Issue 87 | 2025
OCTOBER

South African Institute of Taxation

Unstructured CPD 150mins

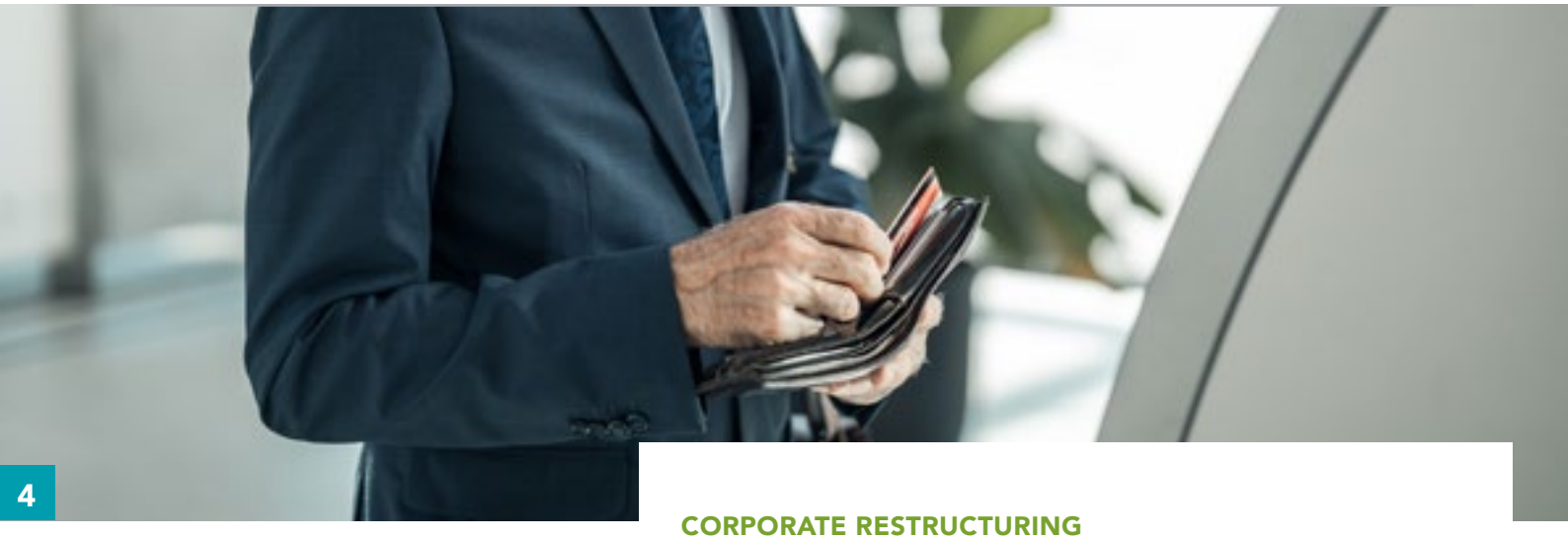
TAX CHRONICLES MONTHLY

Official Journal for the South African Tax Professional

CORPORATE RESTRUCTURING
ASSET VALUATIONS IN ASSET-FOR-SHARE TRANSACTIONS

GENERAL
EXPATS AND LUMP SUM RETIREMENT FUND WITHDRAWALS

VALUE-ADDED TAX
CRYPTO ASSET TRANSACTIONS



4

18

30

ASSET VALUATIONS IN ASSET-FOR-SHARE TRANSACTIONS

Section 24BA of the Income Tax Act, 1962 (the Act), serves as an anti-avoidance provision to address potential value-shifting arrangements as it pertains to asset-for-share transactions as defined in section 42(1) of the Act.

Section 24BA makes provision for an event where a mismatch occurs between the value of an asset acquired and the value of the shares issued as consideration for that asset. In essence, it ensures that, subject to the exclusions set out in the section, when a company acquires an asset by issuing shares, the "market value" of the asset must match the "market value" of the issued shares.

Paragraph 1 of the Eighth Schedule to the Act provides for a broad definition of an "asset", but it does not include currency as an asset. In terms of section 24BA(1), this means that the section is not applicable where shares are issued for cash. The section does, however, apply to an asset in the form of shares, which makes it applicable to share-for-share issues.

This section makes provision for two possibilities, namely:

1. When the value of the asset(s) exceeds the value of the shares received, as governed by section 24BA(3)*(a)*.

2. When the value of the shares is more than the value of the asset(s) received, as governed by section 24BA(3)*(b)*.

In terms of section 24BA(3)*(a)*, if the asset(s) transferred to the company are worth more than the value of the shares issued, the company issuing the shares is deemed to have a capital gain equal to the amount by which the value of the asset(s) exceeds the value of the shares. In addition, the person transferring the asset(s) will be required to reduce the base cost of the shares by the capital gain. By way of an example, if Mr B transferred an asset with a market value of R100.00 to Company A, and Company A issues shares to Mr B with a market value of R90.00, Company A would have a capital gain of R10, while Mr B would have had to reduce the base cost of the shares by R10.00 to R90.00.

The converse is also applicable in terms of section 24BA(3)*(b)*. If the asset(s) transferred have a lower value than the shares issued, the company issuing the shares must account for a deemed dividend *in specie* for the amount by which the value of the shares exceeds the value of the asset(s). This means that if Company A issues shares with a market value of R100.00 to Mr B, and Company A receives an asset with a market value of R90.00 from Mr B, Company A would be deemed to have declared and paid a dividend in specie of R10.00 to Mr B.

It is important to note that the asset-for-share transaction is concluded on a value-for-value basis. The provisions of section 24BA are grounded on the market value of the assets before the conclusion of the transaction and the market value of the shares issued after the conclusion of the transaction. Thus, a valuation of both the share value and the asset value is required to ensure that the requirements of section 24BA are complied with.

There are limited instances, however, where the application of section 24BA would not apply. These include instances when –

1. a company issues shares to another company in exchange for an asset, and after such issue, the two companies form part of the same group of companies; or

2. the transferor of the asset will hold all the shares in the company immediately after the acquisition; or

3. paragraph 38 of the Eighth Schedule applies to the transfer, which means that the transfer occurs between connected persons, and it is deemed to be at market value.

Section 24BA of the Act aims to circumvent the occurrence of value mismatches in asset-for-share transactions. Its operation is grounded on enforcing value equivalence, and failure to ensure that a transaction falls within the ambit of section 24BA may possibly have tax consequences.

It is therefore vital for taxpayers to consult tax advisors to guide them on the correct treatment when structuring commercial transactions and to avoid falling foul of section 24BA.

Tatum du Plessis

PH Attorneys

Acts and Bills

- Income Tax Act 58 of 1962: Sections 24BA (specific emphasis on subsections (1) & (3)*(a)* & *(b)*) & 42(1) (definition of "asset-for-share transaction"); Eighth Schedule: Paragraphs 1 (definition of "asset") & 38.

Tags: value-shifting arrangements; asset-for-share transactions; deemed dividend *in specie*.

EXPATS AND LUMP SUM RETIREMENT FUND WITHDRAWALS

Only two months into the 2026 tax year, many South Africans had again dipped into their retirement fund savings pot (Savings Pot), after also making a withdrawal in the previous six months.

Retirement fund administrators represented on the Retirement Matters Committee of the Actuarial Society of South Africa (ASSA), reported in a media release that around 75% of applications received in March and April 2025 were repeat claims.

This follows after more than 2.69 million South Africans accessed a part of their retirement savings under the two pot retirement system in the tax year ending February 2025. Experts say this is a clear indication that many are eager to lay their hands on extra cash and to do that as soon as they can.

According to the South African Revenue Service (SARS) a gross lump sum of R47 billion was paid to retirement fund members from their Savings Pot in the six months following the implementation of the two pot system on 1 September 2024. This yielded nearly R12 billion in tax revenue, which is more than double the R5 billion initially projected by National Treasury.

Under the new system, retirement fund members are allowed one withdrawal from the savings component in a tax year.

South African expatriates residing abroad are most certainly among those who withdrew money from their Savings Component, which was seeded with up to 10% of their pension fund credit as of 31 August 2024, capped at R30 000. This once-off transfer came from the funds accumulated in the vested pot up to that point.

ENCASHING ON ONE'S POLICIES AFTER CEASING TAX RESIDENCY

Before 1 March 2021 individuals could withdraw retirement interests immediately after formalising their emigration with both SARS and the South African Reserve Bank (SARB). This included pension, pension preservation, provident, provident preservation and retirement annuity funds.

Since then, the 3-year lock-in rule has applied, requiring non-resident taxpayers to maintain their non-resident status for an uninterrupted period of three years or longer before becoming eligible for early withdrawal of lump sum benefits from South Africa. [Editor's note: This right to withdraw the whole lump sum is not available for non-residents who had previously opted for a living annuity.]

"All withdrawals from the Savings Pot are taxed at the taxpayer's marginal rate."

SAVINGS POT FUNDS EXEMPT FROM LOCK-IN RULE

The good news for expatriates who still have retirement funds in South Africa, is that the lock-in rule does not apply to the money in the Savings Pot. It is immediately accessible.

One can withdraw money from the Savings Pot of all one's retirement products once in a tax year. Since 1 September 2024 retirement contributions are split into two, with one third of the contribution going to the Savings Pot and two thirds to the Retirement Pot, which is preserved until retirement.

Expats who are considering using this money, must keep in mind that it comes with tax implications, carries an administrator's withdrawal fee, and is subject to regulations on cross-border transfers.

WITHDRAWALS WILL BE TAXED

All withdrawals from the Savings Pot are taxed at the taxpayer's marginal rate. This also applies to South Africans who have formally ceased tax residency: they may have severed tax ties with SARS to protect their worldwide income from being taxed in South Africa, but they remain liable for tax on South African sourced income.

SARS said in the tax year ending February 2025 the applications for Savings Pot withdrawals received were:

- Almost 768,000 in the tax rate bracket of 0.01% to 18%;
- 642,544 in the bracket between 18.01% and 30%; and
- 640,335 in the bracket between 30.01% and 40%.

By the end of January 2025 SARS' simulated WhatsApp calculator had been used 90 283 times since implementation of the process. The two-pot retirement system calculator, part of the SARS Online Query System, assists retirement fund members with an illustrative amount of what they can possibly expect as a payout. SARS emphasises that all relevant and accurate information must be provided to get a clear estimate of the payout.

TRANSFERRING THE FUNDS ABROAD

Alexforbes said in a March 2025 media article that, in the first few days after the start of the new tax year on 1 March 2025, it had already received over 33,000 savings pot withdrawal claims from members. This highlights the fact that many South Africans are experiencing financial pressure. A previous survey done by Alexforbes showed that 80% of claimants used their Savings Pot withdrawals for debt repayment and essential living expenses. [See https://www.fanews.co.za/article/retirement/1357/general/1358/surge-of-savings-pot-withdrawals-in-new-tax-year/41164.]

After ceasing tax residency, transferring funds abroad can be complex. For instance, one's authorised dealer (bank) must verify the source of funds and non-resident taxpayers need an Approval International Transfer (AIT) PIN from SARS to transfer any funds to their overseas bank accounts.

OTHER CONSIDERATIONS WHEN CEASING TAX RESIDENCY

It is also important to note that upon ceasing tax residency one will be deemed to have disposed of one's assets at market value on the day before departing from South Africa. This may trigger a capital gains tax liability should a capital gain have been realised. This is also known as an "exit tax".

Items included in the exit tax are generally –

- foreign fixed property;
- global and local shares, unit trusts and similar investments;
- crypto assets and similar investments; and
- in certain cases, trusts.

Items excluded are generally –

- South African fixed property in one's own name;
- retirement funds (such as pension, provident, retirement annuity);
- personal use assets such as motor vehicles and furniture; and
- cash.

CONCLUSION

Despite some challenges, such as application rejections and concerns over tax burdens, the system has provided a valuable option for many individuals seeking early access to a portion of their retirement savings. As the system continues to evolve, it will be crucial to monitor its impact on long-term retirement security and financial planning for South Africans.

Those who feel that they have missed out on their annual savings withdrawal last year should consider seeking professional guidance on accessing their Savings Pot amounts to avoid any unwanted surprises from SARS.

John-Paul Fraser & Shuanita de Wet

Tax Consulting SA

Other documents

- Survey by Alexforbes: 80% of claimants used their savings pot withdrawals for debt repayment and essential living expenses.

[https://www.fanews.co.za/article/retirement/1357/general/1358/surge-of-savings-pot-withdrawals-in-new-tax-year/41164].

Tags: savings pot; two pot retirement system; lump sum benefits; retirement pot; marginal rate; tax residency; ceasing tax residency; exit tax; personal use assets.

FOREIGN-HELD IMMOVABLE PROPERTY

An analysis of the divergent treatment of foreign-held South African immovable property under the estate duty and capital gains tax regimes

INTRODUCTION

The sustained interest of non-resident individuals in acquiring high-value immovable property in the Republic of South Africa, whether for personal use or as a component of a global investment portfolio, presents a recurring and complex challenge for international tax and wealth advisors. The structuring of such acquisitions necessitates a sophisticated approach to manage exposure to the array of South African taxes that may be levied both during the holding period and upon exit or succession. This imperative has led to the widespread use of various ownership vehicles, including the holding of South African immovable property by a non-resident individual through a foreign-incorporated company, which is a prevalent and compelling strategy.

