

TAX CHRONICLES

MONTHLY

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TAX ADMINISTRATION

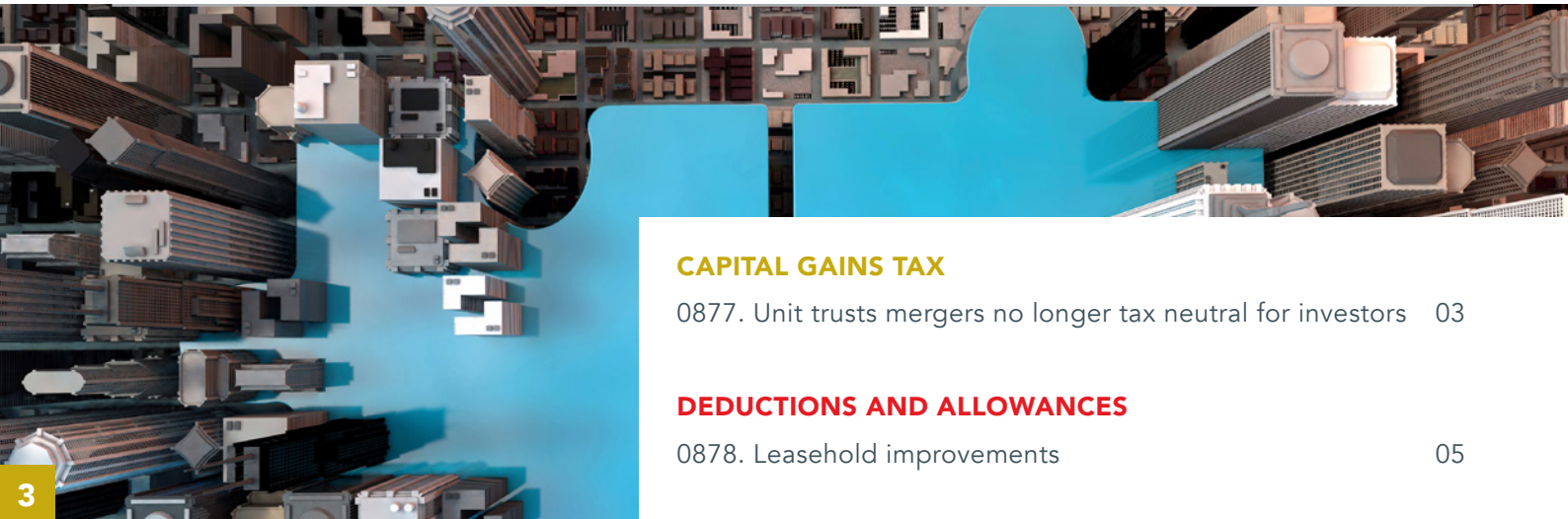
NAVIGATING PRESCRIPTION UNDER SECTION 99

VALUE-ADDED TAX

REQUIREMENTS FOR INDIRECT EXPORTS

GENERAL

TRANSACTIONING WITH ONESELF



CAPITAL GAINS TAX

0877. Unit trusts mergers no longer tax neutral for investors 03

DEDUCTIONS AND ALLOWANCES

0878. Leasehold improvements 05

EMPLOYEES' TAX

0879. Personal service providers 08

EXCHANGE CONTROL

0880. Cryptocurrency and exchange control 10

GENERAL

0881. Transacting with oneself 12

TAX ADMINISTRATION

0882. Navigating prescription under section 99 16

0883. SARS v PAJA 20

0884. Tax court's jurisdiction to alter assessments confirmed 22

TRUSTS

0885. Is a distribution a donation, settlement or other disposition? 24

VALUE-ADDED TAX

0886. Requirements for indirect exports 28

0887. VAT incurred by holding companies: the *Woolworths* judgment 30

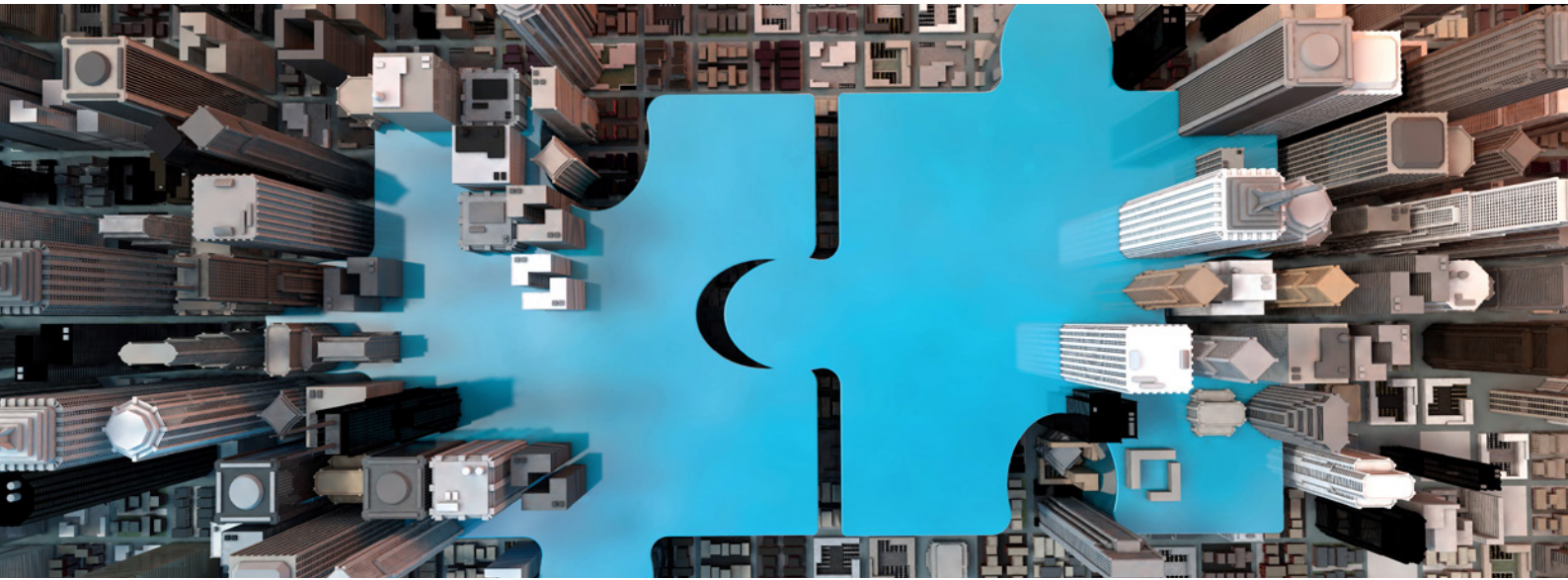
0888. VAT on imported gold coins 32

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UNIT TRUSTS MERGERS NO LONGER TAX NEUTRAL FOR INVESTORS



For millions of South Africans, a unit trust or a portfolio of a collective investment scheme (CIS) is one of the pillars of their financial future, serving as a vehicle for retirement savings, children's education funds, and long-term wealth creation.

Under National Treasury's proposed amendments in the draft Taxation Laws Amendment Bill, 2025 (the draft TLAB), these CIS investors could face an unexpected tax bill on their holdings even if they have not sold any units. [Author's note: It is important to remember that, at this stage (October 2025), this is the only draft legislation comprising proposed amendments.]

The issue arises from the effective exclusion of CIS mergers from the definition of an "amalgamation transaction" under section 44 of the Income Tax Act, 1962 (the Act). This means that the exchange of participatory interests in a CIS during a fund merger will no longer qualify for tax-neutral treatment.

CURRENT RULES PROVIDE FOR TAX NEUTRALITY

Imagine that an investment manager decides to merge the CIS in which a taxpayer is invested (CIS 1) with another fund (CIS 2). This is a common practice done for various non-tax commercial reasons such as industry consolidation, achieving economies of scale, or realigning investment mandates. Crucially, these decisions are made entirely outside an investor's control.

Under the current rules, this merger is tax-neutral for all parties under section 44 of the Act. In a merger, CIS 1 transfers its assets to CIS 2 in exchange for units in CIS 2, which CIS 1 then distributes to its investors. Upon completion, CIS 1 is terminated. For tax purposes, while investors exchange their CIS 1 units for new CIS 2 units, the investors are deemed to have disposed of their CIS 1 units at their tax cost. As a result, any tax is "rolled over" until they eventually sell their new CIS 2 units. This means capital gains tax (CGT) is deferred until a sale of CIS 2 units occurs.

PROPOSED SECTION 44 EXCLUSION TRIGGERS POTENTIAL CGT FOR CIS INVESTORS

The draft TLAB proposes to scrap this relief for CISs entirely. The merger of CISs and subsequent distribution of new units to unitholders would no longer be tax-neutral. Instead, the merger would have the same tax impact as though investors had sold their CIS 1 units for the market value of the new CIS 2 units, triggering an immediate CGT liability for the unitholder on any capital gain.

An investor who wishes to remain fully invested would have to fund the CGT as a “dry tax” either in provisional tax payments or upon assessment. Alternatively, they could be forced to sell a portion of their new CIS 2 units to pay the tax bill. The result is that the investor’s overall asset worth is reduced by the CGT payable, even though they never chose to exit their original investment.

Notably, the *Explanatory Memorandum on the draft Taxation Laws Amendment Bill, 2025* (the EM), provides no specific examples of how section 44 amalgamations are being used for tax avoidance.

REMOVAL OF SECTION 42 TAX-NEUTRAL ROLLOVER RELIEF APPLYING TO CISS

The draft TLAB also removes tax-neutral rollover relief for “asset-for-share” transactions under section 42 for all CIs due to National Treasury’s concerns about “unintended tax avoidance”. The EM highlights a scenario where an investor transfers listed shares to a CI, which then sells them, with the subsequent capital gain being tax-exempt at the CI level.

This potential for tax avoidance was noted in the *Discussion Document on the Tax Treatment of Collective Investment Schemes*. During a January 2025 workshop, participants suggested that this risk could be better managed by disallowing section 42 relief only for closely held CI rather than a blanket ban for all CIs. Unfortunately, the draft TLAB favours a comprehensive removal over a specific remedy. As written, the proposed amendments will no longer provide for tax-neutral section 42 CI transactions.

"The draft TLAB also removes tax-neutral rollover relief for 'asset-for-share' transactions under section 42 for all CIs due to National Treasury’s concerns about 'unintended tax avoidance.' "

CAPITAL DISTRIBUTIONS WOULD TRIGGER CGT

Another proposed amendment would treat any CI distribution that is not income or gross income as a CGT event for the investor. The EM notes that capital distributions are typically “infrequent and relatively minor,” arising from the fund’s “capital” rather than its income or profits. Further, it is unclear what constitutes a capital distribution in a CI context.

Under paragraph 61(3) of the Eighth Schedule to the Act, capital gains realised by a CI are disregarded. Unit holders account for capital gains or losses only upon the disposal of units in the CI under paragraph 61(1). This created a loophole to the extent that proceeds from the disposal of investments held by the CI were distributed to unitholders prior to the unitholder disposing of the units.

It is unclear why a CI would distribute such proceeds, as CIs are designed to grow invested funds, not return them via distributions.

Paragraph 82A closes this perceived loophole and should deter CI portfolios from making such distributions.

PROPOSALS UNDERMINE CIs AS A LONG-TERM INVESTMENT VEHICLE

The proposals introduce potential “stealth” taxes for investors and negate the intended long-term, tax-efficient compounding that makes a CI an attractive investment vehicle. This policy shift is especially concerning when viewed against the backdrop of South Africa’s precarious savings landscape with fewer than 6% of South Africans being able to retire and maintain their standard of living.

Given this stark reality, every aspect of fiscal policy should be geared towards actively promoting and simplifying long-term savings using CIs. By introducing unexpected tax liabilities and eroding the tax efficiency of CIs, the proposed amendments actively deter the very savings culture South Africa desperately needs.

"The proposals introduce potential 'stealth' taxes for investors and negate the intended long-term, tax-efficient compounding that makes a CI an attractive investment vehicle."

Joon Chong & Graham Viljoen

Webber Wentzel

Acts and Bills

- Income Tax Act 58 of 1962: Sections 42 & 44 (specific reference to subsection (1) – definition of “amalgamation transaction”); Eighth Schedule: Paragraphs 61(1) & (3) & 82A;
- Draft Taxation Laws Amendment Bill, 2025 (published for comment on 16 August 2025).

Other documents

- Explanatory Memorandum on the draft Taxation Laws Amendment Bill, 2025*;
- Discussion Document on the Tax Treatment of Collective Investment Schemes* (published by National Treasury in 2024).

Tags: collective investment scheme (CI); amalgamation transaction; tax-neutral; CGT liability; asset-for-share transactions; unintended tax avoidance; capital distribution; tax-efficient compounding.

LEASEHOLD IMPROVEMENTS

In the commercial property world, it is not unusual for lessors to enhance (“sweeten”) a lease agreement by offering the lessees a tenant installation allowance at the commencement of the lease agreement, or by permitting the lessee to make improvements to the leased property.

The appeal for lessees is clear: under the right conditions, improvements to leasehold property by the lessee can unlock valuable tax deductions, even though the lessee is not the owner of the improvements.

Section 11(g) of the Income Tax Act, 1962 (the Act), allows a lessee to claim a **leasehold improvement allowance** – commonly known as the “section 11(g) allowance”, provided that certain requirements are met. In August 2023, SARS issued version 2 of Interpretation Note 110 setting out its view on, among other things, the interpretation of section 11(g). The following are the key requirements of this provision:

1. **Contractual obligation** – The lessee must be *legally obliged* under the lease agreement to carry out improvements on land or buildings granted for their use or occupation.
2. **Value cap** – The total allowances shall not exceed the cost of the improvements or the value specified in the lease agreement.
3. **Fair value default** – If no value is stipulated in the lease, the allowance is capped at the fair and reasonable value of the improvements.
4. **Spread over time** – The deduction must be spread over the period of the lessee's use or occupation, commencing from the date that the improvements are completed, limited to a maximum period of 25 years, and be apportioned for part years.

