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TAX IN A COVID-DRIVEN DIGITAL WORLD

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REGULARS

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15 minutes CPD

DIGITISATION OF DATA FOR TAX ADMINISTRATION

In its drive to digitalise processes and to rely on third-party data for assessments, is SARS moving ahead of its customers, the taxpaying public? Our article looks at progress and change at the revenue service from the other side of the fence.

MATTHEW HADDON, matthew@simpletax.co.za

How can I explain the feat SARS has performed and is currently achieving in order to offer the pre-populated data currently featured in personal income tax returns? An appropriate comparison would be an engine management system in a new motor vehicle: the computer box that is essential to the operational functionality and an integral part of the machine. It is essentially a computer system built to read data from several hundred suppliers, in several different digital languages, all submitted at different times and in different formats. These will need to be compiled and collated in a specific format to generate one result – a true reflection of one taxpayer's taxable income, deductible expenses and tax credits.

The People's Republic of China began the process of converting electronic data from hundreds of sensors in motor vehicles into a manageable, programmable format in the 1970s, and they are still working on it today. It is a constant evolution as new data become available and new functionality becomes relevant.

SARS began its digitalisation process in 2007 and has progressed in leaps and bounds to get to this point. Collaborating with several banks, retirement and financial services providers, pension funds, medical aids and employers, SARS has managed to put all that data into an intelligent system that converts the data into a format that the SARS eFiling system can read and populate concerning tax returns.

I personally feel the jump forward for the 2020 tax year was perhaps overly ambitious as the system required extensive testing, which I am sure was done to a point, but that is not applicable to real-world functionality. We all remember the teething problems the new eFilling format suffered in the beginning of the 2019 Filing Season. The endeavour to digitalise and automate the tax system does not seem to focus on the end-user, the taxpayer. This is reflected in the delayed filing season this year and the limited filing window. In the past, non-provisional taxpayers had from July to November to file their tax returns on eFilling. This year they are limited to filing from 1 August until 16 November.

While this article was being drafted, SARS opened the tax filing season and the advertised limitation of not being able to file tax returns that require additional data until 1 September failed. Taxpayers are now actually able to file returns with additional data, such as additional medical expenses, travel and vehicle allowance claims and rental income and expenses. Again, this presents teething problems of a new untested system, however, a fortunate problem for taxpayers who have an extra 30 days to file their returns.

Cause and effect

While SARS strives to automate in a brutally complex tax system, officials do not seem too focused on the taxpayer's ability to adapt to the new systems or the effect an incorrect assessment can have on an individual or a small business. I have already begun dealing with the after-effects of the first stage of this system where taxpayers are provided with IRP5s but the employers have failed in their obligations (in terms of the Fourth Schedule to the Income Tax Act) to deduct PAYE from salaries, pay it to SARS and to file the reconciliations. Taxpayers do not understand why they suddenly owe SARS if they have, effectively, a receipt from their employer that tax was deducted from their income. According to SARS, the tax amount was never received, hence the PAYE was not actually paid over, and employees find themselves liable for what can be an insurmountable tax liability. SARS' response to these cases is "contact your employer and request that they file their reconciliation".

With the increase in business stresses as a result of COVID-19, how many companies will have closed their doors and gone into liquidation? Where does this leave the unfortunate taxpayer?

It is not a one-size-fits-all system and it is going to be teething for several years with many of these problems causing many more issues. In order to resolve them, SARS seems to be passing the onus of proof on to taxpayers.

The integrity of data supplied by third parties will have to receive the same level of scrutiny as that supplied by taxpayers themselves and providing incorrect data should carry the same consequences for third parties as for taxpayers themselves.

Where to from here?

One particular issue we have picked up in the earlier versions of data integration is the inability of SARS to determine whether a payment is an income or, for example, an innocuous transfer between spouses – which, of course, is tax-exempt – or a refund from a failed purchase or a returned debit order. In an earlier version of this automation, we had a client from whom SARS demanded to know in a very threatening manner why they had neglected to declare R120 000 in additional income. It was actually the same R10 000 that was returned several times. The client attended auctions and paid a R10 000 initial deposit. Each time they left without making a purchase, the R10 000 was refunded.

How many auditors are going to be kept busy following up on income that a spouse transferred to their significant other to pay for a bond or for failed debit orders? With the advent of COVID-19 this would, I assume, be a regular occurrence.

SARS has sold the effectiveness of their artificial intelligence. However, I have yet to see the intelligence so far in dealing with these rather innocent transactions.

Whose bright idea was this anyway?

SARS has a very complex tax system to administer, following that it sought inspiration for this project from Brazil, which has a notoriously complex tax system. I suppose if they can get it right, so can we? (Brazil developed their model from the Chilean revenue authority.)

Brazil began by developing and rolling out a digital invoicing system in 2006 and then, in 2009, a digital bookkeeping system (SPED). The idea was to get a nationalised system where the revenue authority could keep a live view of the transactions of all tax registered businesses, whereby revenue reporting and collections would be enhanced. It also reduced the risk of non-compliance as the system is live and "creative accounting" became very limited. The digital accounting booking (ECD) system was made mandatory in May 2016 and in June 2016; the reporting system was upgraded so the government could draw even more effective reports from trading taxpayers.

Where I am comparing notes here is that SARS generated this system in-house and then rolled out the instructions to various organisations to comply with. Companies and compliance organisations in Brazil had seven years to get to grips with the systems and iron out problems. SARS, it seems, is putting the cart before the horse. It is using the Tax Administration Act – which was supposed to be a levelling Act to improve tax administration, collection and communication – as a weapon to force compliance and steer the country in the direction SARS wants it to go, under threat of penalties and non-compliance notifications.

Conclusion

I do believe that change is progress and change is also inevitable. Digitalisation and intelligent systems are the future and we must all move forward if we want to remain part of the international community. However, we have to take into account the ability of the general population to comply with said changes. In my experience, the general population of South Africa has a "if it's not broken, don't fix it" approach to business and governance. This is evident in government administration, policing and law. SARS, however, is ahead of the curve. While I admire their enthusiasm to keep up with international trends, they are dragging the country kicking and screaming along with them. Perhaps a more filtered approach and possibly an incentivised tactic would be a better way of taking the country forward.

30 minutes CPD

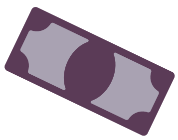
TAX IN A COVID-19 DRIVEN DIGITAL WORLD

▶ **BARBARA CURSON,** batier@icon.co.za

SARS finds itself in a tough environment, facing challenges brought about by the worsening economy and the effects of COVID-19. Our article looks at ways in which SARS can maintain effective enforcement in a world of remote and informal work, excise losses, trade misinvoicing and tax evasion, while regaining the trust of honest taxpaying individuals and businesses.

Current economic environment

SARS is working in an environment that has no precedent, and it has no basis on which to predict the future. We are early into the COVID-19 pandemic, but already it is anticipated that the world will experience the worst recession since the Great Depression prior to World War II.



The economic downturn, before COVID-19 struck, was already negatively impacting tax revenue. Post state capture, SARS is still in the process of rebuilding capacity and increasing the number of skilled staff. Many senior positions have not been filled.

Massive job losses are expected. National Treasury forecasts that the number could be between 690 000 and 1.79 million. Many industries are failing, particularly in the hospitality, travel and retail sectors. Thousands of companies are going under. The banking sector will be impacted by massive impairments.

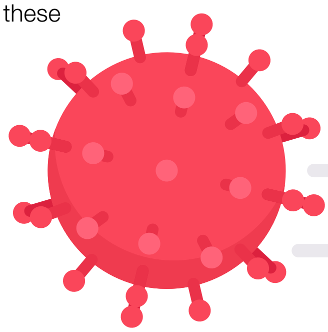
Tax revenue is projected to fall by between R304 billion and R1 099 billion. But these projections will change.

Challenges

COVID-19 has revealed inequalities in our society, and there will be added pressure on National Treasury to use taxation to reduce the inequality gap.

Companies that reduce their tax, albeit by legal means, will be viewed askance by the Government as well as the population. However, the current situation in South Africa – the, in my view, bad economic decisions made by the Government, coupled with ongoing rampant looting and corruption – may push the normal tax compliant taxpayer to reduce tax by any means possible. SARS has to tread a difficult line between enforcing the tax rules, effectively challenging tax avoidance, tax evasion and illicit financial flows, while at the same time trying to regain the trust of taxpayers and support the growth of businesses that significantly contribute to the fiscus.

SARS is hampered by a court process that takes too long. For example, in 2019 SARS won a R1 billion tax evasion case. Sadly, this dates back to 2011. There are too many matters still in the pipeline and for SARS to raise its credibility these matters should get through the court process quickly. On the other hand, SARS should improve various internal processes and reduce systemic errors.



The SARS working environment

SARS was already comfortable in the digital space and was able to quickly adjust to the new normal.

Employees were given email access and data to connect, as well as access to the SARS core system via a virtual private network access. However, employees working at home would require the necessary space and privacy. These working arrangements do raise questions around the confidentiality of taxpayer information, as well as the productivity of staff.

SARS is facing additional pressures. Core administration systems had to be amended to administer COVID-19 tax relief measures and officials had to consider all the requests for deferments and waivers regarding payment of taxes, interest and penalties. SARS also received requests from other government departments for assistance to improve the integrity of the various relief disbursements.

Refunds required the necessary verification and assurance work and SARS has acknowledged that it is still dealing with abuse of the refund system.

Technology and data management teams have used the crisis to improve the digital offering and have added 30 additional functionalities, including automated registration for personal income tax (PIT). Non-filers can submit supporting documents via the SARS website, the verification of banking details has been streamlined and the email system has been integrated with the automated case management system to allow taxpayers to send queries via email.

What is SARS up against?

When the 2020 budget was released in February, taxpayers heaved a collective sigh of relief when there was no increase in VAT nor personal income taxes. But taxpayers had already reached the optimum tax rate and it is doubtful whether more revenue would have been collected if taxes had been raised.

Taxpayers have seen how their hard-earned income was frittered away by state capture and corruption. The badly run state-owned entities, squandering billions on fruitless, wasteful and irregular expenditure, add to taxpayer anger. The continual power blackouts and the tripping of distributors were the icing on the top.

The staggering monthly exodus of skilled taxpayers will add to the loss of tax revenue.

Government's ability to collect taxes depends on the trust between Government and taxpayers. This trust has been broken. Many tax criminals are openly flaunting their wealth. Taxpayer morale is low, as is the willingness to pay tax. Never has the cry for a tax revolt been louder.

Fraud coming out of COVID-19 measures

SARS will have to be particularly vigilant in challenging tax fraud. For example, deferred payments (such as payroll taxes or VAT) can be siphoned off in fraudulent schemes and the entity liquidated before SARS comes knocking on the door.

Dormant companies do not have to submit any tax returns. A dormant company can be used to act as a nominee in transactions and a dormant company can also be used to carry out a short-term activity. Even companies that are not dormant, but are used as a conduit, can carry out a short-term activity without any changes to its end of year annual report.

Many taxpayers are digitally challenged, due to age, not being computer literate, not having access to the internet, the high cost of cell phone data or living in a remote rural area. This period will be particularly challenging for them.

Loss of tax on the alcohol and cigarette ban

The ban on alcohol and cigarette sales will negatively impact excise duties, VAT and income tax. According to #savemylivelihood, there are 34 500 independent tavern owners (with 200 000 dependants), 10 000 shebeen permit holders, and 2 700 independent liquor store owners (with 25 000 employees and over 70 000 dependants). One must add to this the number of restaurants. Many restaurants make their profits from liquor sales. The ban on tobacco impacts tobacco manufacturers and everyone in the supply chain, down to the farmers. We will only know the full extent of this loss at the end of the tax year.

South Africans are not sympathetic to this ban and will not contribute to the loss in taxes.

Smuggling, illicit financial flows and the trade misinvoicing gap

Tobacco smuggling is rife and has escalated as a result of the tobacco ban, effectively turning the average smoker into a criminal. SARS cancelled the tender for the tobacco track and trace system. The current tobacco stamp is easily copied and does not point to where the cigarette was manufactured (the stamp in a track and trace system can be scanned and read by a smartphone).

Smuggling of wildlife can be mixed up with the drug trade. A smuggler that "exports" illegal wildlife can get paid in cocaine, which is delivered elsewhere, and the profits are paid into an offshore account.

Illicit financial flows include bribery, the illegal drug trade, illicit arms deals and the laundering of dirty money. Bribes are not tax deductible. Transferring money from a mine rehabilitation fund offshore – to be looted – is a risk.

- According to a report by Global Financial Integrity (GFI), South Africa's trade misinvoicing gap averaged $19.9 billion (R309 billion) per year from 2008 to 2017. Trade misinvoicing can indicate money laundering, customs duty evasion and tax evasion. According to GFI, less than 2% of shipping containers are searched every year. This raises a question mark over the veracity of customs invoices.

Import overinvoicing can be used to shift money abroad (South African transfers money offshore), reduce income tax liability and avoid anti-dumping duties. Export underinvoicing can also be used to shift money abroad (money owed to a South African is paid into an offshore account) and evade income taxes and export taxes.

SARS does make the odd bust at OR Tambo International Airport but what about our open borders?

Easing into tax avoidance

COVID-19 has resulted in extra costs for everyone. Additional expenses incurred in working from home can be reimbursed by an employer. These can be tweaked.

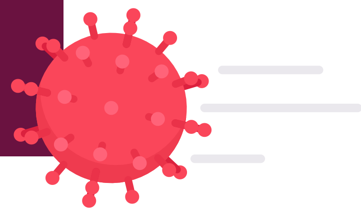
Deducting the costs of a study (in a private dwelling) has capital gains tax implications. There are many innovative ways to rent a study elsewhere.

There are no jobs for most of the thousands of employees who have been retrenched. They will have to find ways to earn a living. There will be sharing of resources, sharing of accommodation, bartering systems and many home industries will develop.

Service providers, such as nail care, hairdressers and car services, can operate from home. Nursing services, frail care and home cleaning services are already provided by independent operators through word of mouth. Construction services have always been available on a cash-only basis. It is not surprising that the sale of Kruger Rands is escalating.

Workers may be prepared to share jobs, and get paid less for fewer hours worked.

"SARS is open for business and does facilitate ongoing interaction, including litigation and dispute resolution."



No entrepreneur will allow a good tax loss to go to waste and this will lead to the purchasing of assessed loss companies. There are instruments that can be used to raise funds and similarly to use up assessed losses.

Multinationals will be able to effectively use losses generated by business operations and this will likely lead to a spike in mergers and acquisitions.

The grey loan market will no doubt flourish. There are complex tools that can be used to disguise income but ensure that the "cost" of the loan gets deducted from revenue.

SARS will have to turn itself into a lean effective tax collector

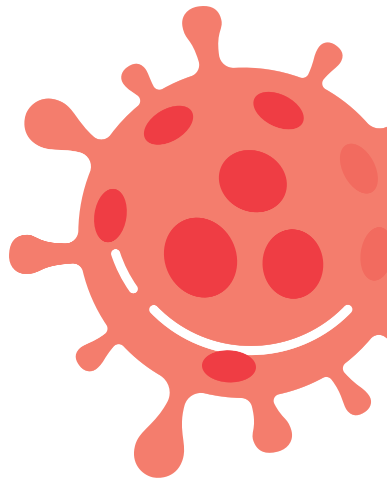
SARS will have to regain the taxpayers' trust by taking the big names to court, reining in tobacco smuggling and reeling in wayward staff who are acting outside the Tax Administration Act.

The Tax Ombud's second report issued on 23 June 2020 raised questions on the effective use of SARS' resources. The Ombud also suggests that SARS reviews and improves the process of raising additional assessments, as well as the efficiency of its objections committee mechanism. SARS adopts a very strict approach towards taxpayers in enforcing compliance within the specified timeframes. However, it does not itself always adhere to these timeframes.

The lack of onsite audits will severely impact SARS' evidence gathering, which could negatively impact any additional assessments raised during this period and the ensuing settlement or litigation process.

It is likely that SARS will resort to inquiries. To be effective, these should be tightly controlled. The information gathered should be relevant and should go to skilled staff who can effectively utilise it. SARS should avoid resorting to fishing expeditions, as well as one-size-fits-all audit or verification letters, as this will only lead to loss of credibility.

SARS is open for business and does facilitate ongoing interaction, including litigation and dispute resolution. It is more difficult, however, for taxpayers who do not have a relationship manager as a go-between.



COVID-19 AND THE CONSEQUENCES FOR TAXPAYERS

15 minutes CPD

GASANT JACOBS, gasant.jacobs@taxtechglobal.com

In a sea of tax and other changes, can South African taxpayers forgo the steady guiding hand of their tax practitioners? Our article argues against going it alone in a perilous year.

The year 2020 has turned out to be a challenging year for almost everyone, but for the South African tax practitioner it is proving to be a particularly bruising year. SARS, on the other hand, is staring at a projected shortfall of R63.3 billion from its budgetary projections, and the consequences of this shortfall is yet to manifest in terms of how SARS will interact with taxpayers and, by extension, tax practitioners.

Filing season changes

This year, taxpayers were introduced to auto-assessments, a change in the law pertaining to how SARS recognises foreign income came into effect on 1 March, the start of tax season 2020 was postponed from July to September (thereby shortening the period) and then of course there was COVID-19 and its aftermath. And the year is not done yet! As tempting as it is to reflect on what has already passed, this article will attempt to analyse the difficulties that still lie ahead for tax practitioners as we enter personal income tax filing season for 2020.

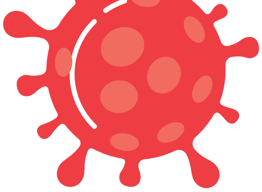
South African taxpayers have become accustomed to the fact that the annual tax-filing season starts in July and normally extends to end-November, with generous allowances for extensions to those who request it. This meant that those who rely on a tax refund from SARS can generally expect to receive their tax refund around August or September. This year, however, given the COVID-19 pandemic and the subsequent havoc that the lockdown created in the South African economy, SARS opted to postpone the 2020 tax filing season by two months. Several SARS employees also contracted the coronavirus and this caused some of the SARS offices to be shut temporarily. This inability to operate normally enabled SARS to accelerate the development of e-services channels and today almost every process that the tax practitioner needs to interact with SARS can be conducted electronically.
When SARS announced the postponement of the tax filing season by two months, they also confirmed that Filing Season 2020 will be implemented in three phases and that the time allowed for taxpayers and tax practitioners to submit their personal income tax returns would decrease dramatically. SARS has not confirmed that the changes in the process are as a direct consequence of the change in the way foreign income will be treated, but we can see this change is certainly going to help SARS understand the extent and quantum of foreign income earned by South Africans.

Legislative changes

In addition to the myriad of changes, taxpayers had to deal with a range of legislative amendments, including the ever changing COVID-19 tax relief measures and the annual tax amendment bills. This year's draft Bill proposes a range of changes, both policy changes and administrative changes, and none more controversial than the proposal to phase out the financial emigration process. The financial emigration process is ordinarily a part of the process of formal emigration but the process has been egregiously abused by some financial advisors. They present this process in the guise of tax advice, selling it to taxpayers living abroad as a mechanism that will change one's tax status from tax resident in South Africa to tax non-resident in South Africa.

The effect of COVID-19 is already devastating, with SARS predicting a revenue shortfall of more than R63 billion for 2020. It is anticipated that this projected shortfall will create an almost perverse incentive for SARS officials to be more robust with taxpayers who are largely compliant in an attempt to fill this proverbial financial hole. In return, this enthusiasm from officials to look under every stone is expected to flow over onto the desks of tax practitioners who will have to ensure that the documentation submitted is in order.

In amongst this sea of changes, SARS used the introduction of auto-assessments as an inducement or encouragement for taxpayers to forgo the use of tax practitioners and to simply accept their auto assessments if they were satisfied with the SARS calculations. This move caused much consternation amongst the tax practitioners who traditionally filed the tax returns on behalf of their clients.



Locked down (in or out)

Looking back, we can already see the difficulties for taxpayers brought about by COVID-19. However, when looking forward, it is even more concerning. South Africa is currently in level 2 of a national lockdown, with the closing of the country's borders as one of the consequences. That means that tax residents (and non-residents) who are now caught up in the lockdown and cannot leave (or enter) the country are at risk of failing the physical presence test of being present in the country for 60 consecutive days or of being present for more than 183 days in the tax year. This immobility could have a dramatic effect on taxpayers who are deemed non-resident or on taxpayers who are hoping to avail themselves of the exemption of R1.25 million that would ordinarily apply to their foreign income.

From 1 March 2020, foreign employment income is no longer fully exempt under section 10(1)(o)(ii) of the Income Tax Act. The exempt amount is limited to R1.25 million in respect of each year of assessment during which the requirements of section 10(1)(o)(ii) are met. The qualifying criteria for the exemption remain the same. This means, amongst other things, the taxpayer needs to be working outside the country for 183 days of the year, of which 60 days must be consecutive days. Any foreign employment income earned over and above R1.25 million will be taxed in the Republic, applying the normal tax rates for that particular year of assessment.

A double tax situation may arise in respect of the portion of the remuneration earned over and above the R1.25 million. This will happen where there is no tax treaty or where a tax treaty does not provide a sole taxing right to one country. This means both countries will have a right to tax the income and the country of residence, in our case the Republic, will provide relief from double tax. Section 6quat of the Income Tax Act is the mechanism under South Africa's domestic law to claim relief from double tax where the amount received for services rendered outside the Republic is subject to tax in the Republic and in the foreign country. This credit may be claimed on assessment when an individual submits an income tax return, provided certain requirements are met. This effectively means that the foreign tax paid on the portion of remuneration included in income will be set off against the South African normal tax paid so that no double tax is ultimately suffered.

It might well be that the taxpayer fully intended to meet all the requirements for exemption in terms of days spent outside of the country but, because of the borders being closed, the taxpayer found himself or herself stuck in the country for six months while the country was in lockdown. They will now be unable to meet the qualifying criteria of being 183 days outside the country in order to avail themselves of the R1.25 million of income being exempt.

"It is anticipated that this projected shortfall will create an almost perverse incentive for SARS officials to be more robust with taxpayers who are largely compliant in an attempt to fill this proverbial financial hole."

We await guidance from the tax administration as to how SARS will treat tax residents (and non-residents) who, due to no fault of their own, fail to meet the physical presence requirements which enable them to claim the exemption from foreign earnings.

A whirlwind

COVID-19 made one thing very clear: everything related to tax in South Africa this year is very unclear! Had SARS introduced auto-assessments last year, perhaps taxpayers would have had a greater level of confidence to engage with SARS without the assistance and steady hand of their local tax practitioners. This year, given the whirlwind of changes, more than ever, taxpayers will need the expert guidance of their local tax practitioners to guide them through the turbulence brought about by the sea of legislative and policy changes.

Notwithstanding SARS' efforts to minimise the role of tax practitioners, COVID-19 and its related consequences have in fact amplified the critical role tax practitioners play in the ecosystem of tax collection and in ensuring voluntary compliance amongst South Africa's tax base.

