proceedings under Chapter 9 or by application to the High Court for review. This was later amended to read:

> "A taxpayer may only dispute an assessment or decision as described in section 104 in proceedings under this Chapter, unless a High Court otherwise directs".

The CC judgment has provided clarity on many pertinent aspects regarding the application of section 105 of the TAA. A brief overview of some of the most important questions raised is provided below.

1. Is a section 105 direction needed for a High Court review or declaratory application?

Section 105 stipulates that a taxpayer may only dispute an assessment or decision described in section 104 in proceedings under Chapter 9, unless a High Court otherwise directs. This means that a section 105 direction is indeed necessary for a taxpayer to pursue a review or declaratory application in the High Court. The High Court's jurisdiction to entertain such applications is conditionally suspended until a section 105 direction is granted. The provision aims to ensure that disputes are primarily resolved in the tax court, with the High Court serving as an exception.

2. What is the effect of section 105 on the High Court's jurisdiction?

Section 105 conditionally suspends the High Court's jurisdiction to entertain review and declaratory applications concerning tax assessments or decisions until a direction is granted. This suspension is not an outright ouster of jurisdiction but rather a procedural requirement that must be met for the High Court to proceed with such cases. The High Court retains its pre-existing jurisdiction, but it can only exercise this jurisdiction on the merits of the case once a section 105 direction is given. This ensures that the tax court remains the primary forum for tax disputes, with the High Court intervening only in specific circumstances.

3. When and how should a section 105 direction be sought and adjudicated?

A section 105 direction should be sought at the threshold of proceedings, typically through a preliminary hearing if the coercive power of the High Court is needed before the main case is ready for hearing. This preliminary hearing should be expedited as far as possible, subject to the organisation of rolls in different Divisions of the High Court. The taxpayer must apply for the direction, and the High Court will adjudicate whether to grant it based on the appropriateness of departing from the default remedy provided by the tax court. The application for a section 105 direction can be made alongside the main application for review or declaratory relief, but it must be substantively justified.

4. What test should the High Court apply when deciding whether to grant a section 105 direction?

The test for granting a section 105 direction is whether there is justification for departing from the default remedy provided by the tax court, rather than requiring exceptional circumstances. The High Court must consider whether the departure is appropriate or whether there is good cause for the departure. This involves assessing whether the taxpayer's grievance can be adequately addressed through the tax court's processes or whether the High Court's intervention is necessary to ensure fair administrative action. The High Court has a wide discretion in making this determination, and each case will depend on its own facts.

5. What factors should the High Court consider when deciding on a section 105 direction?

The High Court should consider several factors when deciding whether to grant a section 105 direction. These include whether the taxpayer has lodged an objection to the assessment and whether the objection has been disallowed. In review cases, the process of objection serves as an internal remedy under section 7(2) of PAJA, and the High Court may decline to grant a direction if the taxpayer has not exhausted this remedy without exceptional circumstances. In declaratory cases, the High Court should assess whether the application raises a pure point of law or involves factual disputes that are better suited for the tax court. Other relevant factors include the urgency of the matter, the potential for piecemeal adjudication, and whether the taxpayer's grievance involves serious procedural irregularities or malfeasance. The High Court's discretion is procedural in nature and should be exercised judicially, considering all relevant facts and principles.

DISCRETIONARY POWERS AND JUDICIAL REVIEW

The exercise of discretionary powers by SARS is a significant aspect of tax administration and litigation. Discretionary powers may affect the content of an assessment, and taxpayers may allege procedural irregularities or unfairness in SARS' conduct preceding the issuance of an assessment. For instance, if SARS is minded to make potential adjustments of a material nature, it must give notice to the taxpayer together with the grounds of the proposed assessment, allowing the taxpayer to respond. The tax court has the authority to investigate whether the relevant component of an assessment is supported by a lawful exercise of the Commissioner's discretionary power. This function is akin to judicial review but is part of the tax court's wide appellate function. The tax court's consideration of the exercise of discretionary power is more limited than where the exercise of the power is made subject to appeal; it is confined to investigating the lawfulness of the exercise of the discretionary power.

In cases where the discretionary component of an assessment is not expressly subject to appeal, the tax court may perform a quasi-review function. The grounds of appeal in this respect are coextensive with review grounds, making it challenging for the taxpayer to persuade the High Court to grant a section 105 direction. The High Court may consider whether there is added benefit achievable in a High Court review that could not be achieved in a tax court quasi-review. The tax court's wide power of revision includes the power to determine the legality of an assessment on grounds of review, as affirmed in cases such as *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Beperk* [1985] and *South Atlantic Jazz Festival (Pty) Ltd v Commissioner, South African Revenue Service* [2015].

However, the tax court is not a court of similar status to the High Court and has not been assigned review powers as contemplated in PAJA, making it necessary to approach the High Court for certain review and declaratory applications.

CONCLUSION

The CC's judgment, essentially comprising rulings in five cases, provided significant clarity on the procedural and substantive aspects of tax dispute resolution in South Africa. These judgments underscore the importance of procedural fairness and the appropriate forum for resolving tax disputes, primarily directing such matters to the tax court unless the circumstances justify High Court intervention. The cases, each of which dealt with different underlying tax provisions aside from the section 105 direction issue, illustrate the diverse challenges taxpayers face when disputing SARS assessments. The CC has emphasised that section 105 directions are necessary for High Court reviews or declaratory applications, ensuring that the tax court remains the primary forum for tax disputes.