"If the lease ends early, any remaining expenditure not yet deducted may be claimed as a deduction in the year that the lease ends."



5. **Completion requirement** – The allowance is claimable only from the date that the improvements are completed and if the property is used to generate “income” (ie, gross income less exempt income) in the hands of the lessee.
6. **Lessor’s income inclusion** – The value of the improvements must constitute “income” in the hands of the lessor.
7. **Termination loss** – If the lease ends early, any remaining expenditure not yet deducted may be claimed as a deduction in the year that the lease ends.

While these rules appear straightforward, complications often arise in practice – particularly where the amount spent differs from the “contract amount” stated in the lease.

- **Spending more** – If the lessee spends more than the contract amount, the allowance is capped at the contract amount. The excess may still qualify for a deduction under other building or other capital allowance provisions if the requirements of those provisions are met. The lessor includes only the contract amount in their income.
- **Spending less** – If actual expenditure is below the contract amount, the allowance is based on the actual amount spent, but the lessor is still taxed on the full contract amount.

THE CONTRACTUAL OBLIGATION TRAP

The allowance is only available if there is a *clear contractual obligation* to effect the improvements. Vague and poorly drafted lease agreements can cause major problems. In practice, most leases do not oblige the tenant to effect improvements but merely grant them the right to do so.

A common mistake is treating the existence of a **tenant installation allowance** – a cash contribution from the lessor at the commencement of the lease agreement – as evidence of a contractual obligation to improve the property. Without a legally enforceable requirement to perform the improvements, the claim fails, leaving the lessee without the section 11(g) deduction. The tax treatment of the payment of the installation allowance by the lessor falls outside the scope of this article.

COMPLIANCE RISKS

The section 11(g) allowance is claimed in a separate section of the corporate tax return (ITR14). If claimed incorrectly, SARS may argue there was material non-disclosure, misrepresentation, or fraud – removing the usual prescription protection and leaving the assessment open to reassessment after the normal three-year period.

Another key risk is that the lessor’s income status matters: if the lessor is a tax-exempt entity, the lessee cannot claim the allowance, even if there is the clear contractual obligation to effect the improvements. This information may not always be readily available – and some lessors may be reluctant to share it with the lessee.

FINANCIAL CONSEQUENCES OF NON-COMPLIANCE

If SARS disallows a section 11(g) claim, the lessee could face:

- **Understatement penalties** – ranging from 10% up to 200% of the understated tax;
- **Underestimation of provisional tax penalties** – 20% of the shortfall if provisional tax estimates are significantly below actual taxable income; and
- **Interest charges** – on the underpaid provisional tax.

The combined effect can be substantial.

CLAIMING EXPENDITURE UNDER THE CORRECT PROVISIONS

Items such as **furniture and fittings, office equipment and plant and machinery** which do not affix to the building and thus do not qualify for the section 11(g) allowance, may qualify for the wear-and-tear allowances (where the requirements are met). Alternatively, certain expenses may qualify for deduction as expenditure on **repairs**. Each case must be assessed individually; there is no one-size-fits-all solution.

CAPITAL GAINS TAX IMPLICATIONS

It is also important to consider the CGT consequences arising from leasehold improvements.

From the lessee’s perspective, there are no CGT implications. This is because the lessee does not acquire ownership of the leasehold improvements – ownership vests in the lessor by operation of law once the improvements are completed. Accordingly, since the lessee never owns the improvements, no capital gains event arises either upon completion of the improvements or upon termination of the lease when the improvements are effectively abandoned.



From the lessor's perspective, the value of the leasehold improvements may influence the base cost of the property, depending on whether the value of those improvements has been included in the lessor's taxable income.

In terms of **paragraph 20(1)(h)(ii)(cc) of the Eighth Schedule to the Act**, the base cost of an asset includes expenditure incurred by another person (in this case, the lessee), to the extent that the value of such expenditure has been included in the lessor's income (gross income less exempt income).

In practice, this means that where the value of the leasehold improvements has been included in the lessor's income, the same amount increases the base cost of the property for CGT purposes, thereby reducing the eventual capital gain on disposal.

Conversely, where the value of the leasehold improvements has **not** been included in the lessor's income – for example, where there is no binding obligation on the lessee to make the improvements – the lessor will not enjoy a corresponding increase in the base cost of the property for CGT purposes.

This treatment ensures that the lessor is not taxed twice on the same amount – first when the improvements are brought into income, and again upon the disposal of the property. The interaction between the income tax and CGT provisions therefore promotes fairness and prevents double taxation.

CONCLUSION

Leasehold improvements can be a valuable tax opportunity, but only when the lease agreement, expenditure, and tax treatment align with the strict requirements of section 11(g). Businesses should seek expert tax advice *before* signing a lease to confirm eligibility and avoid unexpected costs. Ongoing monitoring of legislative changes and maintaining accurate documentation are equally important to safeguard the deduction and ensure compliance.

"Items such as furniture and fittings, office equipment and plant and machinery which do not affix to the building and thus do not qualify for the section 11(g) allowance, may qualify for the wear-and-tear allowances (where the requirements are met)."

Brigitte Zegwaard

BDO

Acts and Bills

- Income Tax Act 58 of 1962: Sections 11(g); Eighth Schedule: Paragraph 20(1)(h)(ii)(cc).

Other documents

- Interpretation Note 110 (Issue 2) – *Leasehold improvements* (16 August 2023).

Tags: leasehold improvement allowance; section 11(g) allowance; capital allowance provisions; corporate tax return (ITR14); understatement penalties; wear-and-tear allowances; exempt income.



PERSONAL SERVICE PROVIDERS

This article examines the employees' tax (PAYE) risks and reporting obligations for a person or entity when engaging with a personal service provider (PSP).



As early as 2000 certain provisions were inserted into South Africa's income tax legislation to provide for amounts paid to a company, close corporation or trust to be subject to PAYE withholding where the company, close corporation or trust makes available the services of an individual that would normally have been rendered to the client in terms of a contract of employment.

By interposing a company, for example, the amount paid for services rendered would be taxed at the lower company tax rate instead of the higher marginal tax rates for individual taxpayers and in addition the company would be able to claim deductions for expenses incurred in providing the service. To discourage the use of an entity, such as a company, as intermediary to provide personal services to a client, which are, in essence, services provided in terms of a contract of employment, the concept of a personal service company or trust (since changed to PSP) was introduced as well as the requirement to withhold PAYE from amounts paid or payable to such entities.

This model, used by individuals for providing services to clients via an intermediate company, close corporation or trust, poses significant risk for the client that engages the company, close corporation or trust, should it not be correctly classified as a PSP.

If the service provider is not correctly classified as a PSP and PAYE is not withheld, the person engaging with the service provider company, close corporation or trust could face a substantial tax bill due plus penalties and interest.

WHEN IS A SERVICE PROVIDER CONSIDERED TO BE A PSP FOR TAX PURPOSES?

Any company, close corporation or trust that meets the definition of a PSP is an "employee" and, if in receipt of an amount for services rendered, such amount constitutes remuneration and is subject to the withholding of PAYE.

Remuneration excludes payments for services rendered by independent contractors, but not payments to a PSP.

It is therefore crucial to correctly determine whether the company, close corporation or trust that renders the services is a PSP or not to ensure that PAYE is withheld.

FIRST TEST

A PSP is defined in paragraph 1 of the Fourth Schedule to the Income Tax Act, 1962, and the first requirement is that the individual that is rendering the services on behalf of the company, close corporation or trust must be a "connected person" in relation to the company, close corporation or trust that is engaged to provide the service, for example a shareholder of the company. If this is not the case, the service provider is not a PSP and payments for services rendered are not subject to the withholding of PAYE.

SECOND TEST

The company, close corporation or trust that provides the service will not meet the definition of a PSP if it employs three or more full-

"The company, close corporation or trust that provides the service will not meet the definition of a PSP if it employs three or more full-time employees throughout the particular year of assessment who are, on a full-time basis, engaged in the business of rendering the service."

time employees throughout the particular year of assessment who are, on a full-time basis, engaged in the business of rendering the service. The employees must, however, not be connected persons in relation to the entity that is providing the service, for example, they must not hold shares in the company, be members of the close corporation, or be settlors or beneficiaries of the trust.

The three or more employees must be directly involved in the service activities of the personal service provider. Auxiliary staff, such as cleaning staff, are not regarded as qualifying employees.

If the test is satisfied, then the service provider is not a PSP and payments for services rendered are not subject to the withholding of PAYE.

If the test is, however, not satisfied, it is necessary to apply the third test.

THIRD TEST

Only one of the criteria needs to be met in order to be classified as a PSP.

- Would the person who is personally rendering the service on behalf of the company, close corporation or trust be regarded as an "employee" of the client if the service was rendered directly to the client and not through the company, close corporation or trust?
- Must the person who is personally rendering the service, or the company, close corporation or trust, perform the duties mainly at the client's premises and, if so, is that person subject to the client's control or supervision as to the manner in which the duties are performed or are to be performed?
- Does more than 80% of the income from services rendered by the company, close corporation or trust consist (or is likely to consist) of amounts received from any one client, or from any "associated institution" in relation to the client?

If any of the above three criteria apply, the company, close corporation or trust will meet the definition of PSP and amounts paid for services rendered are subject to the withholding of PAYE.

PAYE must be withheld at a rate of 27% where the PSP is a company or close corporation and 45% where the PSP is a trust.

MAY AN AFFIDAVIT OR SOLEMN DECLARATION FROM A SERVICE PROVIDER THAT STATES THAT IT DOES NOT MEET THE DEFINITION OF A PSP BE RELIED UPON?

The onus is placed on the person that makes the payment to the service provider for services rendered to determine whether the service provider is a PSP and whether the amounts payable must be subject to the withholding of PAYE.

Although a questionnaire that contains the relevant criteria to determine whether the service provider meets the definition of a PSP may assist with determining whether the service provider

is a PSP, an affidavit or solemn declaration signed by the service provider confirming that it does not meet the definition of a PSP, does not absolve the recipient thereof from their obligations.

In instances where the first two criteria in the third test are not met and an affidavit or solemn declaration has been provided stating that the service provider will not derive more than 80% of its income from one client, the client may, however, rely on the affidavit or solemn declaration to not withhold PAYE, provided that the affidavit or solemn declaration has been relied on in good faith.

RISKS AND CONSEQUENCES FOR THE EMPLOYER SHOULD MISCLASSIFICATION APPLY

Should SARS determine that a service provider is a PSP, and the PSP was incorrectly classified as an independent contractor the client may face the following tax consequences:

- They may be liable for the unpaid payroll taxes and may face penalties, administrative non-compliance penalties, interest or even criminal prosecution.
- They remain liable to SARS for the PAYE but have a right of recovery from the PSP.

It is recommended that all users of services from potential PSPs should have policies and systems in place to correctly classify a service provider and determine whether PAYE should be withheld, for example to use a PSP questionnaire, affidavit or solemn declaration confirming that not more than 80% of the service provider's income is from one client.

Should it be determined that there has been a misclassification of PSP status and PAYE was not withheld, the error can be rectified and relief from penalties and criminal prosecution may be available under the voluntary disclosure programme.

CONCLUSION

The use of a PSP must be approached with caution and users of services from potential PSPs must ensure that the tax status of service providers is determined at engagement. Misclassification can result in significant tax liabilities and penalties.

Naomie Fourie

Forvis Mazars

Acts and Bills

- Income Tax Act 58 of 1962: Fourth Schedule: Paragraph 1 (definition of "personal service provider").

Tags: personal service provider (PSP); marginal tax rates; connected person; administrative non-compliance penalties.

CRYPTOCURRENCY AND EXCHANGE CONTROL

On 15 May 2025, the Pretoria High Court handed down a landmark judgment in the case of Standard Bank of South Africa v South African Reserve Bank and Others [2025]. The judgment addressed the position of cryptocurrency assets in light of South Africa's exchange control regulations.

5.8 MILLION SOUTH AFRICANS HOLD A CRYPTO ASSET

Cryptocurrency was first introduced to the global market in 2009, with its most famous form being Bitcoin. In an October 2024 publication by the South African Revenue Service (SARS) it was estimated that more than 5.8 million South Africans hold a crypto asset. As new technologies emerge, the South African government faces several challenges in determining how to integrate them into existing legislation. This article examines an application by Standard Bank to set aside a forfeiture order issued by the South African Reserve Bank (SARB) against Leo Cash and Carry (Pty) Ltd (LCC), following multiple cryptocurrency transactions that allegedly violated the South African Exchange Control Regulations. The judgment, which is now being taken on appeal by SARB, ruled that cryptocurrency is not subject to South Africa's Exchange Control Regulations.

The High Court analysed the legality of a forfeiture order issued in respect of R16 404 700.27 and R10 000 000.00, which was due to Standard Bank, in accordance with a prior pledge and cession agreement concluded between Standard Bank and LCC. The forfeiture order follows an investigation by the SARB's Financial Surveillance Department which found that LCC had contravened exchange control regulations.

PURPOSE OF THE LEGISLATION

Having come into force in 1961, the Exchange Control Regulations, promulgated in terms of section 9 of the Currency and Exchanges Act, 1933, aim to discourage the export of capital from South Africa

"Having come into force in 1961, the Exchange Control Regulations, promulgated in terms of section 9 of the Currency and Exchanges Act, 1933, aim to discourage the export of capital from South Africa and protect the domestic economy."

and protect the domestic economy. The court in *South African Reserve Bank v Leathern NO and Others* [2021] (*Leathern NO*) held that the purpose of the regulations is three-fold: to prevent loss of foreign currency resources through the transfer abroad of financial capital assets held in South Africa, to ensure effective control of financial and real assets in and out of the country, and to avoid interference with the commercial, industrial and financial systems of the country.

It is apparent that the legislative intent of these regulations is protective and forward-looking, which may support an expansive interpretation that includes digital finance instruments. In the matter before the High Court, Standard Bank provided multiple arguments as to why they felt that cryptocurrency is not subject to these provisions. While logically sound, the arguments made by Standard Bank undermine the purpose of the legislation and the economic stability that the regulations were designed to preserve.