The impact of COVID-19 on the African Continental Free Trade Area

30 minutes CPD

▸ **TRUDI HARTZENBERG,** trudi@tralac.org

The Agreement establishing the African Continental Free Trade Area entered into force on 30 May 2019 and trade under this Agreement was supposed to begin on 1 July 2020. We consider the effect COVID-19 has had on continental trade and look to a brighter future for an integrated African continent.

Trade under the African Continental Free Trade Area (AfCFTA) regime was expected to begin on 1 July 2020. That was before the outbreak of the coronavirus and the declaration of a global pandemic by the World Health Organisation on 11 March 2020. Not unexpectedly, the AfCFTA negotiations have been severely disrupted. Plans to establish the institutions of the AfCFTA have also fallen victim to the pandemic and the policy measures restricting travel and meetings. His Excellency Mr Wamkele Mene from South Africa was sworn in as the Secretary General of the AfCFTA Secretariat on 19 March, just as African countries started closing borders and adopting other measures to curb the spread of the virus. Preparatory work for the establishment of the Secretariat is now being undertaken from the African Union Commission (AUC) in Addis Ababa. Negotiations and the broader work programme to operationalise the AfCFTA are continuing virtually. The date for trade under the AfCFTA to begin is now 1 January 2021.

Progress before the pandemic

In January 2012 Heads of State and Government of the African Union (AU) at the 18th Ordinary Session of the AU Assembly decided to expedite the establishment of a continental free trade area. This decision motivated renewed high-level political support for Africa's trade and integration agenda.

The launch of the AfCFTA negotiations in June 2015 was followed by impressive early progress. The Agreement establishing the African Continental Free Trade Area, the Protocol on Trade in Goods, the Protocol on Trade in Services and the Protocol on Dispute Settlement were concluded and 44 member states signed the Agreement establishing the AfCFTA at the 10th Extraordinary Session of the Assembly of the AU in Kigali, Rwanda, on 21 March 2018. Ratification of the Agreement began soon after, and by 29 April 2019 the requisite 22 ratifications for entry into force had been deposited with the AUC, the designated depositary for the AfCFTA. As per the provisions in the AfCFTA, the Agreement entered into force 30 days later, on 30 May 2019.

Although ratification of the Agreement had proceeded apace, there was already a notable slowdown before COVID-19 struck. As at August 2020, 28 member states have signed and deposited their instruments of ratification. Only Eritrea has not signed the Agreement. The aim is that all 55 member states of the AU sign and ratify the AfCFTA.

Even though the AfCFTA has entered into force it is not possible to trade under this regime yet. Trade among African countries continues under existing trading regimes of regional economic communities or under the rules of the World Trade Organisation for those trade partners that are not members of a specific regional trade arrangement.

Ongoing negotiations

For trade in goods, negotiations of tariff concessions and preferential rules of origin are still under negotiation. For trade in services, specific commitments for the five priority services sectors – financial, communication, transport, tourism and business services – are not yet concluded. We focus here specifically on trade in goods.

A free trade area (FTA) requires at minimum tariff concessions covering substantially all trade, and preferential rules of origin to prevent transhipment. Without these, no trade under the AfCFTA can take place. Tariff and rules of origin negotiations are notoriously difficult. For some member states tariff revenue is an important contributor to the fiscus. The tariff is also an effective trade policy measure to protect domestic industry from import competition. Rules of origin determine the national origin of a product. Although their primary function is to protect the integrity of the FTA to ensure that only qualifying products get the benefit of the FTA tariff regime, they can also be used to protect domestic industry. Since all African countries want to develop and diversify their domestic productive capacity, it is to be expected that these negotiations will be difficult. The outstanding work on rules of origin relates to clothing and textiles, automotive products, edible oils and sugar. These are also tariff-sensitive products.

What will happen to the regional economic communities?

A key objective of the AfCFTA is to boost intra-Africa trade, which is low by comparison with other regions of the global economy. For 2019, only 15% of Africa's total trade was amongst African countries. Intra-Africa trade is also highly concentrated within regional economic communities (RECs). Trade amongst the member states of the Southern African Development Community (SADC) accounts for more than 60% of total intra-Africa trade and trade within the Southern African Customs Union (SACU) accounts for more than 50% of that intra-Africa trade. It is fair to conclude that South Africa, which dominates both intra-SADC and intra-SACU trade, is also a key driver of intra-Africa trade.

Membership of a REC does not automatically mean membership of the REC's trading regime. SADC, for example, has 16 member states. Three of these – Comoros, Democratic Republic of the Congo and Angola – are still to accede to the SADC FTA. Angola made an offer to the other SADC FTA member states earlier this year but has not yet acceded to the Protocol on Trade.

The AfCFTA recognises the RECs and their trading regimes and is designed to build on the trade liberalisation and regional integration that have already been achieved. This is confirmed by the AfCFTA principle of the acquis and by Article 19(2) of the Agreement establishing the AfCFTA. The RECs will continue to exist and member states of the trade regimes of the RECs (FTAs or customs union) will continue to trade with one another under those trade arrangements. Some of the REC trading regimes are still to be consolidated. On paper they register as FTAs or customs union but in practice there is still work in progress. This means, for example, that there may still be some tariffs on trade amongst member states and some member states may not apply the common external tariff on all imports from global trade partners. This is not surprising – integrating unequal partners is a complex and difficult undertaking.

"The negotiation processes are now continuing virtually and it is important not to lose momentum. The AfCFTA holds significant potential for Africa."

Which countries are negotiating tariff concessions in the AfCFTA?

Tariff concessions are negotiated by member states of the AU that are not together in an existing FTA or customs union. Member states of a customs union negotiate as a collective to protect the integrity of the customs union. For example, the member states of the SACU will negotiate with the member states of the Economic Community of West African States (ECOWAS). South Africa (a member of SACU) and Nigeria (a member of ECOWAS) currently trade under their respective WTO tariffs. The AfCFTA will contribute to opening trade opportunities such as these under preferential terms. This means essentially that the AfCFTA will create an additional FTA among those member states that are trading with each other on non-preferential terms.

Member states are currently submitting their tariff offers. These will be the opening gambits in the negotiations. The slow process may reflect a game of strategy as some member states hold out for a second mover advantage once they have seen the offers of interest. Once the negotiations are finalised the outcomes will be reflected in the tariff books of the member states and, provided the rules of origin are complied with, trade under the AfCFTA trade regime can take place.

Trade facilitation lessons learned from the pandemic

A World Bank report launched on 27 July 2020 concludes that most of the income gains from the AfCFTA are likely to come from the reduction of 'red tape and simplification of customs procedures'.

National government departments, customs authorities and other agencies involved in trade management are facing significant challenges during the pandemic. Many measures legitimately being implemented by governments impact trade generally and specifically trade in essential goods such as food, medical equipment, pharmaceutical products and personal protective equipment. Management of import and export permits, tariff rebates for some essential goods and the processing of e-certificates of origin are sapping the capacity of many government agencies. Queues at border posts are longer than ever. Compulsory COVID-19 testing for truck drivers and, in some countries, quarantine requirements are adding to the delays and trade transaction costs. All these experiences confirm how interdependent African countries are and how important effective customs and border management is. The closure of a border or the introduction of COVID-19 testing for truck drivers by one country impacts not only its direct neighbour on the other side of the border post, but also countries along trade routes.

Preparation for the implementation of the AfCFTA – especially of the Annexes to the Protocol on Trade in Goods that deal with trade facilitation matters – should factor in the lessons from the pandemic. The adoption of digital trade solutions is a good example. If e-certificates of origin, e-payments and other digital trade solutions can work during the pandemic, their use should be continued. To this extent, COVID-19 has provided a positive push towards digital trade solutions. The opportunity to capitalise on this should not be missed. Adopting digital trade facilitation solutions to implement the AfCFTA can bring quick gains. Indications are that e-commerce negotiations will be expedited – this is also an important step for Africa.

Concluding remarks

The pandemic has forced a slowdown in the negotiations. The negotiation processes are now continuing virtually and it is important not to lose momentum. The AfCFTA holds significant potential for Africa. Post-COVID-19 recovery, reconstruction and transformation of Africa's economies will need trade governance that boosts intra-Africa trade and also provides incentives for cross-border investment to expand and diversify productive capacity, nationally and in regional value chains.

HOPE FOR ECONOMIC RECOVERY

15 minutes CPD

▸ **CHANTAL MARX,** cmarx@fnb.co.za

Our article looks at different shapes postulated for the economic recovery eagerly awaited by South Africans. We also consider specific measures to kick start the process, like government and private sector investment in a number of infrastructure projects.

The fallout from the COVID-19 pandemic weighed heavily on economic activity in the first half of 2020. As a result, it is inevitable that the world economy will suffer a near-term recession. While a recovery is expected from the third quarter onwards, the global economy will likely suffer its worst contraction in decades in 2020.

Countries across the globe have been trying, and will probably continue to try to offset the COVID-19 economic impact with extraordinary and unparalleled monetary and fiscal policy support. Monetary policy is expected to remain supportive through 2021 and stimulus measures by governments will continue to scale up until clarity on the length of the current disruption is obtained.

The debate about the recovery has been centred on its "shape", which will guide when the global economy will return to pre-COVID-19 levels.

Initially, analysts argued that the recovery will be “V-shaped”. That is, a sharp downturn will be matched by an equally aggressive upswing and essentially the economy was expected to be back at fourth quarter 2019 (4Q19) levels by 3Q20.

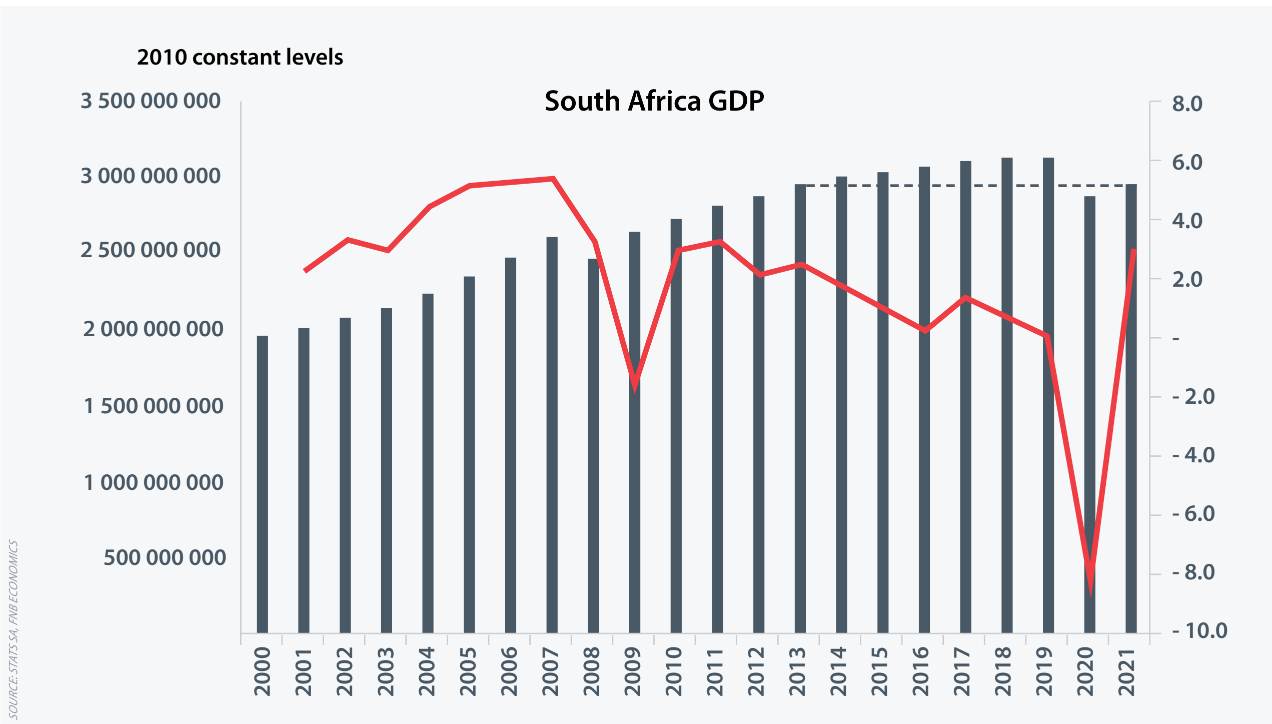
Analysts then conceded that what was initially an event-driven shock had had a more systemic impact on economic activity than first thought. A “U-shaped” recovery was then hypothesised – the economy would recover quickly to previous levels, but not as quickly as originally anticipated. This means analysts thought the economy was set to recover to 4Q19 levels by 4Q20.

A few alternative scenarios were also put forth – including an “L-shaped” scenario where the economy would never recover to pre-COVID-19 levels, and a “W-shaped” recovery scenario where a second wave of infections would halt the initial recovery, but that global activity would eventually return to normal quickly thereafter.

The Organisation for Economic Co-operation and Development (OECD) has suggested that the recovery will be a little more nuanced and the shape will look more like a “Nike swoosh” or a “tick mark” than any letter of the English alphabet. According to this theory, there will be an initial rebound in 3Q20 and 4Q20, but we will end the year at activity levels well below that of 4Q19. The recovery to pre-COVID-19 levels will therefore take several years.

Despite the efforts of monetary authorities and sovereigns globally, the primary risk to global growth remains to the downside. A possible second wave of infections, high sovereign indebtedness following fiscal intervention, oil market volatility, trade wars, nationalistic politics and policies, and anti-globalisation sentiment are some of the risks that could derail the anticipated economic recovery. This is better reflected by the "Nike swoosh" recovery which assumes a longer, slower return to previous levels.

Recession shapes are used to describe different types of recessions, characterising recessions and their recoveries. The most commonly used terms are V-shaped, U-shaped, W-shaped and L-shaped recessions, each taking its name from the similar shape of economic data in graphs during recessions or when referring to their recoveries.



> *"The shape of the economic recovery globally has been debated at length over the past few months and current consensus is now for a sharp downturn, followed by a very gradual recovery."*

What are our expectations for South Africa?

As is the case globally, the South African economy is expected to contract sharply in 2020 and rebound next year. However, as is the case for the rest of the world, we do not expect a recovery back to pre-COVID-19 levels any time soon.

Additionally, South Africa will be one of the countries that face serious fiscal constraints. Locally, this is exacerbated by financial difficulties at state-owned enterprises, particularly Eskom, and weak tax revenue collection this year amid the COVID-19 outbreak and the related adverse impact on income. Against this backdrop, Government has redirected expenditure to areas that require priority, is aiding the most vulnerable in our society and has offered a guarantee scheme through commercial banks to assist small- and mid-sized businesses, among other initiatives. The South African Reserve Bank has done what it can in terms of lowering interest rates and improving financial market liquidity.

Unfortunately, the potential growth rate is expected to remain quite low in the absence of any meaningful structural reform.

Structural reforms

National Treasury highlighted the following reforms in the Supplementary Budget Review presented in June:

- Finalising electricity determinations, unbundling Eskom and taking other steps to open energy markets
- Modernising ports and rail infrastructure
- Licensing spectrum
- Lowering the cost of doing business, reducing red tape, and improving access to development finance for small, medium and micro enterprises
- Supporting agriculture, tourism and other sectors with high job-creation potential
- Facilitating regional trade
- Reducing the skills deficit by attracting skilled immigrants
- Revamping the skills framework and undertaking a range of reforms in basic education and the post-schooling environment to improve outcomes for workers and the firms that can employ them.

Our base case above does not include an improvement in South Africa's potential growth rate due to uncertainty relating to reform implementation and execution.

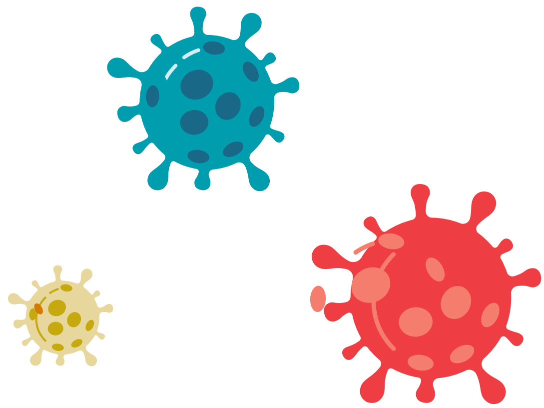
Another factor that has been a constraint on economic growth in South Africa over the past decade has been a decline in fixed investment expenditure – by both the public and private sector. The recent rand-and-cents commitments to infrastructure investment have been encouraging.

Infrastructure investment – the magic pill?

President Cyril Ramaphosa has been touting the potential of higher infrastructure investing as a means of igniting growth in the country since September 2018. The Presidential Infrastructure Coordinating Commission was set up to expedite the programme, and at the State of the Nation address in February this year Ramaphosa announced that this team had identified a "shovel-ready" project pipeline with potential investments of more than R700 billion over the next 10 years.

The economic fallout from the COVID-19 outbreak has meant that an even larger investment will be required to provide a catalyst for economic growth. The size of the envisioned infrastructure programme that sits with the committee now stands at R2.3 trillion. Recently, the first 51 projects valued at R340 billion were gazetted, with work expected to start in the next three months.

Apart from direct benefits of job creation in the construction and support sectors (equipment, materials, etc.), greater investment in infrastructure carries major societal benefits. It may lead to multiplier effects, and ultimately impact positively on economic growth and development through job creation, among



others. Some researchers have suggested that stocks of physical infrastructure could raise a country's GDP by an estimated 2% in the short run.

Improved infrastructure will meaningfully improve peoples' lives and improve efficiency – particularly in sectors such as transport, water, electricity, health care and education.

Investments can lead to higher farm and non-farm productivity, employment and income opportunities, and increased availability of wage goods, thereby reducing poverty by raising mean income and consumption. If higher agricultural and non-agricultural productivity and increased employment directly benefit the poor more than the non-poor, these investments can reduce poverty even faster by improving income distribution as well.

Clearly there are benefits, but how will it be funded?

Of the R340 billion needed to develop the 51 recently gazetted projects, the necessary sovereign guarantees and approvals for increased borrowing have been secured, and funding has been agreed with private-sector banks and development organisations. For the rest, given the fiscal constraints, an alternative approach may be required.

In developed countries or other developing nations where infrastructure investment has made a meaningful contribution to economic growth, it has overwhelmingly been financed through Public-Private Partnerships (PPPs). While direct investment also occurs, asset managers (both retail and institutional) will invest in "infrastructure bonds" that pool together several projects, thereby providing a more even return profile. These may be listed or unlisted.

Infrastructure investing makes sense for private investors, particularly in pension funds since (when they are functioning correctly) they offer consistent yield, reduced volatility and have long-term maturity profiles. There are limits, however, including restriction of liquidity, difficulty in valuing projects (big multidisciplinary teams required), large initial capital investments and a lack of quality projects.

For the government, private investment may provide a cheaper source of capital funding for infrastructure, which will have a positive impact on the fiscus. This could in turn divert funds to other areas benefiting society, including education and health care.

Concluding remarks

The shape of the economic recovery globally has been debated at length over the past few months and current consensus is now for a sharp downturn, followed by a very gradual recovery. South Africa is very much influenced by the global economic picture from an external demand perspective and is expected to follow a similar growth trajectory, albeit off a softer base. Growth in South Africa faces additional challenges but there are also certain actions that can be taken locally to improve the growth picture.

The logical route will be the implementation of structural reforms, resulting in an improvement in private sector confidence, followed by a willingness to invest in the future of the country through a major infrastructure programme. But an even better and faster improvement can be achieved if both can be implemented at the same time. There are certain overlaps between National Treasury's suggested reforms and the infrastructure pipelined – perhaps this could be a good place to start.

SARS RECOVERY
IS THERE HOPE?

60 minutes CPD

Can SARS actually be restored to its former glory and is it ready for the new challenges it now faces? Are the measures taken by SARS effective? Amid a slow economic recovery, can revenue recovery achieve the results needed to enable government to do the necessary? Will SARS' vision to use technology and data enable it to build an intelligent organisation and help to ease the compliance burden on taxpayers? Will the SARS phoenix rise from the ashes? We asked some experts for their views.



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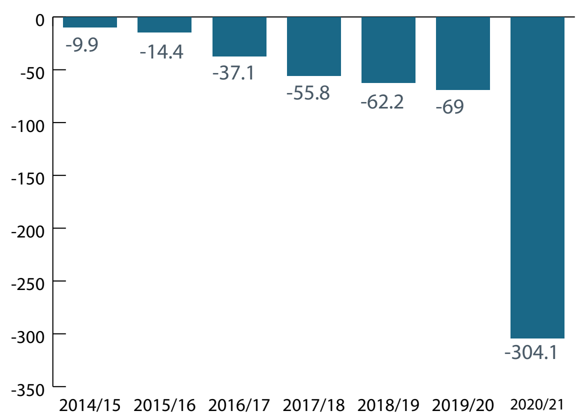
"Easing the compliance burden on taxpayers means that taxpayers, especially SMMEs, will have more time to focus on doing their jobs or growing their businesses."

National Treasury got it right in the Supplementary Budget Review: "As growth recovers, so will tax receipts". And that is the order required. Businesses need to recuperate from the COVID-19 shock. This is the priority. It is not primarily up to SARS to fill the gap in the short run. It is up to the whole of Government to become an enabler for growth. Once growth is achieved, revenue will follow. We show why we expect revenue recovery to take longer than National Treasury forecasts and highlight points for SARS to consider as part of the recovery strategy.

The June 2020 Supplementary Budget Review estimates SARS' shortfall in tax revenue at R304.1 billion for 2020/21 and we can expect this to be even larger this year for at least three reasons. First, the peak of COVID-19 infections may be higher and longer than this June calculation is based on. While the Ministry of Health estimated the peak of COVID-19 infections to be in September, insurance companies are now working with a timeline that sees a peak only around December. This will mean a slower recovery of economic growth and thus slower recovery of revenue. Second, while revenue and GDP are positively correlated, in economic downturns we can expect revenue to sink proportionally further than GDP – as informality, hiding and underreporting income, and capital flight rise as businesses struggle to stay afloat until they see a recovery. As shown below, National Treasury budget forecasts have consistently overestimated revenue since 2014/15 and increasingly so.

Gaps between revenue forecast and actual revenue, 2014/15-2020/21



Source: National Treasury: Supplementary Budget, June 2020

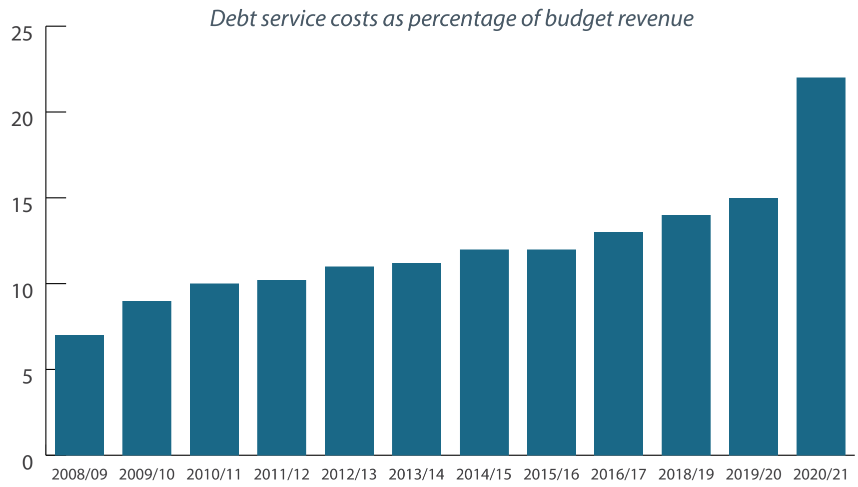
Third, the much needed expediting of network infrastructure spending to kick start growth is at risk. While this prerogative has been pushed by the Finance Minister for a year now (National Treasury, "Economic transformation, inclusive growth, and competitiveness: Towards an Economic Strategy for South Africa", August 2019), it still fails to sink in with other parts of Government who are preventing the needed budget space to be created. Infrastructure spending as a percentage of GDP has already been on a downward path during the last five years and well short of the 10% annual target as set in the National Development Plan. Meanwhile, compensation for Government employees has been rising to over 50% of budget spending. Together with debt service costs, expected to rise to 21.7% of the budget, this does not leave much room for anything else. With persistent talk of even increasing public wages while the rest of the economy is experiencing wage cuts, furloughs, lost jobs and closed businesses, the window of opportunity for economic recovery within two to five years is closing.