This structure, however, gives rise to a profound legislative divergence – a "Great Divide" – in its treatment under South Africa's principal fiscal statutes. On one hand, the Estate Duty Act, 1955 (the Estate Duty Act or the ED Act), as it is currently legislated, meticulously respects the integrity of the foreign corporate structure, thereby effectively sheltering the underlying immovable property from the ambit of South African estate duty upon the death of the non-resident shareholder. On the other hand, the Income Tax Act, 1962 (the Income Tax Act), through the specific and targeted mechanisms of its Eighth Schedule, systematically pierces that same corporate veil to impose capital gains tax (CGT) on any disposal, or deemed disposal, of the shares in that foreign company.

This article provides a definitive, technical analysis of this legislative anomaly. It will demonstrate that while the Estate Duty Act upholds the separate legal personality of the foreign company, the Income Tax Act adopts a substance-over-form approach, deeming an interest in the foreign company to be an interest in the underlying South African property. This analysis will dissect the precise statutory mechanics that create this divergence, explore its historical and policy context, and critically evaluate its profound implications for structuring, lifetime exit strategies, and, most importantly, the often-overlooked tax consequences that crystallise upon the death of the ultimate beneficial owner.

THE ESTATE DUTY SHELTER: UPHOLDING THE CORPORATE VEIL

The foundation for the non-applicability of South African estate duty to shares in a foreign company holding local immovable property rests on a series of precise, interlocking provisions within the Estate Duty Act. The analysis begins with the Act's core jurisdictional principles and culminates in a specific statutory exclusion that is both robust and multi-layered.

A. The principle of territoriality for non-ordinarily resident deceased

A fundamental distinction within the ED Act is drawn between individuals who are "ordinarily resident" in the Republic at the time of their death and those who are not. For persons ordinarily resident, estate duty is levied on their worldwide property. However, for individuals who are not ordinarily resident in South Africa – the focus of this analysis – the tax base is significantly narrower. Estate duty is chargeable only on their South African property. This principle of territoriality, or source-based taxation for non-residents, is a cornerstone of estate planning for foreign nationals with assets in the Republic.

"The Income Tax Act instructs SARS to do precisely what the ED Act does not: to disregard the foreign situs of the shares and to treat their disposal as a disposal of an interest in South African land for CGT purposes."

The ED Act's legislative architecture reinforces this principle. Section 3(2) provides an exceptionally broad definition of "property," encompassing "any right in or to property, movable or immovable, corporeal or incorporeal". This definition is, however, immediately and significantly qualified by a series of specific exclusions for non-ordinarily resident deceased persons, enumerated in paragraphs *(c)* through *(h)* of the same subsection. These exclusions effectively remove from the dutiable estate assets such as immovable property situated outside the Republic, movable property physically situated outside the Republic, and debts not enforceable in South African courts. This structure – a broad initial definition followed by specific territorial exclusions – places the analytical burden squarely on determining the legal location, or *situs*, of an asset for estate duty purposes.

B. A forensic examination of the asset: shares, not property

A cornerstone of this analysis, and a principle that cannot be overemphasised, is the precise characterisation of the asset owned by the deceased non-resident individual. Where a foreign company is interposed to hold the South African immovable property, the asset directly owned by the deceased shareholder is not the property itself, but the shares in that foreign company. The doctrine of separate legal personality, a fundamental tenet of corporate law, dictates that a company is a distinct legal entity, separate from its shareholders. The company owns its assets – the South African immovable property – while the shareholders own the shares, which represent their interest in the company.

Estate duty is levied on the "property of that person as at the date of his death". Consequently, the dutiable asset in the deceased's hands is their shareholding in the foreign company, not the underlying property. This distinction is paramount, as the situs rules applicable to shares differ fundamentally from those applicable to immovable property.

C. The crux of the matter: a meticulous interpretation of the section 3(2)(g) exclusion

The determination of whether shares in a foreign company constitute South African property for estate duty purposes in the hands of a non-resident deceased hinges on a meticulous interpretation of section 3(2)*(g)* of the ED Act. This provision directly addresses and excludes such shares under specific conditions, providing a powerful tool for estate planning. The analysis of this subsection proceeds along two distinct, yet complementary, interpretative paths, both of which lead to the same conclusion of being non-dutiable.

1. **Primary interpretation: the "body corporate which is not a company" test (section 3(2)*(g)*(i))**

The first and most direct route to exclusion is found in section 3(2)*(g)*(i). For a deceased who was not ordinarily resident in the Republic, the definition of "property" does not include "any stocks or shares held by him in a body corporate which is not a company". The application of this test requires satisfying two conditions. Firstly, the deceased shareholder must not have been ordinarily resident in the Republic at the date of death, a common fact pattern for these structures. Secondly, the foreign entity must qualify as a "body corporate which is not a company" for the purposes of the ED Act.

The definition of "company" in section 1(1) of the ED Act is therefore critical. It includes not only entities incorporated or registered under South African law but also any association which, although not so incorporated, "carries on business or has an office or place of business or maintains a share transfer register in the Republic". A foreign corporate entity that is structured solely to hold a personal-use asset for its shareholders and does not conduct active business, have a place of business, or maintain a share transfer register in South Africa would fail to meet this definition. It would thus be classified as a "body corporate which is not a company" under the ED Act. Consequently, its shares, when held by a non-resident deceased, are unequivocally excluded from the definition of "property" under section 3(2)*(g)*(i). The integrity of this position is therefore contingent on the passive nature of the holding structure; the intended use as a "buy & hold" personal asset is crucial to satisfying this primary test.

2. **Alternative interpretation: The "Registration of Transfer" Test (section 3(2)*(g)*(ii))**

The ED Act provides a robust fallback position should the foreign entity, for any reason, be deemed to be "a company" under the South African definition. This might occur, for example, if the use of the property were to change from personal to commercial, potentially constituting the "carrying on of business" in the Republic. In such a scenario, the analysis shifts to section 3(2)*(g)*(ii).

This subsection excludes from the definition of "property" any stocks or shares held by a non-resident deceased in "a company, provided any transfer whereby any change of ownership in such stocks or shares is recorded is not required to be registered in the Republic". The legal formalities and procedures for effecting a transfer of shares in a foreign company are governed exclusively by the laws of its jurisdiction of incorporation. The share register would be located and maintained in its jurisdiction of incorporation, not South Africa. Crucially, there is no provision in South African law that compels the registration in South Africa of a share transfer in a foreign company between two non-residents for that transfer to be legally effective. Therefore, even if the foreign entity were to be considered "a company" under the ED Act, the shares held by the non-resident deceased would still be excluded from their South African dutiable estate because the transfer of those shares upon death would not require registration in the Republic. This dual-layered statutory protection makes the exclusion particularly resilient to challenge.

D. THE LEGISLATIVE DIVERGENCE PART 1: THE CRITICAL ABSENCE OF AN ESTATE DUTY "LOOK-THROUGH"

A pivotal question is whether the South African Revenue Service (SARS) could disregard the separate legal personality of the foreign company and attribute a South African situs to the shares based on the location of the company's underlying assets. This is often referred to as a "look-through" or "substance-over-form" approach. As will be demonstrated in the subsequent section, the Income Tax Act contains explicit provisions to do precisely this for CGT purposes.

However, the ED Act currently contains no equivalent explicit "look-through" provision. The statutory tests in section 3(2)*(g)* focus entirely on the nature of the corporate body and the location of its share transfer register, not on the location or nature of its underlying assets. The general legal principle is to respect the separate legal personality of a company, and in the absence of a specific statutory provision to the contrary, the ED Act adheres to this principle. The shareholder owns the shares, and the company owns the land; the situs of each is determined independently.

This legislative position is not an oversight that has gone unnoticed. The Davis Tax Committee (DTC), in its comprehensive review of the South African estate duty system between 2015 and 2016, made numerous recommendations regarding the use of trusts, inter-spousal abatements, and the primary abatement levels. Despite this wide-ranging review and the clear precedent for a "look-through" approach in the CGT legislation, the DTC did not recommend the introduction of a similar rule for estate duty on property held in corporate structures by non-residents. This legislative inaction, despite a clear opportunity for reform, suggests that the current position is either a deliberate policy choice – perhaps to encourage foreign capital investment in fixed property – or is considered a low-priority issue for lawmakers. This lends significant stability to the current interpretation and the efficacy of the structure for estate duty planning.

THE CAPITAL GAINS TAX NET: PIERCING THE CORPORATE VEIL

In stark contrast to the deference shown to the corporate form by the ED Act, the capital gains tax regime, codified in the Eighth Schedule to the Income Tax Act, adopts the diametrically opposite approach. The legislation is specifically designed to pierce the corporate veil of foreign holding companies to ensure that gains arising from underlying South African immovable property do not escape the tax net.

> "The determination of whether shares in a foreign company constitute South African property for estate duty purposes in the hands of a non-resident deceased hinges on a meticulous interpretation of section 3(2)*(g)* of the ED Act."

A. The scope of capital gains tax for non-residents

The jurisdictional reach of South African CGT is defined in paragraph 2 of the Eighth Schedule. While residents are subject to CGT on the disposal of their worldwide assets, the liability for non-residents is, like estate duty, territorial in nature. Paragraph 2(1)(b) provides that the Eighth Schedule applies to the disposal of the following assets of a non-resident:

- Immovable property situated in the Republic, including any "interest or right of whatever nature" of that person to or in such immovable property; and
- Any asset which is attributable to a permanent establishment of that person in the Republic.

For the purposes of the structure under review, the critical element is the expansive definition of an "interest or right" in immovable property.

B. The "land-rich" doctrine: a deep dive into the deeming provision of paragraph 2(2)

The direct counterpoint to the estate duty exclusion in section 3(2)*(g)* is the deeming provision contained in paragraph 2(2) of the Eighth Schedule. This provision explicitly extends the definition of an "interest in immovable property situated in the Republic" to include shares held in certain companies, whether those companies are resident or non-resident. This provision is commonly referred to as the "land-rich" rule.

For this deeming provision to apply and for the shares in a foreign company to be treated as South African immovable property for CGT purposes, two cumulative conditions must be met:

- **The 80% Value Test:** At the time of disposal of the shares, 80% or more of the market value of those shares must be attributable, directly or indirectly, to immovable property in the Republic.
- **The 20% Holding Test:** The non-resident person disposing of the shares, whether alone or together with any connected persons, must directly or indirectly hold at least 20% of the equity shares in that company.

In the context of a foreign company whose principal asset is South African immovable property, it will unequivocally meet the "land-rich" criteria. The entire value of the company's shares will be attributable to South African immovable property, thus satisfying the 80% test, and the non-resident investors will typically hold a sufficient interest to satisfy the 20% test.

C. The legislative divergence Part 2: The explicit CGT "look-through"

This provision confirms the second half of the article's central thesis. It represents a clear and deliberate legislative design to look through the foreign corporate wrapper and tax the underlying economic gain derived from South African property. The Income Tax Act instructs SARS to do precisely what the ED Act does not: to disregard the foreign situs of the shares and to treat their disposal as a disposal of an interest in South African land for CGT purposes.

This is not an interpretive ambiguity or a matter of administrative practice; it is a targeted statutory anti-avoidance rule. Its introduction with the advent of CGT in 2001 was specifically intended to prevent the exact scenario of a non-resident holding SA property via a foreign company and then selling the shares in that company offshore, thereby realising the capital growth on the SA property without triggering any South African tax liability. The legislative schizophrenia is therefore complete: one Act respects the veil, the other systematically pierces it.

EXIT STRATEGIES AND THE INEVITABLE TAX ON DEATH

The divergent tax treatment established in the preceding sections has profound practical consequences for any exit strategy, whether undertaken during the shareholder's lifetime or occurring upon their death.

LIFETIME EXIT STRATEGIES

There are two primary ways to realise the investment during the shareholder's lifetime: a sale of the shares in the foreign company, or a sale of the property by the company itself. The choice between these options involves a trade-off between different tax rates and transactional complexities.

A critical factor is the Transfer Duty Act, 1949, which contains anti-avoidance rules for a "residential property company" – a definition that a foreign company holding a South African residential property will invariably meet. The consequence is that a sale of shares in such a company is treated as a sale of the underlying property, making the purchaser liable for transfer duty at the same rates as a direct property purchase. This neutralises a key commercial advantage of a share sale from the buyer's perspective.

From the seller's viewpoint, the tax outcomes differ significantly:

- **Share sale:** The non-resident individual shareholder is the taxpayer. The disposal of the "land-rich" shares triggers South African CGT. The gain is taxed at the individual's effective rate, which has a maximum of 18%. The purchaser must withhold 7.5% of the gross proceeds as an advance payment of this tax under section 35A of the Income Tax Act.
- **Property sale:** The foreign company is the taxpayer. The company pays tax on the capital gain at the corporate effective CGT rate of 21.6% – a higher rate than for individuals. The withholding tax rate is also higher, at 10% of the gross proceeds. A subsequent distribution of the after-tax proceeds to the non-resident shareholder would not attract South African dividends tax.