STANDARD BANK'S ARGUMENT

When assessing Standard Bank's claim, the High Court swiftly dismissed the claim for R10 000 000.00 held in a Nedbank account, ruling that it does not have legal standing to challenge this claim and thereafter only considered a claim for R16 404 700.37 which was held in a money market account. The key to Standard Bank obtaining judgment and setting aside the forfeiture order was proving that LCC had not contravened any exchange control regulations in dealing with cryptocurrencies – enabling them to successfully cede the monies as per their agreement with LCC.

In doing so, Standard Bank argued that cryptocurrency is neither a currency nor legal tender in South Africa and consequently, the Exchange Control Regulations did not apply to it. Further to this argument, Standard Bank argued that definitions in the regulations should be given a restrictive interpretation and only if the legislation was amended to include cryptocurrency would it be subject to the regulations. Taking the argument even further, Standard Bank argued that cryptocurrency was not capital and that the Exchange Control Regulations could not be applied to cryptocurrency without a dedicated framework regulating cryptocurrency as an asset.

At this point, one may ask why Standard Bank felt cryptocurrency was not money or a form of capital? In answering this, Standard Bank submitted that the fundamental difference is that when one purchased cryptocurrency, a blockchain recorded the purchase, and the record of this purchase would be stored on thousands of computers globally. Additionally, the transfer of cryptocurrency to another was not payment. It was argued that in this sense, cryptocurrency was not a sum of money.

SARB'S ARGUMENT

On the other hand, SARB's argument attempted to future-proof the regulation in light of the digital economy, arguing for the acceptance of cryptocurrency in the Exchange Control Regulations. In doing so, SARB argued that both the PWC report on which the investigation into LCC was made, and the allegations made against LCC were uncontested. Drawing from *Leathern NO*, SARB submitted that because there was a reasonable suspicion of a contravention, the High Court was not entitled to set aside the blocking order.

In response to the argument that cryptocurrency was not subject to the regulations, SARB argued that a contravention of regulation 3(1)(c) did not require a payment or the identity of any recipient. Furthermore, SARB argued that cryptocurrency was covered by the regulations, noting that in the definitions of the regulations (regulation 1), "money" was defined as "foreign currency or any bill of exchange or other negotiable instrument". Counsel for the respondents (SARB and others) argued that cryptocurrency was an instrument which permitted payment in currency, which is not legal tender in the Republic.

In highlighting the importance of regulating cryptocurrency under the Exchange Control Regulations, SARB submitted that when rands are paid into a South African cryptocurrency wallet, the rands would become cryptocurrencies, and the rand value would be lost from the South African balance sheet. Subsequently, in a foreign jurisdiction that enabled the holder of the cryptocurrency to withdraw a sum of money equal to that cryptocurrency, operating as a form of payment.

Lastly, when considering whether Standard Bank was entitled to the funds in the money market account, SARB argued that Standard Bank was not entitled to the money because in terms of the cession and pledge agreement between Standard Bank and LCC, express consent was required to realise any collateral held by Standard Bank.

THE GAUTENG DIVISION OF THE HIGH COURT

In reviewing the arguments presented before the High Court, Judge Motha noted that it was undeniable that the LCC was involved in a scheme to directly or indirectly export funds, foreign currency and capital from South Africa. The court set out the extent of the LCC's transactions, noting that during 2019 LCC sent 4 405.9783 Bitcoin amounting to R556 020 356,68 to Huobi Global and concluding that it was therefore incontrovertible and uncontroverted that LCC dabbled in cryptocurrency transactions.

The court highlighted that the answer lies in one's interpretation of the word "currency" and held firm that cryptocurrency is not money. The court noted that trying to view cryptocurrency as money leads to strained and impractical results and if it were to be viewed as money, crypto wallets would be attached in terms of regulation 22B. Some of the practical questions raised by the court were whether one can deposit cryptocurrency and whether one must declare cryptocurrency when entering or leaving the Republic.

In conclusion, the judge held that on any interpretation, cryptocurrency fell outside the ambit of capital in regulation 10(1)(c) and that, as Standard Bank argued, a regulatory framework dedicated to addressing cryptocurrency is overdue – citing a published paper by the SARB itself highlighting the lack of a proper regulatory legal framework specifically highlighting that "there is no regulatory protection that would compensate the owner or user of cryptocurrency for any loss that may be suffered".

LEAVE TO APPEAL

Considering the above, the judge held that LCC did not contravene any regulations, and the forfeiture of the money held in the money market account was set aside. On 23 May, SARB filed an application for leave to appeal, seeking to overturn the ruling. The main argument being that the High Court should have concluded that although not considered money, cryptocurrency could at the very least be seen as "capital", triggering the provisions of regulation 10(1)(c). Section 18(1) of the Superior Courts Act, 2013, provides that, as a result of the appeal, the court's decision is suspended pending the outcome of SARB's application for leave to appeal.

Given this prevalence, the ruling has profound implications for not only financial institutions and regulations but also for ordinary citizens whose assets may be subject to the regulations. Without legislative intervention, the South African government may find itself powerless in monitoring and regulating the significant volume of digital wealth cryptocurrency holds.

Charlise Finch & Raffique Motala

Herold Gie

Acts and Bills

- Currency and Exchanges Act 9 of 1933: Section 9;
- Superior Courts Act 10 of 2013: Section 18(1).

Other documents

- Exchange Control Regulations, 1961 (GN R1111 in GG 123 of 1 December 1961), made in terms of section 9 of the Currency and Exchanges Act 9 of 1933: Regulations 1 (definition of "money"), 3(1)(c), 10(1)(c) & 22B.

Cases

- *Standard Bank of South Africa v South African Reserve Bank and Others* [2025] (5) SA 289 (GP) [see <https://www.saflii.org/za/cases/ZAGPPHC/2025/481.html>];
- *South African Reserve Bank v Leathern NO and Others* [2021] (Case no 854/2020) [2021] ZASCA 102 (20 July 2021).

Tags: cryptocurrency assets; foreign currency; bill of exchange; negotiable instrument.

TRANSACTIONING WITH ONESELF

This article examines the tax implications of transactions between branches, the consequences of individuals claiming the value of their labour as a deduction, and the implications of debtors acquiring their own debt.

References to “paragraph” are to paragraphs of the Eighth Schedule to the Income Tax Act, 1962 (the Act), and references to “section” are to sections of that Act unless the context otherwise indicates.

DEALINGS BETWEEN BRANCHES

In *ITC 103* [1927] the appellant carried on the business of a general shipper in London and as a draper and outfitter in South Africa. The businesses in South Africa were operated under various trading names but were the sole property of the appellant. The London office shipped goods to the branches in South Africa and invoiced the branches with the cost of the goods plus a 5% commission and debited this amount against the branch. In addition, the branch was debited with interest on the amount outstanding. The effect of these accounting entries was to decrease the South African branch profits and increase the profits of the London office. The Commissioner included in the South African branch's income the commission and interest as amounts derived from a South African source. On appeal, the court held that as the London and South African branches were carried on as activities of a single entity, the

buying commission and interest were not admissible deductions attributable to the South African branches. It stated that under the well-established principles of income tax law

“a man cannot lend to himself, or trade with himself, or make profit out of himself”

The court referred the matter back to the Commissioner to determine how much of the expenses actually incurred in London were allocable to the South African branches.

The case is a reminder of the principle established in *Joffe & Co (Pty) Ltd v Commissioner for Inland Revenue* [1946], namely, that

“the Court is not concerned with deductions which may be considered proper from an accountant's point of view or from the point of view of a prudent trader, but merely with the deductions which are permissible according to the language of the statute”

[1946 AD 157, 13 SATC 354 at 359]

In *Afrikaanse Verbond Begrafnis Onderneming Beperk v Commissioner for Inland Revenue* [1950] the appellant company had carried on two businesses, a funeral insurance business and a funeral undertaker's business. The appellant's insurance business was assessable under the First Schedule to the Income Tax Act 31 of 1941, read with section 18 of that Act, while its undertaker's business was assessable under the general provisions of that Act. For the 1945 and 1946 years of assessment, the appellant had claimed a deduction for interest of £9 306 and £11 559, respectively, in its undertaker's business while its insurance business reflected corresponding credits. The appellant contended that the charging of interest on the capital invested in the undertaker's business by the insurance business was necessary to maintain actuarial solvency of the insurance business. The Commissioner disallowed the claim on the basis that the company could not incur a liability for interest to itself. The court held that the profits of the company had to be assessed as the profits of a single taxpayer even though the profits from the two businesses had to be computed separately under different provisions of the Act. The profits derived from the non-insurance business could not be diminished by the deduction of theoretical payments between one side of the business and the other.



An interesting application of the above principles arises in the present-day insurance industry. The Insurance Act, 2017, has formalised the use of cell structures within a licensed insurer. [See the definition of “cell structure” in section 1(1) of the Insurance Act 18 of 2017.] A cell structure enables persons who wish to carry on a particular type of insurance business to create a cell within a licensed insurance company without the considerable expense of applying for a separate licence. The licensed insurer is responsible for ensuring that the cell complies with all regulatory and administrative requirements.

The cell owners hold a specific class or classes of shares in the cell enabling them to participate only in the profits derived by the cell. They can also be called on to recapitalise the cell should it make losses. The licensed insurer is, however, ultimately responsible for the cell debts on winding up of the company.

The cell is not a separate legal entity but the equivalent of a branch of a company. For income tax purposes, the licensed insurer submits a tax return including the results of the cell but for accounting purposes a separate tax computation must be completed for the cell so that its share of the tax liability can be debited against its profits. If a cell were to sell its business to the core (the activities carried on by the licensed insurer outside the cell), this will not have any actual tax implications as it would be a case of the insurer trading with itself. To give effect to such a disposal, the proceeds from the sale would be deposited into the cell's bank account by transferring the amount from the core bank account. The amount so transferred would be reduced by the notional tax liability that the cell would have incurred in the form of income tax on recoupments and CGT on the capital realised had it disposed of the business to a third party. The net proceeds would be credited to the cell's distributable reserves. The core would need to respond by debiting its reserves and crediting its bank account. These journal entries are necessary to maintain the rights and entitlements of the various classes of shareholders.

If the cell were to dispose of its business to a third party, the proceeds would be deposited into its bank account and its distributable reserves credited. The cell would be debited with its share of any actual tax liability arising when the insurer submits its consolidated tax return, and the cell bank account would be reduced accordingly.

Any administration fees charged to the cell by the licensed insurer will reduce the cell reserves and increase the core reserves but from a tax perspective they will cancel out and have no impact on the insurer's overall tax liability.

In a Rhodesian case (now Zimbabwe), *Anglo American Corporation of SA Ltd v Commissioner of Taxes* [1975] the appellant company had its head office in Johannesburg and a branch office in Salisbury (now Harare). The company had shares in various companies in South Africa and Rhodesia. In December 1971 the Johannesburg office had collected dividends of R1 137 581 on behalf of the appellant's companies in Rhodesia. The exchange rate between the Rhodesian dollar and the rand was at par at the time. The Salisbury office paid the Rhodesian companies R\$1 137 581, and the Johannesburg office credited the Salisbury office with R1 137 581. The total amount standing to the credit of the Salisbury office in Johannesburg was R1 467 683. On 21 December 1971 the rand was devalued with the result that the amount standing to the credit of the Salisbury office was now worth R\$1 287 441, a

difference of R\$180 242. In submitting its tax return in Rhodesia, the company claimed the R\$180 242 as a loss in the production of its Rhodesian income. The appeal was dismissed on the basis that the Salisbury office and the Johannesburg office were in law one *persona* and, in law, one individual taxpayer. How the two offices adjusted their accounts in relation to each other was simply a matter of internal bookkeeping, and the reality of a transaction must always be looked to. That reality, it is submitted, was that the company had received dividends in rand and deposited them into its South African bank account. It then paid those dividends out of its Rhodesian bank account in an equivalent amount in Rhodesian dollars. Any attempt to create a liability between the branches was simply a bookkeeping fiction.

Under the then tax treaty between South Africa and Rhodesia, a single enterprise which carries on business in both countries was in effect regarded as a separate *persona* in each country when taxing the profits which have their source in either country. In that regard, the court noted that the company's internal bookkeeping did not affect whether a particular receipt was taxable or a loss deductible.

INDIVIDUALS CLAIMING THE COST OF THEIR LABOUR

In *ITC 110* [1928] a builder sought to claim a deduction for a salary he paid himself. The court stated:

“But appellant had raised another interesting point, viz.: that he was entitled, as he himself worked on the building, to give himself a salary and charge it against the cost of the building. For that proposition he had advanced no authority, and, speaking for himself the President was not prepared to accept it as a legitimate charge. It would mean that every farmer who worked and took a turn at ploughing and sowing mealies would be able to charge against his business his personal wages, and the Court did not consider that the Act ever contemplated expenditure of that nature, if indeed it could be called legitimate expenditure.”

In *ITC 780* [1953] the appellant had constructed plant and machinery and sought to claim a wear-and-tear allowance under the equivalent of section 11(e) of the Act on the value of his skill and labour. The court dismissed the appeal on the grounds that the taxpayer had failed to discharge the onus of proving the value of his labour and the fact that the deduction was at the Commissioner's discretion.

In the United Kingdom case of *Oram (HM Inspector of Taxes) v Johnson* [1980], under a provision equivalent to paragraph 20(1) (e) of the Eighth Schedule to the Act, the appellant had sought to add to the base cost of a dwelling house the value of his skill and labour in improving it. In dismissing the appeal, Walton J stated the following at paragraph 6:

“It is perhaps a matter of first impression based on the impression that the word ‘expenditure’ makes on one, but I think that the whole group of words, ‘expenditure’, ‘expended’, ‘expenses’ and so on and so forth, in a revenue context, mean primarily money expenditure and, secondly, expenditure in money's worth, something which diminishes the total assets of the person making the expenditure, and I do not think that one can bring one's own work, however skilful it may be and however much sweat one may expend on it, within the scope of paragraph 4(1)(b) [of Schedule 6 to the Finance Act 1965].”