It is not up to SARS to fill the spending gap through increasing tax receipts in the short run. This is not a time to threaten and shut down businesses but a time to help contribute to growth.

There are, however, steps SARS can take to alleviate the pressure and stimulate the economy. Three such steps are set out below.

First, SARS could ensure that refunds owed to businesses are paid out in a timely manner, particularly to small, medium and micro businesses (SMMEs). The working capital constraints of businesses are exacerbated by late payments, including tax refunds. It particularly leaves SMMEs with cash flow issues and an inability to pay salaries and suppliers, halting the chain reaction and multiplier effects on economic activity. These issues are harder for SMMEs to solve because of their difficulty accessing finance compared to larger corporates. The disruption to cash flow for SMMEs is one of the leading causes of their failing and a disincentive for employment creation.

Second, SARS must continue with its efforts towards ensuring that it works with businesses in a more collaborative way,



Source: National Treasury: Supplementary Budget, June 2020

with all SARS related processes being made easy, clear and effortless. Tax collection heavily relies on the voluntary compliance of taxpayers and research in behavioural economics has demonstrated that people are more inclined to pay taxes when there is perceived fairness and trust in their tax system. Fear, doubt, the lack of understanding, and uncertainty over future tax policy contribute to keeping taxpayers outside the tax net and could incentivise evasion and capital flight.

In the Strategic Plan released by SARS for 2020/21 – 2024/25, SARS outlines nine strategic objectives over the next five years:

1. Provide clarity and certainty for taxpayers and traders of their obligations.
2. Make it easy for taxpayers and traders to comply with their obligations.
3. Detect taxpayers and traders who do not comply, and make non-compliance hard and costly.
4. Develop a high performing, diverse, agile, engaged and evolved workforce.
5. Increase and expand the use of data within a comprehensive knowledge management framework to ensure integrity, derive insight and improve outcomes.
6. Modernise our systems to provide digital and streamlined online services.
7. Demonstrate effective resource stewardship to ensure efficiency and effectiveness in delivering quality outcomes and performance excellence.
8. Work with and through stakeholders to improve the tax ecosystem.
9. Build public trust and confidence in the tax administration system.

Third, SARS should continue taking steps towards a renewed focus on technology. According to the aforementioned Strategic Plan, SARS has a vision to use technology and data to build an intelligent organisation. Easing the compliance burden on taxpayers means that taxpayers, especially SMMEs, will have more time to focus on doing their jobs or growing their businesses. While large businesses are able to apply economies of scale through specialised tax professionals and administration staff, red tape and tax compliance costs hit smaller businesses far harder, taking large amounts of time from managers to a point where conducting business in the formal sector can become unviable. Making processes more efficient, streamlining certain eFiling processes, issuing automated assessments, decreasing the number of verifications (interventions) or customising IT14SD reconciliations in accordance with specific industry needs and other processes can cut the non-value creating time spent on administration and replace this with value-creating business. This will in turn have positive knock-on effects for growth and jobs.

PROF. DEBORAH TICKLE

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"Trust is a key element of the 'social contract' between a government and its citizens and studies have shown that low levels of trust reduce tax morality."

Since the departure of Tom Moyane as Commissioner for SARS there have clearly been significant changes made with a view to restoring SARS to its "former glory". Efforts have been made to rebuild the internal structures that had been dismantled or made less efficient due to the loss of good personnel – the large business centre and the transfer pricing division to name a couple. In addition, previously proposed initiatives which had not been given the opportunity to really "get off the ground" – the high-net-worth individual unit, for example – are being staffed and those staff members are being trained. New and improved digital tools are being put in place to facilitate the identification of high-risk taxpayers and ease the tax return process, keeping SARS at the forefront of technology. Such initiatives are commendable and are key ingredients in the restoration.

However, Commissioner Kieswetter's job is, in many ways, more difficult than the one Pravin Gordhan had when he became Commissioner in 1999. Pravin Gordhan remained Commissioner until 2009 and restructured the organisation from scratch. His "South African Revenue Service" was created during a growth phase for South Africa (it reached a high of 5.6% in 2006), sentiment about the future of the country was positive at that time – Government debt was being brought under control (it was below 50% of GDP in 1999 and reduced to less than 30% by 2008) and fiscal discipline was the order of the day. The future truly looked rosy.

Kieswetter, on the other hand, has to rebuild the morale of the people at SARS so that they, once again, are proud to be serving their country because their work is for the benefit of all in South Africa. Not an easy job when, by the time of Moyane's departure, morale at SARS was at an all-time low. Sadly, since then all citizens, including SARS officials, have been faced with the testimonies made at the Zondo and Nugent Commissions and the fact that there have been few prosecutions to date. Following the departure of Zuma, the hoped-for increased levels of trust between citizens and Government, which includes SARS, have thus not transpired.

Trust is a key element of the "social contract" between a government and its citizens and studies have shown that low levels of trust reduce tax morality. In this climate, Kieswetter's ability to instil in his SARS staff the same sense of public purpose that once prevailed is somewhat inhibited.

Together with the reduced tax morality, low GDP growth over the last few years (below 2% since 2013 and below 1% in 2018 and 2019) has also made the job of collecting budgeted taxes more challenging. Constantly failing to achieve budgets is also never good for staff morale.

The COVID-19 pandemic has exacerbated this problem to much greater levels as communication in all organisations, including SARS, has become more difficult due to the lockdown. SARS officials are now seeing even their consistent sources of tax revenue diminishing due to reduced consumer and business activity, taxpayers being liquidated or sequestrated, employees losing jobs and Government imposing bans on large tax sources – alcohol and cigarettes.

Nevertheless, the Commissioner continues his quest to rebuild SARS in preparation for when there is a better future. He is an excellent public spokesman for the organisation, projecting a professional and efficient persona, which aptly reflects what he is striving to build his organisation to be. Despite all the obstacles (and current budget limitations) he is looking for innovative ways to continue with his initiatives and to ensure that tax compliance is maintained and improved albeit, potentially, more through the "stick method"– enforcement – rather than the "carrot method" which prevails when the social contract is good and tax morality is high.

Kieswetter has also put a joint working group in place between some of his own senior staff and the Davis Tax Committee. Its objectives are, firstly, to try to determine the tax gap and how it can be closed in the long term and, secondly, to provide innovative suggestions to improve tax collections which are do-able within SARS' current capacity.

So, will SARS return to its "former glory"? It is not there yet but there is certainly the will to get there... and where there is a will there is always a way.

DR EMIL BRINCKER

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"Ultimately, the success of the South African economy is dependent on a strong revenue service. It is for this reason that everybody should support any steps that are taken to create an effective SARS."

The catastrophe of COVID-19 that has engulfed South Africa highlighted the importance of effective tax collection. It is not really an alternative to increase tax rates as taxpayers are already bearing the brunt of the weak state of the South African economy and can hardly afford to pay more taxes. It is for this reason that a strong revenue service and the over collection of budgeted amounts (as was the case several years ago) have become essential.

It is noted that several steps have been taken to bolster SARS. This includes the reintroduction of structures and the reestablishment of the large business centre. However, it should be appreciated that this is a long-term process and that matters are not going to change overnight. All is also not necessarily doom and gloom as some pockets of excellence remained within SARS. It is also noted that systems are being upgraded to optimise tax collection.

One of the fundamental issues in South Africa is currently the low level of tax morality. In other words, taxpayers should be seen to want to pay taxes and to pay their fair share. Given the state of corruption and the perceived lack of prosecution of potential offenders, however, the low levels of tax morality are not necessarily going to change. It can be turned around as was shown in the early 2000s.

In addition, large companies that contribute the bulk of taxes to the state coffers are currently being overwhelmed with queries that originate from different offices, some of which deal with the same issues. In this context a co-ordinated approach would be preferable. It should also not only be the so-called "low hanging fruit" that is targeted, but a concerted effort will have to be made to target smaller and medium-sized companies which sometimes easily sail below the radar of SARS.

One cannot overstress education and continuous programmes that need to be implemented and continuously driven, such that all SARS officials remain at the top of their game and are able to act strongly, but fairly. In this process consideration may also have to be given to creating specialised units that focus on certain sectors and to drawing skills from the private sector to assist. Use was previously successfully made of retired consultants and other contract workers to assist revenue collection.

Ultimately, the success of the South African economy is dependent on a strong revenue service. It is for this reason that everybody should support any steps that are taken to create an effective SARS.

TERTIUS TROOST

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"Kieswetter's aggressive investment in technology and automation is undoubtedly a step in the right direction and makes one hopeful that SARS will be able to be restored to its former glory."

The mountain that stood before Commissioner Edward Kieswetter and his team when he took over the reins from Acting Commissioner Mark Kingon should not be underestimated. The wake of destruction from mismanagement was visible and restoring SARS to its former glory was dubbed by many as being impossible. I, however, remain optimistic, and believe in the words of the great Madiba: "It always seems impossible, until it is done".

From day one, Kieswetter knew that hope and trust needed to be restored before any meaningful changes could be made at SARS – not only that of the SARS staff, but that of the entire South African public, who were at their wits' end with the SARS systems, procedures and seemingly underhanded methods of window-dressing the tax collection figures.

Gaining trust, unfortunately, does not happen overnight. The slogan of one of South Africa's most successful fund managers sums it up perfectly: "Trust is earned".

Kieswetter spent his first 100 days in office meeting with SARS staff, keenly listening to what they had to say. He used his time to schedule conferences in order to educate the public and clearly explain his vision of a restored SARS. He met with the private sector to communicate the progress he had made and how they could assist him. He met with auditors and tax specialists at leading firms to gain their buy-in and restore confidence. Finally, and not to be overlooked, he used his political prowess to ensure that there was no unnecessary political intervention. The new SARS ship would only have one captain.

Many could describe these actions as mere talk, without "walking the walk". However, it has been his recent steps that have kindled hope, and in particular his use of technology. Much has been said about the Fourth Industrial Revolution: in essence the embracing of technology. Technology has made possible new products and services that increase the efficiency and pleasure of our personal lives, and SARS has grabbed this opportunity with both hands. Technology can only be used with reliable information: converting data into useable information is where the true value becomes apparent.

Under the previous administration, the ill-investment of funds in a political agenda, instead of SARS systems, almost brought the revenue authority to its knees. However, Kieswetter's aggressive investment in technology and automation is undoubtedly a step in the right direction and makes one hopeful that SARS will be able to be restored to its former glory.

Even though there will be many teething problems, the use of technology will greatly improve the SARS systems. Kieswetter quickly identified that SARS staff were being kept busy with taxpayers who are unwilling to use technology, and that his branch staff could be much better utilised if the public could be won over to use the eFiling or SARS app platforms. Additionally, SARS' handling of the COVID-19 pandemic has been first-class, and its staff's transition to working from home would not have been as easy if technology had not been embraced early on.

While the true rewards of these changes will not materialise immediately – given they require meticulous planning, preparation and implementation – there is light at the end of the tunnel.

I have great respect for what Kieswetter is trying to implement at SARS, and if he keeps doing what he is doing, SARS can be restored. Unfortunately, to measure his success during the current economic climate is virtually impossible, and we will only see the true fruits thereof in years to come.

Nonetheless, I believe there is evidence that the proverbial SARS phoenix is stirring amidst the ashes.

The Tax Faculty

ADMINISTRATION OF DECEASED ESTATES
SEPTEMBER 2020

On completion of the workshop, you should have gained enough confidence to monitor the smooth execution and wrapping-up of a simple estate on your own.

WEBINAR WORKSHOP

5 HOURS

OVERVIEW

In this comprehensive session, we unpack and explore some of the following key aspects:

- Liquidation and distribution account.
- The drafting of a will (which might include generation-skipping).
- The applicability of taxes such as transfer duty and estate duty.
- Accrual claims by or against an estate.
- Common law and statutory claims for maintenance by either a dependant of the testator or a surviving spouse.
- Re-distribution agreements.
- Section 18(3) estates.
- Monetary advances to dependants during the period when an estate is frozen.
- The role of trusts.
- Executor's fees.
- Master's fee tariffs for deceased estates.

PRESENTERS

Pieter Lombard
MTP (SA)

Ilse Lombard
H Dip (Tax Law)

DATE

22 September

Time: 09:00–14:00

CASEWARE AFRICA LAUNCHES INDIVIDUAL TAX

Individual Tax empowers practitioners with a holistic cloud-based individual tax return solution.

CaseWare Africa, a division of Adapt IT, has released details of its latest innovation, Individual Tax. This additional app on the CloudTax platform facilitates the preparation, calculation, and submission of individual tax returns (ITR12).

"It is estimated that the majority of tax practitioners spend between 75% to 90% of their time gathering information and documents in preparation of tax returns", says Michael Mncube, Tax Product Manager, CaseWare Africa ."This together with ensuring that accurate, high-quality tax returns are submitted to SARS on time, often leaves very little room to optimise the efficiency of the methodology and improve the process that the practice follows."

Mncube says gathering tax data using hard copies, client collaboration via countless emails and phone calls, is both tedious and daunting. "This entire process results in long and delayed response times. The use of Excel spreadsheets to calculate and corroborate numbers, a multitude of disconnected datasets used by tax teams, plus the resulting errors, are all compounded when needing to submit each tax return, per taxpayer individually as well – leading to an inefficient and time consuming process," he says.

"Individual Tax offers unsurpassed efficiencies as the collection of tax data for specific tax years is achieved via digital queries that then automatically store the information in the relevant sections of the return – saving significant time and effort" notes Mncube. Individual Tax offers a centralised data storage in a single format, a comprehensive tax calculation framework aligned to SARS, powerful overviews of tax-related balances and the ability to prepare both IRP6 and ITR12 returns in a single solution. "This new addition to our CloudTax suite offers a multitude of benefits including the presentation of a clear view of provisional and income tax returns, together with related values grouped per tax year – all in a single view allowing reconciliations of submissions and assessments."

Additional features include built-in schedules that facilitate the summary of tax data inputs and auto-calculation of totals, thus, eliminating human error. "It also caters for bulk submission of tax returns to SARS, saving additional time and further enhancing efficiency. Seamless annual updates empowers practitioners with peace of mind by ensuring that the latest changes in tax legislation and compliance are incorporated."

CloudTax integrates directly with SARS efiling, which automatically synchronises all taxpayer details and historical correspondence in bulk, into a one-stop centralised location for fast and easy access. Built-in dashboards ensure that deadlines are never missed and that efforts can be directed to the most urgent action items. "By managing all client contact information in one place, practitioners can collaborate directly with taxpayers from within the platform.

"Powered by CaseWare Cloud, CloudTax is always available from any location, on any device, at any time and is included when customers buy Individual Tax," Mncube concludes.

PRODUCT KEY FEATURES

Client Collaboration

- Communicate with taxpayers and request tax return supporting information and documentation directly within the app.

Seamless Data Integration

- Automatically insert taxpayer information and documents in the appropriate locations of the return using built-in queries.

Deadline Management

- Never miss a deadline by easily tracking and monitoring all provisional and annual return progress and statuses.

Tax Management

- Manage a single copy of taxpayer details, revisions, corrections, and collateral in a single centralised platform.

SARS Integration

- Process all taxpayer details, correspondence and tax returns submissions in bulk using direct integration with SARS efiling.

Optimisation

- Utilise checklists, questionnaires and schedules that intelligently expand or collapse according to the complexity of the return.

Multiple-Taxpayer Support

- Manage the entire tax practice on CloudTax and also complete all provisional and annual tax returns.

ABOUT CASEWARE AFRICA

CaseWare Africa, a division of Adapt IT, is the global leader in auditing and financial reporting software and is used in over 130 countries worldwide. Our 20 000 users across Africa, consist of audit and accounting firms, government entities, municipalities as well as large blue chip companies.

CaseWare is the undisputed leader when it comes to compliance automation. Our solutions span across financial reporting, assurance, secretarial and tax engagements, and are not only designed to deliver on our compliance promise, but ensure quality results, increased effectiveness and improved profitability.

45 minutes CPD

THE CASE FOR AN INTERNATIONAL FAIR TAX ACCREDITATION SCHEME

▶ **PAUL MONAGHAN,** paul@fairtaxmark.net

Calls for third-party certification to provide assurance on responsible tax conduct have led to the Fair Tax Mark scheme in the UK. In our article, the author makes the case for eventually extending the scheme to corporations and jurisdictions throughout the world.

About the Fair Tax Mark

The Fair Tax Mark certification scheme was launched in the UK in 2014, and seeks to encourage and recognise organisations that pay the right amount of corporation tax at the right time and in the right place. Unashamedly, drawing on the experience of other social certification schemes like the Fairtrade Mark, it seeks to use third-party certification to provide assurance on responsible tax conduct. The origins of the Fair Tax Mark are rooted in civil society and the tax justice movement, with which it remains well connected. It is the only accreditation scheme that focuses solely on responsible tax assurance. At its launch, it was welcomed by a range of bodies, including the UK Public Accounts Committee and the Institute of Chartered Accountants in England and Wales.

About 55 businesses have now been certified, including Financial Times Stock Exchange (FTSE) listed Public Limited Companies (PLCs), co-operatives, social enterprises and large private business – which between them have over 7 000 offices and outlets. The Fair Tax Mark operates as a not-for-profit social enterprise and believes that companies paying tax responsibly should be celebrated and any race to the bottom resisted.

To date, activities have been focused on the UK. However, a new suite of international standards is now under development. These would enable the Fair Tax certification of businesses that have their ultimate holding company situated outside of the UK. We believe that there is a pressing need for this given:

- the Fair Tax Mark is increasingly approached by businesses from around the world seeking accreditation;
- regulators, investors and municipalities across the globe have expressed a desire to support Fair Tax Mark accreditation (or equivalent) in their jurisdictions; and
- if no action is taken by civil society, unscrupulous accounting and auditing entities will step into the vacuum and propagate low-bar for tax Kitemarks.

Backdrop

The focus of our work is corporate income tax and related measures that are designed to tackle the avoidance of this (such as digital services taxes). Businesses are subjected to many different types of tax, however corporation tax has an importance way beyond the revenues it raises. As argued by the Tax Justice Network: “It holds the whole tax system together. It curbs political and economic inequalities and helps rebalance distorted economies.”

The 100-year consensus that once dominated international tax law is over. The rise of transfer mispricing, tax havens, profit-shifting and a statutory tax rate race to the bottom have seen to that. Public discontent (fuelled by a chain of scandals, data leaks and brave whistle-blowers) has grown to such a level that politicians, the world over, have been forced to take action.

At the heart of the reforms are the G20, the OECD and the Base Erosion and Profit Shifting (BEPS) project. Much has been achieved but tackling issues such as profit shifting remains outstanding. For example, a recent Fair Tax Mark analysis of the Silicon Six (Alphabet, Amazon, Apple, Facebook, Netflix and Microsoft) concluded that there is a significant difference between the cash taxes paid and both the expected headline rate of tax and, more significantly, the reported current tax provisions. Over the period 2010 to 2019, the gap between the current tax provisions and the cash taxes actually paid was US$100.2 billion.

Realising consensus on the way forward will be very difficult (for both political and technical reasons), and there has been a mixed reaction to the partial incorporation of unitary taxation and formulary apportionment in the OECD’s BEPS 2.0 proposals for allocation of profits and new nexus rules. The OECD is publicly confident that it can realise a successful outcome and has promised that detailed Blueprints will be tabled at the October G20 Finance Ministers Meeting, after which they will go to the G20 Summit in November. However, many commentators are sceptical on the prospects of a speedy, positive outcome.

The rise of "voluntary" responsible tax initiatives

Compared with other areas of corporate responsibility, responsible tax conduct has emerged only recently. It has only now been added to long established programmes such as the Global Reporting Initiative and is still noticeably absent from the primary issue listings of the United Nations (UN) Sustainable Development Goals and the UN Global Compact.

A number of voluntary responsible tax programmes have been developed around the world in recent years, as set out in the table below. These include initiatives from corporate responsibility activists, civil society campaigners, investors and tax professionals. They each seek to address the question of: what does responsible tax conduct look like at the level of the individual firm, given the existing legislative context? The demand for an answer to this question is partly driven by a growing number of progressive businesses that are proud to shun tax avoidance and want to communicate this to their stakeholders.

RESPONSIBLE TAX INITIATIVES AND SUBSTANTIVE ELEMENTS

	PUBLIC TAX POLICY	ANTI-AVOIDANCE STATEMENT	PUBLIC COUNTRY-BY-COUNTRY REPORTING	LEVEL OF TAX PAID	MORE DETAILED TAX NOTES, WITH NARRATIVE	RESPONSIBLE ADVOCACY EMBRACED	STAKEHOLDER POLICY INCLUDING TAX AUTHORITIES	BENEFICIAL OWNERSHIP DISCLOSURE	THIRD-PARTY VERIFICATION
Fair Tax Mark accreditation	x	x	x	x	x	x		x	x
Good Business Charter certification	x	x					x		
BITC Resp. Business Tracker	x	x	x		x			x	
B Corp certification		x				x		x	x
Future-fit benchmark	x	x	x		x			x	
CSR Europe blueprint	x				x			x	
The B Team responsible tax principles	x	x	x		x	x	x	x	
GRI 207: Tax reporting	x		x		x	x	x	x	
VBDO benchmark	x	x	x		x		x		
Accountancy Europe reporting template			x						
UN PRI investor guide	x		x			x			
EITI Standard			x					x	

> *"It was important to celebrate businesses that can demonstrate good tax conduct and shun the artificial use of tax havens and contrived tax avoidance practices."*

In early July 2020, we published *The Essential Elements of Global Corporate Standards for Responsible Tax Conduct* which tracks and analyses the many responsible tax initiatives that are now in play across the world, with a view to influencing and guiding the Fair Tax Mark's consideration of a new suite of international standards. Comment on our analysis and conclusions has been sought through to end September 2020.

Four corporate commitments

We have proposed that four corporate commitments should be at the centre of the internationalisation of the Fair Tax Mark and act as the core of the certification of businesses that have their ultimate holding company situated outside of the UK.