While a share sale offers a lower CGT rate for the seller, the purchaser's obligation to pay transfer duty makes them more likely to prefer a cleaner asset deal, free from the company's potential latent liabilities.

THE DEEMED DISPOSAL ON DEATH AND THE UNFUNDED LIABILITY TRAP

The most critical and often underestimated tax event is the death of a shareholder. Section 9HA of the Income Tax Act deems a person to have disposed of all their assets, subject to certain exceptions, at market value on their date of death. Since the shares in the "land-rich" foreign company are considered South African property for CGT purposes, this deemed disposal triggers an immediate CGT liability in the deceased's final tax return.

This creates a significant "unfunded liability trap." While the structure successfully avoids estate duty, the deceased's estate is now faced with a potential CGT liability (at a maximum effective rate of 18%) without any cash proceeds from an actual sale. The executor is responsible for settling this tax debt, which can create a severe liquidity challenge.

A pivotal detail that exacerbates this risk is the inapplicability of inter-spousal rollover relief. South African tax law provides for a CGT deferral when an asset is bequeathed to a surviving spouse, but this relief is explicitly conditional on the surviving spouse being a **South African tax resident**. For non-resident families, this relief is unavailable. The death of the shareholder is therefore not a deferral event but an **absolute and final** taxing point. This transforms a structure designed to avoid one tax (estate duty) into one that accelerates another (CGT), a critical planning failure if not properly anticipated and funded.

CONCLUSION: A ROBUST BUT NUANCED STRATEGY

The use of a foreign company by a non-resident to hold South African immovable property remains a statutorily sound and highly effective strategy for the mitigation of South African estate duty. This conclusion is anchored in the precise wording of the specific exclusions contained in section 3(2)(g) of the ED Act and the critical absence of any legislative "look-through" provision that would attribute the situs of the underlying property to the shares. The current legislative framework, reinforced by the lack of reform proposals from the Davis Tax Committee, provides a stable foundation for this planning.

This estate duty shelter, however, offers no protection whatsoever from South African capital gains tax. The "Great Divide" in the legislation is stark. The explicit "land-rich" provisions in the Eighth Schedule to the Income Tax Act were designed for the express purpose of piercing the corporate veil, ensuring that any lifetime disposal or, critically, any deemed disposal on death, of the shares in the foreign company will trigger a CGT liability.

The final strategic imperative for advisors and their non-resident clients is the recognition that this structure, while powerful, is not a panacea. Its successful and sustainable implementation requires a nuanced, two-pronged approach. The first prong is the careful maintenance of the foreign company's passive nature to secure the estate duty benefit. The second, and equally important, prong is to plan proactively and pragmatically for the inevitable CGT liability, particularly the unfunded liability that will crystallise on the death of a shareholder. The legislative chasm between the two tax Acts creates a valuable planning opportunity, but navigating this complex area is crucial to avoid unforeseen liabilities.

Dr Hendri Herbst

WTS Renmere

Acts and Bills

- Income Tax Act 58 of 1962: Sections 9HA & 35A; Eighth Schedule – Paragraph 2 (specific reference to subsections (1)*(b)* & (2));
- Estate Duty Act 45 of 1955: Sections 1(1) (definition of "company") & 3(2) (definition of "property" – paragraphs *(c)–(h)* (specific reference to paragraph (g)(i) & (ii));
- Transfer Duty Act 40 of 1949.

Tags: immovable property; non-resident shareholder; ordinarily resident; source-based taxation; situs rules; substance-over-form approach; foreign situs; residential property company; "land-rich" provisions.

THE ABSENCE OF A LAND-RICH SHARE CLAUSE IN TAX TREATIES

Non-residents who dispose of shares in a land-rich company may be subject to capital gains tax in South Africa, depending on the terms of any applicable tax treaty.

While most of South Africa's tax treaties include a land-rich share article granting South Africa a taxing right, not all do. This raises the question: in the absence of such an article, does South Africa still retain the taxing right, as asserted by SARS?

Under paragraph 2(1)*(b)*(i) read with paragraph 2(2) of the Eighth Schedule to the Income Tax Act, 1962 (the Act), a non-resident is required to account for a capital gain or loss on the disposal of equity shares in a land-rich company if –

- 80% or more of the market value of those shares at the time of their disposal is directly or indirectly attributable to specified immovable property assets in South Africa; and
- that person (whether alone or together with any connected person in relation to that person), directly or indirectly, holds at least 20% of the equity shares in that company.

The specified immovable property assets are –

- immovable property in South Africa;
- any interest or right of whatever nature to or in such immovable property; and
- rights to variable or fixed payments as consideration for the working of or the right to work mineral deposits, sources and other natural resources in South Africa.

A qualifying holding of such shares is treated as an interest in immovable property in South Africa for purposes of paragraph 2(1) *(b)*(i).

Paragraph 2(2) also includes ownership or a right to ownership in any other entity as well as a vested right in the assets of a trust, but for purposes of this article only equity shares will be considered.

The purchaser of such shares (whether a resident or a non-resident) is required to withhold tax under section 35A of the Act at the rates specified in that section when the amounts payable by the purchaser exceed R2 million. [See section 35A(14)*(a)*.]

Section 35A(15) defines "immovable property" for purposes of section 35A to mean

> "immovable property contemplated in paragraph 2(1)*(b)*(i) and (2) of the Eighth Schedule".

Thus, the withholding tax is potentially imposable on the disposal of shares by a non-resident seller meeting the requirements of paragraph 2(2). The non-resident seller would also need to register for income tax so that the purchaser can pay the tax to SARS using the seller's income tax reference number. Strictly speaking, the non-resident seller should submit a tax return based on the requirements of the annual public notice to submit returns. Section 35A(3)*(b)*, however, empowers SARS to issue an estimated assessment based on the tax withheld if the taxpayer does not submit an income tax return within 12 months of the end of the relevant year of assessment.

Under section 35A(2), the seller can apply for a tax directive using form NR03 that no amount or a reduced amount be withheld by the purchaser. One of the grounds for such a directive is whether the seller is subject to tax on the disposal of the immovable property.

"The definition of "immovable property" in section 35A(15), relied on by SARS, is prefaced by the words "For purposes of this section". The definition is therefore unavailable for the interpretation of the rest of the Act, including the Eighth Schedule"

[Section 35A(2)*(c)*.]

Regard must therefore be had to any applicable tax treaty to determine whether SARS has a taxing right over the disposal by a non-resident of shares contemplated in paragraph 2(2).

Article 13(4) of the OECD Model Tax Convention provides as follows:

> "4. Gains derived by a resident of a Contracting State from the alienation of shares or comparable interests, such as interests in a partnership or trust, may be taxed in the other Contracting State if, at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50 per cent of their value directly or indirectly from immovable property, as defined in Article 6, situated in that other State."

[OECD (2017), Model Tax Convention on Income and on Capital: Condensed Version 2017, OECD Publishing]

Article 6 (2) provides as follows:

> "2. The term 'immovable property' shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources; ships and aircraft shall not be regarded as immovable property."

The problem, however, is that not all South Africa's tax treaties contain an equivalent of article 13(4). An example is the tax treaty with Luxembourg. Article 13(1) of that treaty is similar to article 13(1) of the OECD Model Treaty in that it grants South Africa the right to tax a resident of Luxembourg on the alienation of immovable property as defined in article 6. Article 13(4) of the Luxembourg treaty provides as follows:

> "4. Gains from the alienation of any property other than that referred to in paragraphs 1, 2 and 3, shall be taxable only in the Contracting State of which the alienator is a resident."

Thus, a disposal of South African movable property by a resident of Luxembourg is taxable only in Luxembourg.

Section 35(1) of the Companies Act, 2008, states that shares are movable property. Similarly, section 30 of the Close Corporations Act, 1984, states that a member's interest in a close corporation is movable property. In *Cooper v Boyes NO & Another* [1994 (4) SA 521 (C) at 535], Van Zyl J stated that:

> "a share represents an interest in a company, which interest consists of a complex of personal rights which may, as an incorporeal movable entity, be negotiated or otherwise disposed of."

THE SARS VIEW

The SARS *Comprehensive Guide to Capital Gains Tax* (Issue 4) dated 22 December 2011 stated the following in paragraph 4.2:

> "Treaties such as those with Luxembourg, Mauritius and the Netherlands [*Article 13(4) of the treaties with Luxembourg and Mauritius and Article 14(4) of the treaty with the Netherlands*] provide that sales of assets other than immovable property are only taxable in the country of residence. Since shares are not 'immovable property' under South Africa's domestic law it follows that the provisions of these tax treaties will override paragraph 2(1)*(b)*."

The 1997 treaty with Mauritius was replaced on 17 June 2015. Article 13(4) of the new treaty provides as follows:

> "4. Gains derived by a resident of a Contracting State from the alienation of shares deriving more than 50 per cent of their value directly or indirectly from immovable property situated in the other Contracting State may be taxed in that other State."

SARS obtained an opinion from senior counsel that supported its view that it still had taxing rights over shares in a land-rich company even when the relevant treaty did not contain the land-rich share clause, and the Guide was amended to reflect that view.

The essence of the SARS argument [*Comprehensive Guide to Capital Gains Tax* (Issue 9) dated 5 November 2020 in paragraph 4.2] is that the words "law of the contracting state" in article 6(2) refer to the tax law of South Africa. Article 3(2) of the OECD Model Treaty states that the meaning of any term not defined in the treaty should be given the meaning it has for tax purposes, which meaning shall override any other meaning under other laws of the state concerned.

SARS argues that article 6(2) includes certain interests in immovable property such as a long lease ("rights to which the provisions of general law respecting landed property apply") and usufructs over immovable property, and so it should also include an interest in immovable property contemplated in paragraph 2(2).

SARS also relies on the definition of "immovable property" in section 35A(15), which includes paragraph 2(2).

"Article 3(2) of the OECD Model Treaty states that the meaning of any term not defined in the treaty should be given the meaning it has for tax purposes, which meaning shall override any other meaning under other laws of the state concerned."

THE COUNTER ARGUMENT

There are, however, some persuasive counterarguments to the SARS view.

In law there is a presumption against purposeless provisions in a statute, or to use the technical term, tautology. A recent example of this principle was highlighted in the *Thistle Trust v Commissioner, South African Revenue Service* [2025], where the Constitutional Court rejected the argument that section 25B(1) overrode paragraph 80(2) of the Eighth Schedule. The court stated in paragraph [55]:

> "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."

Likewise, article 13(4) must have been included in the revised tax treaty with Mauritius, and in the many other treaties negotiated since capital gains tax was introduced in 2001, for some purpose. That purpose was to secure South Africa's taxing rights over shares in land-rich companies held by non-residents.

The 1977 and 1998 issues of the OECD Model Tax Convention and Commentary stated the following on Article 13:

> "23. Certain tax laws assimilate the alienation of all or part of the shares in a company, the exclusive or main aim of which is to hold immovable property, to the alienation of such immovable property. In itself paragraph 1 does not allow that practice: a special provision in the bilateral convention can alone provide for such an assimilation. Contracting States are of course free either to include in their bilateral conventions such special provision, or to confirm expressly that the alienation of shares cannot be assimilated to the alienation of the immovable property."

In *ITC 1878* [[2015] 77 SATC 349 (J) at 364] the court noted the importance of using the OECD commentary to interpret a tax treaty when it stated the following:

> "The explanations provided in the Commentary are of immense value in understanding or interpreting any article contained in the treaty. In fact, some forty years ago, Corbett JA, (as he then was), dealing with an issue of whether a taxpayer who resided in Switzerland was liable for taxation in South Africa, drew on the Commentary on the OECD Model Tax Treaty to interpret the provisions of a treaty between South Africa and Switzerland on Double Taxation. [*Secretary for Inland Revenue v Downing* 1975 (4) SA 518 (A), 37 SATC 249 at 255.]"

Despite article 3(2) conferring preference on words defined in domestic tax legislation, the Act contains no definition of immovable property in section 1(1) or in the Eighth Schedule. It must therefore bear its ordinary meaning.

LAWSA states that immovable things

> "are things which cannot be moved from one place to another without damage or change of form".

[See CG van der Merwe "*Movables and Immovables*"]

Examples include land and buildings, growing crops and trees and minerals under the surface of the land. Other things are made immovable through registration in the deeds registry such as a lease of at least 10 years and the servitudes of usufruct, *usus* and *habitatio*.

The definition of "immovable property" in section 35A(15), relied on by SARS, is prefaced by the words "For purposes of this section". The definition is therefore unavailable for the interpretation of the rest of the Act, including the Eighth Schedule.

The opening words of paragraph 2(2) state that for purposes of paragraph 2(1)*(b)*(i)

> " 'an interest in immovable property situated in the Republic' includes any equity shares held by a person in a company ...".