A similar view on the meaning of "expenditure" was expressed in *Commissioner, South African Revenue Service v Labat Africa Ltd* [2013], in which Harms AP stated [at paragraph 6] that expenditure

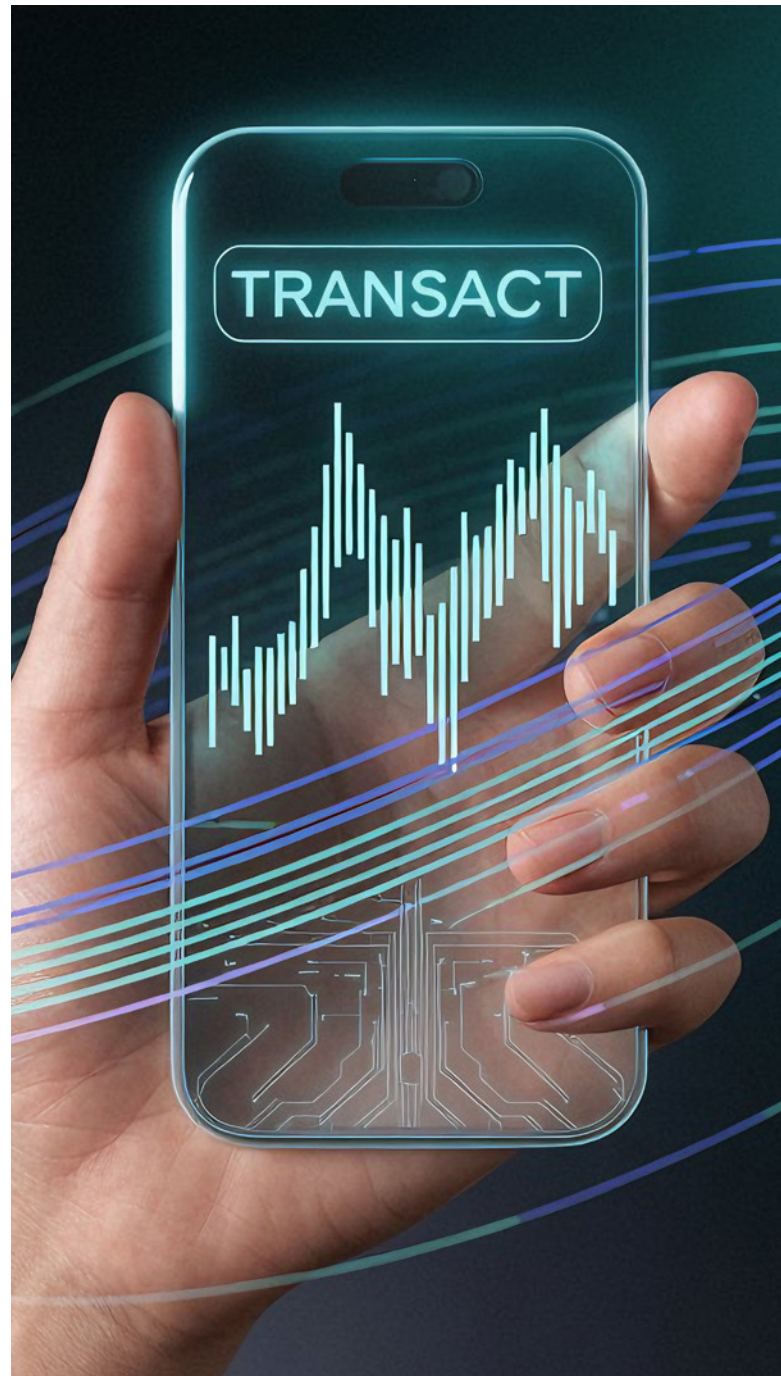
"requires a diminution (even if only temporary) or at the very least movement of assets of the person who expends"

There is one situation, however, in which debtors who built or improved an asset through their own labour may be able to receive base cost for their efforts. This situation arises when the asset was erected or improved before 1 October 2001 (valuation date) and the market value method is adopted to determine the valuation date value of the asset.

DEBTORS ACQUIRING THEIR OWN DEBT

When debtors acquire their own debt, the amount owing is extinguished through a process known as merger or *confusio*. The leading case on this topic is *Grootchwaing Salt Works Ltd v Van Tonder* [1920], in which Innes CJ stated the following:

"Now *confusio* in the sense with which we are here concerned is the concurrence of two qualities or capacities in the same person, which mutually destroy one another. In regard to contractual obligations it is the concurrence of the debtor and creditor in the same person and in respect of the same obligation. (Pothier *Verbintenissen*, paragraph 641; Opzomer, Vol. 7, paragraph 1472; Van der Linden (1.18, paragraph 5). The typical example of *confusio* and the one mainly dealt with in the books is the case of a creditor becoming heir to his debtor or vice versa. But the same position is established whenever the creditor steps into the shoes of his debtor by any title which renders him subject to his debt (Pothier *Verb*, paragraph 642) and it is common cause that *confusio* takes place as between lessor and lessee when the latter acquires the leased property. As to the consequences of *confusio* there can be no doubt that speaking generally it destroys the obligations in respect of which it operates. Pothier (paragraph 643) is clear upon the point. A person, he says, can neither be his own creditor nor his own debtor. And if there is no other debtor then the debt is extinguished. *Non potest esse obligatio sine persona obligata*. (See also Voet, 46.3.19; Cens. For, Pt. 1.4.38, paragraph 1; Van der Linden, 1.18, sec. 5, etc.), but the obligation is only destroyed to the extent to which the concurrence of the opposing capacities renders it impossible to exist."



"In *Afrikaanse Verbond Begrafnis Onderneming Beperk v Commissioner for Inland Revenue* [1950] the appellant company had carried on two businesses, a funeral insurance business and a funeral undertaker's business. The appellant's insurance business was assessable under the First Schedule to the Income Tax Act 31 of 1941, read with section 18 of that Act, while its undertaker's business was assessable under the general provisions of that Act."

Merger can occur by cession. For example, a trust could distribute a debt to its beneficiary who owed that debt to the trust, or a subsidiary could distribute a debt to its holding company which owed the debt to the subsidiary. A company that issued a listed debenture could acquire its own debt on the open market. In all instances, the debtor will acquire the debt for an instant before it is extinguished through merger.

A debt acquired by cession must be distinguished from the waiver of a debt. This distinction is important because the different methods for extinguishing a debt can have profoundly different tax consequences. For example, assume a beneficiary owes a trust R100, which the beneficiary used to buy a capital asset which is still held and that the debt is fully recoverable. If the trust waives the debt, paragraph 38 of the Eighth Schedule does not apply because no asset is disposed of to the debtor. The debtor's liability is simply extinguished without the receipt of an asset. The trust will claim a capital loss under paragraph 56(2) which will not be clogged under paragraph 39, while the debtor must reduce the base cost of the asset under paragraph 12A(3). By contrast, if the trust cedes the debt to the debtor, paragraph 38 will apply since an asset is being disposed of to the debtor who acquires it for an instant before it is extinguished through merger. The debtor and the trust are connected persons [see paragraph (b)(i) of the definition of "connected person" in section 1(1)], and the debt is being disposed of through donation. There will be no debt benefit under paragraph 12A because the debt will have been extinguished because of the debtor having incurred expenditure of R100 under paragraph 38. The trust will make neither a capital gain nor a capital loss on the disposal since it will have proceeds under paragraph 38 of R100. [Author's note: See Example 11 in SARS Interpretation Note 91 (Issue 2), dated 20 July 2022 "Concession or compromise of a debt" at 20. The example deals with a situation in which the market value of the debt is less than its face value and thus triggers a base cost reduction under paragraph 12A(3).]

A company that acquires its own shares does so for an instant before they are extinguished through merger. It is for this reason that paragraph 11(2)(b) disregards the disposal of the share by the acquiring company to prevent a capital loss.

CONCLUSION

Generally,

- transactions between branches do not give rise to tax consequences;
- individuals do not incur expenditure for their own labour; and
- debtors acquiring their own debt by cession will acquire it for an instant before it is extinguished through merger. This extinction can result in a recoupment under section 19 or a base cost reduction or capital gain under paragraph 12A for the debtor when the market value of the debt is less than its face value.

Duncan McAllister

Webber Wentzel

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Acts and Bills

- Income Tax Act 58 of 1962: Sections 1(1) (definition of "connected person": paragraph (b)(1)), 11(e), 19 & 20(e); Eighth Schedule: Paragraphs 11(2)(b), 12A (specific reference to subparagraph (3)), 20(e), 38 & 56(2);
- Income Tax Act 31 of 1941: Section 18; First Schedule;
- Insurance Act 18 of 2017: Section 1(1) (definition of "cell structure");
- Finance Act 1965 (United Kingdom): Schedule 6, paragraph 4(1)(b).

Other documents

- Interpretation Note 91 (Issue 2): "Concession or Compromise of a Debt" at 20 (Example 11) – dated 20 July 2022.

Cases

- *ITC 103* [1927] 3 SATC 328 (U);
- *Joffe & Co (Pty) Ltd v Commissioner for Inland Revenue* [1946] AD 157; 13 SATC 354 at 359;
- *Afrikaanse Verbond Begrafnis Onderneming Beperk v Commissioner for Inland Revenue* [1950] (3) SA 209 (A); 16 SATC 401;
- *Anglo American Corporation of SA Ltd v Commissioner of Taxes* [1975] (1) SA 973 (RA); 37 SATC 45 (Rhodesian case);
- *ITC 110* [1928] 4 SATC 59 (U);
- *ITC 780* [1953] 19 SATC 328 (C);
- *Oram (HM Inspector of Taxes) v Johnson* [1980] 2 All ER 1 at 6;
- *Commissioner, South African Revenue Service v Labat Africa Ltd* [2013] (2) SA 33 (SCA); 74 SATC 1 at 6;
- *Grootchwaing Salt Works Ltd v Van Tonder* [1920] AD 492.

Tags: wear-and-tear allowance; expenditure; debtor's liability; base cost reduction.

NAVIGATING PRESCRIPTION UNDER SECTION 99

The quest for finality in tax matters is a cornerstone of a fair and efficient tax system. Taxpayers require assurance that, after a reasonable period, their tax affairs for a particular year are settled.

Conversely, the revenue authority must have adequate opportunity to ensure compliance and collect taxes rightfully due. In South Africa, section 99 of the Tax Administration Act, 2011 (the TAA), is the central provision governing the time limitations for the South African Revenue Service (SARS) to issue assessments. However, this provision is a complex tapestry of rules, exceptions, and extensions, creating what can often feel like shifting sands for taxpayers and practitioners alike.

This article seeks to unpack the intricacies of section 99, delving into its standard prescription periods, the pivotal role of the “date of assessment”, and the exceptions that may extend these time frames. By providing a comprehensive exploration of these provisions, it aims to arm taxpayers and practitioners with a clearer understanding of their rights and obligations, ultimately fostering greater certainty and fairness in the application of tax law.

THE GENERAL RULE: STANDARD TIME LIMITS FOR ISSUING ASSESSMENTS

At its core, section 99(1) of the TAA establishes the primary prescription periods. Generally, SARS may not issue an assessment –

- three years after the date of an original assessment issued by SARS (this typically applies to taxes like income tax where SARS issues an assessment, such as an ITA34, after the taxpayer files a return);
- five years after the date of an original assessment in the case of a self-assessment for which a return is required (common examples include value-added tax (VAT) or pay-as-you-earn (PAYE)); or





- five years from the date of the last tax payment (or the effective date if no payment was made) for a tax period where no return is required.

The “date of assessment” is the critical trigger for these periods. For assessments issued by SARS, it is the date indicated on the assessment notice. For self-assessments where a return is required, the Supreme Court of Appeal (SCA) in *Commissioner for South African Revenue Service v Char-Trade 117 CC t/a Ace Parking* [2018] provided vital clarification. The SCA held that the “date of assessment” is the date the taxpayer submits the relevant return. This judgment has profound implications: if a taxpayer fails to submit a self-assessment return where one is mandated, the five-year prescription period under section 99(1)(b) does not commence against SARS. This potentially leaves the taxpayer indefinitely exposed to assessment for that specific tax period.

Once the relevant three-year or five-year period has lapsed from the correctly determined date of assessment, and provided that none of the statutory exceptions apply, SARS is barred from issuing an assessment (including an additional or revised assessment that would alter the tax liability) for that specific tax type and tax period. This provision is fundamental to providing taxpayers with finality and certainty regarding their tax liabilities for past periods.

NON-PRESCRIPTION: THE EXCEPTIONS IN SECTION 99(2)

The certainty offered by section 99(1) is significantly tempered by the exceptions outlined in section 99(2). The most formidable of these is found in section 99(2)(a), which permits SARS to issue an assessment beyond the standard limitation periods if the failure to assess the full amount of tax was due to **fraud, misrepresentation, or non-disclosure of material facts** (FMND) on the part of the taxpayer or a person acting on their behalf.

Understanding these terms is critically important:

- **Fraud** in a tax context generally involves an unlawful act committed with the specific intention of deceiving or misleading SARS, thereby causing an underassessment of tax. It implies deliberate dishonesty.
- **Misrepresentation** is broader. It refers to a false statement of fact made by a taxpayer that leads to an underassessment. Importantly, a misrepresentation can occur negligently, fraudulently, or even innocently. It does not typically include the expression of a mere opinion or an interpretation of law, provided that all material facts supporting that interpretation were disclosed.
- **Non-disclosure of material facts** involves the failure by a taxpayer to reveal a fact that they had a duty to disclose, and which, if known to SARS, would have influenced the assessment outcome. The intention to conceal is generally irrelevant; the mere failure to disclose a material fact can suffice, provided that the fact is indeed “material”. Material facts are those that would reasonably be expected to influence a SARS assessor’s decision-making.