Embrace public country-by-country reporting and related reporting transparency

Multinational businesses should be required to report on revenue, profit, tax and employee investment, on a public country-by-country basis. Ideally, this information would be provided in an open data format and be machine readable.

Comprehensively implemented public country-by-country reporting would significantly increase corporate tax transparency and enable citizens worldwide to see if a business is paying the right amount of tax in the right place at the right time. Public scrutiny is useful for researchers, investigative journalists, investors and other stakeholders to properly assess risks, liabilities and opportunities to stimulate fair entrepreneurship. Such transparency is also essential for determining whether a business is complying with commitments detailed in their public tax policy or strategy.

This would be a business-friendly measure. The OECD and European Commission have both identified the competitive advantage certain multinational companies have over domestic rivals and SMEs – given that the latter frequently only operate in one country and are not able to engage in profit shifting between tax jurisdictions to reduce their taxes. As a consequence, they face a higher tax bill compared to their competitor multinationals; public country-by-country reporting has been shown to drive increased tax revenues.

A survey of more than 1 300 chief executive officers acoss the world, conducted by PwC in 2014, found that 59% agreed that multinational corporations should be required to disclose basic financial information, such as revenue, taxes paid, and number of employees on a country-by-country basis. During the European Parliament hearings to discuss the introduction of public country-by-country reporting across all sectors in the European Union, executives from HSBC and Barclays voiced their support for legislation that would increase reporting to all multinational enterprises.

In addition, companies should publicly disclose a full list of their subsidiaries (together with tax residency). Subsidiary disclosure is already a requirement in places such as the UK; in the US, the SEC only requires that "significant" subsidiaries be disclosed.

The disclosure of the fullest possible profit and loss report, together with detailed tax notes and a narrative explanation, is desirable for businesses of all sizes. In large parts of the world, smaller businesses are exempt from such reporting requirements (for example, in the UK), as are large, unlisted businesses elsewhere (for example in the US). However, tax avoidance and evasion are pervasive in businesses of all sizes and types, and so the need for exemplar tax conduct and transparency is relevant to all businesses.

Publish a binding policy undertaking not to use tax havens artificially or pursue tax avoidance

The 'Big Four' accountancy firms have sought to use their considerable influence to dampen down considerations of morality and fairness in tax conduct. First, by directing debates toward the narrow silo of 'legality' (i.e. tax avoidance is legal and therefore not inappropriate); and more recently, under external pressure to be more progressive, to the slightly broader consideration of 'reputational risk management'.

Such a 'lowest common denominator' approach would be unthinkable in other areas of corporate responsibility, such as environmental protection or human rights. This is not just the case for business in general, but also the 'Big Four': for

example, KPMG has proudly committed to ‘eradicating single use plastics’ and the purchase of renewable energy for its operations. The UK requires all large companies that operate there to publish a tax strategy, with baseline matters such as the approach to risk management and governance arrangements explained. Australia operates a similar, albeit voluntary, Tax Transparency Code.

All businesses should be encouraged to publish such a tax policy, and to additionally embrace moral considerations. In particular, they should explicitly shun tax avoidance and the artificial use of tax havens, and commit to the declaration of profits in the place where their economic substance arises.

Recent analysis from the UN Principles for Responsible Investment (PRI) found that just 23 of 41 multinational companies published their “global positions on tax”, with only five explaining their “approach to tax havens”.

Any policy should be subject to annual affirmation, via compliance checks. The policy should be owned by a named board director. Accompanying public country-by-country reporting would further demonstrate responsible tax conduct and build trust.

Disclose their beneficial owners and persons of significant control

All businesses should disclose their beneficial owners and persons with significant control (if different). The threshold for disclosure should be at least at the level of 10% of shareholdings or voting rights (as currently required by the Fair Tax Mark), but preferably lower. A beneficial owner in respect of a company means the person(s) who directly or indirectly ultimately owns or controls a corporate entity. This includes ownership via trusts.

Anonymously owned companies are one of the key tools used by money launderers and tax evaders to hide illicit gains and taxable assets from law enforcement and tax inspectors. Public registers are a key means to making this more difficult. Moreover, making beneficial ownership public is good for fair competition, allowing companies to know who they are doing business with.

Several prominent business leaders have put their name to the call for company ownership transparency, including Paul Polman, the CEO of Unilever, Bob Collymore, the CEO of Safaricom and Mo Ibrahim, the founder of Celtel.

Pursue independent assurance from outside of the big accountancy firms

Trust in big business has fallen in recent years in the OECD member countries that GlobeScan has tracked over time. Their Radar global public opinion poll of 2019 found that: “many view business as not having the best interests of society in mind”. It also found that fewer than half of those in the 25 countries surveyed believe that large companies pay their fair share of taxes, with people in Europe and North America less likely to agree that companies pay a fair share of taxes than those residing in Asia and Africa. People in France, Germany, and Spain are said to be: “the least likely to think that companies are paying their fair share, reflecting the very low levels of trust in business to operate in society’s best interest in these countries.”

Against this background, corporate claims of responsible tax conduct can benefit from independent third-party assurance – in the same way as concepts such as Fairtrade and organic standards do so.

Organisations rooted in civil society are best placed to provide this assurance, with the involvement of the big accountancy firms (especially the ‘Big Four’) treated with scepticism given their involvement in the enabling of tax avoidance. This scepticism extends beyond the tax justice civil society movement. For example, whilst polling of the UK public found that 75% agreed that: ‘it was important to celebrate businesses who can demonstrate good tax conduct and shun the artificial use of tax havens and contrived tax avoidance practices’; just 15% said that they trusted ‘company auditors’ to accurately confirm whether a ‘company was paying the right amount of tax’, compared with 41% for the Fair Tax Mark and 57% for the HMRC tax authority.

Independent assurance rooted in civil society is far more likely to support the emergence of much needed legislative and regulatory developments, such as public country-by-country reporting.

CORPORATE TAXPAYERS' EXPERIENCES WITH SARS

2020 has seen the third issue of PwC's yearly Tax Controversy and Dispute Resolution Survey. To find out how taxpayer experiences with SARS compare with previous years, read our summary.

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Introduction and objectives of the survey

PwC's annual Tax Controversy and Dispute Resolution Survey was created to benchmark taxpayer experiences when dealing with SARS. The latest survey, the third in the annual series, targeted those persons in charge of tax functions across various industries, and was conducted between May and July 2020. The 2020 survey was sent out to 1901 PwC clients across various industries and was also published for those who wished to participate anonymously. A total of 184 people participated which included 37 people participating via the anonymous link. A total of 107 corporate respondents completed the full survey.

We believe the findings of the survey will be useful to clients/taxpayers in general, as well as to SARS as the survey provides key insights regarding taxpayer's experiences in respect of the tax system and various aspects of tax administration. The aim of the survey is to support constructive engagements with SARS about how it can improve public trust, efficiency, and confidence in the tax administration system as well as improve its stakeholder engagement. These are among SARS' key strategic objectives and are important drivers not only to rebuild the organisation, but also to ensure effective and efficient collection of taxes in a tough economic climate.

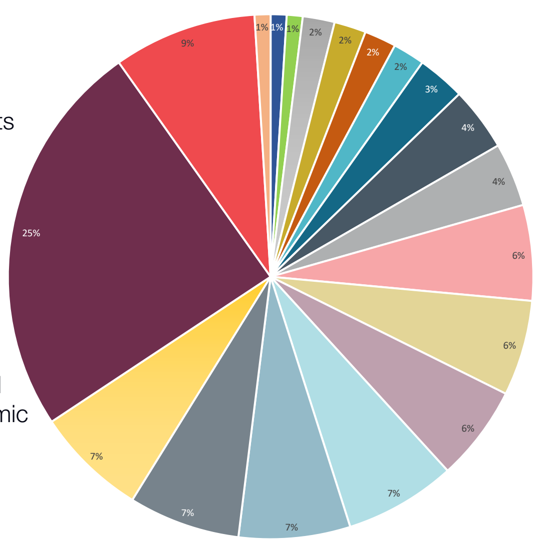
In this article, we aim to provide a high-level summary of the 2020 survey findings.

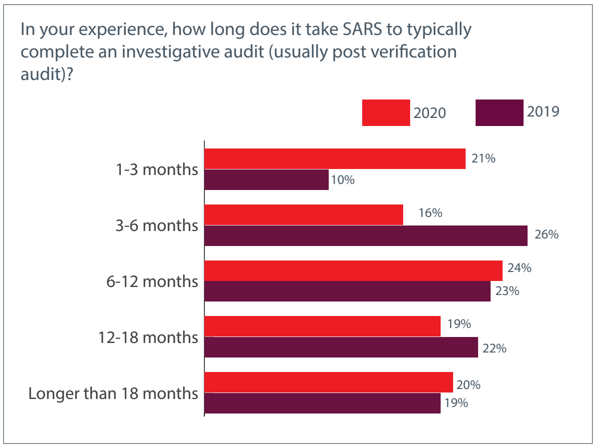
Respondent / participant profile

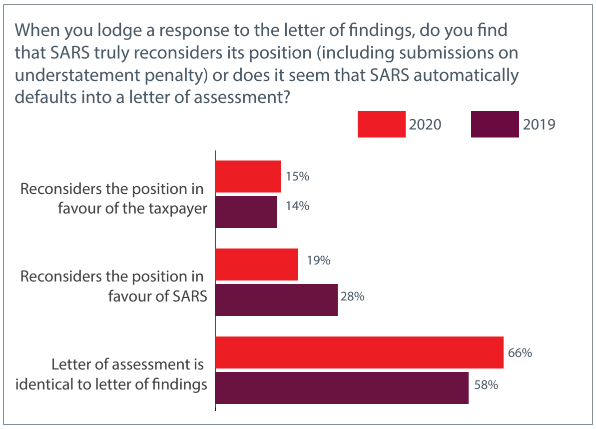
In this year's survey, 23% of participants represented small companies, 24% medium-sized businesses, 22% large local companies and 32% multinationals.

Similar to the prior year, a large number of participant companies belong to the financial services sector, but companies from the telecommunications, transportation and logistics, metals, hospitality and leisure, international development and public sectors also participated in the survey.

Which industry is your company in?



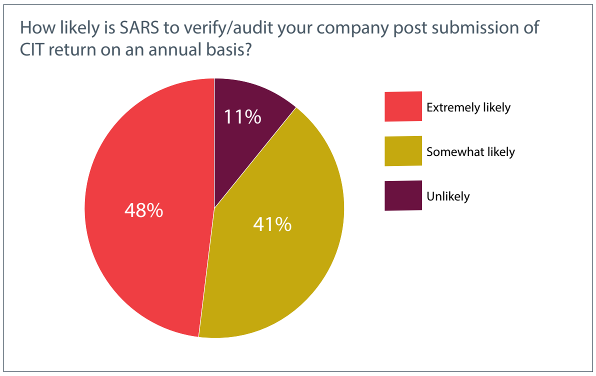


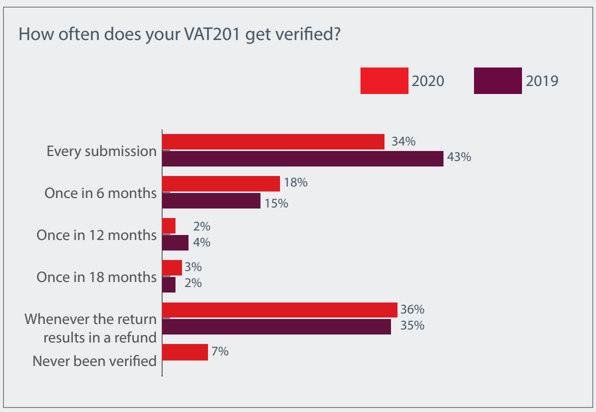


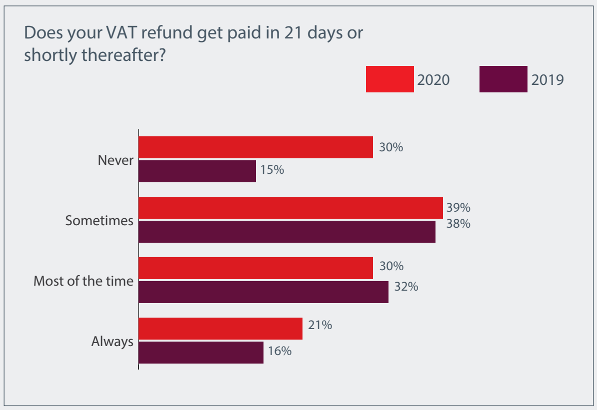
Audit process: Corporate income tax

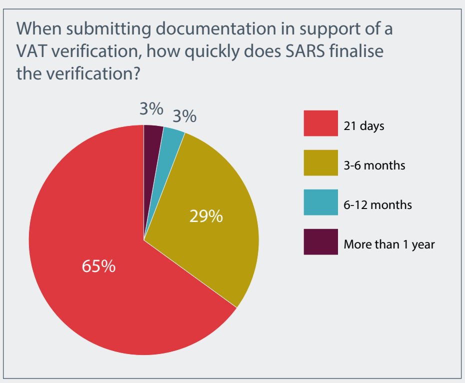
When a taxpayer files their return, an assessment is issued based on the information submitted by the taxpayer. In some instances, SARS may require the taxpayer to verify certain information submitted in the return. This year, 48% (2019: 42%) of taxpayers indicated that it is extremely likely that their company will get selected for a verification audit following submission of their corporate income tax return. The 6% increase suggests that SARS could be performing audits more frequently — perhaps in an effort to detect non-compliance as well as to meet its revenue collection targets.

Two-thirds of participants reported that when they lodge their response to SARS' letter of findings, the finalisation of the audit letter issued is identical to the letter of findings, which raises the question as to whether SARS officials adequately apply their minds to taxpayer submissions before finalising audits. 43% of participants indicated that SARS takes on average 6–18 months to complete an investigative audit and 20% reveal that it takes more than 18 months.





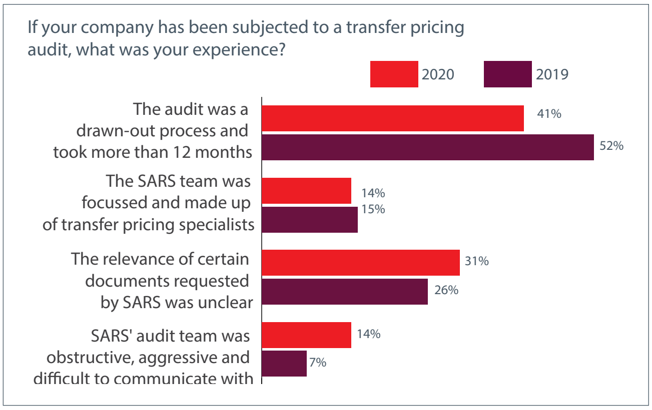


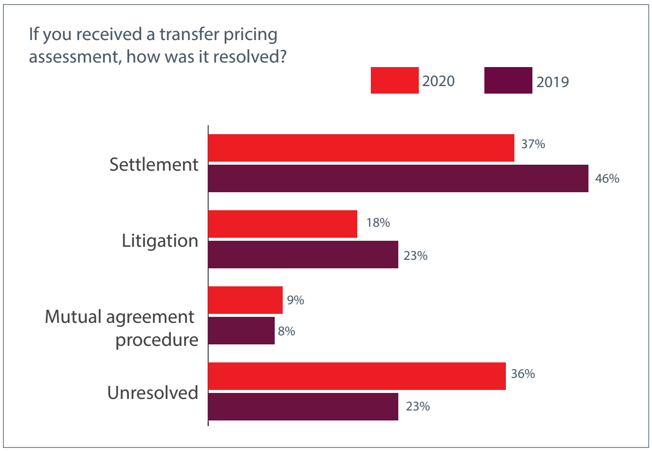


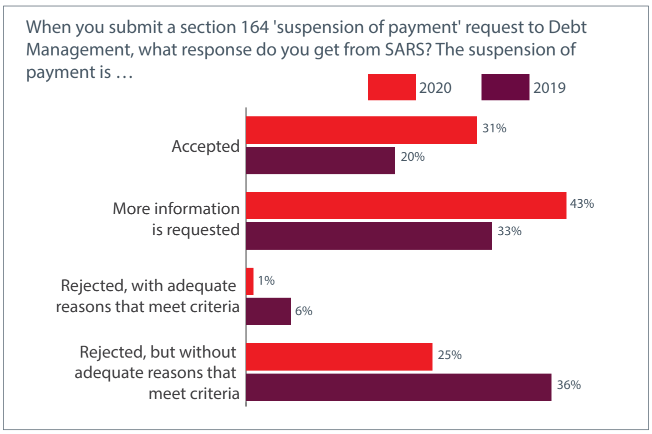
Value added tax: Selection for verification and VAT refunds

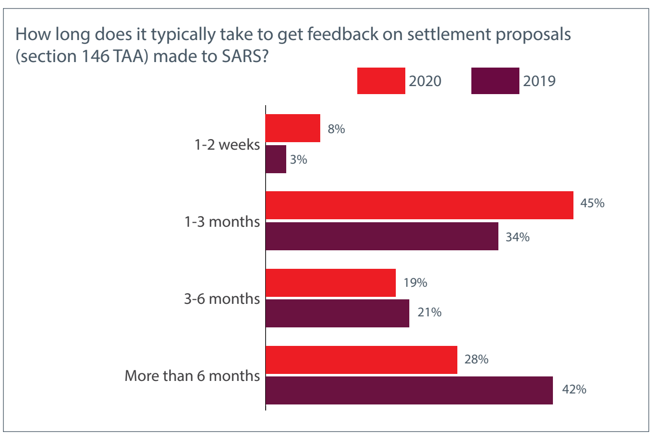
The VAT returns of a significant proportion of participants (2020: 70%, 2019:78%) are selected for verification on every submission or whenever the return results in a refund, raising a question on the efficiency of the verification process. It would be expected that if a vendor's track record shows their returns are always compliant, the vendor should be reclassified for periodic verification or perhaps only be selected if there is an unusual spike in refunds.

This year's results reveal that SARS has consistently adhered to the 21-day pay-out period with 51% of participants reporting that their refunds get paid out within this period always or most of the time (2019: 47%). This is in line with the Commissioner of SARS' undertaking to release refunds sooner.









Transfer pricing: Taxpayers' experiences during an audit

In recent years, SARS has increased the frequency of transfer pricing risk reviews and as a result has expanded audit activity in this area, in an effort to address base erosion and profit shifting (BEPS) in South Africa.

Companies that engage in cross-border transactions need to ensure that they have documentary evidence available in the event that they are subjected to transfer pricing audits. In this year's survey, 41% of participants (2019: 52%) responded that the audit was a drawn-out process and took more than 12 months to complete. 14% (2019: 7%) of participants found SARS' audit team to be obstructive, aggressive and difficult to communicate with. In addition, 31% of the participants revealed that the relevance of certain documents requested by SARS was unclear (2019: 26%).

36% of respondents report that transfer pricing audits have remained unresolved, which is a 13% increase from last year (2019: 23%). This raises the question of whether the SARS officials who are expected to conduct these audits have the necessary skills for this complex area. The upside is that there is a renewed focus on the SARS Large Business Centre and strengthening the transfer pricing audit team.

Debt management: Suspension of payment applications

A request for suspension of payment, which is governed by section 164 of the Tax Administration Act, is a good option when it comes to staying the collection of disputed tax debt owed to SARS. This year, 31% of participants indicated that their suspension of payment applications were accepted, which is 11% higher than last year's results.

Moreover, 43% of the participants indicated that more information was requested following the submission of their suspension of payment application to SARS, which is a 10% increase from last year. This could mean that SARS officials are more critically reviewing these applications and not granting suspension of payments "willy-nilly".

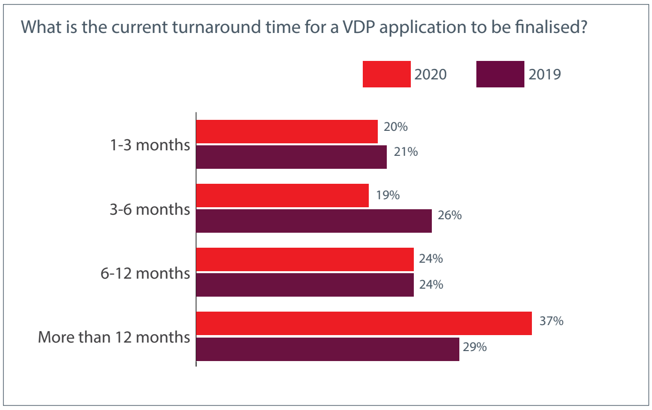
The proportion of participants who reported that their applications were rejected without adequate explanation has decreased substantially from 41% in 2019 to 25% this year. SARS is seemingly taking long to provide feedback on settlement proposals, with 45% of respondents waiting 1–3 months for an outcome, potentially negatively affecting revenue collection for SARS.

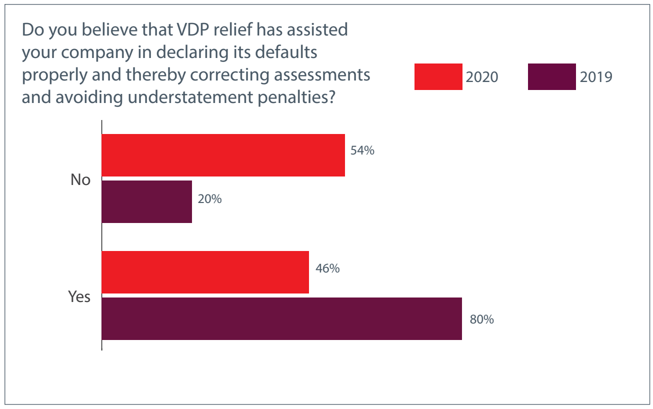
Voluntary disclosure programme: Turnaround times and value added

When taxpayers voluntarily disclose prior defaults and make full disclosure to SARS via its VDP process, this ideally relieves SARS from engaging in time-consuming and often protracted verifications or audits. For taxpayers, the voluntary disclosure programme (VDP) provides an opportunity to regularise their tax affairs without incurring potentially significant penalties or criminal charges. This year, 42% of participants said that they had made use of the VDP process. Of these, 37% indicated that the VDP took more than 12 months to finalise, compared to 29% last year.

Many taxpayers find the VDP process perplexing and 73% of participants would find an Interpretation Note helpful when drafting and submitting a VDP application. This appears to be an area in which SARS could be generating much more income from taxpayers who are voluntarily offering outstanding taxes to them.

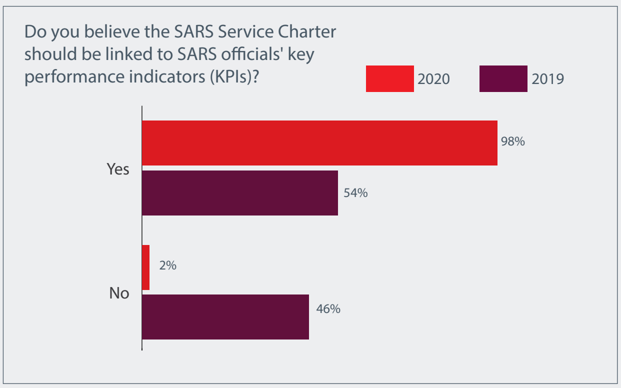
A discouraging finding is that 54% of the participants feel the VDP did not assist their company in declaring its defaults. This is more than double the 20% of participants who shared this view last year.