Paragraph 2(1)*(b)*(i) refers to

> "immovable property situated in the Republic held by that person or any interest or right of whatever nature of that person to or in immovable property situated in the Republic ...".

One could understand the SARS argument if paragraph 2(2) stated that "immovable property situated in the Republic" includes any equity shares held by a person in a company... but it does not use those words. Even if it did, it would be questionable whether such wording would get SARS across the line. Arguably, it would require a general definition applicable to the Act as a whole.

SARS' interpretation of article 6 is also irreconcilable with the exclusion to the exit charge in section 9H(4)*(a)*, which excludes

> "immovable property situated in the Republic that is held by that person".

This exemption can only mean immovable property in the ordinary sense of the term and cannot include shares in a land-rich company.

When the Taxation Laws Amendment Act, 2012, inserted section 9H(4) in the Act, it included

> *"(b)* any interest or right of whatever nature of that person to or in immovable property situated in the Republic, including an interest in immovable property contemplated in paragraph 2(2) of the Eighth Schedule".

The above paragraph was deleted in the succeeding year by section 21 of the Taxation Laws Amendment Act, 2013, because of treaties with countries like Luxembourg. National Treasury was concerned that it would lose its taxing right when the person became a resident of such a country. Therefore, to at least have a last bite at the cherry in such an instance, it brought shares within the exit charge.

SARS' view that article 6(2) includes all types of interests in immovable property is misplaced. The examples given by SARS in its Guide of long leases and usufructs are real rights which are immovable property under the general law of South Africa. Moreover, they are specific inclusions in article 6(2). Without being mentioned among those specific inclusions, shares, which are personal rights, cannot be read in.

INTERNATIONAL DEVELOPMENTS

On 3 May 2024, the Tax Appeals Court of the Canton of Zurich [see 1 GR.2023.22] found in favour of a taxpayer involving a matter in which the tax treaty between Switzerland and Germany did not contain a land-rich share clause. [https://blogs.deloitte.ch/tax/2024/05/court-rejects-zurich-practice-to-levy-real-estate-capital-gain-tax-on-shareholders-in-germany-.html [Accessed 11 April 2025]] The decision was confirmed on 15 January 2025 by the Administrative Court of the Canton of Zurich. [SB.2024.00054] An appeal against this decision is pending before the Swiss Federal Supreme Court. [9C_144/2025]

CONCLUSION

It is submitted that SARS needs to reconsider its position as expressed in the *Comprehensive Guide to Capital Gains Tax* (Issue 9).

Duncan McAllister

Webber Wentzel

ASA June 2025 https://magazine.accountancysa.org.za/asa-june-2025/page-66

Acts and Bills

- Income Tax Act 58 of 1962: Sections 1(1), 9H(4)*(a)*, 25B(1) & 35A (specific reference to subsections (2)*(c)*, (14)*(a)* & (15) (definition of "immovable property"); Eighth Schedule: Paragraphs 2 (subparagraphs (1)*(b)*(i) & (2)) & 80 (specific emphasis on subparagraph (2));
- Taxation Laws Amendment Act 22 of 2012;
- Taxation Laws Amendment Act 31 of 2013: Section 21;
- Companies Act 71 of 2008: Section 35(1);
- Close Corporations Act 69 of 1984: Section 30.

Other documents

- Form NR03 (application for a tax directive);
- OECD Model Taxation Convention on Income and on Capital 1977: Article 13;
- OECD Model Tax Convention on Income and on Capital: Condensed Version 1998: Article 13;
- OECD Model Tax Convention on Income and on Capital: Condensed Version 2017: Articles 3(2), 6(2) & 13(1), (2), (3) & (4);
- SARS *Comprehensive Guide to Capital Gains Tax* (Issue 4) dated 22 December 2011: Paragraph 4.2;
- *Comprehensive Guide to Capital Gains Tax* (Issue 9) dated 5 November 2020: Paragraph 4.2;
- Agreement between the Government of the Republic of South Africa and the Government of the Republic of Mauritius for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income (2 July 1997): Article 13(4);
- Agreement between the Government of the Republic of South Africa and the Government of the Republic of Mauritius for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income (17 June 2015): Article 13(4);
- Convention between the Government of the Republic of South Africa and the Government of the Grand Duchy of Luxembourg for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital (6 December 2000): Article 13(4);

- Convention between the Government of the Republic of South Africa and the Kingdom of the Netherlands for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital (23 January 2009: Article 14(4);
- CG van der Merwe "*Movables and Immovables*" 27 (Second Edition Volume) LAWSA [online] (My LexisNexis: 31 January 2014) in paragraph 51.

Cases

- *ITC 1878*; [2015] 77 SATC 349 (J) at 364;
- *Cooper v Boyes NO & Another* [1994] (4) SA 521 (C) at 535;
- *Thistle Trust v Commissioner, South African Revenue Service* [2025] (1) SA 70 (CC), 87 SATC 103 paragraph [55];
- *Secretary for Inland Revenue v Downing* [1975] (4) SA 518 (A), 37 SATC 249 at 255;
- 1 GR.2023.22 (3 May 2024) (Tax Appeals Court of the Canton of Zurich) [https://blogs.deloitte.ch/tax/2024/05/court-rejects-zurich-practice-to-levy-real-estate-capital-gain-tax-on-shareholders-in-germany-.html [Accessed 11 April 2025]]
- SB.2024.00054: Confirmation of Tax Appeals Court decision (15 January 2025) by the Administrative Court of the Canton of Zurich;
- 9C_144/2025: Appeal against Zurich Administrative decision – pending before the Swiss Federal Supreme Court.

Tags: land-rich company; immovable property; withholding tax; tax directive; taxing rights.

AUTO-ASSESSMENTS

AUTO-ASSESSMENTS: FRIEND OR FOE?

It has been four years since the South African Revenue Service (SARS) first introduced auto-assessments to streamline the tax filing process. Auto-assessments are an attempt by SARS to achieve a more simplified approach to tax compliance by making it easier for taxpayers to comply with their obligations, providing clarity and certainty for taxpayers regarding their obligations, and improving and modernising their systems to offer digital and streamlined services. After just over two weeks into the 2025 personal tax filing season, SARS had auto-assessed nearly 6 million taxpayers and released R10.6 billion in refunds, with the majority paid out within 72 hours. This represents a substantial increase from the 2021 year of assessment, during which approximately 3.4 million taxpayers were auto-assessed.

Whilst the issuance of automatic assessments is a great initiative and a move in the right direction, unfortunately, the unintended results cannot be ignored. These results have dire consequences not only for taxpayers but also for the fiscus. Since the inception of auto-assessments, there have been multiple instances where auto-assessments contain incorrect and incomplete information. Previously, taxpayers could accept or reject the auto-assessment; however, these assessments are finalised without any input from taxpayers, and refunds are issued almost instantly.

WHAT HAS CHANGED SINCE 2021

Initially, auto-assessments were designed for taxpayers with straightforward financial profiles. SARS has since added several taxpayers, including provisional taxpayers. It needs to be borne in mind that these are taxpayers who receive income other than remuneration, and where PAYE has not been withheld at source. These additional sources of revenue include interest earned in investments, rental income from investment properties, and profit on the sale of assets.

Provisional taxpayers are required to make estimated tax payments during the year to ensure that any tax shortfall on their various income streams is covered promptly. This year, many provisional taxpayers who were incorrectly auto-assessed received refunds of the payments they made due to mismatched or incomplete data.

Various institutions (like banks, medical schemes, retirement funds, etc) are legally obligated to submit third-party data submissions, which contain taxpayer-related information to SARS. This information is generally pre-populated on the taxpayers' income tax returns. Data integrity is a crucial element in the issuance of auto-assessments as SARS relies on the accuracy, completeness, and consistency of the data submitted by third parties. When data is tainted, it can have a profoundly negative impact on taxpayers and SARS, especially in instances where taxpayers are auto-assessed and are unaware of it.

THE RESPONSIBILITY OF A TAXPAYER

Taxpayers are obligated to review the correctness of the auto assessments. If they disagree, they have an opportunity to submit a revised return. The cut-off date for submitting a revised return is 20 October 2025, regardless of whether a refund has been paid within 72 hours. The process to follow when the taxpayer does not agree with the auto-assessment is not the same as an objection against an assessment. These are two very different processes.

If the auto-assessment is not correct the taxpayer must proceed to submit a revised return, SARS will then issue a reduced or an additional assessment. If the taxpayer does not agree with the revised assessment, they may proceed to object to the assessment within 80 business days from the date of the issuance of the revised assessment.

In practice, many taxpayers are unaware of how to proceed with submitting a revised return or the consequences of ignoring an incorrect assessment issued in their favour. As a result, they proceed to accept the position and use the refund.

Many taxpayers are only familiar with the basic principles of tax and often assume that since they receive a salary from an employer, tax is already accounted for and withheld, so their tax affairs are in order.

> "Taxpayers are obligated to review the correctness of the auto assessments. If they disagree, they have an opportunity to submit a revised return."

COMMON CAUSES OF INCORRECT ASSESSMENTS

However, many factors can impact the correctness of an assessment that results in undue refunds. Some of the more significant factors include instances where employers used incorrect source codes on the IRP5 certificates, additional sources of income not included in third-party data submissions (such as rental income and asset sales), and instances where retirement funds have been transferred to other approved funds. SARS regards those transfers as an additional contribution to a retirement fund, for which a deduction is allowable. These may all result in undue refunds to taxpayers, which the taxpayer is not entitled to.

THE 3-YEAR RULE DOES NOT ALWAYS PROVIDE PROTECTION

Section 99 of the Tax Administration Act, 2011, prescribes that SARS may not issue an additional assessment or reassess a tax return more than 3 years after the original assessment was issued, unless certain exceptions apply. Many taxpayers are unfamiliar with this rule or its exceptions.

These exceptions include fraud, misrepresentation, or non-disclosure of material facts. As a result, where an auto-assessment is accepted and is based on incorrect or incomplete information, the 3-year prescription rule cannot apply. The result of this is that SARS can revise the assessment at any time and include penalties and interest. Stated differently, SARS may issue an auto-assessment that a taxpayer simply accepts/agrees with. SARS may then proceed to audit the (essentially its own) auto-assessment, disagree with its own assessment, and raise penalties and interest.

SARS may also impose administrative penalties on taxpayers who fail to comply with their obligations to file accurate returns. These penalties range from 5% to 200% and are in addition to the tax payable for the relevant tax period.

POTENTIAL BENEFITS OF SUBMITTING A REVISED RETURN

There are also instances where it can be beneficial for taxpayers to submit revised returns, as the auto-assessments do not always consider specific allowable deductions/allowances, for which SARS currently has no record. Examples may include additional medical expenditures and section 12B and section 12BA allowances (deductions in respect of capital allowances on machinery, implements, or equipment used to generate renewable energy).

THE WAY FORWARD FOR AUTO-ASSESSMENTS

The auto-assessment process was initially aimed at taxpayers with a basic financial position and to reduce the burden on those taxpayers to meet their tax filing obligations. There are ways to achieve the objective and lessen the unintended outcomes it currently experiences.

More focus should be on the integrity of the data and prior engagement with the taxpayers who have been identified for auto-assessments.

TO SUM UP

As can be seen, there are many factors to consider, and the incorrect result can lead to dire consequences for both taxpayers and the fiscus.

Whilst the initiative to simplify taxpayers' tax affairs is welcomed it can, in certain instances, create more difficulties and complications for the taxpayers and SARS. It may lead to further financial constraints in an already struggling economy.

Taxpayers should thus review their auto-assessments carefully and not simply accept them on face value, ensuring that a thorough review of the income tax return is undertaken.

Juanita van der Merwe

AJM

Acts and Bills

- Income Tax Act 58 of 1962: Sections 12B & 12BA;
- Tax Administration Act 28 of 2011: Section 99.

Tags: auto-assessments; revised return; additional assessment; revised assessment; administrative penalties; allowable deductions.

SARS INTERPRETATIONS NOT CAST IN STONE

The importance of applying one's mind to provisions in the tax legislation, and not simply accepting interpretations set out in publications issued by the South African Revenue Service as "cast in stone", has been highlighted in two cases.

This article looks at these cases against the status of South African Revenue Service (SARS) publications from a legal perspective.

First, it is important to understand what types of publications SARS issues.

To start, one should look at the type of documents that fall into the definition of "official publication", as set out in section 1 of the Tax Administration Act, 2011 (the TAA). These comprise binding general rulings, interpretation notes, practice notes or public notices issued by a senior SARS official or the Commissioner. The term "public notice" is also defined in section 1 to make it clear that, to qualify as such, the notice must be published in the *Government Gazette*. Documents falling within this category are important as their content qualifies as a "practice generally prevailing". This term is also defined in section 1 with reference to section 5 of the TAA, which tells us that it is a practice regarding the "application . . . of a tax Act".