A crucial element for SARS when invoking this exception is **causality**. It is not enough to merely establish FMND; section 99(2)(a) explicitly requires that the failure to assess the full tax amount must have been “due to” such conduct. SARS must demonstrate a direct causal link between the taxpayer’s FMND and the resulting underassessment. Furthermore, the **onus of proof rests squarely on SARS** to prove, on a balance of probabilities, both the existence of the alleged FMND and this causal connection.

The SCA judgment in *Commissioner for South African Revenue Service v Spur Group (Pty) Ltd* [2021] sent significant ripples through the tax community. In this case, Spur had incorrectly answered “No” to pertinent questions in its income tax returns (eg, regarding contributions to a trust and deductions limited by section 23H of the Income Tax Act, 1962) and failed to separately disclose certain items in designated fields. The SCA held that these actions constituted deliberate misrepresentation and non-disclosure of material facts, as they limited SARS’ ability to flag potential tax risks through its automated risk identification processes. The court emphasised that the accuracy of the tax return *itself* is paramount, and reliance on information contained in attached financial statements might not cure such defects for prescription purposes. The *Spur* case highlights the critical importance of accurate and complete disclosure *within the tax return form itself*.

However, the more recent Western Cape tax court judgment in *Pear (Pty) Ltd v Commissioner for the South African Revenue Service* [2024] provides a vital counter-perspective and clarifies that an assessment can be incorrect yet still be protected by prescription. The court stressed that SARS cannot simply assume dishonesty or misrepresentation merely because an assessment is found to be wrong; objective proof of the alleged misconduct at the time of raising the additional assessment is required from SARS. Furthermore, the non-disclosure of a relatively small and, in the court’s view, immaterial amount (R1 197.52 of notional interest in this instance) was found insufficient to trigger section 99(2)(a). This case reaffirms that both the nature of the taxpayer’s conduct and the materiality of any misstatement or omission are key considerations.

Other exceptions to the standard prescription periods detailed in section 99(2) include assessments issued to give effect to the outcome of a dispute resolution process (such as an objection or appeal finalised under Chapter 9 of the TAA), instances where SARS and the taxpayer agree (prior to expiry) to extend the prescription period (a common occurrence during complex audits to allow for thorough investigation and engagement), and certain assessments related to a "practice generally prevailing" at the date of the original assessment.

"This article seeks to unpack the intricacies of section 99, delving into its standard prescription periods, the pivotal role of the 'date of assessment', and the exceptions that may extend these time frames."

STRETCHING THE CLOCK: SARS' POWERS TO EXTEND PRESCRIPTION PERIODS

The Tax Administration Laws Amendment Act, 2015, introduced further complexities by granting SARS powers to extend prescription periods under specific circumstances, as detailed in section 99(3) and 99(4).

- **Section 99(3):** SARS can, by giving at least 30 days' prior notice, extend a prescription period by a duration approximate to a delay arising from the taxpayer's failure to provide all relevant material requested by SARS under section 46(1) of the TAA within the specified or agreed extended period, or due to the time taken to resolve a dispute concerning SARS' entitlement to access such information. Practitioners have noted that SARS may seek to rely on this provision even where an extension for providing information was formally requested by the taxpayer, granted by SARS, and subsequently complied with by the taxpayer, which can be a point of contention.
- **Section 99(4):** SARS can unilaterally extend a prescription period by up to three years (for assessments by SARS) or two years (for self-assessments) by giving the taxpayer at least 60 days' prior notice. This power can be exercised if an audit or investigation being conducted by SARS relates to complex matters such as the application of the doctrine of substance over form, the general anti-avoidance rule (GAAR), the taxation of hybrid entities or instruments, or the application of transfer pricing provisions under section 31 of the Income Tax Act.

A decision by the Commissioner to extend prescription under these subsections constitutes administrative action and must therefore comply with the principles of lawfulness, reasonableness, and procedural fairness as enshrined in the Promotion of Administrative Justice Act, 2000 (PAJA). This implies that taxpayers should, in principle, be afforded an opportunity to make representations before such an extension is finalised.

THE IMPACT OF OBJECTIONS AND APPEALS ON SECTION 99

The lodging of an objection or appeal by a taxpayer does *not* generally suspend or interrupt the initial three-year or five-year period within which SARS must issue an original assessment or an additional assessment if the grounds for doing so (eg, discovery of new facts not amounting to FMND, or even FMND itself) exist independently of the dispute.

However, a crucial exception is found in section 99(1)(d)(iv), read with section 99(2)(b). These provisions clarify that the standard limitation periods in section 99(1) do not apply to an assessment issued by SARS if it is made to give effect to the outcome of a dispute resolved under Chapter 9 of the TAA. This means that if a taxpayer's objection is disallowed and a subsequent appeal is dismissed (or if an objection is allowed in part, or an agreement is reached), SARS can issue a consequential assessment reflecting that outcome, even if the original three-year or five-year period for assessment has, by then, expired. This ensures that the results of the dispute resolution process can be practically implemented.



The judgment in *TALT v Commissioner, South African Revenue Service* [2024] further illuminated aspects of the dispute process. While primarily focused on whether a taxpayer could introduce new grounds of appeal not explicitly stated in the initial objection, the case operated within the framework that the outcome of an appeal could necessitate further assessment action by SARS. The court found that if an objection (eg, on grounds of prescription) was made against a specific *amount* in an assessment, the taxpayer could later introduce other grounds of appeal (eg, on the merits of the taxability of that same amount) in the tax court, provided that it related to the same disputed part or amount.

COMPASS TO NAVIGATE PRESCRIPTION

The intricacies of section 99 present significant risks and strategic considerations for taxpayers and their advisors:

- Accuracy is paramount:** The *Spur* judgment serves as a stark warning. Incorrect answers or omissions in the tax return itself can be deemed FMND, potentially negating prescription. Meticulous completion of returns, addressing all questions accurately, is non-negotiable.
- Non-filing is perilous:** As established in *Char-Trade*, failure to file a required self-assessment return means the assessment prescription clock under section 99(1)(b) simply does not start ticking for SARS, leading to indefinite exposure.
- The onus on SARS for FMND:** While SARS can invoke FMND to bypass prescription, the *Pear* judgment (although non-binding) reinforces that SARS must objectively prove such misconduct and its materiality; a mere error or incorrectness in an assessment by the taxpayer is insufficient. Taxpayers should hold SARS to this burden of proof.
- Vigilance regarding extensions:** Taxpayers must be aware of SARS' powers to extend prescription under section 99(3) and 99(4) and be prepared to engage robustly, asserting their rights to procedural fairness under PAJA.
- Comprehensive record retention:** Given the far-reaching implications of FMND allegations, which can effectively remove any ultimate time limit for assessment, retaining comprehensive tax records, correspondence with SARS, and supporting documentation for tax return positions indefinitely is a prudent strategy. Standard statutory record-retention periods may prove insufficient in high-risk scenarios.

CONCLUSION

Section 99 attempts to strike a delicate balance between providing taxpayers with much-needed certainty regarding their past tax affairs and enabling SARS to effectively administer the tax system and collect revenue due to the fiscus. However, the numerous exceptions to the standard prescription periods, particularly the provisions relating to fraud, misrepresentation, or non-disclosure of material facts, coupled with SARS' statutory powers to extend these timelines, mean that the shield of prescription is not absolute.

Taxpayers and their advisors must navigate this complex terrain with diligence, ensuring meticulous accuracy in all disclosures to SARS and maintaining a thorough understanding of their rights and SARS' obligations. While the sands of prescription can indeed shift, a well-informed, compliant, and proactive taxpayer stands the best chance of finding firm ground and achieving the finality that the prescription rules aim to provide.

"Meticulous completion of returns, addressing all questions accurately, is non-negotiable."

Dr Hendri Herbst

WTS Renmere

Acts and Bills

- Income Tax Act 58 of 1962: Section 31;
- Tax Administration Act 28 of 2011: Sections 46(1), 99 (reference made to subsections (1), (1)(b), (1)(d)(iv), (2), (2)(a), (2)(b), (3) & (4); Chapter 9 (sections 101 to 150);
- Tax Administration Laws Amendment Act 23 of 2015;
- Promotion of Administrative Justice Act 3 of 2000.

Other documents

- ITA34 Notice of assessment.

Cases

- Commissioner for South African Revenue Service v Char-Trade 117 CC t/a Ace Parking* [2018] (776 of 2017) [2018] ZASCA 89 (31 May 2018); [2018] JDR 2257 (TC);
- Commissioner for South African Revenue Service v Spur Group (Pty) Ltd* [2021] (320/2020) [2021] ZASCA 145 (15 October 2021);
- Pear (Pty) Ltd v Commissioner for the South African Revenue Service* [2024] (IT 46080) [2024] ZATC 19 (5 December 2024);
- TALT v Commissioner, South African Revenue Service* [2024] (A2023/077887) [2024] ZAGPJHC 827; 87 SATC 222 (27 August 2024).

Tags: date of assessment; primary prescription periods; self-assessment; underassessment; fraud; misrepresentation; material fact; balance of probabilities; practice generally prevailing; general anti-avoidance rule (GAAR); non-filing; tax records; statutory record-retention periods; non-disclosure of material facts.

SARS v PAJA

Beginning most prominently with the original hearing of ABSA Bank Ltd and Another v Commissioner, South African Revenue Service [2021] in the High Court, a taxpayer's right to approach the High Court to request the administrative review of SARS' decisions has been a bone of contention between SARS and taxpayers.

Although the *ABSA* case was put to bed by the Constitutional Court early in 2025 (it was consolidated with four other cases in *United Manganese of Kalahari (Pty) Limited v Commissioner for the South African Revenue Service and Four Other Cases* [2025]), the most recent case to reach the High Court in this saga between SARS and taxpayers came in the form of *Kerbyn Cape 2 (Pty) Ltd v Commissioner, South African Revenue Service* [2025].

BACKGROUND FACTS IN KERBYN CAPE

SARS selected Kerbyn Cape for an income tax audit and value-added tax (VAT) audit. Following the finalisation of these audits, SARS issued Kerbyn Cape with additional assessments for both income tax and VAT on 5 February 2016.

At the time that the additional assessments were received by Kerbyn Cape, its sole director was overseas. As a result of company documents being stored at his private residence and thus being inaccessible (these being required in order to object to the additional assessments), and due to seeking expert tax advice prior to lodging its objections, Kerbyn Cape took longer than the then prescribed 30 business days in which to lodge its objections. In fact, Kerbyn Cape took until 27 May 2016 to lodge its objection to the income tax additional assessment, and until 29 October 2016 to lodge its objection to the VAT additional assessment.

SARS declined to consider Kerbyn Cape's first income tax objection on the basis that it was invalid as it had been filed outside of the prescribed time period without exceptional circumstances having been shown for this delay. Despite this, SARS invited Kerbyn Cape to submit a second objection addressing whether exceptional circumstances existed to warrant SARS considering its objection. This Kerbyn Cape did, but SARS also declined to consider this second objection.

Nevertheless, SARS again invited Kerbyn Cape to submit a third objection, which Kerbyn Cape did in October 2016, and again invited Kerbyn Cape to submit a fourth objection following SARS declining to consider its third objection, which Kerbyn Cape did on 17 August 2017. Finally, SARS issued a letter to Kerbyn Cape on 21 September 2017 indicating that it did not consider exceptional circumstances to exist that would warrant it considering Kerbyn Cape's income tax objections, and thus these were declined.

A similar process occurred in respect of Kerbyn Cape's VAT objections. SARS declined to consider Kerbyn Cape's first VAT objection on the basis that it was invalid. Kerbyn Cape therefore submitted a second VAT objection on 7 August 2017. On 29 August 2017, SARS issued a letter to Kerbyn Cape indicating that it did not

consider exceptional circumstances to exist that would warrant it considering Kerbyn Cape's VAT objections, and thus these were declined.

As a result, Kerbyn Cape decided to turn to the Tax Ombud, filing a complaint against SARS in June 2018 in respect of both the income tax and VAT additional assessments. Nothing came of this, and on 6 March 2019 Kerbyn Cape filed a consolidated objection to both additional assessments.

SARS declined the consolidated objection on the basis that exceptional circumstances were not demonstrated by Kerbyn Cape for the late filing of this objection, and that the additional assessments had already prescribed. Therefore, Kerbyn Cape applied to the High Court in terms of the Promotion of Administrative Justice Act, 2000 (PAJA), for the review of SARS' decision not to consider its objections.

HIGH COURT'S DECISION

SARS raised two points *in limine* (ie, procedural points which had to be decided prior to the merits of the matter being heard, and the outcome of which could impact whether the court would consider the merits). These were that: (i) the High Court lacked jurisdiction to hear the matter as the tax court had exclusive jurisdiction over tax matters; and (ii) Kerbyn Cape had not exhausted internal remedies as required by section 7(2) of PAJA.

On the point of jurisdiction, section 105 of the Tax Administration Act, 2011 (the TAA), provides that:

"A taxpayer may only dispute an assessment or decision in section 104 in proceedings under this Chapter, **unless a High Court otherwise directs.**" (emphasis added)

Based on previous cases (most notably *Commissioner, South African Revenue Service v Rappa Resources (Pty) Ltd* [2023]), SARS submitted that Kerbyn Cape could only approach the High Court to request that it hear the matter where exceptional circumstances existed.

On the point of internal remedies, SARS argued that Kerbyn Cape had not made out any case for having exhausted these. In response, Kerbyn Cape argued that due to the lapse of time, it was prohibited from approaching the tax court for condonation of the late filing of its objections (as any condonation application had to be filed within 20 business days of SARS' decision not to accept the objection as valid in terms of rule 50 of the rules promulgated under section 103 of the TAA).

Considering these arguments, the High Court found that Kerbyn Cape had not made out an argument under section 105 for why the High Court should direct that the matter be heard by it. Therefore, the court decided SARS' first point *in limine* in its favour.