In particular, the *Absa Bank* case highlights the complexities involved in applying the GAAR and the necessity of addressing pure points of law through judicial review when appropriate. The CC upheld the High Court's decision to grant a section 105 direction, reinforcing the need for judicial review in cases involving intricate legal questions. Overall, these rulings provide valuable guidance for taxpayers and tax practitioners, emphasising the procedural requirements and considerations for seeking section 105 directions.

The judgments ensure that tax disputes are resolved efficiently and fairly, maintaining the integrity of the tax administration system while allowing for judicial oversight in exceptional cases.

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Acts and Bills

- Income Tax Act 58 of 1962: Sections 80A–80L (general anti-avoidance rules (GAAR): specific reference to section 80J));
- Tax Administration Act 28 of 2011: Chapter 9 (Dispute resolution – sections 101–150); specific reference to sections 1 (definitions of "additional assessment", "assessment", "jeopardy assessment", "original assessment" & "reduced assessment"), 42(2)*(b)*, 91, 92, 103, 104, 105 (*main emphasis of article is on this section*) & 107;
- Promotion of Administrative Justice Act 3 of 2000: Section 7(2);
- Value-Added Tax Act 89 of 1991: Section 11(1)*(f)*.

Other documents:

- Dispute resolution rules promulgated under section 103 of the TAA: Rules 7 & 10.

Cases

- *United Manganese of Kalahari (Pty) Limited v Commissioner for the South African Revenue Service and four other cases (CCT 94/23; CCT 98/23; CCT 66/23; CCT 72/24; CCT 320/23)* [2025] ZACC 2 (31 March 2025);

  [Note: the five cases in question are:

  - *United Manganese of Kalahari (Pty) Limited v Commissioner for the South African Revenue Service* (CCT 94/23);
  - *Rappa Resources (Pty) Limited v Commissioner for the South African Revenue Service* (CCT 98/23);
  - *Forge Packaging (Pty) Limited v Commissioner for the South African Revenue Service* (CCT 66/23);
  - *Absa Bank Limited and United Towers (Pty) Limited v Commissioner for the South African Revenue Service* (CCT 72/24); and
  - *Lueven Metals (Pty) Limited v Commissioner for the South African Revenue Service* (CCT 320/23)].
- *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Beperk* [1985] (2) SA 668 (T);
- *South Atlantic Jazz Festival (Pty) Ltd v Commissioner, South African Revenue Service* [2015] (6) SA 78 (WCC).

Tags: declaratory relief; additional VAT assessments; discretionary powers.

ENHANCED REPORTING REQUIREMENTS

The South African Revenue Service (SARS) has had trusts under a microscope since April 2023 when the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act, 2022, came into full effect.

SARS has issued stern warnings to trustees to ensure the accurate and honest submission of trust tax returns and made it abundantly clear that trustees can no longer shift the responsibility of managing a trust's tax affairs entirely to tax practitioners. Trustees must understand trust-specific tax rules to avoid penalties and legal consequences.

SARS has introduced a dedicated filing season for trusts, with the 2024 tax year spanning from 16 September 2024 to 20 January 2025. As part of SARS' additional requirements for tax returns, trustees now have to ensure that they submit three resolutions during different months to SARS for trust tax submissions.

- **First resolution:** had to accompany trust tax returns (ITR12T) and was due 20 January 2025. The ITR12T applies to trusts with more than 10 beneficiaries at any time during the year of assessment.
- **Second resolution** for trust tax returns was due at the end of February 2025. This resolution has to indicate the estimated vested percentages that have been allocated to a specific beneficiary.
- The **third resolution** for trust tax declarations, IT3(t), is due at the end of September 2025. The goal of this resolution is for the representative taxpayer of the trust to supply specific information about the amounts vested in the beneficiaries for a particular year of assessment.

It is important to note that these resolutions cannot be backdated as SARS is in the process of implementing artificial intelligence to detect backdated resolutions and determine the actual date of preparation of a resolution. This measure reinforces the need for real-time trust administration and encourages trustees to manage their trust as a separate entity on a continuous basis.

These resolutions are another mechanism employed by SARS to ensure that all trust income and distributions are accurately accounted for, to identify any inconsistencies or omissions in trust reporting and to ultimately strengthen SARS' revenue collections.

In addition to requirements of the resolutions for trust tax submissions, trusts are now required to provide comprehensive supporting documents when submitting their tax returns, including trust instruments, annual financial statements, resolutions and minutes of trustee meetings and beneficial ownership information.

Starting from April 2025, SARS is expected to start imposing administrative penalties on trusts that fail to submit income tax returns or IT3(t) third-party data returns. These penalties can be applied retrospectively, emphasising the urgency for trusts to align their systems and information with SARS' requirements. It is also important to note that failure by trustees to disclose the beneficial ownership information of the trust to both the Master of the High Court and SARS may also result in substantial penalties and/or sanctions for the trustees.

Trustees must remember to manage trust tax compliance proactively, ensuring timely and accurate submissions to both the Master of the High Court and SARS. The additional requirements implemented by SARS have enhanced regulation and emphasised the importance of transparency and accountability making it essential for trustees to familiarise themselves with these requirements. Trustees can avoid penalties and legal repercussions by taking the necessary steps to ensure they comply with the requirements set out by SARS.

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Acts and Bills

- General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act 22 of 2022.

Other documents:

- Trust tax returns (ITR12T);
- Trust tax declarations, IT3(t).

Tags: trust tax returns (ITR12T); trust tax declarations, IT3(t); real-time trust administration.

South African Institute of Taxation