A practice generally prevailing is binding on SARS, but not on the taxpayer. Thus, having set out its view on the application of a piece of legislation in a tax Act, SARS must stick to its view and is not able to change it unless the relevant law is removed or changed, the Commissioner for SARS withdraws it, or a court of law overturns or modifies the interpretation (and the case is not appealed or the finding is fact-specific or the Judge made it only as an incidental remark to the case). It is thus important, when looking at such a publication (and in fact any source that sets out an interpretation of tax law) to make sure that the law has not been amended since its issue. Such an amendment could render the views expressed no longer valid.

The legal support for the point that a practice generally prevailing is binding on SARS is because section 99(1)*(d)* of the TAA prohibits SARS from issuing an additional assessment if the original assessment was based on a practice generally prevailing. In addition, when it comes to settlement procedures SARS may not reach a settlement that would be contrary to the law or a practice generally prevailing (unless there are exceptional circumstances that justify departing therefrom). [See section 145 of the TAA.]

One may probably be questioning why binding private rulings are not included in the above list as they are also binding on SARS and not the taxpayer. Such rulings do not, however, fall within the term "official publication" as is required for a practice generally prevailing. They have their own set of rules. [See sections 75 to 90 of the TAA.] Thus, despite the fact that they are published (largely with the facts in very cryptic form) for transparency purposes, they are binding only on SARS in respect of the specific taxpayer that sought the ruling. Although it is unlikely SARS would give a different ruling if the circumstances are exactly the same, as SARS is bound to treat all taxpayers equally, SARS is not bound to apply the application of the tax Act set out in the ruling in the same manner for any other taxpayer.

No other publications issued by SARS, including non-binding private opinions, are binding on SARS. Thus, when reference is made by taxpayers to, for example, SARS Guides, including the "*Guide to Complete*" an income tax return, or "Frequently Asked Questions" (FAQs) and the suggested treatment of items therein are followed, it must be borne in mind that SARS cannot be held to those treatments, should an assessment be raised or a court of law be approached. That said, it cannot be denied that some of the technical documents are clearly very well researched and can be used as a basis when undertaking research to reach a view on the correct treatment of an item of income, expense or capital. The *CGT Guide* is a case in point.

Nevertheless, if SARS changes its mind about something reflected in any of these Guides, and updates the Guide accordingly, unlike the views set out in an official publication, it cannot be held to follow the previous view during the time that the previous version existed.

In relation to Interpretation Notes (IN), which are updated fairly regularly, it is also important to be aware that although a Draft IN may provide a new (and appealing) approach, SARS is not bound by the draft version until the word "Draft" is removed.

Critical to all of this is that taxpayers and their advisors are not bound by any of the views on the application of the tax laws set out in any of these documents (official publication or not) and it is thus critical that taxpayers and their advisors apply their mind and analytically consider the application of the law and do not simply blindly follow what the publications say.

Having done such an exercise, it is then wise to consider the status of any SARS publication that deals with the issue being examined and, if it sets out a practice generally prevailing in an official publication, as defined, and provides a better outcome for the taxpayer, there is no reason not to adopt that approach. But what if the official publication provides a less beneficial answer?

Then there are two choices: The safe (and potentially more costly) approach of following the SARS view set out in the official publication or, alternatively, following the approach the detailed research has led to. There is, of course, risk in the latter course of action because, if a court reaches a contrary view, then not only the relevant tax but also interest thereon will be payable. However, as shown in recent case law, provided the opinion has been reached on reasonable grounds, it may serve to mitigate penalties.

The Constitutional Court held in *Thistle Trust v Commissioner, South African Revenue Service* [2024] in favour of SARS on the main issue. On the matter of penalties, SARS argued that because the taxpayer had followed the view set out in an opinion from its tax advisor and not the view set out in a SARS publication, the taxpayer had not taken reasonable care when completing its tax returns and should thus be subject to penalties. Chaskalson AJ said

> "This argument is based on the proposition that no taxpayer can act reasonably on advice that differs from SARS' statements of its interpretation of tax legislation. The argument would elevate SARS to the status of an authority that can decree the only reasonable interpretations of tax legislation. It is an untenable argument." [*Thistle Trust* at paragraph 89]

The Judge referred to *Marshall NO and Others v Commissioner, South African Revenue Service* [2018] to support his contention. That case, regarding VAT, discussed the fact that the taxpayer had not followed an Interpretation Note. The Judge made it clear that the view of a body that clearly has a vested, and thus potentially biased, interest in the outcome of the interpretation cannot, without question, be simply followed by the courts.

Although a tax court case, IT 76795 (issued on 13 January 2025), does not create precedent, it also adds to the point that taxpayers and tax advisors must apply their minds. The case concerned the question of whether the raising fees incurred by the taxpayer constituted "interest or similar finance charges" for the purposes of section 24J (or alternatively section 11(a) of the Income Tax Act, 1962.

In September 2024 SARS issued a draft IN ("*Meaning of 'Similar Finance Charges'*"), in which it comprehensively discusses interest and raising fees and concludes:

> "Consequently, a raising fee, as described above, is not a similar finance charge and will not constitute 'interest' as defined under paragraph *(a)*. It will therefore not qualify for a deduction under section 24J(2)".

SARS posed many of the arguments set out in the draft IN during the tax court case. Ultimately, the Judge, AJ Myburgh, found the taxpayer's argument to have merit and found in its favour. SARS will likely need to revisit its draft IN and consider the facts of IT 76795 against its discussion in the draft IN and its conclusion. It is not clear whether SARS will appeal the case but, either way, the lesson is clear: a taxpayer would be wise not to simply follow SARS publications without considering the facts of its own case.

It is very possible that taxpayers with deadlines to submit tax returns in November or December 2024 would not, based on the September 2024 draft IN, have claimed a deduction for raising fees they have incurred and would thus have paid tax on those amounts, even though, as in this tax court case, that might not be what the law requires.

Just to be clear, though, this article is not advocating that taxpayers and tax advisors ignore all SARS publications, merely that they do not simply follow them mindlessly. Once a view has been reached, if it differs from SARS' view, a decision has to be made: Follow the SARS view which, if from a current official publication, will assure no resistance from SARS because it is bound by its view (a risk-free choice) or take the advisor's view, knowing that there could be a long and costly dispute, but that, at the end of the day, the savings could be significant and the correct principle established. It is all about understanding all the options and making a choice.

ASA May 2025 (https://magazine.accountancysa.org.za/asa-may-2025/page-64)

Adjunct Associate Professor Deborah Tickle

AActs and Bills

- Income Tax Act 58 of 1962: Sections 11*(a)* & 24J (specific reference to subsection (2));
- Tax Administration Act 28 of 2011: Sections 1 (definitions of "public notice" & "practice generally prevailing"), 5, 75 to 90 (Advance Rulings), 99(1)*(d)* & 145.
- Other documents
- SARS' *Comprehensive Guide to the ITR12 Income Tax Return for Individuals*;
- SARS' F*requently Asked Questions (FAQs)*;
- SARS' *Comprehensive Guide to Capital Gains Tax* (Issue 9) (dated 5 November 2020);
- Draft Interpretation Note issued by SARS in September 2024 ("*Meaning of 'Similar Finance Charges'*").

Cases

- *Thistle Trust v Commissioner, South African Revenue Service* [2024] ZACC 19. [2025] (1) SA 70 (CC);
- *Marshall NO and Others v Commissioner, South African Revenue Service* [2018] ZACC 11; [2018] (7) BCLR 830 (CC); 2019 (6) SA 246 (CC));
- *IT 76795* (issued on 13 January 2025).

Tags: official publication; public notice; practice generally prevailing; raising fees.

SARS TO SUPPLY REASONS FOR ASSESSMENTS – CDH

A taxpayer's ability to challenge an assessment issued by the South African Revenue Service (SARS) stems from the fundamental rights to just administrative action and access to courts.

These rights are protected and enforced through the provisions of the Tax Administration Act, 2011 (the TAA), which provide a structured framework for objections and appeals. A key component of this framework is Rule 6 of the rules promulgated under section 103 of the TAA, which empowers taxpayers to request reasons for an assessment prior to lodging an objection.

The effectiveness of the mechanism in Rule 6 hinges on the quality and adequacy of the reasons provided by SARS. Clear and sufficient reasons are essential for enabling taxpayers to understand the basis of an assessment and to formulate a meaningful objection.

On 23 May 2025, the tax court handed down judgment in the case of *BCJ v Commissioner for the South African Revenue Service* [2025]. The judgment addresses critical aspects of SARS' obligations under Rule 6. Specifically, the tax court was required to consider whether the reasons furnished in response to the taxpayer's request for reasons were adequate, in the context of SARS' conclusion that a series of transactions had triggered the General Anti-Avoidance Rules (GAAR) under the Income Tax Act, 1962 (the Act).

BACKGROUND TO THE DISPUTE

On 22 June 2023, SARS issued a letter of findings (LOF) to the taxpayer in respect of the 2020 year of assessment, together with a notice in terms of section 80J, pertaining to a series of transactions including, *inter alia*, the sale of shares and the realisation of a capital gain. Section 80J requires SARS to notify a taxpayer of its intention to invoke the GAAR and to provide the taxpayer an opportunity to respond. In the LOF, SARS set out the application of the GAAR as an alternative basis of the assessment. It is the focus on the GAAR that brought into question the scope of Rule 6, particularly in relation to the standard required from SARS when providing reasons for an assessment.

In the LOF, SARS identified several indicators from the transactions that formed the basis for its conclusion that the impugned transactions resulted in the avoidance of dividends tax or capital gains tax. The indicators cited by SARS include round-trip financing, non-arm's length dealings, offsetting or cancelling elements and a lack of commercial substance, among others. Consequently, SARS concluded that the transactions constituted an "impermissible avoidance arrangement" in terms of sections 80A and 80L of the Act.

In response to the LOF and the section 80J notice, the taxpayer outlined its grounds for disputing SARS' intention to invoke the GAAR, indicating, *inter alia*, that SARS appeared to have applied the criteria applicable to an arrangement concluded in a business context, without demonstrating how the arrangement in question had occurred in a business context. It is important to note that section 80A distinguishes between avoidance arrangements entered into in the context of business and those occurring in a context other than business.

SARS issued a finalisation of audit letter (FOAL) and a notice of assessment (NOA) on 20 November 2023, for the capital gain from the sale of shares. Again, SARS did not demonstrate how the arrangement occurred in the context of business.

The taxpayer then formally requested reasons from SARS under Rule 6 as to why it had accepted that the arrangement was concluded in the context of business. When SARS subsequently responded, the taxpayer was not satisfied.

On 22 March 2024, the taxpayer instituted proceedings in the tax court to compel SARS to provide adequate reasons, specifically regarding SARS' position that the arrangement was concluded within a business context. The taxpayer argued that the reasons furnished by SARS were insufficient and did not meet the standard required by Rule 6.

THE TAX COURT'S FINDINGS

The court held that the reasons furnished by SARS enabled the taxpayer to understand why SARS alleged the existence of an arrangement that yielded a tax benefit and lacked commercial substance. However, when specifically requested to provide reasons for its conclusion that the arrangement occurred in a business context, SARS instead reiterated its reasons for concluding that the arrangement lacked commercial substance. This, the court held, was not the issue SARS was asked to provide reasons for.

The court held that SARS would have had to make a preliminary determination that the arrangement occurred within a business context before concluding that it lacked commercial substance. As such, SARS' failure to provide the specific reasons requested by the taxpayer constituted a failure to comply with its obligations under Rule 6.

Ultimately the court found that the reasons provided by SARS were inadequate as they failed to address why SARS accepted that the arrangement occurred within a business context. The court ordered SARS to properly respond to the taxpayer's request for reasons in respect of the assessment issued for the 2020 tax year, within 10 days of the order.

GETTING TO THE BOTTOM OF A TAX ASSESSMENT

Taxpayers must be aware of their rights when engaging with SARS, especially the right to request reasons for an assessment. This raises a critical question: what exactly qualifies as "adequate reasons"? Before exploring the issue of adequate reasons, it is essential to revisit the purpose of Rule 6 and its critical role in safeguarding taxpayers during the dispute resolution process.

Rule 6 enables an aggrieved taxpayer to request that SARS provide reasons for an assessment prior to lodging an objection. The request must be submitted within 30 business days from the date of assessment and SARS may, upon request, grant an extension of up to 45 business days. If SARS determines that adequate reasons have not already been provided (such as in the grounds of assessment), it is obliged to respond within 45 business days of receiving the request. SARS may extend the period to respond by another 45 business days on notice to the taxpayer.

The rule is designed to ensure that taxpayers can prepare a well-informed and comprehensive objection to an assessment by SARS. Without adequate reasons, a taxpayer is left to speculate, which undermines the fairness and effectiveness of the dispute resolution process.

Furthermore, the *SARS Guide on Dispute Resolution* notes that the important effect of the request for reasons is that a taxpayer is not required to lodge an objection until SARS has provided a response.

What then are adequate reasons? The tax court in the *BCJ* judgment provided some guidelines as to what would constitute adequate reasons, including that –

- they must constitute more than just mere conclusions; and
- not only should SARS inform the taxpayer of its decision, but also of the reasons for its decision in a simple manner which does not require the taxpayer to speculate or assume the reasons.