With respect to exhausting internal remedies, the High Court pointed out that a decision by SARS that an objection is invalid for being filed outside the prescribed time period is in and of itself subject to objection. Therefore, the court concluded that Kerbyn Cape should have filed an objection to SARS' first decision not to consider its first income tax and VAT objections (as opposed to filing subsequent objections). On this basis, the court decided SARS' second point *in limine* in its favour as well.

IMPLICATIONS OF KERBYN CAPE FOR TAXPAYERS

With the hearing of *United Manganese of Kalahari* in the Constitutional Court in March 2025, the decision in *Kerbyn Cape* with respect to jurisdiction and a taxpayer's ability to approach the High Court under section 105 of the TAA has been somewhat overshadowed. Importantly, *United Manganese of Kalahari* has clarified that when seeking the High Court's directive that it hears a tax matter, exceptional circumstances are not required to be shown by a taxpayer – the relevant considerations for whether a High Court should direct that it hears a matter under section 105 of the TAA are fact-specific, hinge on the nature of relief being requested from the High Court, and include, among other things, whether the matter is capable of being subject to appeal to the tax court or not, and whether it is desirable in the circumstances for a specific point in the matter to be separated from the remainder of the dispute and heard in the High Court.

That being said, *Kerbyn Cape* still provides guidance to taxpayers when considering whether all internal remedies have been exhausted (and therefore whether, under PAJA, administrative review is possible). Interestingly, the court in *Kerbyn Cape* decided to ignore the fact that SARS invited the taxpayer to submit further objections on no less than three occasions. Instead, the court held that the taxpayer should have objected to SARS' decision not to consider its first income tax and VAT objections. Where a taxpayer has submitted an objection which SARS considers invalid, it is not uncommon for SARS to decline the objection but invite the taxpayer to submit a second objection remedying the invalidity of the first. On the facts in *Kerbyn Cape*, it would not be unreasonable for the taxpayer to take SARS up on this invitation and file a second objection (or third or even fourth, as was the case).

Some views have been expressed that SARS should not be permitted to "run the clock down" on a taxpayer by issuing successive invitations to submit further objections until an additional assessment has prescribed. The High Court's decision in *Kerbyn Cape* should not be read as condoning this. However, once SARS had issued its letters of 29 August and 21 September 2017 about the income tax and VAT objections, respectively, it was at this time incumbent on the taxpayer to object to SARS' decision not to consider its objections, and then appeal this to the tax court.

Kerbyn Cape therefore reminds a taxpayer that knowing what decisions it can object against, and knowing when to object, are as important as the merits of its case. Even the strongest merits stand no chance if a court refuses to consider them on procedural grounds. Due to the specific dispute resolution process contained

in the TAA, this is all the more important for tax disputes. For this reason, seeking expert advice during a tax dispute can be as important procedurally as it is when formulating the merits of an objection.

Nicholas Carroll

Cliffe Dekker Hofmeyr

Acts and Bills

- Tax Administration Act 28 of 2011: Sections 104 & 105;
- Promotion of Administrative Justice Act 3 of 2000: Section 7(2).

Other documents

- Rules promulgated under section 103 of the Tax Administration Act (Dispute Resolution Rules): Rule 50.

Cases

- *ABSA Bank Ltd and Another v Commissioner, South African Revenue Service* [2021] (3) SA 513 (GP);
- *United Manganese of Kalahari (Pty) Limited v Commissioner for the South African Revenue Service and four other cases* [2025] (5) BCLR 530 (CC); [2025] ZACC 2 (31 March 2025);

[Note: the five cases in question are:

- *United Manganese of Kalahari (Pty) Limited v Commissioner for the South African Revenue Service* (CCT 94/23);
- *Rappa Resources (Pty) Limited v Commissioner for the South African Revenue Service* (CCT 98/23);
- *Forge Packaging (Pty) Limited v Commissioner for the South African Revenue Service* (CCT 66/23);
- *Absa Bank Limited and United Towers (Pty) Limited v Commissioner for the South African Revenue Service* (CCT 72/24); and
- *Lueven Metals (Pty) Limited v Commissioner for the South African Revenue Service* (CCT 320/23)].
- *Kerbyn Cape 2 Proprietary Limited v Commissioner, SARS* (15899/2023) [2025] ZAWCHC 308;
- *Commissioner, South African Revenue Service v Rappa Resources (Pty) Ltd* [2023] (4) SA 488 (SCA).

Tags: administrative review; income tax audit; additional assessments; exceptional circumstances; internal remedies; additional assessment.



TAX COURT'S JURISDICTION TO ALTER ASSESSMENTS CONFIRMED

In July 2025, the Supreme Court of Appeal (SCA) clarified a simple yet crucial principle of tax court procedure in the case of Lion Match Company (Pty) Ltd v Commissioner for the South African Revenue Service [2025]: the withdrawal of a taxpayer's legal representation, even at the last minute, does not equate to the withdrawal of the appeal itself.

Most importantly, the SCA has confirmed that section 129(1) of the Tax Administration Act, 2011 (the TAA), does not preclude the tax court from altering an assessment in the South African Revenue Service's (SARS') favour, as contemplated in section 129(2) of the TAA, even if the taxpayer is absent when the appeal is heard.

Though this may seem uncontroversial, the judgment is important as it corrects a fundamental procedural misstep by the tax court and affirms the proper interpretation of section 129 of the TAA and Rules 44 and 46 of the Tax Court Rules. It underscores why procedural disengagement can backfire and how SARS could secure harsher relief in a taxpayer's absence.

BACKGROUND

The dispute originated in a capital gains tax appeal brought by the Lion Match Company (LMC), which was set down for hearing in November 2019. A month prior to trial, LMC's longstanding attorneys of record withdrew. On the morning of the hearing, new representatives appeared solely to move for a postponement. When this was refused, they too withdrew.

Counsel for SARS proceeded to lead evidence in support of an upward adjustment to the original additional assessment. The tax court, however, declined to entertain the relief, holding that the

withdrawal of LMC's representatives had the effect of a withdrawal of the appeal, thereby ousting the tax court's jurisdiction.

In reaching this conclusion, the tax court relied on section 116(1) of the TAA, which provides that the tax court hears appeals lodged under section 107, and section 129(1), which states that:

"...the tax court, **after** hearing the appellant's appeal lodged under section 107 against an assessment or 'decision', must decide the matter..."

The tax court interpreted these provisions together to mean that it could only exercise its powers under section 129(2) after hearing the appellant's appeal, which, in its view, required the taxpayer's active participation in the hearing. Once the appellant's representatives withdrew, it considered there to be no "appeal" before it to be heard. The court further held that Rule 44(7) of the Tax Court Rules, which allows the tax court to decide a matter in a party's absence, could not override sections 116 and 129(1) of the TAA.

WITHDRAWAL MUST BE EXPRESS

On appeal, the High Court (Full Bench), squarely rejected the tax court's approach. The High Court emphasised that Rule 46 of the Tax Court Rules governs the withdrawal of appeals and provides as follows:

"A party who has lodged an appeal may withdraw it by delivering a notice of withdrawal to the registrar and to the other parties."

No such notice was delivered by or on behalf of LMC. The High Court found that the tax court's interpretation was wrong and inconsistent with the principles outlined in *Africa Cash and Carry (Pty) Ltd v Commissioner, South African Revenue Service* [2020]. In the absence of compliance with Rule 46, there was no valid withdrawal of the appeal. The mere withdrawal of legal representatives or non-appearance at the hearing does not suffice.

JURISDICTION IS RETAINED

The High Court further held that the tax court remained fully empowered to decide the matter under section 129 of the TAA, read with Rule 44(7) of the Tax Court Rules.

Section 129(2) provides that, in the case of an appeal against an assessment or decision referred to in section 104(2) –

"the tax court may –

- (a) confirm the assessment or decision;
- (b) order the assessment or decision to be altered; or
- (c) refer the assessment [or decision] back to SARS for further examination and assessment;"

Rule 44(7) complements this, stating:

"If a party or a person authorised to appear on the party's behalf fails to appear before the tax court at the time and place appointed for the hearing of the appeal, the tax court may decide the appeal under section 129(2) ..."

There is nothing in either provision that makes taxpayer participation a prerequisite for the tax court's jurisdiction. Once an appeal is validly lodged under section 107, the tax court retains its full powers to determine the matter, including its power to alter an assessment upwards in SARS' favour (if the revision is justified on pleadings and evidence) even if the taxpayer is not present to contest the evidence.

The SCA endorsed the High Court's reasoning and upheld the High Court's order that LMC's additional assessments be increased accordingly.

Both the High Court and SCA in *Lion Match* confirmed that an upward adjustment by the tax court under section 129 must be grounded in the case before it, namely SARS' pleaded grounds of assessment and supporting evidence. It is therefore clear that the tax court's jurisdiction to adjust an assessment is not abstract or open-ended but anchored in the Rule 31 statement and supporting material.

In this regard, the earlier tax court interlocutory ruling in *Lion Match Company (Pty) Ltd v Commissioner for the South African Revenue Service* [30 January 2017] underscores the procedural limits of SARS' pleaded case. This judgment made it clear that while SARS may amplify an existing ground of assessment, it cannot substitute an entirely new factual or legal basis through its Rule 31 pleading;

doing so requires a fresh additional assessment. Although the interlocutory ruling in *Lion Match* was not tested in the subsequent High Court or SCA appeals, this principle was reaffirmed in the April 2025 tax court judgment of *Commissioner for the South African Revenue Service v SC (Pty) Ltd* [2025].

Read together with the SCA's judgment, these authorities show the full picture. The tax court's jurisdiction under section 129 is wide, even extending to upward adjustments in the taxpayer's absence, but it is exercised strictly within the confines of SARS' pleaded case. The rationale is to balance SARS' ability to pursue higher liability where the evidence supports it, against the taxpayer's right not to face a "moving target" in the form of shifting or entirely new grounds of assessment.

CONCLUSION

The *Lion Match* line of cases underscores both the reach and the limits of the tax court's powers. Even in a taxpayer's absence, the court retains full jurisdiction under section 129 to adjust assessments, including upwards, where SARS' pleadings and evidence warrant it. But those powers are confined to the grounds of assessment actually advanced by SARS; they cannot be recast through its Rule 31 statement. This balance ensures that while SARS may seek harsher relief, taxpayers are shielded from facing a case that shifts beneath their feet.

Mariska Delpont

Cliffe Dekker Hofmeyr

Acts and Bills

- Tax Administration Act 28 of 2011: Sections 104(2), 107, 116(1) & 129(1) & (2).

Other documents

- Tax Court Rules: Rules 31, 44 (specific reference to subrule (7)) and 46;
- Rule 31 statement.

Cases

- *Lion Match Company (Pty) Ltd v Commissioner for the South African Revenue Service* (IT 13950 (30 January 2017));
- *Africa Cash and Carry (Pty) Ltd v Commissioner, South African Revenue Service* [2020] (2) SA 19 SCA;
- *Lion Match Company (Pty) Ltd v Commissioner, South African Revenue Service* [2025] JDR 3336 (SCA (28 July 2025)); [2025] ZASCA 112;
- *Commissioner for the South African Revenue Service v SC (Pty) Ltd* (case number 45840, 15 April 2025).

Tags: procedural disengagement; additional assessments; supporting evidence; Rule 31 statement; grounds of assessment.



IS A DISTRIBUTION A DONATION, SETTLEMENT OR OTHER DISPOSITION?

Although not a new question, there has been a debate raging amongst some tax practitioners over whether a distribution from a discretionary trust is a “donation, settlement or other disposition”. The question has gained momentum as the focus on discretionary distributions to non-residents has increased.

The South African Reserve Bank indicated in May 2023 [Circular 14/6/2_2023, dated 23 May 2023 – Exchange control circular 3/2023] that, subject to the fulfilment of certain requirements, it will allow South African tax resident trusts to distribute (vest) previously blocked amounts to non-resident beneficiaries (these now include foreign trusts).

In addition, there was a tax amendment in 2023 (effective 1 March 2024) to section 25B of the Income Tax Act, 1962 (the Act), to tax South African (SA) tax resident trusts (SA trust) on income the trustees vest in non-SA tax resident beneficiaries. This was discussed in detail by Piet Nel and Pieter van der Zwan in the September 2024 edition of ASA and in the May 2025 Issue (Issue 82) of *Tax Chronicles Monthly* (Article No 0815): *Beneficiaries with vested rights trust and the conduit principle*. Their article clearly spelt out the problems this change can cause for the non-resident beneficiaries.

However, these changes highlighted a further question that tax practitioners have been asking themselves: Is a discretionary distribution by an SA trust, which vests income or capital in a non-resident beneficiary a “donation, settlement or other disposition” (collectively hereinafter referred to as a “donation”) as contemplated in section 7 (and similar provisions in the Eighth Schedule) of the Act? Bear in mind that the definition of “person” in section 1(1) of the Act includes a trust.

If the answer is that such a distribution is a donation there would be little impact on distributions by SA trusts to SA tax resident beneficiaries. This is because the likelihood that distributions from SA trusts to SA tax resident beneficiaries would result in attribution back to the trust being minimal. This is so because section 7(5) (and similar provisions in the Eighth Schedule) requires there to be a stipulation or condition which restricts the recipient from using the funds and such restrictions are rarely imposed by trusts when they distribute to their beneficiaries. Thus, this discussion is confined to distributions to non-resident beneficiaries. There is also no impact on beneficiaries with vested rights as they already “own” the income or assets, even if their rights of enjoyment are delayed.

But if the distribution is to a non-resident, as contemplated by section 7(8) or paragraph 72 of the Eighth Schedule pertaining to capital gains, the following question arises: Could it be argued that any income or capital gain that arises in the hands of the non-resident beneficiary “by reason or in consequence of” that donation, which would have been taxed in South Africa had the non-resident beneficiary been a resident, is required to be included in the taxable income of the SA trust, as “donor”?

Confusion is caused by Part V of Chapter II of the Act, which indicates that donations tax must be paid “on the value of any property disposed of (**whether...in trust or not**) by any resident”. Section 56(1)(l) of the Act then exempts from the tax, the value of property disposed of under a donation “if such property is disposed of under or **in pursuance of any trust**”. Bear in mind that “property” means “any right in or to property, movable or immovable, corporeal or incorporeal . . .” and it would thus include money.

