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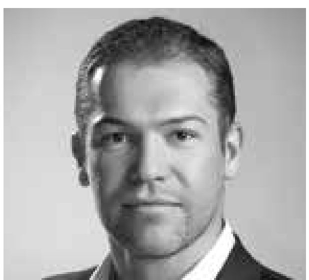

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PUTTING THE PIECES BACK TOGETHER

SA AND SARS IN 2019 AND BEYOND

New SARS Commissioner, Edward Kieswetter, shares his vision of SARS as a well-functioning, world-class revenue service. We also get the perspectives of other esteemed players in our tax world and an economist's view of the role of tax in rebuilding our economy (and tax revenues).

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VIEWS FROM THE SARS COMMISSIONER

A new vision for SARS

I believe that the higher purpose that SARS serves, is to be a well-functioning, world-class revenue service that enables government to build a democratic state that fosters sustainable economic growth and social development. During my tenure I aim to build a modern tax agency that is plugged into the economy, connected to the world, engaged in the fourth industrial revolution and, through strengthened public trust and high performance, builds a compliance culture that is in the top quartile internationally. Tax morality and fiscal citizenship are therefore amongst my key strategic priorities.

The contribution that the tax practitioner fraternity can make towards reaching this goal, is integral. Tax practitioners have a significant role as intermediaries and as key stakeholders in facilitating tax compliance and tax morality towards building the country. We must all act with intent to deal with corruption and low morality wherever it is found in the system – private and public sectors. We need to keep a degree of professional scepticism and ensure that we don't become complicit.

The feedback we receive on our service, systems and processes will help SARS expand on business solutions that will make it easier for taxpayers to comply with their tax obligations. I invite tax practitioners to journey with us as we rebuild SARS through regular and robust engagement.

My immediate plan is to stabilise SARS operationally, and restore governance, integrity and confidence in the organisation. Stakeholder engagement has been an important first step – with the staff of SARS being the first set of stakeholders. I have also met with the leadership of the recognised controlling bodies, business associations and other key professional bodies and government entities that SARS will need to work with to achieve compliance levels that will aid it to restore revenue to the fiscus. An important expectation I have of our stakeholders is their moral obligation to, along with SARS, facilitate tax morality. This is a campaign I intend on undertaking.

Building a world class organisation requires building an internal culture of respect, professionalism, high performance and delivery. Plugging skills and capability gaps is an important feature in rebuilding SARS, and developing an employee proposition that attracts and retains the right people with the right technical skills and attributes of integrity. I want to see a framework in place for high performance with a highly skilled and engaged workforce at the core.

In terms of SARS' operations in the pursuit to build public trust, I am applying my mind to the infrastructure of SARS in terms of, amongst others, resourcing the large business centre and high net worth unit, continuing SARS' modernisation programme, and establishing a high-level integrity unit, a dedicated compliance unit, as well as investigative and research capacity. On the latter, we have established interim capacity to address the enforcement value chain and a team to monitor developments across the various commissions, including the Zondo and PIC commissions underway.

A strategic priority is to broaden the tax base by developing a single view of the taxpayer across tax types. SARS has made strides in the mining of third party data in the personal income tax (PIT) space. We are currently working with Judge Dennis Davis on researching the tax gap. These interventions will enable SARS to hone in on enhancing its systems and capabilities to detect non-compliance, including illicit activity under the radar.

Competency in the area of base erosion and profit shifting, transfer pricing and illicit financial flows will be key as we solidify our audit capacity, while also attending to basic service through our processes and systems to make it easy for the taxpayer who is compliant.

Edward re-joined as SARS Commissioner on 1 May 2019. He had formerly served as the founding Group Executive of the SARS Large Business Centre and High-Nett-Worth Unit, SARS Chief Operating Officer and Deputy Commissioner during the period 2004 to 2009. From 2010 to 2016, he was the Group Chief Executive for the Alexander Forbes Group Holdings where after a successful turnaround, the company was listed on the JSE. Edward also held senior executive roles at FirstRand Banking Group and Eskom. Most recently he managed his own investments and served on various boards which amongst others included NE: Transnet, Chair: Technology Innovation Agency and Lead Independent: Shoprite Holdings.