In assessing the adequacy of the reasons provided by SARS, the tax court referenced several precedents. Notably, it referenced the case of the *Commissioner for the South African Revenue Service v Sprigg Investment 117 CC t/a Global Investment* [2010], where the Supreme Court of Appeal (SCA) was similarly tasked with evaluating whether SARS had furnished sufficient reasons in response to a taxpayer's challenge. The SCA in Sprigg, in turn cited with approval the SCA judgment in *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd* [2003], which itself drew on principles developed by the Federal Court of Australia. From that jurisprudence, key criteria for evaluating the sufficiency of reasons were extracted, aptly described as the "*Phambili test*" by the SCA. These criteria include:

- The decision maker must explain their decision in a way which will enable an aggrieved person to say:

  "even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision involved an unwarranted finding of fact, or an error of law, which is worth challenging";

- the decision maker should set out their understanding of the relevant law, any findings of fact on which their conclusions depend, especially facts in dispute and reasoning which led them to those conclusions; and
- the decision maker must provide reasons using clear and unambiguous language, avoiding vague generalities or the formal language used in legislation.

From the above criteria, it is clear that adequate reasons must go far beyond a mere statement of conclusions. The taxpayer must be placed in a position to meaningfully assess whether the decision involves a misapplication of the law or an unwarranted finding of fact.

In essence, the *Phambil*i test reinforces the principle of procedural fairness and the importance of administrative accountability in tax assessments. It affirms that the right to request reasons under Rule 6 is not a mere formality, but a safeguard that enables taxpayers to exercise their rights effectively.

If a taxpayer is not satisfied with the reasons provided by SARS, they may apply to the tax court for an order compelling SARS to furnish reasons within a timeframe determined by the court.

However, while this right is a valuable procedural safeguard, it must be exercised responsibly and not misused. In the Sprigg case, for example, the SCA found that SARS had already provided adequate reasons and that the taxpayer's application was merely a delaying tactic as there was no reason why the taxpayer was unable to formulate its objection.

It is also important to distinguish between a statement of grounds for an assessment as required under section 96(2)*(a)* of the TAA, and the reasons for an assessment. This distinction is highlighted in *SARS' Guide on Dispute Resolution*, which notes that grounds for a decision are generally not as extensive as reasons for a decision. The distinction is important because a taxpayer only acquires the right to request reasons under Rule 6 when they are aggrieved by the assessment. Requiring SARS to provide adequate reasons for every adverse decision would be administratively burdensome.

CONCLUSION

Taxpayers, whether individuals or corporates, must be vigilant in reviewing any assessments issued by SARS and should not hesitate to invoke their right under Rule 6 to request reasons where the basis of an assessment is unclear.

SARS is not only required to state what it has decided, but also why. Especially in complex matters involving anti-avoidance provisions like the GAAR, taxpayers must be equipped with sufficient information to understand the legal and factual foundation of SARS' conclusions. Without this, the ability to lodge a meaningful objection is compromised.

Taxpayers should carefully review any letters of findings or notices of assessment; request reasons promptly if the rationale is unclear or incomplete; and be mindful of deadlines for submitting requests for reasons and objections.

"Any uncorrected issues may lead to SARS imposing penalties and interest in a period where VAT output has potentially been underdeclared or where VAT input has been overclaimed."

Naomi Mudyiwa & Heinrich Louw

Cliffe Dekker Hofmeyr

AActs and Bills

- Income Tax Act 58 of 1962: Sections 80A to 80L (specific reference to sections 80A, 80J & 80L);
- Tax Administration Act 28 of 2011: Sections 96(2)*(a)* & 103.

Other documents

- Rules promulgated under section 103 of the Tax Administration Act (Dispute Resolution Rules): Rule 6;
- General Anti-Avoidance Rules (GAAR) under Part IIA of Chapter III (sections 80A to 80L) of the Income Tax Act 58 of 1962;
- Section 80J notice;
- Finalisation of audit letter (FOAL) issued by SARS;
- Letter of findings (LOF) issued by SARS;
- Notice of assessment (NOA) issued by SARS;
- SARS' Dispute Resolution Guide (*Guide on the Rules promulgated in terms of section 103 of the Tax Administration Act, 2011*) (3rd Issue: 23 May 2023).

Cases

- *BCJ v Commissioner for the South African Revenue Service* (2024/8) [2025] ZATC 7 (23 May 2025);
- *Commissioner, South African Revenue Service v Sprigg Investment 117 CC t/a Global Investment* [2010] 73 SATC 114; [2011] (4) SA 551 (SCA) (1 December 2010);
- *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd* [2003] (6) SA 407 (SCA).

Tags: just administrative action; General Anti-Avoidance Rules (GAAR); letter of findings (LOF); impermissible avoidance arrangement; finalisation of audit letter (FOAL).

THE STATUS OF THE TAX COURT

Considerable uncertainty has arisen about the status of the tax court.

Despite the name and the nature of its presiding officers, unlike other specialist "courts" established by Parliament to consider matters in specific areas of law, recent judgments have commented that the tax court is currently neither a court of law nor a judicial tribunal, but rather functions as an administrative tribunal. In light of the debatable justification for this state of affairs, this article posits that it may be worth reconsidering the composition and function of the tax court.

BACKGROUND

A number of specialist "courts" have been established by Parliament to consider matters in specific areas of law. These include the Competition Appeal Court, the Electoral Court, the Labour Court, the Land Court and the tax court. On a related note, the Johannesburg High Court in April 2025 decided to pilot a dedicated insolvency court.

Most of these specialist "courts" have equivalent status and powers to the High Court, except the tax court, which has been described in recent judgments as an administrative tribunal falling outside the judicial system. Typically, these specialist courts have specialised judges with extensive experience in the relevant field of law, whereas the tax court has High Court judges seconded to it who do not always necessarily have specific experience in tax law (or even commercial law) matters.

Several key issues and challenges have arisen lately regarding the status of the tax court. Below those key issues are highlighted and the question is raised as to whether it is time to undertake an investigation into the efficacy of the tax court, with a view to potential reforms to bring it in line with best practice. Reforms may also assist in clarifying certain issues which have arisen, thereby ensuring that the tax court is fit for purpose. The history of the establishment of the tax court (and other specialist courts) is key as it may reveal why certain positions have recently been adopted and clarify the purpose of the structure of the tax court.

CASE LAW

In *Poulter v The Commissioner for the South African Revenue Service* [2024], the High Court considered several factors to determine whether the tax court constitutes a court of law. The context for the case was a dispute as to whether the taxpayer's father, a layperson, could represent his daughter in proceedings before the tax court.

In the case, Binns-Ward J analysed various characteristics of the tax court, such as (i) its lack of an inherent power to regulate its own proceedings, (ii) the fact that tax court decisions are determinative only of a specific taxpayer's liability in a given case and do not create general binding precedent, and (iii) the fact that (according to the reasoning in the judgment) the tax court is established by proclamation by the President instead of an Act of Parliament, as contemplated in section 166*(e)* of the Constitution. In light of these factors, the learned judge arrived at the conclusion that the function of the tax court is essentially that of an administrative tribunal and "court of revision" rather than a "court of law", albeit one with all the trappings of a court in the judicial sense. This led to a finding that the provisions of the Legal Practice Act, 2014, governing the appearance of laypersons as representatives in courts of law were not applicable to the tax court.

This judgment has found some criticism on various grounds. One such ground is the questionable accuracy of the statement (in the judgment) that it is "very unusual in the context of tax disputes" for a dispute to involve a question of law exclusively (rather than being mixed with questions of fact). Another ground is a possible flaw in the learned judge's interpretation of section 116 of the Tax Administration Act, 2011 (the TAA), as meaning that the tax court is not established or recognised by an Act of Parliament – despite sections 116 to 132 of the TAA setting out in detail how the tax court is established and should function.

In *United Manganese of Kalahari (Pty) Limited v Commissioner of the South African Revenue Service and Four Other Cases* [2025], the main issue was the correct test to be applied when a taxpayer seeks a direction in terms of section 105 of the TAA to deviate from the default forum for disputing an assessment or decision. The Constitutional Court stated that the tax court is not a superior court with inherent jurisdiction.

In particular, Rogers J stated in the judgment that the tax court is neither a "court" nor a "tribunal" as contemplated in section 33(3)*(a)* of the Constitution, read with the definitions of "court" and "tribunal" in the Promotion of Administrative Justice Act, 2000 (PAJA). However, the question was expressly left open as to whether it is correct that, constitutionally, the tax court is not a "court" as contemplated in section 166*(e)* read with section 170 of the Constitution. These issues are important in the context of, among other things, whether a tax court can entertain a PAJA review.

It is evident, therefore, that there is currently a level of uncertainty in relation to the jurisdiction, status, operating procedures and purpose of the tax court.

HISTORY AND STATUTORY FRAMEWORK OF THE SPECIALIST COURTS

To help understand how South Africa's court system has arrived at the current position, it is useful to consider the history of the establishment of the tax court, and the specialist courts in general.

"Another ground is a possible flaw in the learned judge's interpretation of section 116 of the Tax Administration Act, 2011 (the TAA), as meaning that the tax court is not established or recognised by an Act of Parliament – despite sections 116 to 132 of the TAA setting out in detail how the tax court is established and should function"

South Africa's court system has undergone substantial development over the years, particularly with respect to the structure and jurisdiction of the superior courts. As already mentioned, related to this is the creation of various specialist "courts" in terms of specific legislation, such as the Labour Court and Labour Appeal Court in terms of the Labour Relations Act, 1995 (the LRA), the Competition Appeal Court in terms of the Competition Act, 1998, the Land Claims Court in terms of the Restitution of Land Rights Act, 1994 (now the Land Court in terms of the Land Court Act, 2023), the Electoral Court in terms of the Electoral Commission Act, 1996, and the tax court previously in terms of section 83 of the Income Tax Act, 1962 (the Act) but now in terms of the TAA.

Between 2003 and 2012, various iterations of Superior Courts Bills and Constitution Amendment Bills were drafted and circulated for deliberation and consultation with interested parties. The aim of this process and the draft legislation included **rationalising** the court structure and legislation and providing a uniform framework for the judicial administration of judicial functions of courts. The future of specialist courts was a major point of discussion, with the initial drafts of these bills proposing to bring these courts into the fold of the unified High Court as "Special Divisions". Some common critiques against dedicated specialist courts were that they could lead to **forum shopping** and/or were not cost-effective.

At the time of drafting the Superior Courts Bill, 2010, it was intended for the tax court to become similar in status to the High Court, as was the case with the other specialist courts. Alternatively, the drafters may have considered this to be the case already. In this regard, the Memorandum on the Objects of the (draft) Superior Courts Bill, 2010, referred to the incorporation of:

> **"[E]xisting specialist courts that are similar in status to the High Court** (namely the Competition Appeals Court, Electoral Court, Tax Court, Labour Court, and Land Claims Court), into the High Court of South Africa as Special Divisions of the Court."

A document compiled by Parliament's Research Unit and shared during deliberations on the Superior Courts Bill, 2011, further stated that "[t]he Special Income Tax Courts sit within divisions of the High Court".

However, the proposed integration of the specialist courts into the High Court was controversial, particularly in the realm of labour matters, and concerns were raised about a potential loss of skills and of the speedy resolution of specialised disputes. This proposal was later omitted, with the Memorandum on the Objects of the Superior Courts Bill, 2011, noting that this was done "[o]n consideration of the comments received, and particularly as a result of further consultation with the Heads of the Superior Courts". It is not altogether clear whether there was an appreciation of the impact of this omission on the future status of the tax court, as the only "existing specialist court", the establishing legislation of which did not explicitly confer High Court equivalent status. When the TAA was introduced, it repealed but substantially reproduced section 83 of the Act – perhaps a missed opportunity to clarify the position.

COMMENTS

Whatever the correct view of the current status of the tax court is, the question remains as to whether there is an opportunity for an investigation into and potential reform of the tax court system, including its composition, status and jurisdiction. For example, it appears somewhat contradictory and inefficient for a tax court, which consists of at least one High Court judge, assisted by two non-judicial members, to serve as an administrative tribunal only. If the tax court is to remain, there may essentially be three alternatives to consider: retaining the *status quo*, ie, an unusual marriage of an administrative tribunal and a court, making it a High Court equivalent, or embracing its administrative tribunal role.

With the first alternative, it is worth considering updating the nomenclature and certain of the processes of the tax court to clarify whether the tax court is in fact a "court" in terms of section 166*(e)* of the Constitution, albeit not on the same level as the other specialist courts.

With the second alternative, Parliament could make the tax court a court of law with equivalent status to the High Court, with its own specialised judges. Tax court decisions on general questions of law could then create binding precedent, rather than being binding only on the parties and carrying persuasive value. It would then also avoid debates as to whether it has inherent jurisdiction to hear a PAJA review, thereby avoiding some of the complications in the *United Manganese* case. There is perhaps a challenge in reclassifying the tax court as a superior court with inherent powers while retaining the current general constraints against publicity of the identities of taxpayers, but this challenge should not be insurmountable.