The implication of these provisions is that an action “in pursuance of any trust” is a donation and if one does not think any further,

linking this point to section 7(8) or paragraph 72 of the Eighth Schedule could result in any amount that consequently arises in the hands of the non-resident beneficiary being taxed in South Africa in the SA trust’s hands.

So, is a distribution a donation?

It can be argued that the case of *ITC 1840* [2009] supports the view that a trust distribution to a beneficiary, in the ordinary course, is not a donation. A reading of the case will, however, lead one to conclude that it tends to rather support the contention that a distribution to a beneficiary may be viewed as a donation and not the opposite. In paragraph 56 of the case the judge said:

“Even if the 1996 awards were made in the *bona fide* but mistaken belief that the 1994 children’s trusts were beneficiaries of the appellant without regard to the prohibition against awards of a capital nature during the lifetime of X, these were donations as contemplated by the legislature.”

And in paragraph 58:

“I accept that where the trustees of a trust make an award of an amount of money, and such award is accepted by the beneficiary of such award, the trust has awarded property as defined in section 55(1) of the Act. What is disposed of in terms of such a donation is a right in or to movable, corporeal property in the form of money, and this constitutes a donation as defined.”

ITC 1840 was, in any event, appealed and the judgment issued by the Supreme Court of Appeal (SCA) [*The Abraham Krok Trust v Commissioner for the South African Revenue Service* [2010]] renders the discussions in *ITC 1840* of little value. In the *Krok Trust* case the trust assets were divided into six separate and equal trusts (subtrusts). A further six trusts were later created (children’s trusts). Each of the six children’s trusts had a beneficiary of the family trust as its beneficiary, but the six children’s trusts were not themselves specifically named as beneficiaries of the family trust. The trustees of the subtrusts entered into a sale agreement with the trustees of the children’s trust, resulting in the children’s trusts owing the subtrusts an amount of R52 million. The Krok trust then decided to retrospectively award each of the children’s trusts an amount equal to the balance owing. Donations tax and late payment interest thereon were levied on the award. The SCA held that the award was a donation, and that section 56(1)(l) exempted it from donations tax. Thus, the question of whether a distribution to a named beneficiary is a donation was not part of the finding.

Of interest, however, is that Judge Nugent commented (albeit *obiter*) that

“A donation that is made by a trustee to the beneficiary of a trust would ordinarily attract donations tax. But such a donation is exempted from the tax by section 56(1)(l), which exempts property which is disposed of under a donation if such property is disposed of under and in pursuance of any trust.”

and he further advised that the judge in *Welch’s Estate* [2005], in paragraph 24, indicated that

"the obvious purpose of [the exemption] is to avoid donations tax being levied twice upon what was in essence one donation by the donor."

Welch's case further elaborates that section 56(1)(l)

"seems to be intended to protect the donor and the trustee from the levying yet again of donations tax upon the ultimate disposal by the trustee of the corpus to the beneficiary who gives nothing in return for it. Its apparent purpose is simply to avoid taxing twice what is in reality one donation traceable to the initial act of the donor in settling assets upon the trust"

These cases thus seem to largely support that the vesting of income or capital in a beneficiary constitutes a donation and, on that basis, one could conclude that section 7(8) would apply.

If one were to reach this conclusion, one can, of course, put the obvious argument forward – that amounts derived by the non-resident beneficiary using the funds flowing from the distribution did not arise "as a consequence" of that donation (a requirement of section 7(8)), but rather because of the way the non-resident beneficiary has applied skill and labour to derive the income.

In *Kohler v Commissioner for Inland Revenue* [1949] Judge Murray explained that where there are words like "in consequence thereof", when looking at causation, one must seek to find the proximate and not the remote cause. This was elaborated on, in the later *Widan* case [*Commissioner for Inland Revenue v Widan* [1955]], to mean that one must look at the "real efficient cause". Thus, if the amount vested in the beneficiary is simply invested, the argument that it did not arise "in consequence of" the donation would fail, but if the recipient has exercised skill and labour to derive the income, then the cause of the income could be said to not directly arise by reason, or in consequence, of the donation.

But what if the beneficiary has simply invested the funds distributed to it?

One might then turn to the *Comprehensive Guide to the Income Tax Return for Trusts* (the Guide) for support for the contention that a discretionary distribution (the act of vesting of an amount in a beneficiary) is not a donation. In paragraph 6.13(b) the Guide provides definitions for various terms which are designed to act as guidelines in respect of "contribution, distribution, or donations in the context of trusts". The distinction drawn here between a distribution and a donation might provide some comfort, especially as the two terms are separately dealt with.

However, it becomes clear when looking at the descriptions that the purpose of the distinction in the Guide is merely to provide context to terms used in the Guide: "A distribution by a Trust refers to amounts vested in the Trust beneficiaries" whereas a "donation to a Trust refers to amounts paid to the Trust by any person in a manner that is gratuitous/with disinterested benevolence". This distinction is also made in Interpretation Note 114 (*Interaction between section 25B(1) and section 7(8) in case of conflict, inconsistency or incompatibility*). The distinction nevertheless bears further consideration.

It thus becomes apparent that it is important, as with all tax questions, to think through the principles in detail.

Firstly, section 7(8) refers to a "donation, settlement or other disposition". These terms have been judicially considered. In *Ovenstone v Secretary for Inland Revenue* [1980] (2) SA 721 (A), 42 SATC 55 at page 76 Judge Trollip advised that the phrase

"covers any disposal of property made wholly gratuitously out of liberality or generosity; it also covers any disposal of property made under a settlement or other disposition for some consideration but in which there is an appreciable element of gratuitousness and liberality or generosity"

As a result of the case, it became clear that a low-interest or interest-free loan, whereby the interest that would generally be charged to a third party but is not charged, is considered to demonstrate the aspect that reflects the generosity of the lender (albeit that, in law, there is no obligation to charge interest on a loan).

"It can be argued that the case of *ITC 1840* [2009] supports the view that a trust distribution to a beneficiary, in the ordinary course, is not a donation."

A "donation" is, as indicated by the Guide (above) a gratuitous disposal of property with pure liberality or disinterested benevolence. It thus requires sheer liberality on the part of the donor – nothing can be expected in return. The donor, without legal obligation, undertakes to give something [see *Silke on South African Income Tax* § 10.61]. Where there is something to be given in return, there cannot be a pure donation. The "settlement or other disposition" in section 7(8) and paragraph 72 do, however, potentially contemplate something being given in return, albeit that it is not adequate (ie, there is still an element of gratuitousness or pure liberality).

However, when a trustee vests an asset in a beneficiary two things must be borne in mind. Firstly, the trustee has a limited choice as to in whom they are able to vest the assets because only the named beneficiaries have any right to be considered for purposes of the distribution (albeit that for a discretionary trust the right of each beneficiary that it will be them, is a hope or a *spes*). Furthermore, despite having only a *spes*, the discretionary beneficiaries have the right to hold the trustees to account that they will act in the best interests of each beneficiary in relation to the trust assets and in relation to the other beneficiaries. Section 9 of the Trust Property Control Act, 1988 states:

"A trustee shall in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another."

Secondly, as indicated in the definition of "trust" in the Trust Property Control Act, a trust means

"an arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument" [Note: The definition of "trust" in the Act is similar to this definition.]

It could thus be argued that the fact that the trust deed *requires* trustees to make distributions to beneficiaries surely means that the distribution cannot be motivated by any amount of pure liberality as contemplated in the definition of donation.

The discussion in the Constitutional Court in *Thistle Trust v Commissioner, South African Revenue Service* [2024] highlights the point that the trustees simply hold the assets for the benefit of the ultimate beneficiaries when it quotes the 1971 *Rosen* case [*Secretary for Inland Revenue v Rosen*]. In relation to income received by trustees on behalf of the trust, the intervening trustee is treated "as a mere administrative conduit-pipe," despite that the trust is a separate person for purposes of the Act.

Thus, since the trustees simply hold the assets settled on the trust for the benefit of the beneficiaries, it could be argued that vesting those assets in any of the stated beneficiaries cannot be seen as any form of gratuitous disposal with sheer liberality because, firstly, the trustees are ultimately obliged to vest all the assets in the stated beneficiaries and, secondly, in return, the beneficiary disposes of their *spes* against the trust in respect of that particular "property" when it is vested in them.

In addition, as indicated in the *Krok Trust* case (see above) any relevant donation has already taken place when the assets were moved to the trust for the benefit of the beneficiary body and a second "donation" can surely not take place on transfer of the assets, through vesting, in any particular one of the named beneficiaries in light of this exchange. One can refer back to the quote from *Welch's* case cited above regarding section 56(1)(l):

"Its apparent purpose is simply to avoid taxing twice what is in reality one donation traceable to the initial act of the donor in settling assets upon the trust"

Of course, whether these arguments would stand up in a court of law is debatable. Tax is never simple and when it comes to trusts the complexity is significant. Each scenario is different, and one must consider the relevant scenario carefully and understand why a section in the tax legislation applies or not. It is thus important to make sure one is clear on why a distribution by an SA trust to a discretionary foreign beneficiary does or does not give rise to a section 7(8) or paragraph 72 implication.

Adjunct Associate Professor Deborah Tickle

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Acts and Bills

- Income Tax Act 58 of 1962: Sections 1(1) (definitions of "person" & "trust"), 7 (specific reference to subsections (5) & (8)), 25B, 55(1), 56(1)(l); Chapter II: Part V (sections 54 to 64); Eighth Schedule: Paragraph 72;
- Trust Property Control Act 57 of 1988: Sections 1 (definition of "trust") & 9.

Other documents

- Tax Chronicles Monthly* (May 2025 – 0815): *Beneficiaries with vested rights trust and the conduit principle* (Piet Nel & Pieter van der Zwan);
- Exchange Control Circular 3: *Private individuals who cease to be residents for tax purposes*; [Circular 14/6/2 2023, dated 23 May 2023 – issued by the South African Reserve Bank];
- Silke on South African Income Tax* § 10.61;
- Comprehensive Guide to the Income Tax Return for Trusts* (11 April 2025 – Revision 23): Paragraph 5.13(b);
- Interpretation Note 114 (*Interaction between section 25B(1) and section 7(8) in case of conflict, inconsistency or incompatibility*).

Cases

- ITC 1840* [2009] 72 SATC 79: Paragraphs 56 & 58;
- The Abraham Krok Trust v Commissioner for the South African Revenue Service* (58/10) [2010] ZASCA 153 (29 November 2010); [2010] JDR 1438 (SCA);
- Kohler v Commissioner for Inland Revenue* [1949] (4) SA 1022 (T); 16 SATC 312;
- Commissioner for Inland Revenue v Widan* [1955] (1) SA 226 (A); 19 SATC 341;
- Ovenstone v Secretary for Inland Revenue* [1980] (2) SA 721 (A), 42 SATC 55 at page 76;
- Thistle Trust v Commissioner, South African Revenue Service* [2025] (1) SA 70 (CC); [2024] ZACC 19 (at paragraph 41);
- Secretary for Inland Revenue v Rosen* [1971] (1) SA 172 (A);
- Welch's Estate v Commissioner, South African Revenue Service* [2005] (4) SA 173 (SCA).

Tags: distribution from a discretionary trust; donation; settlement; other disposition; non-resident beneficiaries; foreign trusts; interest-free loan.

REQUIREMENTS FOR INDIRECT EXPORTS

Indirect exports offer valuable opportunities for South African businesses to expand internationally, but navigating the VAT regulations requires caution.

When the foreign buyer takes responsibility for arranging transport, the supplier (also referred to as the seller) must meet specific criteria to apply a preferential VAT rate. One of the most crucial requirements is securing proper export documentation within a set timeframe. If these conditions are not satisfied, the transaction may attract a standard VAT rate, even if the goods have physically left the country.

DIRECT VS INDIRECT EXPORTS - KEY DIFFERENCES

Understanding how VAT applies when exporting goods from South Africa is essential:

Direct exports: The supplier arranges transport and the exportation of the goods to a recipient outside South Africa. When proper documentation is retained and the goods are exported via a designated port, the transaction may qualify for VAT at the zero rate. Direct exports have a lower risk, as the supplier controls the compliance process.

Indirect exports: This only applies to goods when the foreign buyer collects the goods in South Africa and takes responsibility for exporting the goods. The supplier must rely on the buyer for proof of export, making this method riskier. Zero-rating is possible under strict conditions, as outlined in Government Notice R.316, GG 37580, issued under section 74(1) of the Value-Added Tax Act, 1991.

VAT OPTIONS FOR INDIRECT EXPORTS

Suppliers have two options when it comes to indirect exports:

Option 1: Charge 15% VAT

The buyer may claim a refund through the VAT Refund Administrator. Goods must be exported within 90 days from the date of the tax invoice. The VAT refund claim must be submitted within 90 days from the date of export.

Option 2: Apply 0% VAT

The seller may elect to apply the zero rate if the requirements set out in Regulation 316 are met, which include that:

- the buyer is a "qualifying purchaser", as defined in the Regulation;
- goods are exported via a designated commercial port; and
- the supplier obtains complete export and other documentation specified in Regulation 316 within 90 days from the date the goods are required to be exported – the Regulation requires the goods to be exported within 90 days from the earlier of the date the invoice is issued or the date any payment is received.

WHY 15% VAT IS OFTEN THE SAFER OPTION

While zero-rating benefits the buyer, it places the risk on the supplier. If the buyer delays or fails to timeously provide the required documents, the supplier becomes liable for the VAT. Charging 15% VAT upfront, shifts the compliance burden to the buyer.

TIMELINES & EXTENSIONS

Suppliers must adhere to the prescribed deadlines for submitting export documentation, but extensions may be granted under specific circumstances.

"While zero-rating benefits the buyer, it places the risk on the supplier. If the buyer delays or fails to timeously provide the required documents, the supplier becomes liable for the VAT."