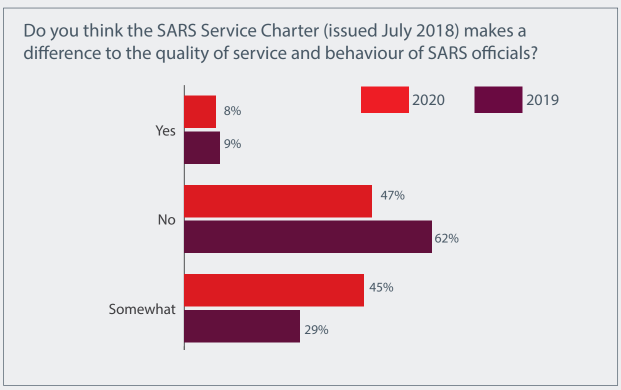




SARS Service Charter: Linking service to SARS officials' KPIs

The SARS Service Charter was introduced in July 2018 to enshrine both SARS' and taxpayers' rights and obligations and to ensure quality service from SARS and its officials, including providing timelines on turnaround times to taxpayers. This year, 47% of participants stated that the Service Charter does not make a difference to the quality of service and behaviour of SARS officials. While this response is an improvement on last year's 62%, an overwhelming 98% of participants believe that SARS officials' key performance indicators should be linked to the Service Charter in order to ensure compliance and adherence (2019: 54%). This 44% increase suggests that SARS needs to do more to ensure that its officials produce the standard of quality and service promised in the Service Charter.





COVID-19: Taxpayers' views on relief provided

The lockdown implemented in response to the COVID-19 pandemic resulted in large-scale disruption. During this time many businesses were unable to trade and faced significant financial challenges.

The Minister of Finance announced certain tax relief measures to alleviate the financial burden placed on taxpayers with the introduction of the Disaster Management Tax Relief Bill, 2020, and the Disaster Management Tax Relief Administration Bill, 2020 (effective from 1 April 2020). Taxpayers felt that the strict criteria for tax relief should have extended beyond the scope set out in the Bills, as only those taxpayers who met the qualifying criteria envisaged in the aforementioned Bills were able to make use of certain tax relief measures.

Participants were asked if their company met the requirements of a qualifying taxpayer (gross income of below R100m) and whether they felt the requirements were too restrictive. A third of respondents indicated that their organisations did not meet the requirements and believed that full compliance should not have been required to utilise the tax relief.

Just below half (45%: 2020) of respondents believe National Treasury has not done enough to assist taxpayers. Participants indicated that they need greater help to improve liquidity and promote business continuity. When asked whether SARS was equipped to handle their company's queries or service-related issues, 23% of respondents replied with 'never'.

Among companies that have an annual turnover of below R100m, 44% indicated that they have used the tax relief measures. Companies with turnover greater than R100m require assistance just as much as smaller companies, with 23% reporting utilising the tax relief measures afforded by the Tax Administration Act, such as remission of penalties and interest and deferral of payment arrangements.

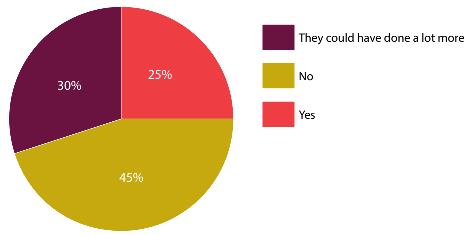
The Tax Administration Act deals with the various tax administrative processes, which are subject to specific timelines. The Disaster Management Tax Relief Administration Bill 2020, provides for the Level 5 and Level 4 national lockdown period (26 March 2020–31 May 2020) in terms of a limited section of the Tax Administration Act to be regarded as dies non, which means that these days will not be counted for the purpose of calculating the respective administrative time periods.

For instance, the dies non rule will apply to all time periods in respect of dispute resolution under Chapter 9, including section 103, of the Tax Administration Act, but it does not apply to other provisions such as the submission of tax returns or a response to a request for relevant material under section 46 of the Tax Administration Act.

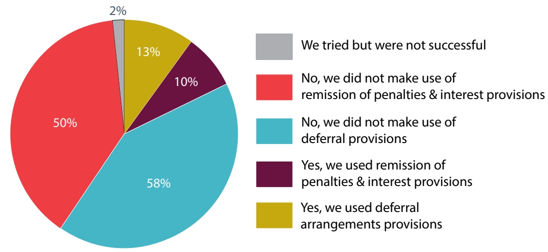
No less than 88% of respondents believe the extension of time periods should have extended beyond the period provided, and 76% believe that the definition of dies non should have included the time period relating to the submission of tax returns, while 64% also believe it should apply in relation to the payment of tax.

Many companies are currently under immense financial strain and 34% of participants reported that they discontinued or reduced their payments of PAYE (34%), as well as provisional tax (20%), VAT (15%), CIT annual payments (7%) and customs duties and levies (7%) in an effort to reduce expenses and continue trading.

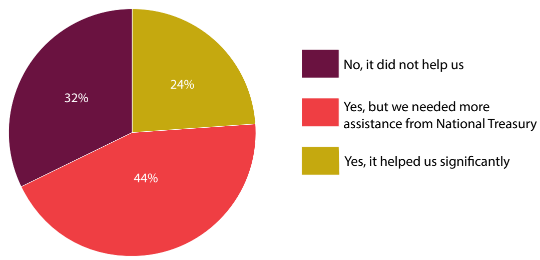
Do you believe that SARS / National Treasury has done enough to assist taxpayers with tax relief during the COVID-19 pandemic and lockdown to relieve liquidity and promote business continuity?



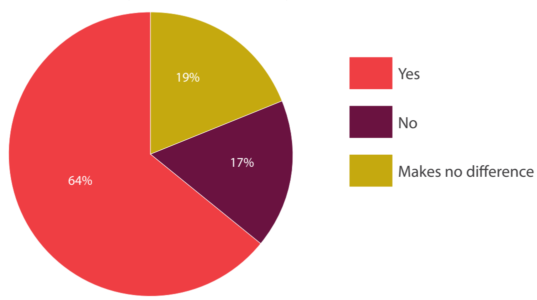
If your company has an annual turnover of above R100m, did your company make use of the normal relief measures in the Tax Administration Act, such as deferral or remission of penalty and interest provisions?



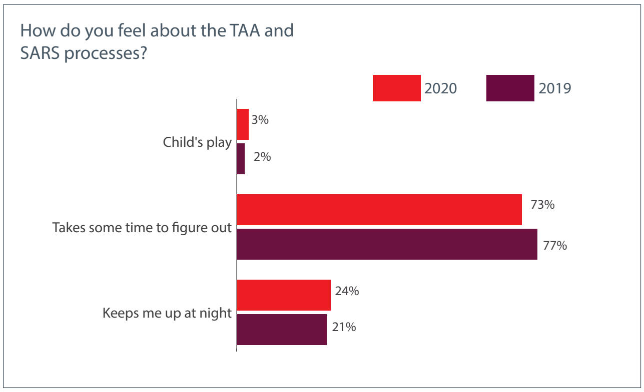
If your company has an annual turnover of below R100m, did your company make use of any of the relief measures announced in the Disaster Management Tax Relief Bill (i.e., PAYE, ETI, provisional tax, SDL or VAT categories)?



Do you believe that extension of time periods should have been included for taxpayers in relation to payment of tax?

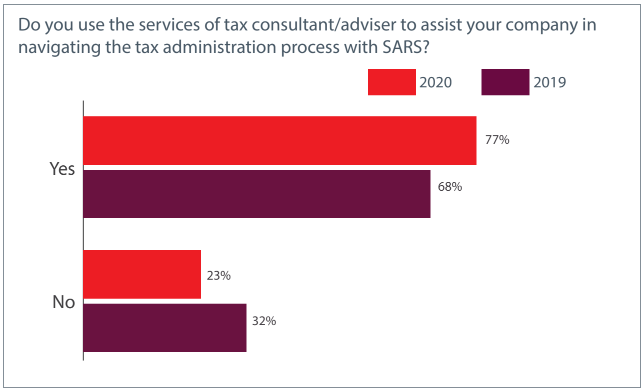


"The report reveals that SARS continues to strive to rebuild taxpayers' trust and confidence in SARS as well as the overall tax system."



Taxpayer behaviour: Taxpayers' views about the TAA and SARS processes

Taxpayers can get a little lost and overwhelmed with the tax system making it a challenge to pay their taxes or meet their tax obligations. This year nearly three-quarters (73%) of survey participants indicated that it takes them some time to figure out the Tax Administration Act and SARS processes and 77% indicated that they engage the services of tax consultants or advisors in this regard. This suggests that the SARS systems may be too complex and that there may not be adequate guidance available to enable taxpayers to understand and navigate the tax system.



The way forward: Suggested areas for improvement

We asked participants to share their views on what they think SARS should do to improve its service to taxpayers. The greatest number of participants suggested that SARS improve the technical skills of its staff and enhance its communication channels for taxpayers to communicate with SARS directly (i.e., excluding the call centre and eFiling).

Other suggestions include employing more staff and improving turnaround times, improving enforcement capabilities to broaden the tax base, and improving the eFiling system, which we are aware that SARS is addressing via its modernisation project. Overall, taxpayers are calling for increased ease of compliance with the tax laws and their tax obligations.

Conclusion

With the fairly recent appointment of SARS Commissioner Edward Kieswetter, there has been a drive to improve service delivery at SARS. In SARS' Strategic Plan for 2020/21–2024/25, it outlines nine strategic objectives for the next five years: 1) Provide clarity and certainty for taxpayers and traders of their obligations; 2) Make it easy for taxpayers and traders to comply with their obligations; 3) Detect taxpayers and traders who do not comply, and make non-compliance difficult and costly; 4) Develop a high performing, diverse, agile, engaged and evolved workforce; 5) Increase and expand the use of data within a comprehensive knowledge management framework to ensure integrity, derive insight and improve outcomes; 6) Modernise systems to provide digital and streamlined online services; 7) Demonstrate effective resource stewardship to ensure efficiency and effectiveness in delivering quality outcomes and performance excellence; 8) Work with and through stakeholders to improve the tax ecosystem; and 9) Build public trust and confidence in the tax administration system.

The full 2020 survey report will be available on the PwC South Africa website from September 2020. It will provide an analysis of survey results and trends observed since 2018. The report reveals that SARS continues to strive to rebuild taxpayers' trust and confidence in SARS as well as the overall tax system. Insights provided by taxpayers provide useful insights for SARS to gauge what areas require its attention, and which areas should be prioritised over others.

LIFE IN A REMOTE WORLD: TAX ENFORCEMENT IN TP

15 minutes CPD

Many businesses have had to change the way they operate as a result of COVID-19, with many activities undertaken remotely. Our article examines how to apply the arm's length principle to transfer pricing transactions that take place in 2020.

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The unusual business conditions of the COVID-19 outbreak will require a more flexible approach from tax authorities when analysing transfer pricing in the 2020 year of assessment.

The COVID-19 outbreak in late 2019 / early 2020 has impacted the way we live daily and has had a devastating impact on the global economy. While countries struggle to revive ailing economies with interest rate cuts and capital injections, tax authorities need to be more flexible when enforcing transfer pricing for affected transactions in the 2020 year of assessment.

Working remotely

Most transfer pricing investigations start off as a desk audit when large amounts of data are collected and analysed by the tax administration. Most of this activity can be performed remotely. With reliable technology, the functional analysis interviews can also be conducted remotely. The main change to transfer pricing enforcement is the flexibility that tax authorities will have to exhibit when applying the arm's length principle.

One of the important comparison issues will be how business operations changed during the various levels of lockdown. Many multinationals have key individuals providing high value-add activities to the supply chain and operational effectiveness of the group. These personnel were dislocated from their normal place of work and had to carry out these substantial business activities remotely.

Many countries have provided guidance on the impact these employees have on tax resident status, employees' tax and permanent establishment issues, but very few have considered the impact on transfer pricing. Tax authorities would need to consider the people affected, the location, duration and importance of the functions they perform and the potential impact the dislocation could have on transfer pricing models. For example, there would be an impact on the intra-group services provided remotely rather than from a central location, and an impact on the development of the group's intangible assets.

Remote business activities

The impact of remote working affects individual employees as well as supply chains. Many companies were forced to move aspects of their supply chains to a remote operation, for example when sales and distribution centres functioned remotely.

The Organisation for Economic Co-operation and Development (OECD) is grappling with taxing the digital economy in its traditional sense (for example, Google or Amazon), and now COVID-19 is likely to see a greater shift towards conducting business activities remotely. The draft guidance from the OECD seeks to assist tax authorities to identify and tax profits arising in locations where a company has a digital footprint but no physical presence. With key changes in business operations to remote activities, this draft OECD guidance could also be relevant to businesses outside the traditional digital economy.

> *"It is clear that tax administrations will have to be open to differing approaches in adjustments to comparable data when investigating and enforcing transfer pricing for transactions undertaken in the 2020 year."*

Arm's length and adjustments
One of the greatest challenges arising from the COVID-19 lockdowns has been the impact on the economy and the "new normal". Tax authorities usually apply the arm's length principle by determining the profits from a transaction which entity XA in Country A entered into with a related party XB in Country B based on the comparability of the terms and conditions which would have existed had XA and XB transacted independently.

To justify a transaction as at arm's length, taxpayers compile transfer pricing reports using benchmarked data. Benchmarking identifies internal or external comparable data using the most appropriate transfer pricing method (such as the transaction net margin method) for the relevant years, often with comparability adjustments made to the data. Tax authorities rely on this data to determine whether the company they are auditing has transacted with connected parties at arm's length. The benchmarking data is pivotal in enforcing the arm's length principle.

The challenge with comparability data is the time lag. Invariably, there is a two- to three-year lag before the data is available to be used for the year under review. An analysis supporting 2020 would normally rely on data available for 2016-2018. This data would create significant comparability issues as it would not reflect the impact of the devastating economic downturn or significant changes to business operations in 2020. Whether such data could be suitably adjusted is questionable.

Although the use of multiple-year data could provide a more reasonable comparison, it is still doubtful whether this data would truly reflect the impact of the pandemic and its associated economic recession. An alternative could be to use data from the previous recession years during the global financial crisis in 2007-2008. Although that historical data may provide a comparison for the current economic impact, it would not necessarily reflect changes in business operations as a result of more activities being carried out remotely.

Another alternative is to consider whether comparability adjustments could be made. Tax authorities often rely on these adjustments where there are comparability defects between the benchmark data and the tested party. Economic circumstances relating to the transaction under review are a key comparability factor.

The extent of any comparability adjustments should also consider the nature of the transaction under investigation. For example, a distributor selling a diverse portfolio of goods may be less impacted than a manufacturer that experienced significant operational downtime. The impact of the lockdown would have also been experienced differently depending on the nature of the tested party and the industry. Businesses that were already operating remotely would exhibit less dramatic changes than those that are historically bricks-and-mortar industries. Certain industries may also be more affected than others. In South Africa, the hospitality, airline, liquor and tobacco industries have been decimated, but those providing telecommunication services and online retailers are less affected.

In a benchmarking analysis, it is common to adjust the results of the comparables. However, it may be more accurate to adjust the financial performance of the tested party to "normalise" its profits for 2020. The difficulty of doing this lies in identifying and justifying the items on the income statement which should be adjusted. For example, bad debts or inventory write-offs could be considerable and significantly higher than in previous years. The company's overall costs may also have increased significantly, requiring an adjustment to the normal levels in previous years.

More scientific adjustments or analysis can be undertaken to determine how the drop in sales impacts profitability so as to apply adjustments to the comparable data. A less scientific approach could be for the tax authorities simply to accept a more appropriate point in the range, such as the lower quartile result of the data set to be an arm's length result.

Conclusion
It is clear that tax authorities will have to be open to differing approaches in adjustments to comparable data when investigating and enforcing transfer pricing for transactions undertaken in the 2020 year. Taxpayers should also ensure that all commercial decisions and changes in business operations which have an impact on the existing transfer pricing model should be clearly documented and justified in anticipation of an audit by the relevant tax authorities.

REVENUE AUTHORITIES MINE TAXPAYERS' DATA

15 minutes CPD

▶ **MARELIZE LOFTIE-EATON,** marelize.loftieeaton@firstrand.co.za

Since the advent of FATCA and CRS, revenue authorities have increasingly made use of third-party data to follow the money. SARS is no exception. Find out how South African taxpayers and practitioners are impacted and what the future holds.

You can run; however, it has become extremely difficult to hide from any revenue authority across the globe as information sharing has become the international standard. Previously, information on a specific taxpayer could only be shared between two competent authorities that entered into a double taxation agreement. This operating environment has changed radically with the global introduction of automatic exchange of information legislation and agreements.

In 2010 the United States passed the Foreign Account Tax Compliance Act (FATCA), which requires all foreign financial institutions to identify customers with any US indicia and report the assets and identities of these persons to the Internal Revenue Service (IRS) on an annual basis. On 15 July 2014 the Organisation for Economic Co-operation and Development (OECD) approved the Common Reporting Standard (CRS) principles. CRS requires jurisdictions that sign the multilateral agreement to obtain information from in-country financial institutions on all customers that hold foreign residency or foreign tax residency. The revenue authorities in the jurisdictions where the accounts are held will then automatically exchange that financial account information with those countries listed as residencies or tax residencies. South African financial institutions report FATCA and CRS records directly to SARS.

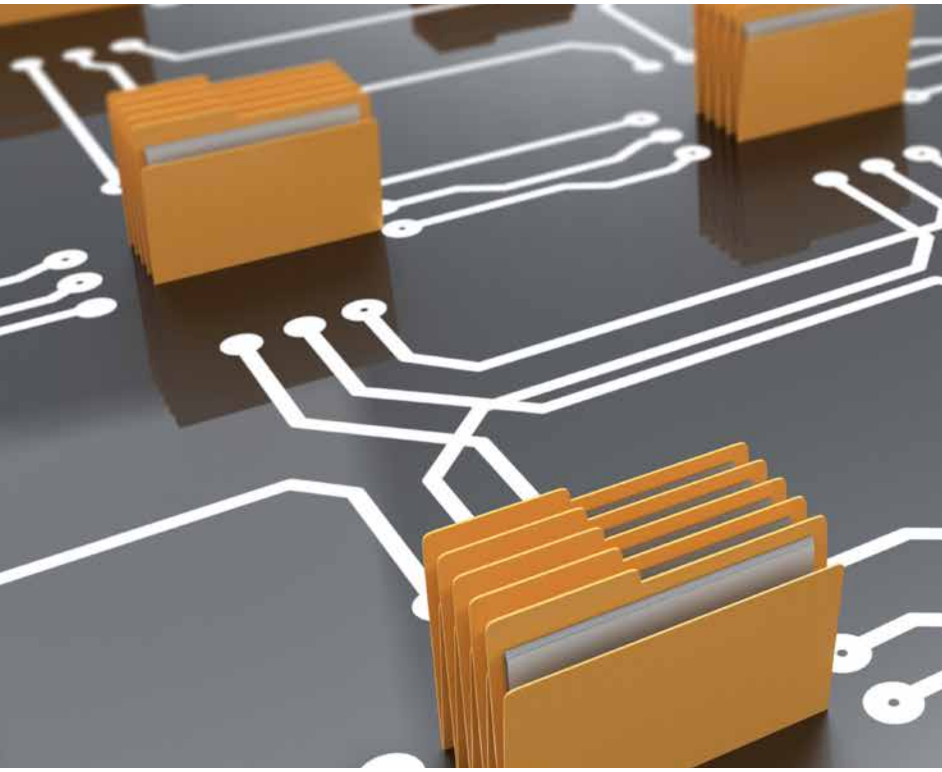
Due to the sensitivity and detail of the financial data shared by SARS with the US and other revenue authorities, the IRS and OECD performed a security due diligence on the SARS systems and submission channels to ensure that the financial data is adequately protected in terms of the requisite international standards.

The exchange of information under the CRS undoubtedly resulted in a major shift in international tax transparency and the ability of jurisdictions to detect offshore tax evasion. Recent media leaks, together with information collected through international tax compliance audits, however established that tax advisors and other intermediaries, despite the international reporting, still assist in designing and marketing offshore structures and arrangements. These arrangements can be used by tax dodgers to circumvent proper reporting of financial information to the revenue authority where it is tax resident. International exchange of information between revenue authorities can either be obtained upon request or automatically. In 2017 the Bari Declaration issued by the G7 Finance Ministers requested the OECD to start "discussing possible ways to address arrangements designed to circumvent reporting under the Common Reporting Standard or aimed at providing beneficial owners with the shelter of non-transparent structures". It also stated that the OECD should consider "model mandatory disclosure rules inspired by the approach taken for avoidance arrangements outlined within the BEPS Action 12 Report".

The BEPS Action 12 Report provides a framework to design a disclosure regime that detects aggressive or abusive tax planning schemes earlier and identifies the promoters and users of these schemes.

In 2018 the OECD published The Model Mandatory Disclosure Rules (MDR) for CRS Avoidance Arrangements and Opaque Offshore Structures based on the best practice recommendations in the BEPS Action 12 Report. In June 2019 the OECD released the international administrative and operational framework for the exchange of information under MDR. The MDR exchanges will be based on a multilateral competent authority agreement that will enable the exchange of information about avoidance arrangements with all jurisdictions of tax residence of the concerned taxpayers. This will allow tax authorities of such jurisdictions to use such information to carry out compliance activities with respect to both the taxpayers and the intermediaries involved in the arrangements disclosed under MDR.

As highlighted above, anti-avoidance provisions are proposed with the intent to design a disclosure regime aimed at identifying potentially aggressive or abusive tax planning schemes, the promoters of such schemes and the taxpayers using such structures or arrangements. MDR introduces the concept of "hallmarks" to be able to identify what would constitute an avoidance arrangement. From a generic perspective this includes, for example, an account, product or investment that is designed to not meet the definition of a financial account under CRS, but has substantially similar features or characteristics to a financial account. It encompasses any arrangement that can be reasonably concluded to be designed or marketed with the aim or effect of avoiding reporting, or alternatively accurate reporting, under CRS.



The basis of critical information, which lies at the heart of CRS exchanges, includes ownership information of all relevant legal entities and arrangements (legal and beneficial ownership) where the entity is a passive non-financial entity(. MDR further introduces reporting of information on arrangements that disguise the beneficial owners of assets held and potentially circumvent reporting thereof under CRS.

The MDR is not limited to compliance by financial institutions and includes disclosure to the tax authorities by lawyers, accountants, financial advisors and other service providers in respect of any schemes they put in place for their clients to avoid reporting under CRS or prevent the identification of beneficial owners.

The information to be disclosed includes all the steps and transactions that form part of the scheme, including key details of the underlying investment, organisation and persons involved, and the relevant tax details of the clients, customers or users of the scheme as well as any other Intermediaries involved.

The European Union and other countries have already implemented MDR. The effective date of MDR in South Africa is 1 March 2023. This will invariably expand the already onerous reporting obligations of South African financial institutions.