With the third alternative, the tax court could become more like the Taxation Review Authority (TRA) in New Zealand, where a TRA is presided over by a specialist tax practitioner (who does not need to be a judge) appointed by the Governor-General. In fact, predecessors of the current South African tax court, namely the Special Court established under section 58 of the Income Tax Act 40 of 1925 and section 79 of the Income Tax Act 31 of 1941, also originally provided that the "court" would be presided over by an advocate of the equivalent of the High Court rather than a judge. A return to such a composition, to align with the tax court's administrative tribunal status, could be accompanied by a simplification of the Tax Court Rules and process, which would hopefully yield more efficient resolution of tax disputes and free up judicial resources for other matters.

However, each alternative should be considered with reference to whether the existing tax board's jurisdiction should rather be extended to involve a greater scope, thereby freeing up resources in the tax court for more complex, higher value matters.

The precise alternative to be adopted, if any, is a matter that requires detailed deliberation. There is no simple solution and answer to what is a vexed, yet important, question. In the interim, it would certainly be useful to get clarity in the legislation in relation to some of the more pressing issues.

"In *Poulter v The Commissioner for the South African Revenue Service* [2024], the High Court considered several factors to determine whether the tax court constitutes a court of law."

Jerome Brink & Theodore Pauw

Cliffe Dekker Hofmeyr

Acts and Bills

- Income Tax Act 58 of 1962: Section 83;
- Tax Administration Act 28 of 2011: Sections 105 & 116–132 (specific emphasis on section 116);
- Constitution of the Republic of South Africa, 1996: Sections 33(3)*(a)*, 166*(e)* & 170;
- Promotion of Administrative Justice Act 3 of 2000 (PAJA): Section 1 (definitions of "court" and "tribunal");
- Income Tax Act 40 of 1925: Section 58;
- Income Tax Act 31 of 1941: Section 79;
- Labour Relations Act 66 of 1995;
- Competition Act 89 of 1998;
- Restitution of Land Rights Act 22 of 1994;
- Land Court Act 6 of 2023;
- Electoral Commission Act 51 of 1996;
- (Draft) Superior Courts Bill, 2010;
- Superior Courts Bill 7 of 2011.

Other documents

- Memorandum on the Objects of the (draft) Superior Courts Bill, 2010;
- Memorandum on the Objects of the Superior Courts Bill 7 of 2011.

Cases

- *Poulter v The Commissioner for the South African Revenue Service* [2024] 86 SATC 415; (A88/2023) [2024] ZAWCHC 97; 86 SATC 415 (2 April 2024);
- *United Manganese of Kalahari (Pty) Limited v Commissioner of the South African Revenue Service and Four Other cases* [CCT94/23; CCT 98/23; CCT 66/23; CCT 72/23 & CCT 320/23]; [2025] (5) BCLR 530 (CC).

Tags: court of law; judicial tribunal; administrative tribunal; court of revision.

UNDERSTATEMENT PENALTIES

The annual draft tax bills circulated for comment by the National Treasury and the South African Revenue Service (SARS) in August 2025 contain contentious proposed amendments to the understatement penalty (USP) regime.

The effect will allow the "*bona fide* inadvertent error" defence to avoid any USP only where the prejudice results in a "substantial understatement" – an objective test based on the calculated tax shortfall to SARS.

This article examines the practical implications of these proposed amendments in the draft Tax Administration Laws Amendment Bill, 2025 (draft TALAB), in light of recent case law.

THE USP REGIME

The gateway to the USP regime is the existence of an "understatement", a broadly defined term in section 221 of the Tax Administration Act, 2011 (the TAA). The broad definition means that almost any error on a tax return, regardless of its magnitude or the taxpayer's intent, can technically be an understatement and result in a USP.

The current wording of section 222(1) provides that a *bona fide* inadvertent error is a complete defence against the imposition of any USP. However, the term "*bona fide* inadvertent error" is not defined anywhere in the TAA.

SARS, in its *Guide to Understatement Penalties* (Issue 2), expresses the narrow view that:

"... it seems likely that the only errors that may fall within the *bona fide* inadvertent class are typographical mistakes – but only properly involuntary ones."

Taxpayers have argued for a broader interpretation that encompasses honest mistakes of law made in good faith. This has given rise to important judgments by the Constitutional Court (CC) and Supreme Court of Appeal (SCA), which challenge SARS' narrow interpretation of the meaning of "*bona fide* inadvertent error".

These cases have not always resulted in a win for the taxpayer on the tax positions taken, but they establish a judicial trend towards protecting taxpayers who act in good faith and who rely on professional advice. These cases form the critical backdrop to understanding the proposed amendments in the draft TALAB.

CSARS V CORONATION INVESTMENT MANAGEMENT SA (PTY) LTD [2023]

Although the taxpayer won on the merits of the case at the CC, the SCA's reasoning on USP and the meaning of *bona fide* inadvertent error remains good law.

Despite finding against Coronation on the technical tax issue, the SCA set aside the 10% "substantial understatement" USP that SARS had imposed. Coronation argued that it relied on an opinion from a leading tax expert, but it did not disclose the contents of the opinion to SARS as the opinion was protected under legal privilege.

The SCA confirmed that a taxpayer can consciously and deliberately adopt a specific tax position based on professional advice, be proven wrong on the law, and still not be liable for USP because their actions were not taken in bad faith. The SCA concluded that Coronation had submitted its tax returns with the genuine *bona fide* belief that its interpretation of the foreign business establishment exemption was correct. The SCA's reasoning directly contradicted SARS' narrow view that a deliberate (ie, non-accidental) choice of tax position can never be an "inadvertent" error.

The SCA also rejected SARS' attempt to draw a negative inference from Coronation's refusal to disclose its legal opinion. The SCA held that it was not incumbent on the taxpayer to waive its legal privilege. To conclude that the opinion was unfavourable was "simply speculative" and insufficient to attribute bad faith by the taxpayer.

THE THISTLE TRUST V CSARS [2024]

In the *Thistle Trust* case, the CC found against the taxpayer on the tax issue but rejected the 50% USP imposed by SARS. The CC established the principle that relying on a reasoned opinion from senior counsel (as the taxpayer did) provides "reasonable grounds" for a tax position, even if the advice is ultimately held to be incorrect in court.

SARS argued that if the taxpayer had taken reasonable care in completing its returns, it would have ignored the legal advice received from senior counsel and instead adopted the SARS interpretation.

The CC held that the SARS argument is based on the:

"... proposition that no taxpayer can act reasonably on advice that differs from SARS' statements of its interpretation of tax legislation. The argument would elevate SARS to the status of an authority that can decree the only reasonable interpretations of tax legislation. It is an untenable argument."

The CC further confirmed that SARS bears the burden of proving the facts that justify the imposition of a USP. SARS cannot simply assert that a taxpayer lacked reasonable grounds – it must present evidence to prove it.

Although the CC acknowledged the public importance of defining the meaning of a *bona fide* inadvertent error, the CC declined to set down guidelines because there was no reasoned judgment on the issue from the preceding courts and SARS had no sustainable case for imposing the 50% USP.

This judicial restraint left the legislative ambiguity of the meaning of *bona fide* inadvertent error unresolved. The proposed amendments in the draft TALAB now seek to resolve that ambiguity.

PROPOSED AMENDMENTS IN DRAFT TALAB

Currently, the *bona fide* inadvertent error defence is a general exclusion which applies to any understatement. The proposed amendments intend for the defence to be delinked from taxpayer behaviour and available when the taxpayer's conduct results in a "substantial understatement", an objective calculation. This would nullify the core USP-related principles drawn from the *Coronation* and *Thistle Trust* judgments.

A "substantial understatement" is defined as one where the resulting prejudice to SARS or the fiscus exceeds the greater of (i) 5% of the amount of tax properly chargeable or refundable under the relevant tax statute for the relevant period, or (ii) R1 000 000. The issues in dispute when challenging any USP in additional assessments will shift from arguing about the nature of the error (inadvertent or deliberate) to proving the quality of the taxpayer conduct (reasonable or unreasonable).

SARS bears the burden of proving the behaviours relied on for the USP. The tax opinion will become a critical piece of evidence as it would be relied on to prove that even if the tax position adopted was wrong, it was arrived at through a diligent and reasonable process that justifies reducing the USP.

Joon Chong

Webber Wentzel

Acts and Bills

- Tax Administration Act 28 of 2011: Sections 221 (definition of "understatement") & 222;
- draft Tax Administration Laws Amendment Bill, 2025.

Other documents

- SARS' *Guide to Understatement Penalties* (Issue 2) (18 April 2018).

Cases

- *Commissioner, South African Revenue Service v Coronation Investment Management SA (Pty) Ltd* [2023] ZASCA 10 (7 February 2023); [2023] (3) SA 404 (SCA);
- *Thistle Trust v Commissioner, South African Revenue Service* [2024] ZACC 19 (2 October 2024); [2025] (1) SA 70 (CC); 87 SATC 103.

Tags: understatement penalty (USP); *bona fide* inadvertent error; substantial understatement.

TRANSFER PRICING LITIGATION

The Western Cape Tax Court's recent ruling in Commissioner for the South African Revenue Service v Taxpayer SC (Pty) Ltd (case 45840) signals a potentially transformative phase for transfer pricing (TP) disputes.

This case may embolden the South African Revenue Service (SARS) to adopt a more assertive approach to TP assessments and litigation, particularly where complex structures and offshore intellectual property (IP) are involved.

CASE OVERVIEW

The case concerned SC, a South Africa-based food retailer, which received remuneration for activities performed for SIL, a related party in Mauritius. Under the franchise agreements with non-South African subsidiaries, SIL was contractually responsible for trademarks, know-how, and related intangibles.

SARS audited SC for the 2015 and 2016 tax years and concluded that SC was, in fact, responsible for the strategies driving the group's expansion into the African market. SARS found that SC determined standards for developing marketing intangibles in non-South African jurisdictions and that SIL's role was largely administrative – limited to signing franchise agreements drafted and vetted by SC employees.

As a result, SARS adjusted SC's taxable income, determining that the remuneration received fell below the arm's-length range under the comparable uncontrolled price (CUP) method. The adjustment added R118.3 million in 2015 and R162.3 million in 2016. SC appealed the assessment, arguing that the CUP method was "defective and inapplicable".

Following SC's submission of its appeal, SARS filed its statement of grounds of assessment and opposition and subsequently produced an expert report authored by Dr Maning. SC objected to the inclusion of this report, arguing that it not only failed to support the grounds of assessment originally advanced by SARS but appeared to contradict them. On this basis, SC contended that the report had no proper place in the appeal as framed and should be withdrawn.

SARS, in response, applied to amend its Rule 31 statement to incorporate a reference to Dr Maning's report. It argued that the report provided an additional, alternative method for determining arm's length compensation, reinforcing – rather than replacing – its original assessment. Conversely, SC maintained that the amendment would amount to a substantive change to the factual foundation of the assessment, effectively requiring SARS to issue revised assessments.

The tax court dismissed SC's appeal.

SUBSTANCE OVER FORM

While the court did not evaluate which TP method was appropriate, the ruling has notable implications. It permits SARS to amend its Rule 31 statement to introduce another method, despite initially relying on the CUP method. This sets a precedent for SARS to pivot between methodologies during litigation, provided that the underlying facts remain unchanged.

Importantly, SARS prioritised economic substance over contractual form, aligning with the functional analysis of how intangibles are developed, maintained and exploited. Despite SIL's legal ownership of the IP, SARS focused on the actual functions performed by SC in South Africa.

"In essence, Rule 52 is a request for leniency, while Rule 56 is a demand for compliance. The two serve distinct procedural purposes."

STRATEGIC IMPLICATIONS FOR TAXPAYERS

The judgment affirms SARS' authority to amend its approach during disputes. This flexibility underscores the importance for taxpayers to be prepared for alternative transfer pricing methodologies being raised in the course of a dispute. Rather than focusing solely on defending their current methodology, taxpayers may need to consider the implications of other potential approaches to ensure a comprehensive response. SARS is also scrutinising offshore IP ownership structures more closely, with Mauritius's low-tax environment drawing particular attention. This reflects a strategic focus on high-value, IP-driven transactions, which, despite their complexity, may deliver significant adjustments for SARS.

THE ROAD AHEAD

TP litigation in South Africa is "here to stay." Increased SARS funding and a more dynamic approach to TP assessments suggest further disputes are on the horizon.

This case reinforces that TP is as much an art as it is a science. Different experts can reasonably adopt different views on arm's-length pricing, and those debates are likely to intensify.

For South African taxpayers, the case underscores the need for robust TP documentation, proactive risk assessments, and close monitoring of offshore IP structures. As SARS adopts a more assertive, substance-driven approach, early engagement and strong technical defences will be essential.