Edward's qualifications include a Master of Commerce in SA & International Tax Law (Cum Laude) from North-West University, an MBA from Henley Business School (UK), a Master of Science in Education from the University of Western Cape, a Honours degree in Mathematics and Science Education, also from the University of Western Cape, as well as a National Diploma in Electrical Engineering from the Cape Peninsula University of Technology. In addition Edward was awarded the prestigious African American Scholarship and an academic appointment as an Associate in Education at Harvard University, USA.

He is the recipient of several awards including a Lifetime Achievement Award for Excellence in Management in 2017 from SAPSO, Finalist in the All Africa Business Awards 2016, ACO Dealmaker of the Year, 2015, and SA Boss of the Year, 1999.

He serves as a Visiting Professor at the Da Vinci Institute as well as Free State University, Member of Ahmed Kathrada Foundation and remains involved as a Social Activist.

"Tax morality and fiscal citizenship are therefore amongst my key strategic priorities."

VIEWS FROM **THE LEADERS IN TAX**

EM

JB

TL

NG

Have you experienced improvements at SARS over the last year?

EM I'm afraid that I can't say I have. In fairness, though, it might be a bit too soon to expect that just yet. Speaking to some individuals at SARS, one does get the impression that the mood is improving and that structures are being changed for the better, but I can't say that I have noticed that filtering down into results yet. And replacing the lost talent and experience will be an enormous challenge.

JB Unfortunately I have not experienced any improvements which may have been made at SARS over the last year in the areas in which I operate.

TL It would honestly be unrealistic to expect that there could have been improvements at the SARS over the last year, based on the revelations at the Nugent and other Commissions. SARS is at the lowest it can be in a democratic state. However, this presents a great opportunity for SARS to embark on a trajectory (structurally and therefore operationally) of improvement. Considering the bad state of the economy, this improvement may just be accompanied and partnered with the uptake in the economy and general outlook. Such economic growth could accentuate SARS' improvement in achieving its primary mandate of collecting taxes, and with the positive political turnaround that everyone is hoping for, this might have a positive impact on tax morality and result in a positive cycle of growth.

NG No. The majority of staff are not really motivated to assist taxpayers. There is an apathy and lack of willingness. For example, my company was told that our refund was not being paid as we are under audit. However, no notification of audit was received and to date we are still awaiting information as to what audit is being undertaken and by whom.

What would you like to see SARS focus on going forward?

EM Training. Training. Training. The general level of knowledge of the tax laws at the audit level in particular is not very good, which is where the dispute always starts (there are some refreshing exceptions, but they are few and far between). And there also seems to be a lack of training on internal policies and procedures, which affects the ways that disputes are dealt with. For example, SARS will put out a Guide, e.g., on understatement penalties, and SARS auditors (and apparently the penalty committee and the objection committee also) simply don't apply the principles contained in it, even when one quotes from the Guide itself.

JB SARS' focus, as a public organisation, should be to ensure that the tax laws are properly applied and implemented. This means that their objective should not be to try to collect as much tax as they can but should be to ensure that tax is paid when it is due and is not paid when it is not due.

There has been a sharp increase in the number of tax disputes going to court over the past decade, including cases in which SARS' prospects of succeeding were poor from inception. I would like to see SARS focus on devoting its litigation expertise and resources to those tax disputes in respect of which it has reasonable prospects of success and to get proper advice in identifying such disputes. In addition, I would like to see SARS focus on resolving disputes during alternative dispute resolution proceedings by inter alia appointing facilitators who are trained in dispute resolution and by appointing experienced and knowledgeable employees to participate in the proceedings and to make the appropriate decisions on SARS' behalf.