The standard deadline for export documentation is 90 days, which is calculated from the date that the movable goods are required to be exported (the general rule is the earlier of the date of invoice or the date that payment is received). SARS may, in exceptional cases, grant extensions for the time period within which the goods must be exported such as –

- that the recipient has modified the order or contract terms;
- logistics delays, specifically, an inability to secure transport; or
- export country regulations for certain goods (eg, registrable goods).

FINAL THOUGHTS FOR SELLERS

If a seller is unsure about zero-rating an indirect export, it is usually safer to charge VAT at 15%. This protects the business from unexpected SARS liabilities.

To stay compliant suppliers should –

- have clear written agreements with buyers;
- understand who is responsible for transport and documentation: and
- always collect and retain the correct export documents on time.

"Suppliers must adhere to the prescribed deadlines for submitting export documentation, but extensions may be granted under specific circumstances."

Sindisiwe Zinyongo

Forvis Mazars

Acts and Bills

- Value-Added Tax Act 89 of 1991: Section 74(1).

Other documents

- Government Notice R.316 in *Government Gazette* 37580, issued under section 74(1) of the VAT Act (2 May 2014).

Tags: preferential VAT rate; standard VAT rate; VAT at the zero rate; direct exports; indirect exports; qualifying purchaser; designated commercial port; export documentation.

VAT INCURRED BY HOLDING COMPANIES: THE WOOLWORTHS JUDGMENT

The July 2025 judgment handed down by the Supreme Court of Appeal (SCA) in *Commissioner for the South African Revenue Service v Woolworths Holdings Ltd* [2025] has once again raised the issue of the deductibility of VAT incurred by a holding company on the acquisition of professional services as input tax. This judgment should be read in the context of two previous judgments by the SCA which dealt with a similar issue, namely *Commissioner, South African Revenue Service v De Beers Consolidated Mines Ltd* [2012] (*De Beers*) and *Consol Glass (Pty) Ltd v The Commissioner for the South African Revenue Service* [2020] (*Consol*). This article will compare these three judgments and discuss the implications of the *Woolworths* judgment for holding companies.

LEGISLATIVE BACKGROUND

"Input tax" is defined in section 1(1) of the Value-Added Tax Act, 1991 (the VAT Act), as the tax charged on the supply of goods or services to a vendor or on the importation of goods by the vendor. To qualify as input tax the goods or services must be acquired by the vendor wholly or partly for the purpose of consumption, use or supply in the course of making taxable supplies. A taxable supply is a supply of goods or services by a vendor where tax is chargeable at the standard rate under section 7(1)(a) or the zero rate under section 11 of the VAT Act. Importantly for the purposes of the VAT Act, the supply of goods or services must be made by the vendor in the course or furtherance of the enterprise carried on by the vendor. VAT incurred by a vendor on the acquisition of goods or services which are not consumed for the purposes of making taxable supplies will not be allowed as input tax and may not be deducted by the vendor under section 16(3).

Holding companies often present a unique challenge when determining the deductibility of VAT incurred on the acquisition of goods or services as input tax. Holding companies generally earn interest and receive dividends from their subsidiaries which under the VAT Act are regarded as consideration for the making of an exempt supply and a non-supply, respectively, and therefore do not form part of the holding company's enterprise. VAT incurred on the acquisition of goods or services for the purposes of earning interest or receiving dividends may therefore not be deducted as input tax.

Furthermore, in *De Beers* and *Consol*, the SCA limited the deductibility of VAT incurred by companies on the acquisition of services for the purposes of mergers, acquisitions or the raising

of capital by ruling that there was not a sufficient link between the acquisition of these services and the day-to-day enterprise of the company.

COMMISSIONER FOR SARS V DE BEERS

A consortium approached De Beers Consolidated Mines Limited (De Beers) to propose a transaction in terms of which a newly established company would become the new holding company of De Beers. To assist in finalising the transaction, De Beers appointed non-resident and resident financial advisors and service providers. The Commissioner determined that the services provided by the non-resident service providers were imported services and assessed De Beers under section 7(1)(c). Furthermore, the Commissioner determined that the VAT charged by the resident service providers could not be deducted by De Beers as input tax. De Beers objected and thereafter appealed against these assessments.

On appeal from the tax court, the SCA found in the case of a public company that there is a clear distinction between the enterprise of the company with the attendant overhead expenses and the special duties imposed on a public company in the interests of its shareholders. The court found that the special duties of a public company when it is the target of a takeover are too far removed from the VAT enterprise of the public company to justify characterising services acquired in the discharge of those duties to be acquired for the purposes of making taxable supplies. In other words, the court found that the services acquired from the non-resident and resident service providers were unrelated to the core enterprise activity of De Beers, being the mining and sale of diamonds.

Of importance for the *Woolworths* judgment, the court did, however, in *De Beers*, concede that if a vendor conducts business as an investment company, the investments which that vendor holds could conceivably be regarded on their own as constituting an enterprise within the meaning of that term, as defined in section 1(1) of the VAT Act.

CONSOL GLASS (PTY) LTD v COMMISSIONER FOR SARS

Consol Glass (Pty) Ltd (Consol) restructured its debt and like De Beers, Consol also acquired the services of non-resident and resident service providers. The Commissioner raised additional

assessments for VAT on the imported services provided by the non-resident service providers and disallowed the deduction of the VAT incurred on the services provided by the resident service providers as input tax. Consol objected and subsequently appealed against these additional assessments.

The SCA, in considering the appeal, determined that the issues to be decided were, firstly, the vendor's purpose in acquiring these services, and, secondly, whether this purpose was for the making of taxable supplies in the course or furtherance of the vendor's enterprise. The Commissioner contended that the services were acquired by Consol for the purpose of making exempt supplies in the form of a financial service being the issue of a debt security.

The court found that for the purposes of this enquiry it was essential to determine the enterprise that the vendor was conducting and found that the enterprise of Consol was the manufacture and sale of glass containers and not the carrying on of a financial services enterprise. When determining the closeness of the connection required between the services acquired and the making of taxable supplies the court found that a functional relationship was significant. In other words, for a given taxable supply, what goods or services were consumed, used or supplied for the purposes of that supply?

With regard to the company reorganisation which led to the original Eurobond debt and the subsequent restructuring of that debt, the court found that this activity did not bring a material change to Consol's enterprise of making and selling glass containers. There was therefore no functional link between the restructuring of the debt and the making of taxable supplies by Consol. In the circumstances the services acquired from the non-resident and resident service providers were not consumed, used or supplied in the making of taxable supplies and Consol's appeal was dismissed.

COMMISSIONER FOR SARS v WOOLWORTHS HOLDINGS LIMITED

Woolworths Holdings Limited (Woolworths) is a group holding company that provides management services to its subsidiaries, including the provision of financial services and treasury functions. Woolworths charges its subsidiaries management fees for the provision of these services.

Woolworths acquired the shares in an Australian entity, David Jones Limited. The acquisition was funded through a rights offer made to both resident and non-resident shareholders. Various local service providers charged fees for services rendered as part of this rights offer and Woolworths sought to deduct the VAT incurred on a portion of these fees as input tax. Furthermore, Woolworths claimed that a portion of the services rendered by foreign service providers was used in the making of taxable supplies and was therefore not imported services under the VAT Act.

SARS disallowed the deduction of VAT on the acquisition of these local services and assessed the services provided by non-resident service providers as being imported services. This assessment was made on the basis that the rights offer was not undertaken in the course or furtherance of an enterprise conducted by Woolworths. In support of this disallowance, SARS argued that Woolworths was not engaged in the continuous or regular activity of issuing shares as part of its enterprise.

The SCA disagreed with SARS and found that Woolworths had the characteristics of an active investment company and that the management of these investments could be regarded as an enterprise as envisaged in the VAT Act. In particular, the court found that the determination of a vendor's enterprise involved a comprehensive consideration of the vendor's activities and that this inquiry should not be narrow or restricted. Accordingly, SARS had erred by isolating the rights offer to shareholders and thereby ignored the true extent and nature of Woolworth's enterprise. In contrast to the judgment in *De Beers*, where the services acquired were unrelated to the mining enterprise of De Beers, the court found a functional link between the services acquired by Woolworths and its enterprise of managing and expanding its investments.

CONCLUSION

The implications of the *Woolworths* judgment are significant for investment holding companies and the judgment serves to unlock input tax on goods or services acquired for the purposes of the vendor's enterprise. In particular, the *Woolworths* judgment provides a fresh perspective on the *De Beers* and *Consol* judgments and the determination of an entity's enterprise for the purposes of the VAT Act. When evaluating a vendor's enterprise for the purposes of the deductibility of input tax, SARS is obliged to undertake a holistic and comprehensive examination of the vendor's activities rather than focus on one particular aspect thereof.

Corporate vendors that are undergoing or planning acquisitions, mergers or capital raising would be well advised to consider the implication of the *Woolworths* judgment and the opportunities now available for the deduction of input tax.

Duane Shipp

WTS Renmere

Acts and Bills

- Value-Added Tax Act 89 of 1991: Sections 1(1) (definitions of "enterprise" & "input tax"), 7(1)(a) & (c), 11 & 16(3).

Cases

- Commissioner for South African Revenue Service v Woolworths Holdings Ltd* (863/2023); [2025] ZASCA 99 (4 July 2025); [2025] JDR 2978 (SCA);
- Commissioner, South African Revenue Service v De Beers Consolidated Mines Ltd* (503/11); [2012] ZASCA 103; [2012] (5) SA 344 (SCA); [2012] 3 All SA 367 (SCA); 74 SATC 330 (1 June 2012);
- Consol Glass (Pty) Ltd v The Commissioner for the South African Revenue Service* [2020] ZASCA 175; [2020] JDR 2795 (SCA).

Tags: input tax; taxable supply; supply of goods or services; acquisition of goods or services; resident service providers; exempt supplies; non-resident service providers.

VAT ON IMPORTED GOLD COINS

SARS Commissioner Edward Kieswetter spelt it out again after the May 2025 Budget Speech: SARS is committed to collecting significantly more tax in the 2026 fiscal year.

He warned that the South African Revenue Service (SARS) will use all legal instruments to address non-compliance.

Despite best efforts to educate and forewarn South Africans, there are still taxpayers and their advisors who make very expensive mistakes when challenging SARS. For delinquent taxpayers who take the risk, the reality is that this Commissioner is not making idle threats.

The April 2025 tax court judgment in *Southern Africa (Pty) Ltd v Commissioner, South African Revenue Service* (VAT 22315, 25 April 2025) stands as a cautionary tale of what happens when a complex transaction is approached with legal shortcuts and no strategic foresight.

IMPORTING GOLD COINS? TAXPAYERS MUST EDUCATE THEMSELVES ON THE VALUE OF A VAT RULING

In *Southern Africa (Pty) Ltd*, the taxpayer lost its claim for a R26,9 million input VAT refund. This matter relates to 9000 gold coins, weighing 358 kg and with a customs value of R157 million, brought into South Africa.

The taxpayer, a clearing agent operating on behalf of a third party (BIV), did not do their homework. The judgment reads that both the taxpayer and BIV “were under the mistaken impression that no importation VAT was payable on the importation of the coins”.

The taxpayer did not initially declare VAT on the import of the gold coins, which entered through OR Tambo International Airport from the United Kingdom (UK).

SARS informed the taxpayer that gold coins are not exempt from VAT and that a voucher of correction (VOC) was needed to bring VAT into account. The taxpayer then passed a VOC to declare VAT, which SARS accepted. SARS later deducted R26,9 million in VAT from the taxpayer’s deferment account. The matter was further complicated when the gold coins were subsequently exported back to the UK. However, SARS refused to accept a second VOC, intended to retrospectively cancel the original customs declaration on which the VAT was paid.



THE COURT WAS NOT IMPRESSED

Failing to convince SARS to issue a refund of the import VAT, the taxpayer took their plethora of arguments to the tax court. This included claims that –

- the taxpayer qualified as a representative taxpayer or responsible third party entitled to the refund under sections 154 and 158 of the Tax Administration Act, 2011;
- no valid importation had occurred because the goods were later exported; and
- the taxpayer was entitled to an output tax adjustment under section 21 of the Value-Added Tax Act, 1991 (the VAT Act).

The presiding officer was Judge J Bam of the High Court, Gauteng Division. In a well-written judgment, the taxpayer's arguments were systematically squashed, with the court stating:

"Through the life of this case, the Commissioner has consistently informed the applicant of its position. The Commissioner cannot be forced to make a refund of VAT contrary to the provisions of the VAT Act." (emphasis added)

The learned judge agreed with SARS' rejection of the refund on the basis that the taxpayer was not the lawful importer. This was because it was BIV, not the taxpayer, who was reflected as the importer according to all supporting documentation, the VAT registration number, and the accompanying import forms.

In one of the most damning lines of the judgment, the court concluded:

"The appellant has no case against the respondent. It never had." (emphasis added)

The taxpayer was ordered to pay SARS' legal costs, including the costs of two counsel. This underscores what may happen to taxpayers when a knife is brought to a gun fight.

WHAT WENT WRONG FOR THE TAXPAYER?

The taxpayer acted first and asked questions later. Had the taxpayer sought expert tax advice from the outset, they may have been able to avoid a hefty VAT bill and the legal costs of a failed court battle.

Applying for a simple VAT ruling from SARS prior to import would have clarified whether the agent could claim input VAT, and under what circumstances. With a bit of foresight, the taxpayer and BIV could have imported the gold coins with no VAT risk.

What is quite striking is not how the case failed, but how easily it could have been avoided.

"SARS informed the taxpayer that gold coins are not exempt from VAT and that a voucher of correction (VOC) was needed to bring VAT into account."

Megan Langton

Tax Consulting SA

Acts and Bills

- Tax Administration Act 28 of 2011: Sections 154 & 158.

Other documents

- Voucher of Correction (VOC).

Cases

- *Southern Africa (Pty) Ltd v Commissioner, South African Revenue Service* (VAT 22315, 25 April 2025).

Tags: representative taxpayer; responsible third party; output tax adjustment; VAT registration number.