KEY LESSONS FOR TAXPAYERS

- Expect increased scrutiny on IP structures, particularly those involving low-tax jurisdictions such as Mauritius.
- Prepare for methodological challenges: SARS may adopt different TP approaches during disputes, so defence documentation should anticipate multiple methods.
- Focus on substance: Ensure that intercompany arrangements accurately reflect the actual functions, risks, and assets of each entity.
- Strengthen defences early: Proactive engagement, thorough TP documentation, and readiness for litigation are now essential for managing risk.

"SARS audited SC for the 2015 and 2016 tax years and concluded that SC was, in fact, responsible for the strategies driving the group's expansion into the African market."

Marcus Stelloh

BDO

AOther documents

- Expert report authored by Dr Maning (submitted by SARS in Taxpayer SC's case);
- Rule 31 statement.

Cases

- *Commissioner for the South African Revenue Service v Taxpayer SC (Pty) Ltd* (case 45840) [2025] ZATC 8 (15 April 2025).

Tags: offshore intellectual property; uncontrolled price (CUP) method; revised assessments; alternative transfer pricing methodologies; arm's-length pricing.

CRYPTO ASSET TRANSACTIONS

The Value-Added Tax Act, 1991 (the VAT Act), regards certain activities pertaining to cryptocurrency as financial services. But what if the supply involves a crypto asset and not cryptocurrency?

WHAT'S CURRENCY GOT TO DO WITH IT?

Crypto assets are not currently recognised as legal tender by the South African Reserve Bank and cannot be classified as money for VAT purposes. Crypto assets are a digital representation of value.

The crypto landscape has more to offer than just cryptocurrency. The difference between cryptocurrency and crypto assets lies in the scope of the two terms. Cryptocurrency is an example of one type of crypto asset. Crypto assets are a digital representation of value or medium of exchange and also include stablecoins, non-fungible tokens (NTFs), central bank digital currencies (CBDCs), and security tokens.

IT'S ALL ABOUT CHARACTER

In the absence of specific provisions in the VAT Act, the normal rules will apply. This will require the vendor to understand the nature and function of the crypto asset, and the role of the vendor.

According to the Intergovernmental Fintech Working Group (IFWG), crypto assets can be classified as:

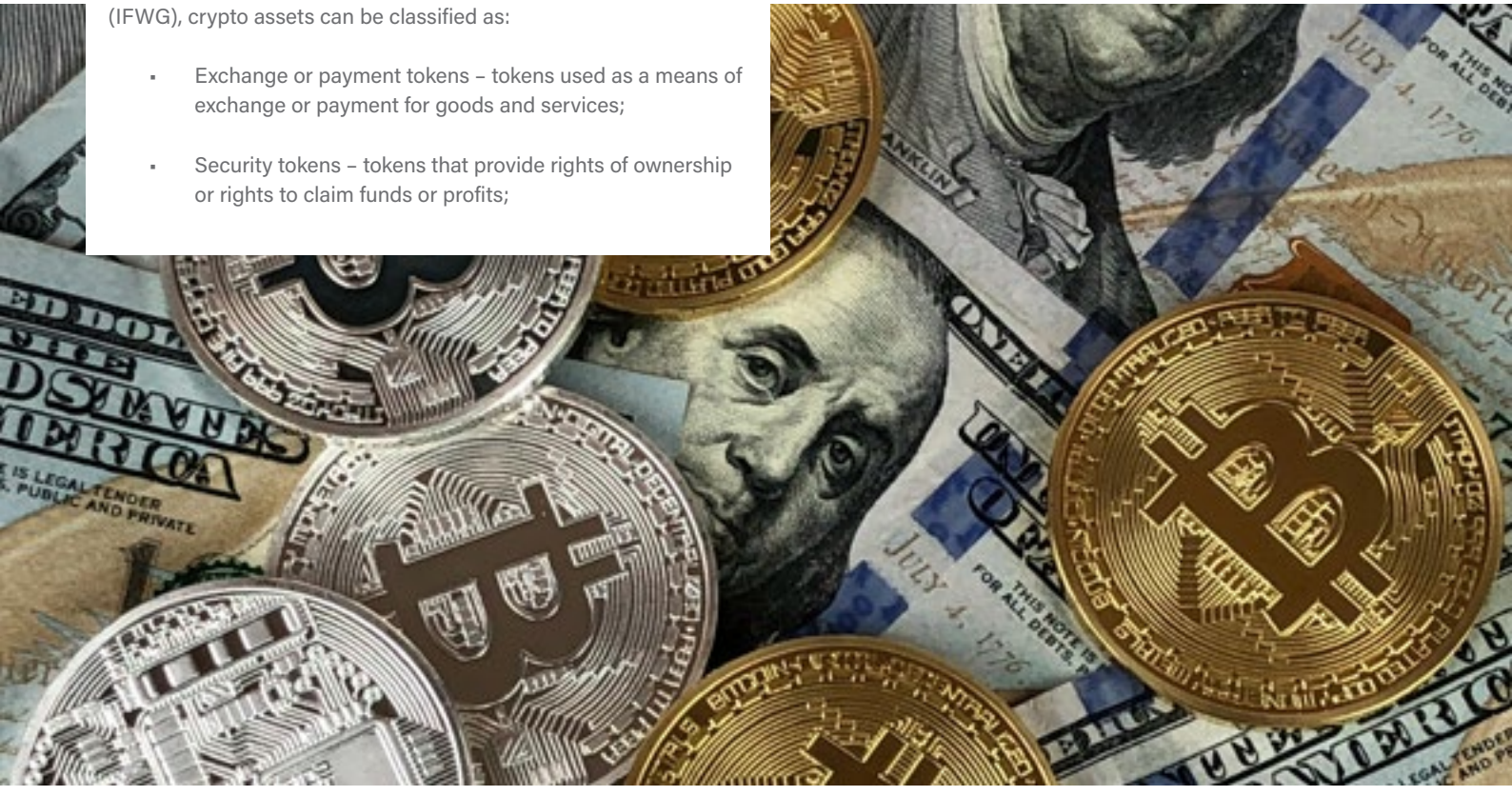
- Exchange or payment tokens – tokens used as a means of exchange or payment for goods and services;
- Security tokens – tokens that provide rights of ownership or rights to claim funds or profits;
- Asset-backed tokens – the value of the token is determined by the value of underlying assets such as commodities; and
- Utility tokens – tokens that can be redeemed to access a specific product or service.

[see IFWG. 2021. *Position paper on crypto assets*]

The role that vendors play in a crypto asset transaction can include providing access to an online asset trading platform, providing services related to trading, conversion or exchange of crypto assets into fiat currency (ie, normal currency) or other crypto assets and *vice versa*, as well as acting as a payment partner.

NOW WHAT?

The charging section (section 7 of the VAT Act) requires output tax to be imposed on the supply of goods or services in the course or furtherance of any enterprise carried on by a vendor. Output tax should be imposed at the standard rate of VAT (currently 15%), unless one of the zero-rating provisions of section 11 of the VAT Act applies. Exempt supplies, such as the supply of financial services, are excluded from the charging section as exempt supplies are not part of a VAT enterprise.



"To determine the VAT treatment of the activities carried on in respect of crypto assets, the terms and conditions of the contractual agreement between the service provider and the customer is of significance."

With effect from 1 April 2019, the VAT Act has regarded certain activities pertaining to cryptocurrency as financial services (see section 1(1) (definition of "financial services") and section 2 of the VAT Act).

Notably, the VAT Act only includes the issue, acquisition, collection, buying or selling or transfer of ownership of ***cryptocurrency*** as "financial services". The supply of "financial services" by a vendor constitutes an ***exempt supply***. However, if the consideration payable in respect of the ***cryptocurrency*** activities is any fee, commission, merchant's discount or similar charge, the services are not regarded as financial services and will be a ***taxable supply of services***.

The VAT Act is silent on the implications of the supply of other forms of crypto assets. Due to the lack of global or domestic guidance regarding the exact nature of crypto assets, there is currently no uniform accounting and tax (including VAT) treatment prescribed in a number of countries.

To determine the VAT treatment of the activities carried on in respect of crypto assets, the terms and conditions of the contractual agreement between the service provider and the customer is of significance.

AGREE AND DO NOT DISAGREE

Vendors should carefully consider the description of the services to be provided, as well as the consideration to be charged for these services. When describing the services, it is best to consider each activity in the supply chain.

Example

Where a vendor usually only accepts fiat money as payment for goods supplied, but allows a specific customer to settle the purchase price with crypto assets, the activities in the supply chain would be as follows:

1. The vendor supplies goods to a customer.
2. The customer pays for the goods by transferring crypto assets.
3. The vendor accepts the crypto assets as payment, and converts the crypto assets into fiat money.

The potential VAT consequences of the above activities are:

1. The vendor is required to impose output tax at the standard rate on the supply of the goods.
2. The transfer of the crypto assets could be financial services if the crypto assets consist of cryptocurrency. If not, the nature of the crypto assets should be considered in more detail to determine if there is a possible taxable supply.
3. Potentially, the vendor could be said to be providing crypto-to-fiat conversion services, which could be argued to be the making of a taxable supply of services by the vendor. Output tax, would, however, only be imposed (assuming the parties are not connected) where consideration is charged for the conversion service.

MAKING SENSE OF IT ALL

It is impossible to provide a comprehensive analysis of all the possible types of transactions involving crypto assets. It is hoped that the South African Revenue Service will provide more guidance in the foreseeable future.

Until then, it is important to realise that not all transactions involving crypto assets will be financial services. In the absence of specific provisions in the VAT Act, vendors should carefully consider the activities being carried on, and seek input from professional tax advisers when drafting crypto-related agreements or entering into transactions involving crypto assets.

Evádne Bronkhorst

Forvis Mazars

*This article was published in African Mining (7 July 2025): *Is currency too cryptic for VAT? - African Mining Online*

Acts and Bills

- Value-Added Tax Act 89 of 1991: Sections 1(1) (definition of "financial services"), 2 & 11.

Other documents

- IFWG. 2021. *Position paper on crypto assets*. [Downloaded: 2025-06-25]. [Online] Available from: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.ifwg.co.za/IFWG%20Documents/IFWG_CAR_WG-Position_Paper_on_Crypto_Assets.pdf]

Tags: cryptocurrency; crypto assets; central bank digital currencies (CBDCs); fiat currency; zero-rating provisions; exempt supplies; financial services; output tax; taxable supply.

DIRECT EXPORTS

When it comes to VAT and the exportation of goods, people usually think, "exports are simple, you just zero rate it!" The exportation of goods is far more nuanced and if it were that easy, there would not be detailed legislation, interpretation notes and regulations on the matter.

A fundamental principle of VAT is that the goods or services supplied by a vendor in the course or furtherance of the vendor's enterprise should generally be subject to VAT at the standard rate, currently 15%. However, the legislation provides for certain supplies to be zero-rated, the exportation of goods being one of them. This means that the supply is still a taxable supply that is subject to VAT, albeit at the rate of zero per cent.

In order to zero-rate these supplies, the goods have to leave the country within the required time frame and the required documents have to be obtained.

The application of the legislation largely depends on whether the export is a direct or indirect export and on the mode of transport used to export the goods, such as via road, rail, sea or air.

It is important to note that with regard to the mode of transport used, the goods have to be exported through designated exit points on the borders of South Africa, eg, there are designated harbours, airports, border posts, railway stations, etc, that are required to be used.

WHAT ARE DIRECT EXPORTS?

This article is going to dive a little deeper into direct exports.

With direct exports, the vendor / supplier / seller will be responsible for delivering / consigning the goods to a recipient at an address outside of South Africa. This also applies where the seller contracts a cartage contractor to deliver the goods on the seller's behalf.

This is the most commonly used type of export, because it is less risky as the seller is in full control of the process and can ensure that the goods leave the country and that the correct documentation is obtained.

TIMELINES AND SUPPORTING DOCUMENTS

The general rule is that goods are required to be exported within a period of 90 days from the earlier of the issuance of an invoice or the time any payment of consideration is received.

There are exceptions to the above for instances where an advance payment is required, for the supply of precious metals, hunted animals or tank containers, and for instances where movable goods are subject to repair, improvement, erection, manufacture, assembly or alteration.

The vendor is required to be in possession of the required supporting documents within 90 days from the date that the goods are required to be exported unless an exception exists. If the relevant time frames are not adhered to, an output tax adjustment is required to be made. However, where the documents are obtained within a period of five years, an input tax adjustment may be made to effectively reverse the previous output tax adjustment.

The exact supporting documents required depend on whether the goods are transported via road, rail, sea or air, etc. Supporting documents may include documents such as –

- a copy of the zero-rated sales invoice;
- customs documentation;
- proof of payment of the goods and transport;
- freight documentation; and
- an order / contract between the customer and seller.

Direct exports present less risk compared to indirect exports when it comes to the application of VAT at the zero rate. However, sellers are required to ensure that their compliance processes and systems are in order to ensure that not only the goods are exported within the required timeframe, but that the correct supporting documents are obtained timeously.

Leila Wright

Forvis Mazars

Tags: taxable supply; zero-rate; zero-rated sales invoice.

South African Institute of Taxation