Financial institutions hold the most detailed and accurate financial data of taxpayers and are therefore the largest contributor of third-party data to SARS. Financial institutions report bi-annually to SARS on all accounts and investments held by customers, even where the balance is zero and no interest has been earned. Financial information as well as the latest demographical details are provided to SARS. This reporting includes, inter alia, data on interest earned, proceeds from investments, dividends earned, capital gains or losses, tax-free investment contributions, withdrawals or transfers and withholding tax on interest.

The reporting includes the monthly debits and credits and SARS regularly requests more detailed information in terms of section 46 of the Tax Administration Act. This includes bank statements and information relating to flow of funds, in instances where the turnover in the accounts exceeds the income declared by the taxpayer. SARS also recently sent SMSs to taxpayers based on "discrepancies identified between third party data received and their tax returns submitted". These "discrepancies" relate to the possible "under-declaration" of income. In this regard, it should be appreciated that even though credits do not necessarily equal income, a constant flow of funds into an account may be indicative of additional income that may not have been declared.

SARS uses the data provided to verify information provided by the taxpayers in their tax returns. In addition, SARS uses this financial information and account details for the collection of taxes due and in the SARS risk engine to flag taxpayers for audits.

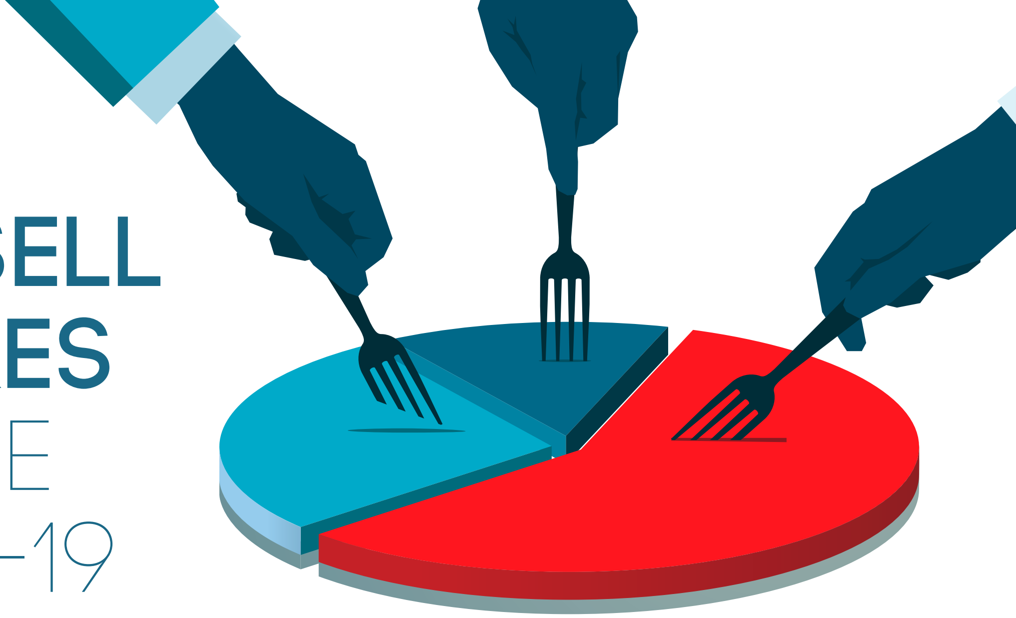
Bi-annual third-party data submissions are not limited to financial institutions as SARS compels employers, estate agents, attorneys, medical aid schemes and other entities that hold financial data of taxpayers to report same.

In the 2020 filing season SARS raised "auto-assessments" based on third-party information provided to it. The term "auto-assessment" in essence refers to a pre-populated tax return compiled by SARS that reflects all the third-party data obtained by SARS. A taxpayer can either accept the pre-populated return or add additional income received and claim deductions. Only once edited or accepted will an assessment be raised. The normal dispute resolution process is still available to taxpayers.

It is to be expected that SARS will soon request third-party data on a monthly basis, as it reflects real-time information. This follows international best practice by implementing taxation at source, as most first-world tax administrators have done. SARS is already in the process of implementing real-time balance requests from financial institutions and this appears to just be the beginning of future real-time data requests.

To ensure that no stone is left unturned, SARS also receives information from the South African Reserve Bank and the Financial Intelligence Centre on local and international money flows.

Therefore, if you want to hide money, the only conceivable place SARS will not currently find it will be under your mattress. However, be aware of whistle blowers and fuming spouses.



BUY AND SELL STRUCTURES IN THE TIME OF COVID-19

▶ **HARRY JOFFE**, harryj@discovery.co.za

A buy and sell agreement between co-shareholders in a company is a mechanism to ensure continuity of the company should one of the shareholders die or become disabled. How are these arrangements impacted by COVID-19?

15 minutes CPD

Like most planning structures, buy and sell arrangements have been affected by COVID-19. Before analysing how the virus has affected them, let us understand what a buy and sell arrangement is.

Many small companies involve a few shareholders. For the sake of simplifying this, let us assume that their shares in the business are owned in their names and that A, B, C and D each own a 25% share in the company. Should a shareholder die – say D – the most common question that arises is what happens next? The obvious risk is that if there is no formal agreement and the remaining shareholders do not have sufficient capital to buy out the family of the deceased – in the case of a right of first refusal – then the co-shareholding capacity of D's shares will be passed to his or her family, and A, B and C will have to navigate the reality of being stuck with D's family as their new co-shareholder. Such a situation is unlikely to be favourable for the business, owing to the fact that the family would be unlikely to have the required skills or interest to be an asset to the business. The possibility of friction is endless with arguments on issues such as the payment of dividends and returns. In this case, the end result is often disastrous; both parties lose out – the remaining shareholders are stuck with a shareholder they do not want and the deceased shareholder receives no real value for his or her share.

The solution

A buy and sell agreement between all the shareholders needs to be signed. The agreement should compel a shareholder to sell his or her shares to the remaining shareholders on his or her death or disability, and should also compel the surviving shareholders to purchase the deceased or disabled shareholder's share. Importantly, the agreement should set a price or an objective manner to determine a price for the purchase of the shares. This agreement creates a win-win situation – the deceased or disabled shareholder's family will receive full value for the shares and the remaining shareholders will be able to take over the business without having an unwanted shareholder. The big question that arises is: How do the remaining shareholders raise the money to buy the deceased or disabled shareholder's share?

Raising cash through life assurance

The most affordable way to raise cash to fund the purchase of a deceased shareholder's shares is through life assurance. Each shareholder will own life policies on the lives of the other shareholders. When a shareholder dies, the policy proceeds will pay out to the remaining shareholders, who will then use the money to purchase the deceased shareholder's shares. That means that, in the example above, A, B and C will own a policy on D; A, B and D will own a policy on C; A, C and D will own a policy on B; and B, C and D will own a policy on A. This ensures that on the death of a shareholder, the proceeds of the life policy will pay out immediately to the remaining shareholders who will use the money to buy the shares from the deceased estate in terms of the buy and sell agreement. The deceased's heirs will then receive the full cash value for the shares, and the remaining shareholders take over the business. A similar chain of events would ensue on disability, only then the shares would be bought directly from the disabled shareholder. It is important that the buy and sell agreement contains an objective definition of what will qualify as a disability. It is normally linked to the definition in the life policy.

The tax and estate duty consequences

It is important that the requirements of section 3(3)(a)(iA) of the Estate Duty Act are complied with as they give exemption from estate duty concerning the policies. To paraphrase the Act, the three requirements are:

1. The policy must be taken out by a person, who on date of death of the deceased was a partner or co-shareholder of the deceased.
2. The purpose of the policy must have been to acquire the whole or a part of the deceased's interest or share.
3. The deceased must have paid no premiums on the policy on his or her life.

For this reason, a buy and sell structure has to be a complex one, where A, B and C will own the policy on D, and pay for the premium pro rata. In that way, the policy will not attract estate duty on the death of D, and A, B and C will receive the proceeds to purchase D's share.

In addition, following that the policies will be owned and paid for personally by A, B and C, the premiums on the policy are not tax-deductible. However, the proceeds will pay out free of income tax.

The most common case of when buy and sell polices will not qualify for estate duty exemption is when the shares in the company are owned in trusts. That will mean the life assured does not own any shares and cannot be a partner or co-shareholder to the policy owners. The policies, in that case, will need to be increased to cater for the estate duty.

The impact of COVID-19

COVID-19 has affected existing buy and sell agreements in three ways:

Firstly, it has affected the share values of many companies. This means that existing buy and sell agreements need to be re-examined, as the share values in an agreement could be outdated and overvalued. In consequence, this could have tax and financial implications. For example: A and B value their shares at R5 million each in their buy and sell agreement. They insure each other for R5 million. With the effects of COVID-19 in the performance of industries and economies, let us say that the shares have dropped in value to R2.5 million. If the buy and sell agreement is not amended and A dies, B will have to pay R5 million for shares worth only R2.5 million. The danger here is that SARS could deem this to be a donation of R2.5 million. While it could be argued that this was fortuitous and there was no intention to make a donation, the counter argument from SARS would be that the agreement should have been amended and the fact that this did not take place shows the intention to make a donation, particularly if the agreement was left for a long period. It is an arguable point either way, but it is far better to avoid the tax and financial risk of overpaying for a share by ensuring the share values in the agreement are updated to reflect their true value. This will also assist in avoiding litigation between existing shareholders and heirs of the deceased concerning share payment value.

Secondly, because COVID-19 has led to many businesses dropping in value, it has created the incentive for surviving shareholders to try and ignore the buy and sell agreement. Assume again A and B have a buy and sell agreement and have insured each other for R5 million. A now dies. In a COVID-19 environment, B would have an incentive to rather keep the cash and not buy A's shares. It is important that shareholders ensure their buy and sell agreement is signed, is properly and unambiguously drafted and has effective enforcement mechanisms. This will ensure A's estate and family get paid out properly by B on A's death.

Finally, some businesses might be forced to close due to COVID-19. It is imperative to ensure that the existing buy and sell agreement contains a clause on what happens to the insurance policies if the business ends. Let us assume the following scenario: A and B have a buy and sell agreement, and they each insure each other. The business now ends. What happens to the policies? If there is nothing in the agreement, A could hold on to the policy on B's life, pay the premiums and cash in when B dies. Remember, insurable interest in a policy is only required on the inception of the policy. If B was ill and uninsurable, there would be nothing he or she could do under common law to get the policy back. It is vital to ensure that any buy and sell agreement contains a clause allowing the life assured to take cession of any policies on their lives if the business ends or if they leave the business: Thus obligating the policy owners to cede the policy if so requested by the life assured.

Conclusion

A buy and sell agreement between co-shareholders in a company, funded by life insurance, is the most efficient way to ensure continuity of the company on the death or disability of one of the shareholders. However, like it is doing to everything else, COVID-19 has the potential to seriously impact existing buy and sell agreements, and has created an urgent need for these existing agreements to be reviewed. Sadly, the writer has seen too many cases already where there was no signed buy and sell agreement or the existing buy and sell agreement was inaccurate and out of date. This had the result that the company did not survive the death of one of the shareholders and the ensuing fight between remaining shareholders and the family of the deceased.

> *"COVID-19 has the potential to seriously impact existing buy and sell agreements."*

THE TAX OMBUD Ensuring taxpayers' rights are upheld

What role can the Office of the Tax Ombud play to protect taxpayers against unfair treatment by SARS? TaxTalk spoke to Professor Thabo Legwaila, the recently appointed CEO of the Office of the Tax Ombud (OTO), about the important role that the Tax Ombud plays in South Africa.

In a time where COVID-19 lockdown is in place, many taxpayers have been retrenched, find themselves cash-strapped and/or are struggling to keep their businesses afloat. "The pandemic has devastated the country's economy and put extra pressure on SARS to collect as much tax as it possibly can in order to meet the needs of the country. Unfortunately, it is expected that SARS will not meet its collection targets. Therefore, it might become more assertive in terms of its collection methods. The services of the OTO are pivotal in ensuring that collections are done fairly, and that taxpayers' rights are protected," says Legwaila.

Measuring the OTO's success

The OTO has made, and continues to make, a positive contribution to improving the country's tax administration system and making a difference in the lives of taxpayers. Since it was established, it has assisted thousands of taxpayers and saved them millions of rands that could have been lost, had the OTO not investigated their complaints. By way of factual illustration, in the 2018/19 financial year, the value of the top 10 tax refunds paid to taxpayers through the intervention of the OTO exceeded R35 million. Most importantly, the OTO is playing an important oversight role with regard to SARS, and has been credited with some of the positive changes seen at the revenue collector and with restoring public trust in SARS. It is important to note that in the 2018/2019 year SARS implemented 99.27% of the OTO's recommendations.

Biggest challenges ahead from the perspective of the CEO

"One of the mammoth, but important tasks that I will have to see through at the OTO is the total structural independence of the OTO from SARS. It is not viable to have the organisation that you have oversight over (in this case SARS) having influence on your operational matters, such as procurement processes, IT and recruitment. The OTO has engaged its stakeholders on this matter, and they have provided support for its call to be structurally independent. We have engaged National Treasury on the matter and are optimistic that it is just a matter of time before structural independence is achieved.

"Since joining the OTO, I have become perturbed by the number of complaints from taxpayers rejected by the OTO. Complaints are rejected because they fall outside the mandate of the OTO or because the complainants have not exhausted the SARS complaints resolution mechanisms, as required by section 18(4) of the Tax Administration Act. More so there are no compelling circumstances that exist to justify taxpayers approaching the OTO without first exhausting the SARS internal complaints resolution mechanisms in terms of section 18(5) of that Act. Some of the rejected complaints are brought by taxpayers directly, and others by tax practitioners on behalf of taxpayers.

"Of the 4 822 complaints received by the OTO in the 2018/2019 financial year, 2 022 were rejected. Of the rejected cases, 718 complaints were brought by tax practitioners, i.e. more than a third of all rejected complaints. This is alarming. Also consider that 95.05% of these complaints were rejected because the taxpayers and tax practitioners did not exhaust the SARS internal complaints resolution mechanisms. This means that a considerable number of tax practitioners do not understand the mandate of the OTO and the circumstances in which the OTO can accept a complaint. This is despite the multiple measures that the OTO has undertaken to educate tax practitioners about the mandate of the OTO and related matters. In addition, there is the negative effect of possible failure by tax practitioners to provide relevant and appropriate service to the taxpayers, an increase in the fees charged by tax practitioners, delay in ensuring resolution of the matters, etc. While we will improve the education and awareness drive regarding the OTO to both taxpayers and tax practitioners, I urge tax practitioners, in particular, to familiarise themselves with the mandate and processes of the OTO."

About the CEO of OTO
Professor Thabo Legwaila was appointed Chief Executive Officer at the OTO in April 2020.

Professor Legwaila was a Senior Lecturer at the University of Stellenbosch, Visiting Fellow at Harvard University, Senior Tax Consultant at Klynveld Peat Marwick Goerdeler and later Ernst & Young, Director of Business Tax at the National Treasury and Head of Africa Tax at Citibank. He is a Professor of Tax at the University of Johannesburg and a member of the Davis Tax Committee. He holds the following academic qualifications: B Juris (University of Venda); LLB and LLM (University of the Witwatersrand); Postgraduate Diploma in Tax Law (University of Cape Town); LLM (University of Cape Town) and LLD (University of Pretoria). He is co-author and editor of the textbook *Tax Law: An Introduction*.

OTO advice to taxpayers

As the economic strain brought about by COVID-19 continues to affect individuals, businesses, government and the world unabated, taxpayers should vigilantly and accurately determine their tax liabilities in terms of the various laws applicable to them, to ensure that they meet their tax obligations on time. However, should conflict relating to service, procedural or administrative matters emerge, and should taxpayers find that they are unable to resolve these matters with SARS, taxpayers should avail themselves of the services of the OTO, after taking cognisance of the processes in place. In this regard, taxpayers should note that the OTO Call Centre number is operational, but all walk-ins to the OTO are still suspended until further notice, due to COVID-19 lockdown restrictions.

Taxpayers should visit the OTO website on www.taxombud.gov.za to learn about the various types of complaints that the OTO deals with and the processes involved in lodging a complaint. Taxpayers should not be afraid to approach the OTO for free assistance and can send an email to complaints@taxombud.gov.za or alternatively call 0800 662 837.

What to expect from the OTO during the tax season

The OTO is developing a digital and social media campaign to educate taxpayers about its services and mandate. The campaign will be flighted during the SARS 2020 Tax Filing Season and Revenue Drive 2021 under the theme “TaxpayersRightsMatter”. The theme is aimed at assuring taxpayers that the OTO is “customer centric”. For this reason, the campaign will focus on the rights of taxpayers, the types of complaints that the OTO deals with and how taxpayers can lodge a tax complaint with the OTO. In addition, the OTO will be talking to taxpayers who have been let down by SARS, who have fought battle after battle, and who have reached a point where they no longer feel like they matter.

The theme “TaxpayersRightsMatter”, assures taxpayers that they are the central focus of the OTO’s service philosophy, and that their rights as taxpayers will not be overlooked. The OTO is fair and abides by the law at all times. By putting the taxpayer front and centre, it is building a brand that is there for taxpayers.

Case Law
WRAP-UP

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Can a franchisee deduct future expenditure against income used to finance contractual expenditure? Does a certified statement filed by SARS constitute a valid civil judgment and when does an assessment become final? We summarise three cases dealing with these issues.

BIG G RESTAURANTS (PTY) LIMITED VS. [2020] ZACC 16 (21 JULY 2020)

Issue

The Court in this case had to consider the operation of section 24C of the Income Tax Act, which allows taxpayers to claim deductions in respect of future expenditure incurred against income that will be utilised wholly or partly to finance the said expenditure. The critical requirement to utilise this provision is that the expenditure and the income against which the deduction will be made must be in terms of the same contract.

Facts

This case concerned a company (the taxpayer) that operates various restaurants in terms of written franchise agreements concluded with the Spur Group. The taxpayer claimed a section 24C(2) allowance for the 2011 to 2014 years of assessment concerning the future costs of revamping its restaurant premises. Based on the franchise agreements, the taxpayer was obligated to periodically revamp the premises where the franchise business was conducted.

The taxpayer claimed this allowance on the basis that, for purposes of section 24C(2), income received from customers in terms of individual contracts of sale with its customers constituted income received for purposes of the franchise agreements between itself and the Spur Group. Therefore, the costs of revamping the premises comprised "future expenditure" as envisaged in section 24C of the Act.

The Commissioner disallowed the deduction and raised an additional assessment for the 2011 to 2014 years of assessment. The reason for the disallowance was that the income in respect of which such allowance is claimed must have accrued in terms of the same contract that imposes the future expenditure in respect of which the allowance is being claimed.

The matter was initially heard in the Tax Court, which found in favour of the taxpayer and set aside the additional assessments. The Commissioner appealed to the Supreme Court of Appeal (SCA) and was upheld by the SCA on the basis that the income of the taxpayer did not accrue in terms of the franchise agreement per se. Consequently, the decision of the Tax Court was set aside.

This case was brought before the Constitutional Court by the taxpayer – not to answer a constitutional question on the validity of section 24C, but rather due to the fact that the matter raised an arguable point of law of general public importance.

In determining whether the Constitutional Court had jurisdiction to entertain the matter on these grounds, it acknowledged that the franchise agreement would hardly be unique, and that Spur franchises are particularly common across South Africa. On this basis, the Constitutional Court found that this matter involves a point of sufficient general public importance, as "a determination of the contested issue is likely to affect Spur franchisees throughout South Africa. The issue transcends the narrow interests of the litigants and implicates the interest of a significant part of the general public".

SARS' case

The Commissioner argued against the allowance claimed by the taxpayer, on the basis that an allowance in terms of section 24C can only be claimed in respect of income that has accrued in terms of the exact same contract that imposes the future expenditure for the allowance being claimed.

The income in respect wherein the taxpayer claimed the allowance was income that accrued in terms of individual contracts concluded by the taxpayer with patrons at the restaurants of the taxpayer and the future expenditure is not imposed by those contracts, but rather by the franchise agreements.

Therefore, SARS contended that the future expenditure was imposed by different contracts, these being the franchise agreements between the taxpayer and the Spur Group, and not the individual contracts for the sale of food as argued by the taxpayer.

Taxpayer's case

As a franchisee, the taxpayer argued that it ought to be allowed to deduct from its income the future expenditure it had to incur under the franchise agreements with Spur, such as the requirement to upgrade and refurbish its restaurants in line with the brand and image of Spur restaurants.

The taxpayer submitted that the countless contracts of sale of food with the patrons were, and have to be read as, part of the franchise agreement that was concluded. Therefore, the income earned in terms of the sale of food contracts was income earned in terms of the franchise agreement. Consequently, the sale of food contracts satisfied the requirements of "sameness" in respect of the franchise agreement.

The taxpayer also placed reliance on the judgment of the Tax Court a quo, which held that the franchise agreement itself imposed an obligation on the taxpayer to sell food, being the sole business of the taxpayer in terms of that franchise agreement and, therefore, the income generated from the sale of those meals was a result of the franchise agreement.

Outcome

The leave to appeal to the Constitutional Court was granted. However, the appeal of the taxpayer to set aside the decision of the SCA that found in favour of the Commissioner was dismissed by the Constitutional Court.

Core reasoning

The Constitutional Court was not satisfied that the taxpayer had been able to place the contracts in terms of which it earned an income from its patrons within the ambit of the income-earning contract as envisaged in section 24C. Furthermore, the obligations that the taxpayer had to perform were not imposed by the sale of food contracts, but instead the franchise agreements.

The Constitutional Court did not read the "sameness" requirement in the section 24C to connote that there must be one single contract stipulating for the earning of income and the imposition of future expenditure. Two or more contracts may indeed be so inextricably linked that they may satisfy the requirements of section 24C. In the present case, however, the Court found that lack of correlation between the income-earning contracts and obligation-imposing contracts plainly made section 24C inapplicable.

Takeaway

The judgment again illustrates the importance of possessing an intimate understanding of not only contractual principles when drafting an agreement, but also the tax implications that would flow therefrom.

Furthermore, in order to rely on the allowance as provided for in section 24C a taxpayer is obliged to discharge the onus of proof that the "sameness" requirement of the contract has been met in terms of the income earned and expenditure incurred. The possibility exists that there can be two or more contracts that are inextricably linked in this vein, whereby the transactional consequences of the contracts may still meet the requirements of section 24C.

BARNARD LABUSCHAGNE INC VS. SARS AND ANOTHER

(23141/2017) 2020 ZAWCHC (15 May 2020)

Issue

This court application dealt with the validity and enforceability of a civil judgment taken unilaterally by SARS against the applicant (the taxpayer), in terms of sections 172 and 174 of the Tax Administration Act, as well as the constitutional validity of such sections.

Facts

The taxpayer was a small law practice, which had been in existence for a period of 25 years and consistently experienced issues with the allocation of payments to SARS between the periods of 2009 and 2017.

A meeting was held in 2011 between the taxpayer and SARS, after which SARS advised the taxpayer that the payments had been properly allocated.

In 2013, SARS took a judgment against the taxpayer and then proceeded to raise interest and penalties on amounts that were actually paid on time by the taxpayer. The taxpayer thereafter informed SARS of the allocation of payment issues once again, resulting in the penalties being remitted and the judgment granted against the taxpayer being withdrawn.

In 2017, after the taxpayer's alleged uncooperativeness, SARS issued a letter of final demand for the payment of outstanding tax debt. When this letter was not responded to by the taxpayer, a notice of third-party appointment was issued to Absa Bank to recoup the outstanding tax debt.

Having received a negative response from the bank on October 2017, SARS thereafter issued a letter to the taxpayer, notifying the taxpayer that SARS intended to approach the High Court to obtain a civil judgment against the taxpayer for failing to pay its tax debt. Following absence of response from the taxpayer, SARS continued to obtain a civil judgment against the taxpayer on 15 December 2017.

SARS' case

SARS contended that the applicant had several dispute resolution mechanisms at its disposal before approaching the High Court with this application at great haste. For example, section 105 of the Tax Administration Act provides that a

taxpayer may only dispute an assessment or "decision", as described in section 104 unless a High Court otherwise directs.

SARS further argued that the taxpayer could not demonstrate that section 172 read with section 174 of the Tax Administration Act resulted in a violation of any of the provisions of the Constitution.

Taxpayer's case

The taxpayer contended that SARS' grounds for the rescission of the judgment were not based on an objection against an assessment or a decision by SARS as referred to in section 104 of the Tax Administration Act, as SARS had not raised assessments or made decisions referred to in section 104 of which the applicant would ordinarily object or appeal.

The taxpayer stressed that it was, therefore, entitled to bring these proceedings before the Court in terms of section 105 of the Tax Administration Act. According to the taxpayer, section 105 could be read in isolation or as a standalone section, without reference to section 104.

The taxpayer further contended that the Court had jurisdiction to rescind an incorrect judgment, in terms of section 172 read with section 174 of the Tax Administration Act.

In the event that the Court found this not to be the case, in the alternative, the taxpayer requested that the Court declare sections 172 and 174 of the Tax Administration Act constitutionally invalid on the grounds that these provisions infringed on the taxpayer's rights under sections 34, 165 and 169 of the Constitution.

Outcome

The Court found in favour of SARS. The application for rescission of judgment was dismissed with the taxpayer ordered to pay for the costs of the application.

Core reasoning

Section 172 of the Tax Administration Act deals with the process in terms of which a SARS official may file a certified statement with the courts (stating that a taxpayer has an outstanding tax debt), which statement will then be treated as a valid civil judgement and is enforceable as such under section 174 of the Tax Administration Act. This statement may be filed by SARS, irrespective of whether there is any ongoing dispute as submitted by the taxpayer, unless the tax debt has been suspended under section 164 of the Tax Administration Act.

Furthermore, SARS is not required to give the taxpayer prior notice of the filing of such certified statement if SARS is satisfied that giving such notice would prejudice or jeopardise the collection of the tax.

It was held that a certified statement filed with the court is, in fact, not a court judgment in itself. Instead, this is merely treated as such, creating an enforceable recovery mechanism. Therefore, such certified statement may not be rescinded as a normal civil judgment would be. Further, SARS is in a position to unilaterally withdraw the judgment at any time, implying it is not final in nature. The Court further held that the taxpayer had failed to demonstrate the basis on which the impugned provisions are unconstitutional.

Takeaway

A certified statement that is filed at court by SARS may be treated as a valid civil judgment, but it does not constitute one. Although it is a lawful enforcement mechanism, it is by no means final and may be unilaterally amended or withdrawn by SARS at any time.

This means that a taxpayer may not institute court action to have this certified statement varied or rescinded, as it does not meet the requirements of a valid civil judgment.

JOSEPH NYALUNGA VS. CSARS
(90307/2018)[2020] ZAGP (06 May2020)

Issue

In terms of this review application for the review and setting aside of two decisions made by the respondent (SARS) five years ago, the Court had to consider whether it had jurisdiction to do so in the circumstances. Relief was sought in terms of the Promotion of Administrative Justice Act, with alternative relief sought on the basis of legality and non-compliance with the Constitution of the Republic of South Africa (the Constitution).

Facts

On 3 April 2013, whilst the taxpayer was incarcerated, an employee of SARS hand-delivered a notification of its intention to audit the taxpayer, setting out the scope of the intended audit.

On 4 September 2013, an audit findings letter dated 3 September 2013 was delivered personally to the taxpayer. The audit findings letter informed the taxpayer of SARS' intention

to raise an assessment and its reason for this. The letter also provided the taxpayer with an opportunity to provide further relevant material within 21 business days, failing which, SARS would proceed to raise the estimated assessment.

The taxpayer's failure to respond or to provide the relevant material resulted in SARS sending a finalisation of audit letter. The finalisation of audit letter advised that it constituted an assessment and, accordingly, that the taxpayer had 30 business days to submit an objection thereto. The taxpayer responded to the finalisation of audit letter and informed SARS that he would not be able to respond to SARS or to object within 30 days, as a result of his incarceration. SARS submitted that the 30-day period to file an objection would commence from the taxpayer's release date (24 March 2014). Therefore, the taxpayer had until 7 May 2014 to file an objection.

SARS thereafter issued a final demand for payment on 24 February 2014 and later obtained a judgment in terms of section 172 of the Tax Administration Act for an amount of R15 166 511.89. Accordingly, a warrant of execution was issued. However, after an unsuccessful attempt at attaching the taxpayer's assets, SARS followed up with the taxpayer regarding his outstanding returns.

The taxpayer then undertook to visit a SARS branch to submit the outstanding returns, which he previously had not done. On 18 September 2018, the sheriff of the court successfully attached the taxpayer's assets and proceeded to advertise the sale thereof by way of public auction. These aforementioned actions prompted the taxpayer to bring an urgent application to stay the auction.

The taxpayer's case

The taxpayer disputed SARS' audit findings on the grounds that he was not able to actively participate as a normal taxpayer would, due to his incarceration, and argued that the process followed by SARS was unfair. Further, the taxpayer challenged the audit and calculations conducted by SARS, stating that no explanation was advanced as to the origin of the amounts. Finally, the taxpayer submitted that SARS' decision was unconstitutional as it infringed on his constitutional rights and the rule of law.

SARS' case

SARS contended that the taxpayer's review application was four years out of time. SARS also argued that the High Court did not have jurisdiction to hear the review application, and only the Tax Court would have such jurisdiction. Further, SARS noted that the allocated time frames to dispute the assessments themselves had prescribed and that the relief sought would have no practical effect.

Outcome

The Court found in favour of SARS, the review application was dismissed and a costs order granted against the taxpayer.

Core reasoning

The Court noted that, in terms of section 105 of the Tax Administration Act, the Court does not have jurisdiction if the taxpayer is challenging the assessment by SARS without first resorting to the relevant dispute resolution mechanisms. The taxpayer had not made out a case on the papers for the High Court to "otherwise direct" that it be heard.

Section 100(1) of the Tax Administration Act provides for the finality of an assessment, providing inter alia that an assessment will be final where no objection has been made or where an objection has been withdrawn. The Court held that it was common cause that the taxpayer did not raise an objection and that it is, therefore, evident that the assessment was final in terms of section 100(1)(a) and (b).

The Court further held that the time period to raise an objection in terms of section 104(5) had come and gone, more so in terms of section 104(5)(b) which limits one seeking an extended period to object to three years following the assessment. In casu, four years had passed and the assessment had thus prescribed.

Takeaway

Taxpayers must adhere to procedural requirements provided for in legislation. The courts will not likely deviate or condone non-compliance with the time frames provided. It is, therefore, imperative that taxpayers submit objections timeously and within the three-year period before the relevant assessment has prescribed.

BINDING RULINGS

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Three rulings recently issued are presented here: they relate to internal restructuring and a sale of shares, redemption of intra-group loans and the securities transfer tax implication of the transfer of JSE listed shares by foreign pension funds to an authorised contractual scheme.

BINDING PRIVATE RULING (BPR) 345

Asset-for-share transactions followed by an unbundling transaction and a sale of shares to a third party

Issue

The Ruling determines the tax relief for parties involved in an internal restructuring in respect of the corporate rules as encapsulated in section 42 and section 46 the Income Tax Act, followed by a sale of shares to a third party.

The facts

The applicant is a resident listed company and the sole shareholder of Listco, which is to be listed at the conclusion of the proposed transaction, and Company A. The applicant and Company A are shareholders in Company B. The members of the senior management of Company B hold shares in Company C, which is a non-resident company.

The applicant seeks to demerge and have Listco listed on the Johannesburg Stock Exchange (JSE), whilst the applicant retains its own listing on the JSE.

The applicant intends to take the following steps in order to implement the proposed transaction:

1. The applicant will establish Listco six months before the last day to trade (LDT).
2. The applicant will transfer 26.78% of its shareholding in Company B to Company A in exchange for the issue of one share by Company A to the applicant. Thereafter the applicant will transfer its remaining shareholding in Company B to Listco in exchange for shares issued by Listco, in terms of section 42 of the Income Tax Act. The LDT-1 will be the effective date of the sale.
3. The applicant will then distribute all of its shares in Listco to its shareholders as a distribution in specie in terms of section 46 of the Income Tax Act, after the market close on LTD.
4. Company A will similarly transfer 26.78% of its shareholding in Company B to Listco at market value in exchange for shares issued at market value by Listco to Company A.
5. A dual listed company (DLC) will then be created and special DLC shares in Listco will be issued to a South African trust. The indicative date will be the listing date. Listco will then be admitted to trade on the JSE and will make an initial public offering of its shares, whereafter Company A will sell 11.69% of its shareholding in Listco to the underwriters. The effective date of the sale to the underwriters is anticipated to be the listing date.
6. The applicant will subsequently distribute its shares in Listco to its shareholders, whereafter Company C will transfer 20% of its shareholding in Company B to Listco in exchange for shares in Listco.

The unbundling transaction may result in fractional entitlements for the applicant's shareholders (fractional shareholders), which will then be rounded off and the aggregated excess fractions of the unbundled shares will then not be transferred to it following the unbundling, however, it will be sold on its behalf and with its consent in the market.

Furthermore, the applicant's foreign shareholders will not be entitled to receive the shares in Listco (restricted shareholders), but will rather receive a cash amount corresponding to the net proceeds from the sale of their shares in the applicant, which they would otherwise have been entitled to receive following the unbundling, although it will be sold on their behalf in the market.

Ruling

The ruling is subject to the following conditions and assumptions:

- No single non-resident shareholder to whom shares will be unbundled will, either alone or together with a non-resident who is a connected person, hold an interest of 20% or more in the applicant.
- The parties to the proposed transaction will not be in a position to elect section 42 of the Income Tax Act as it will not apply.

In respect of the asset-for-share transactions set out above, the ruling issued by SARS is as follows:

- Each transaction will qualify as an "asset-for-share transaction" as defined in paragraph (a) of the definition in section 42(1) of the Income Tax Act. Specifically:
  - » Based on the transferor holding the shares as capital assets, in terms of section 42(2)(a)(i)(aa), that person will be deemed to have disposed of the shares to the transferee for amounts equal to the base costs of those shares. Accordingly, no capital gain will arise.
  - » In terms of section 42(2)(a)(ii)(aa) the transferor's base costs in the transferred shares will be transferred to the shares issued to it in exchange.
  - » In terms of section 42(2)(b)(ii), in determining any capital gain or loss regarding disposal of the relevant asset, that person (transferor) and the company (transferee), which acquired the asset in terms of an asset-for-share transaction must be deemed to be one and the same person with respect to the date of acquisition of the asset and the amount and date of incurral by that person of any expenditure in respect of that asset allowable in terms of paragraph 20 of the Eighth Schedule.
- The provisions of section 24BA of the Income Tax Act will not apply in respect of these steps and they will be exempt from securities transfer tax under section 8(1)(a)(i) of the Securities Transfer Tax Act, nor will they constitute a "transfer", as defined in the Securities Transfer Tax Act. Therefore, no securities transfer tax liability will arise as a result of the issue of shares.
- The provisions of section 42(6) of the Income Tax Act will not apply when the applicant ceases to hold a qualifying interest in Listco on LDT.
- In respect of the first transaction under step 2, the provisions of section 42(7) will apply, as the disposal of shares will take place within 18 months of the acquisition of those shares. However, no gain will arise and the disposal to the third-party buyer by Company A of the shares in Listco – which it acquired within 18 months – will not result in section 42(5) and (6) applying.
- Section 42(7) will apply to the capital gain realised when Company A disposes of its remaining Listco shares to the third-party buyer. Such taxable capital gain may therefore not be set off against any assessed loss or balance of assessed loss of Company A.

In respect of the unbundling transaction, the ruling issued by SARS is as follows:

- The applicant will be regarded as having distributed "all" the shares in Listco, notwithstanding the fact that the shares held by the restricted shareholders may have to be disposed of on behalf of and with the consent of the restricted shareholders, and the "standard rounding convention" prescribed by the JSE Listings Requirements will be applied to the allocation of securities held by fractional shareholders.
- Listco shares will be distributed by the applicant to its shareholders in accordance with each shareholder's effective interest in the unbundling company, notwithstanding the fact that the "standard rounding convention" will be applied to the fractional shareholders.
- The tax relief specified in section 46(2), (3A), (5), and (5A) of the Income Tax Act will therefore apply in respect of such transaction and in particular:
  - » The applicant must disregard the distribution of the Listco shares for purposes of determining its taxable income or assessed loss under section 46(2), and the contributed tax capital following the distribution will be deemed to be the amounts as set out in section 46(3A).
  - » The distribution by the applicant will be disregarded in determining any liability for dividends tax in terms of section 46(5).
  - » In terms of section 46(5A) of the Income Tax Act, paragraph 76B of the Eighth Schedule will not apply in respect of the distribution.
- Section 46(7) will not apply as Company C will not hold shares in Listco immediately after such distribution, which will then be exempt from securities transfer tax in terms of section 8(1)(a)(iv) of the Securities Transfer Tax Act.
- The transfer of the shares in Listco to the applicant shareholders or realisation agent, on behalf of the restricted shareholders or the shareholders with a fractional entitlement, as the case may be, will be exempt from securities transfer tax under section 8(1)(a)(iv) of the Securities Transfer Tax Act, as the distribution will be an "unbundling transaction" as referred to in section 46.
- No rulings are issued in relation to steps 1, 6, and 8.

BINDING PRIVATE RULING (BPR) 346
Tax implications resulting from the elimination of intra-group loans (16 July 2020)

Issue
This ruling determines the income tax and dividends tax consequences of the redemption of intra-group loans by way of set-off against dividends payable.

Facts
The applicant is an investment holding company. It owns all the equity shares in co-applicant A and co-applicant B. Co-applicant B holds 100% of the share capital in co-applicant C.

The following loan accounts exist between the applicants:
- Loan 1 receivable by co-applicant A from the applicant
- Loan 2 receivable by co-applicant A from co-applicant B
- Loan 3 receivable by co-applicant C from the applicant
- Loan 4 receivable by co-applicant C from co-applicant A
- Loan 5 receivable by co-applicant B from the applicant

The loans arose from ongoing advances by the group companies to one another to fund operations within the group. None of the funds were used to fund the acquisition of assets. The loans were used to fund the day-to-day operations of the group companies.

The group wishes to eliminate the intra-group loans as far as possible. The steps to implement the proposed transactions are as follows:

Step 1:
- Co-applicant A will declare a dividend to the applicant equal to the balance of loan 1, which will be left outstanding on loan account.
- Co-applicant A and the applicant will agree to set off the dividend payable by co-applicant A against loan 1 payable by the applicant to co-applicant A, resulting in the full settlement of both loans.

Step 2:
- Co-applicant C will declare a dividend to co-applicant B equal to the balance owing in respect of loan 3, which will be left outstanding on loan account. Co-applicant C will cede loan 3 to co-applicant B in settlement of the dividend.
- Co-applicant B will cede loan 3 and loan 5 to co-applicant A in part payment of loan 2.

Step 3:
- Co-applicant C will declare a dividend to co-applicant B for an amount equal to the balance in respect of loan 4, which will be left outstanding on loan account. Co-applicant C will cede loan 4 to co-applicant B in settlement of the dividend.
- Loan 2 and loan 4 will be set off against each other. The net balance will be an amount owing by co-applicant B to co-applicant A in respect of loan 2.

Step 4:
- Co-applicant A will declare a dividend to the applicant for an amount equal to the sum of the balances of loans 2, 3 and 5, which will be left outstanding on loan account.
- Loan 3 and loan 5 will be set off against the dividend.
- Co-applicant A will cede loan 2 to the applicant in settlement of the dividend.

Ruling
The ruling made in connection with the proposed transaction is as follows:
- The dividend to be declared by co-applicant A, which equals the amount owed by virtue of loan 1 by the applicant, will be exempt from dividends tax under section 64F(1)(a) of the Income Tax Act.
- The dividends to be declared by co-applicant C in steps 2 and 3 will be exempt from dividends tax under section 64F(1)(a).
- The dividend to be declared by co-applicant A in step 4 will be exempt from dividends tax under section 64F(1)(a).
- The redemptions of loans 1, 3 and 5 by way of the set-off arrangements in step 1 and step 4 will, in each instance, constitute a “concession or compromise” as defined in paragraph (a)(ii)(aa) of that term in section 19(1). However, the set-off arrangements will in none of those cases amount to a “debt benefit” as defined in section 19(1).

This ruling does not cover the application of any general or special anti-avoidance provision to the proposed transaction.

BINDING CLASS RULING (BCR) 071
Transfer of portfolio investments by foreign pension funds to an authorised contractual scheme

Issue
This is a ruling on the securities transfer tax implication of the transfer of JSE listed shares (the shares) by foreign pension funds to an authorised contractual scheme (ACS), and entitlements to treaty relief of the class members.

Facts
The applicant is an asset management company, resident in the UK, acting in its capacity as the ACS manager. The class members are the administering authorities of certain pension schemes. The applicant and class members are the parties to the proposed transaction.

The class members directly hold various portfolio investments, which include the shares. As a result of the introduction of a new

statutory regime in the UK, class members are required to pool their investment assets. Effectively, the portfolio investments, inclusive of the shares, will be transferred into one or more sub-funds of an ACS as an investment vehicle for that purpose. The ACS that will be used in this instance will be a co-ownership fund and the transfers will be done in exchange for the issue of a proportional number of units in a sub-fund or sub-funds.

The ACS has no legal personality and is not a taxable entity for UK tax purposes. Therefore, it is treated by the UK revenue authority as a tax transparent investment vehicle, with the result that income accruing to the ACS is the income of investors in proportion to their investments. Any capital gains derived by the ACS do not flow through the investors, and any capital gains tax liability will be determined only for an individual class member upon the disposal of its units by that class member.

The ACS itself is not regarded as a collective investment scheme. The ACS categorises investments into sub-funds and each sub-fund is regarded as a collective investment scheme for UK tax purposes. The assets of each sub-fund are beneficially owned by the unitholders in that sub-fund as tenants in common and cannot be used to discharge any liabilities thereof or meet any claims against, any persons other than the unitholders in that sub-fund in their capacity as unitholders. Each sub-fund is transparent and not a taxable entity for UK tax purposes and, as such, not subject to tax in the UK on income or gains arising on underlying investments.

Conditions and assumptions

This binding class ruling is binding between SARS and the class members and is valid for a period of three years from 13 March 2020.

The binding class ruling is subject to the following additional conditions and assumptions:

- The ACS has no legal personality in terms of UK law and does not constitute an entity in its own right.
- The ACS is not a taxable entity for purposes of direct taxes in the UK, and taxable income derived by the ACS is taxable in the class members only.
- The determination of any capital gains tax liability for each class member will be made upon the disposal of units by the class member, and not when the ACS disposes of underlying investments.
- The income derived and paid by the ACS to the class members retains its nature for the class members.
- The investment parameters of the ACS will limit equity share investments that will be made in South African entities such that those investments will not equal or exceed 20% of the investee company's equity share capital as contemplated in paragraph 2(2)(b) of the Eighth Schedule to the Income Tax Act.

Ruling

The ruling made in connection with the proposed transaction is as follows:

- The transfer of the shares by the class members to the ACS will result in a change in beneficial ownership from the class members to the ACS. This will constitute a "transfer" as defined in section 1 of the Securities Transfer Tax Act and the ACS will be liable for securities transfer tax in terms of section 7(1)(a) of the Securities Transfer Tax Act.
- No securities transfer tax liability will arise upon the investment or withdrawal of funds from the ACS resulting in a change in the number of units held by the class members, without a corresponding change in the underlying securities held by the ACS.
- The ACS does not qualify as a resident for the purposes of the double tax treaty between South Africa and the UK and will not be entitled to relief under the treaty.
- As the class members are beneficial owners of the dividends flowing from the shares, the class members will be entitled to the relief provided in paragraph 2 of article 10 of the Treaty, as amended by article II of the Protocol. Section 64H(3) will apply to the class members.

TAX DIRECTORY

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PART 1

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Johann has over 35 years' experience in tax, specialising in corporate tax compliance. He is a CA(SA) and holds an MCom (Taxation). He began his career at EY as a Trainee Accountant, he then progressed to Tax Partner at EY, after doing his national service and working for SARS. Johann also has experience in commerce where he had the role of Financial Director and was also Operational Specialist at the Office of the Tax Ombud.

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Hylton is a qualified attorney and joined the tax consulting department of a large accounting firm before moving to the firm in 2008.
He specialises in domestic corporate and international tax. This includes inbound and outbound acquisitions, double taxation agreement interpretation, mergers and acquisitions, intra-group re-organisations and implementation, and general consulting.
Hylton holds a BCom, LLB, LLM (Tax) and HDip (International Tax).

Nicoline Benzien
Individual, Trust and Estates, Associate Director (JHB)

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Nicoline is an Associate Director and part of the individual, trust and estates compliance team. Nicoline has over 26 years of experience working exclusively in the individual and trust compliance sector and in that time has built up a deep knowledge and understanding of the issues and challenges faced by the market. Her main focus is to provide a quality service that represents value for money.

Steve Curr
Corporate Tax Consulting Director (CTN)

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Steve completed his articles at BDO, after which he spent time in commerce and industry at Wooltru and then returned to the profession with EY Tax in London. Steve has extensive experience in advising companies in respect of domestic and cross-border merger, acquisition and reorganisation transactions, including, transaction structuring and tax due diligence. Steve also focusses on private client matters, particularly involving SA and UK resident individuals.

Henk Boshoff
Head of Corporate Tax Compliance (JHB)

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Henk was previously at Ernst and Young and gained extensive tax consulting and compliance experience on multinationals and listed companies. Henk heads up the BDO JHB corporate tax compliance unit. He has more than 25 years' experience in tax and specialises in all aspects of corporate income tax and corporate tax compliance. Henk holds a BCom, BCom (Hons) and Advanced Certificate in Tax.

Ilsa Groenewald
Associate Director – Tax (DBN)

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Ilsa has over 38 years' experience in the tax compliance industry, of which she spent 10 years at the local SARS office. She joined the private sector in 1990 and gained valuable experience in compliance at PwC. Ilsa joined BDO SA in October 2005 and heads up the corporate and individual compliance department in Durban. Ilsa has extensive experience in income tax and PAYE compliance, including the administration of monthly tax payroll.

Marcus Botha
Head of Corporate Tax Consulting (JHB)

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Marcus previously headed up PwC's tax reporting and strategy unit and Nedbank's tax risk unit. He specialises in corporate tax and consults on tax management to governing boards and audit committees. He has assisted numerous listed companies and stakeholder groups such as governments, revenue authorities, regulators, and civil social organisations. Marcus holds a BCom (Acc), BCom Hons (Acc), CTA and MCom (Tax).

Doné Howell
Individual, Trust and Estates Director (JHB)

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On leaving university, Doné joined SARS for three years, working in the PAYE inspections and individual assessing departments. Thereafter she joined the private sector and now has 20 years of experience. She has been a partner since 2008.

Doné specialises in individual and trust taxation as well as employees' tax.

Anton Kriel

Head of Compliance (CTN)

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Anton has more than 30 years' experience in tax. He started his career in tax in 1990 at SARS and gained valuable experience in VAT and corporate tax. He was instrumental in developing the tax offering of BDO Cape Town. Anton has extensive experience in tax due diligences, tax structuring, tax compliance, and tax consulting. Anton holds an HDip Tax.

Bruce Russell

Corporate Tax Consulting Director (CTN)

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The experience gained in advising dynamic and growing businesses has given Bruce a real appreciation for the tax planning and tax considerations that are important to these businesses and their owners. Bruce has also provided advisory to large businesses and multinationals. He provides corporate tax, employees' tax, VAT and international tax advisory across a number of sectors including property, manufacture, franchising, advertising, fishing and professional services.

Patrick McLennan

Transfer Pricing Associate Director (CTN)

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Patrick has a background in economic forecasting, where he worked with the Pardee Centre for International Futures (US) and Institute for Security Studies (South Africa). In 2013, he joined a big four firm as a transfer pricing economist in the United States (Seattle), and then was seconded to South Africa in 2014. Patrick has also completed some postgraduate work in isiZulu language and culture from the University of Pennsylvania and University of Zululand.

Chris Smith

Corporate Tax Consulting Director (CTN)

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Joining the firm in June 2015 as Tax Director, Chris, a CA (SA), specialises in corporate transactions, mergers and acquisitions and CGT. He has been appointed to the SAICA Southern Regional Tax Committee and is an External Examiner for the UCT Master's Programme. Chris joined PwC in 1996 after graduating from UCT. He became a Corporate Tax Manager in 2001, responsible for managing practice risk management. He also specialises in international tax and structured finance transactions.

Seelan Muthayan

VAT Director (JHB)

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Seelan is an admitted Attorney with 24 years' tax and legal experience. Seelan heads up the BDO JHB VAT and Customs Unit. He was previously Group Tax Manager of a JSE-listed company, and Specialist in Domestic Direct and Indirect Taxes at SARS. Seelan is Non-Executive Member of the SAIT Board, and Member of SAICA's VAT Committee. He holds a BProc, LLB, LLM (Tax) and a Certificate in Customs and Excise.

Marcus Stelloh

Transfer Pricing Director (JHB)

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Marcus has 15 years' experience in transfer pricing, cross-border structuring and international tax. He has extensive knowledge in transfer pricing planning and compliance within South Africa, Australia and Africa; transfer pricing defence strategies and litigation support; and transfer pricing negotiations with SARS. Marcus' experience in specific sectors includes mining, oil and gas, financial services, information technology, manufacturing, distribution, telecommunications, services, shared services and cooperatives.

Rowan Pretorius

Corporate Tax Consulting Associate Director (JHB)

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Rowan has over 15 years' experience, he specialises in providing assurance on tax accounting, tax financial reporting, and IAS 12 and IFRIC 23 disclosures. He has assisted various listed, owner managed businesses and multinationals across various sectors. Rowan is a qualified CA (SA) with a Masters in Taxation from the University of the Pretoria and a Postgraduate Diploma in Mining Tax Law from the University of the Witwatersrand.

Lindy Steyn

Associate Director : National Tax Operations

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Lindy started her career in the audit department of BDO South Africa and then moved across to the tax team. Lindy has spent 5 years with the BDO National Tax team, with her previous role being the Financial Manager for Tax. She is actively involved in creating best practice for financial, risk and people management. Lindy is the Training Officer for the SAIT Tax Professional - Occupational Tax Certificate Qualification and liaises with SAIT regularly on all aspects.

Louis van Manen

Corporate Tax Consulting Director (JHB)

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Louis joined the firm's tax consulting department in 2005. Louis has extensive experience in corporate tax matters covering a broad range of industries and economic sectors, servicing clients ranging from large JSE-listed companies to small public benefit organisations. Areas of expertise include company reorganisations, REITs, financial services, securitisations, IT14SDs, VDPs, accrual and compliance reviews and tax due diligences. He holds a Higher Diploma in Tax Law and is a CA(SA).

Marcelle van Rensburg

Senior Tax Manager (PTA)

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Marcelle joined BDO Pretoria Tax in January 2004 as a Tax Consultant and is now a Senior Manager. Marcelle deals with all aspects of tax compliance, including annual tax returns, provisional tax, dividend tax returns and VAT returns. Being a certified payroll administrator Marcelle also handles payrolls, PAYE returns and EMP501 reconciliations. She holds a BCom Law, LLB degree (cum laude).

Barry Visser

Corporate Tax Consulting Director (JHB)

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Prior to commencing his tax consulting career, Barry spent five years at SARS in the VAT, income tax and master tax audit divisions.

Today he deals with a wide range of clients, from privately-held businesses to large listed entities. With over 20 years of tax consulting experience, his expertise extends to opinions on various tax matters, restructuring, due diligence investigations, tax reviews, liaison with SARS and dispute resolution.

David Warneke

Head of Corporate Tax Consulting (CTN)

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David has more than 20 years' tax experience and consults to large listed and unlisted multinationals. He is a Tax Professor at UCT and was appointed to the Tax Court. He is a member of SAICA's National Tax Committee and its Southern Region Tax Committee. David holds a BCom (Hons) (Acc), HDip (Tax), MCom (Tax) and is a CA (SA).

Cliff Watson

VAT Director (JHB)

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Cliff started his career at SARS where he worked for 11 years, completing indirect tax courses and gained vast experience in SARS' audit and general processes and moved into consulting where he worked with large corporate and multinational clients on the VAT implications of their South African and cross border operations.
He has excellent knowledge of the South African VAT implications of import and export transactions. He expanded his consulting ability to include customs and excise.

PKF

Alexa Muller

Tax Specialist, PKF Cape Town

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Alexa provides tax advice to clients on diverse matters – including South African and cross-border corporate restructures, trusts and estate planning for individuals. She assists clients with advance tax ruling applications, voluntary disclosure programme applications, and exchange control compliance. Alexa joined PKF Cape Town in March 2018, with more than a decade of experience in a tax advisory role. She obtained her BCom and LLB degrees and holds a Higher Diploma in Taxation.

Kubashni Moodley

Director, PKF Durban

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Kubashni provides clients with tax opinions on various tax matters, primarily specialising in corporate restructuring. She is intricately involved in the dispute resolution process between taxpayers and SARS which includes the submission of objections and appeals as well as regularly attending ADR hearings on the client's behalf. She assists with the preparation of transfer pricing policy documentation, obtaining of advanced tax rulings and frequently compiles tax-related articles for public distribution.

Deon van Zyl

Director, PKF Port Elizabeth

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Deon started his career at the Auditor General, and then Momentum Wealth as a Financial Analyst. Deon then travelled abroad, joining Deloitte, working on financial services. On his return to South Africa he joined Absa Capital, working in debt capital markets and project finance. In 2011, Deon joined PKF and in 2013 was appointed as a Director. Deon currently heads up the tax department at PKF Port Elizabeth. He is passionate about owner managed businesses and specialises in corporate tax, trusts and estate planning and provides clients with tax opinions on various tax matters. Deon assists clients with dispute resolution and corporate restructures. He holds an MCom (Taxation) and is an Accountant Member of the Tax Court.

Paul Gering

Director, PKF Durban

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Paul currently heads up the tax department of PKF Durban. He is largely responsible for the compilation of the annual PKF tax booklet which is distributed nationwide. He specialises in trusts and estate planning and provides clients with tax opinions on various tax-related issues. He also assists clients in dealing with complex SARS audits and dispute resolution which includes representing clients at the Tax Court. Paul is also a member of the SAICA Eastern Region Tax Committee and also serves on the PKF International Tax Committee.

Ziyaad Moosa

Director, PKF Octagon

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From mergers and acquisitions to BEE deal structuring, Ziyaad has served his clients in many capacities. He is an accomplished partner who works with a wide range of clients across the automotive, retail, property, and commodities markets. Ziyaad assists clients with various tax matters including corporate tax and estate planning. Ziyaad has also guided his clients in dealing with SARS audits from inception through to tax court. Ziyaad joined PKF Octagon in 2012 after a spending three years in commerce as the CFO of a business process outsourcing company. He is a chartered accountant and registered auditor.

MAZARS

AUDIT | TAX | ADVISORY

Mike Teuchert

Tax Partner: National Head of Taxation Services

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Mike is a qualified Chartered Accountant with more than 20 years of commercial experience including project finance, tax consulting, financial management and corporate finance. Mike is a Partner and manages the tax advisory department in Cape Town and is the National Head of Taxation Services for Mazars in South Africa. He specialises in tax consulting with an emphasis on direct income tax and international tax to the corporate market.

Charl Hall

Transfer Pricing Manager

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Charl leads the national transfer pricing team of Mazars and has experience in South Africa as well as the UK. In recent years, Charl has delivered a number of large, pan-Africa transfer pricing assignments to multinational clients. He is also responsible for the growth and development of Mazars' transfer pricing services across the continent. In addition to transfer pricing, he has experience in matters relating to the application of the Tax Administration Act and is involved in complex dispute and tax administrative matters for all tax types.

Diane Seccombe

Head of Taxation Training

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Di is an admitted attorney with a Master's degree in taxation - she has been involved in tax for well over 10 years; and is currently the Head of Taxation Training. In this capacity Di provides tax training both live and online via the Upskill platform. Di also consults on Income Tax matters including, Corporate, Individual and International tax, as well as VAT.

Walter Blake

Tax Partner

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Walter joined Mazars in 2013. He currently facilitates the auditing for the National Lottery and has a great deal of experience in that industry. His expertise includes tax consulting, general business consulting, manufacturing, construction, professional services, IT and real estate. His clients are mainly privately-held businesses, ranging from small to large. Along with servicing his client portfolio, Walter is also involved in the financial management of the Mazars central offices.

Bernard Sacks

Tax Partner

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Bernard is a Partner at Mazars in Cape Town, a qualified Chartered Accountant and TEP. He specialises in corporate tax, dispute resolution and VAT. He has been involved in various corporate restructure transactions. Bernard's other areas of focus include remuneration structuring, personal financial planning, estate planning and exchange control. He has extensive knowledge and serves as trustee to a number of trusts.

Elzahne Henn
Tax Director

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Elzahne is a Tax Consulting Director at Mazars in Cape Town. She leads our private clients and global mobility business in Cape Town and specialises in personal tax, global mobility, international tax planning for individuals and exchange control. She also advises on matters related to employee tax and assists individuals and employers through the process of a SARS audit and in resolving disputes with SARS through the objection, appeal and alternative dispute resolution process.

Graham Molyneux
Tax Partner

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Graham joined Mazars in March 2018 as a Tax Partner, having spent 20 years in a Big Four environment, including nine years as a Tax Partner. He is a qualified CA (SA) and Chartered Tax Advisor (UK). He also holds a PGDip in Tax Law. His main focus is advising clients on corporate international tax matters, as well as advising them on tax strategy and tax risk management.

Robin Galloway
Tax Consulting Manager

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Robin is a qualified Tax Practitioner and Tax Manager at Mazars in Port Elizabeth. He specialises in corporate and international tax. Robin has been with Mazars since November 2015, where he focuses on corporate tax, international tax, transaction tax, tax compliance and global mobility.

Althea Soobyah
Tax Director

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Althea is an admitted Attorney with a Masters in Corporate Law who joined Mazars as a Director in Tax Consulting in May 2020. She focuses on all areas of corporate tax, including mining, tax restructuring, mergers and acquisitions and tax dispute resolution. She was previously employed by one of the Big Four accounting firms where she was involved with transfer pricing and general controversy matters, including providing tax advisory services to clients across multiple sectors. Prior to her employment with a Big Four firm, Althea spent 14 years with SARS and held various roles including Senior Specialist within Legal and Policy at Head Office and Senior Manager: Legal and Domestic Taxes in the Large Business Centre.

David French
Tax Director

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David is a qualified Chartered Accountant and Tax Consulting Director at Mazars in Gauteng. He specialises in corporate and international tax. David spent 18 years at a Big Four firm working in tax consulting. Thereafter, he spent over seven years at SARS in anti-avoidance, where he was a delegate to Working Party 11 of the OECD's BEPS project and the JITSIC Panama Papers group. He specialises in corporate tax, financial services and international tax.

Crowe

Michael McKinon

Director: Crowe Tax and Advisory JHB (Pty) Ltd

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Michael joined Crowe in 2006 and has been a tax partner at Crowe Tax and Advisory (JHB) since 2014. He has developed specialised experience in cross-border tax and business structuring. Base erosion, tax residency, digital tax and South African exchange controls are his main areas of interest. Michael has a wide ranging client base, which includes medium to large local and internationally based multinational enterprises.

Reinette Theart

Director: Crowe Tax and Advisory JHB (Pty) Ltd

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Reinette joined Crowe Tax (formerly Horwath Tax Consulting) when it was founded in 2010 and has acquired practical experience in consulting to medium to large entities, varying from international groups to local owner managed businesses. She advises on all areas of tax, including corporate taxes, capital gains tax, VAT, employees' tax, tax administration and disputes with SARS. Areas of special interest include mining tax, corporate restructuring, taxation of non-profit entities and VAT.

Kent Karro

Director: Crowe Taxation Cape (Pty) Ltd

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Kent specialises in the South African tax system including income tax, VAT, capital gains tax, estate duty and donations tax – in particular how these taxes affect both South African residents and non-residents receiving or paying amounts, subject to such taxes and the legal planning for their minimisation. The South African Institute of Tax Professionals (SAIT) has admitted Kent as a Master Tax Practitioner (SA).

Yolanda Rybnikar

Director: Crowe Taxation Cape (Pty) Ltd

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Yolanda's areas of expertise are in the financial and professional services industries, distribution, manufacturing, hospitality management, non-governmental organisations, pharmaceuticals, automobiles and the audit of attorneys and estate agency trust accounts. Yolanda has been appointed as one of the few Accountant Members of the Western Cape Special Court for tax appeals created as a court in terms of the South African Income Tax Act.

Jaco Odendaal

Director: Crowe Winelands (Pty) Ltd

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Jaco commenced his professional career as a trainee with PwC in January 2000 and qualified as a Chartered Accountant (SA) in 2003. He practiced as an auditor for eight years, after which he was appointed Managing Director of Exceed Tax and Advisory Services (Pty) Ltd. He recently decided to join Crowe Winelands. Jaco holds a BAcc (Hons), and Postgraduate Diplomas in VAT and Tax Law.

Graeme Saggers
Tax Director

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Graeme Saggers is a Chartered Accountant (SA) and holds an MCom(Tax) degree from the University of Cape Town. He is the head of the tax advisory practice for Nolands nationally and has experience in corporate and individual tax consulting ranging from local and international matters as well as dispute resolution. His primary clients are entrepreneurs, HNWIs and multi-national companies.

Chenay Carelse
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Chenay Carelse is a Tax Advisor (SA) and holds a BCom (Hons) (Tax) degree from the University of Cape Town. She is currently completing her MCom (Tax) degree. Chenay has experience in handling complex SARS procedural matters and has experience in advising clients on VAT, TAA and CIT queries.

Simphiwe Mili
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Simphiwe Mili is a Tax Advisor (SA) and holds a BCom (Hons) (Tax) degree from the University of Cape Town. She is currently completing her MCom (Tax) degree. Simphiwe has experience in handling SARS procedural matters and has experience in advising clients on VAT, TAA and CIT queries.

Bennie Groenewald
Executive Director

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Bennie is a commercial lawyer and master tax practitioner who worked in banking and financial services for 25 years across multiple market segments in South Africa, Sub-Saharan Africa and the UK. He spent 15 years in senior and executive leadership positions and dealt extensively with cross-border banking and finance including corporate tax, project finance, asset finance, debt capital markets and all legal aspects. In recent times, he qualified as a Business Rescue Practitioner. Bennie holds an LLM Tax Law, BProc and HDip Tax.

Sibongile Jembula
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Bongi started her working career at SARS in different divisions dealing with all tax types. She then moved over to the consulting environment where she worked for some of the Big Four firms. With more than 15 years in the indirect tax compliance and consulting environment, she is an experienced senior manager providing services to clients on the VAT implications of their South African and cross-border operations. She recently expanded her consulting expertise to include VAT analytics as well as customs and excise implications.

Azwinndini Magadani
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Azwinndini is a qualified Chartered Accountant with over 15 years of experience in the tax consulting environment. He advises and/or assists clients on corporate tax, corporate restructuring, tax dispute resolutions, tax compliance, tax accounting, cross border transactions, international tax, tax due diligence, VAT, dividends tax, payroll taxes and withholding taxes. He is member of the National Tax Committee of SAICA. He is also an admitted Advocate of the High Court of South Africa.

AJ Jansen van Nieuwenhuizen
Director: Transfer Pricing

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With 19 years of tax consulting experience and 8 years spent in commerce, AJ is a rounded dedicated transfer pricing (TP) practitioner with 13 years' TP experience. AJ is a member of SAICA's TP sub-committee and a member of Grant Thornton International's TP steering committee. AJ's dedicated TP team has experience across a broad range of industry sectors and delivering global assignments through collaboration with Grant Thornton International member firms.

Khanyisa Cingo-Ngandu
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With more than 11 years of tax consulting experience with commercial experience, Khanyisa is a well-rounded corporate tax adviser. Her core experience includes but is not limited to restructuring transactions, foreign funding structures, tax digitisation, amongst other corporate tax areas. She works with a dedicated team of VAT and employees' tax specialists.

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Professor Emil Brincker is a Director and National Head of CDH's Tax and Exchange Control Practice. Emil's experience includes the areas of corporate finance, corporate reorganisation and restructuring, exchange control, export finance, funding, general banking and commercial including derivative transactions, empowerment transactions, transfer pricing, project finance and tax law including income tax, tax controversy, VAT, stamp duties, PAYE, capital gains tax and other fiscal statutes.

Emil was the first attorney to appear in the Supreme Court of Appeal in Erf 3183/1 Ladysmith v CIR. He has authored and co-authored numerous books and articles and has advised on billions of rand of structured finance transactions.

Chambers Global has consistently ranked Emil in Band 1 for Tax from 2003–2020. The Legal 500 EMEA series 2018-2020 ranked Emil as a leading individual for Tax.

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Dries Hoek is a Director in CDH's Tax and Exchange Control Practice. He is an expert in all aspects of tax law with a particular interest in the tax issues that flow from mergers and acquisitions, with over ten years' experience advising South African and international companies on domestic and cross-border transactions. Dries has extensive experience in conducting due diligence reviews, the appraisal of acquisition and disposal transactions, financial modelling and providing clients with general corporate tax planning and advisory.

The Legal 500 EMEA 2018 recommended Dries for tax.

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Gerhard Badenhorst is a Director in CDH's Tax and Exchange Control Practice. He is a chartered accountant and specialises in VAT matters in various industries, including financial services, mining and property. Gerhard acts for various private, public and multinational corporations and non-profit organisations. He is a guest lecturer on VAT at the University of Pretoria and the University of the Witwatersrand and serves as a member of the South African Institute of Chartered Accountants VAT Subcommittee, and was an ad hoc member of the VAT Subcommittee of the Davis Tax Committee.

Gerhard has been advising on VAT matters since its implementation in South Africa. He has advised and assisted Counsel with the VAT litigation of clients in the Tax Court, the High Court and the Supreme Court of Appeal. Chambers Global 2009–2020 ranked him in Band 1 for Indirect Tax. Legal 500 EMEA 2014–2020 recommended Gerhard in Tax.

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Mark Linington is a Director in CDH's Tax and Exchange Control Practice. Mark specialises in mergers and acquisitions, business restructuring and reorganisation, empowerment structuring, private equity fund formation and private equity buyouts. He also has significant experience in providing general corporate tax services.

Chambers Global 2017–2020 ranked Mark in Band 1 for Tax Consultants. Chambers Global 2007-2016 ranked him in Band 2 for tax consultants. The Legal 500 EMEA 2016–2020 recommended Mark for Tax.

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Petr Erasmus is a Director in CDH's Tax and Exchange Control Practice. He specialises in customs and excise law. Petr started his career as a Customs and Excise Officer at SARS: Customs in 1996. He was deployed across a wide range of customs and excise positions and offices before being appointed as a Tax Lawyer/Legal Advisor in 2007 at SARS' head office in Pretoria. During this time, Petr was exposed to numerous matters relating to the entire scope of customs and excise. He is able to assist with the full scope of customs and excise matters including licencing and registration, dispute resolution (internal remedies and litigation), opinions, audits, training and (tariff, valuation and origin) determinations.

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Stephan Spamer is a Director in CDH's Tax and Exchange Control Practice. He is a corporate and international tax lawyer with vast experience in advising on all aspects relating to domestic and international tax matters and exchange controls. His experience includes advising companies on the tax implications applicable to a broad range of their local and cross-border corporate and transactional work. Before joining Cliffe Dekker Hofmeyr, Stephan headed the Tax Department at Baker McKenzie (SA) and prior to that was a Tax Partner at ENSafrica. Chambers Global ranked him in Band 2 for Tax. The Legal 500 EMEA 2020 recommended Stephan for Tax.

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Howmera Parak is a Director in CDH's Tax and Exchange Control Practice. She specialises in corporate tax, international tax and exchange control. Her experience covers South African and cross-border M&A related tax matters as well as tax issues in connection with structuring of and financing of both domestic and cross border transactions and local empowerment transactions. She also advises on domestic and international tax controversy matters across all phases of the audit cycle, alternative dispute resolution and tax litigation proceedings in South Africa.

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Virusha focuses on customs and excise, including customs litigation and export controls, cradle-to-grave offerings on all aspects of customs and excise, all customs-related risks in the context of cross-border transactions in Africa, cross-border trade issues such as anti-dumping and other trade remedies, dual use, customs reviews and health checks. She offers training to companies that wish to avert customs and excise risk.

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Denny is a transactional, international, corporate, and general tax specialist, with vast experience working on cross-border transactions in Africa including domestic and international corporate restructurings and private equity fund structures. He also advises on the application of South African exchange control regulations. He is a graduate of the University of Johannesburg and holds an LLB, LLM in Corporate Law and Higher Diplomas in International Tax Law and Tax Law.

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Jana is a Master Tax Practitioner with 25 years' experience consulting to local and multinational organisations in numerous sectors on South African VAT and tax risk management. She has extensive experience in tax accounting and tax controversy management. She holds a national diploma in Cost and Management Accounting, a higher diploma in SA and International Taxation and post graduate certifications in Professional Practice Framework for Internal Audit and Business Management.

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