SARS should also take steps to ensure that its processes for the submission of returns and information and the payment of amounts due are simplified and user friendly.

TL Fundamental to the SARS' focus going forward should be the rebuilding of its own credibility and trust with taxpayers. One of its trump cards is the fact that it was once one of the most effective and trusted organs of state. Some of the immediate actions could be to provide clarity on new developments, considering that taxes are reactive; apply the current policy to new developments by interpretation and with the National Treasury; continue collaborative interactions with taxpayers as that builds trust and necessary partnerships with taxpayers.
Revenue is central in building the relationship between the state and its citizens, and the latter is key in establishing an accountable, responsive and ultimately legitimate state. With this in mind, SARS should embrace its role as more than merely tax collection and administration. It is the direct link between the taxpayer's income and state revenues. The credibility of this link is key to the legitimacy of the state. SARS' power to use the stick more than the carrot is depleted by the state of low tax morality as well as the oft-rumoured threat of tax revolt and SARS should therefore consider the short to medium term period as "carrot time".

NG

- Focus on building. Firstly, and as a matter of urgency put certainty to key positions. The Commissioner has only been there for 3 months, but for taxpayers uncertainty has existed for more than a year now and there is a level of impatience to see change.
- Address the skills deficit and rebuild technical centres of expertise.
- Create new and improved structures that will take the organisation forward. There needs to be a streamlining structurally to create efficiencies, expeditious decision making, clear levels of responsibility and accountability to the level where taxpayers cannot be told "it's not my area…". It is very concerning how one can get lost in the SARS system because one keeps getting referred on. An organisation like SARS needs to reformulate itself structurally as well as technically if it is to regain credibility.
- Service delivery - a taxpayer should not have to wait weeks to receive feedback on simple information requests. TRMs take a very hands-off approach when engaging with taxpayers as if their role is simply to receive feedback. I would like to see TRMs play a more service orientated role. For example, there was an instance where a

file of subsidiary was being transferred and for several months the only feedback the TRM could relay was "It is in the process…".
- Training, development and succession planning – SARS staff are in need of technical training, soft skills training (how to engage professionally) and there should be succession planning initiatives.
- Clear the VDP backlog.
- Create a walk-in help centre for large business taxpayers.

Is there anything you would specifically not want SARS to do?

EM I would not want SARS to carry on with this KPI system based on production (production meaning assessments raised for tax and penalties) which, in turn, affects their bonuses. It may well be that an individual auditor's bonus is not directly affected by his or her personal production, but there is no doubt that overall performance affects overall bonuses. As such each auditor has a vested pecuniary interest in the outcome of an audit and a dispute. A SARS official should administer the tax laws dispassionately and fairly in an unbiased manner, but in this circumstance he or she clearly has a conflict of interest. And one can see the difference when the dispute escalates to higher levels where the official is not remunerated based on production, and suddenly one notices a much more objective approach to the issue. The system is not only bad for taxpayers, but it causes unnecessary matters to be escalated to the appeal stage when it could be settled much earlier if objective minds were brought to bear.

JB The things I would specifically not want SARS to do include the following:
- Failing, in its general approach and in its assessments for penalties, to properly differentiate between an honest taxpayer who has tried to pay the correct amount of tax (but has for some reason underpaid tax), and a dishonest taxpayer who has evaded tax.
- Failing to concede or settle tax disputes in circumstances where it is appropriate for it to do so.
- Assessing a taxpayer for large penalties to increase the pressure on the taxpayer to make a settlement offer.

TL SARS should refrain from actions that would further damage the relationship with taxpayers. SARS should refrain from the following: (a) ignoring the role of the Tax Ombud; (b) opposing measures of taxpayers' rights as that might increase the antagonism between taxpayers and SARS; (c) embarking on tax morality drainers like withholding of tax refunds; (d) bluntly and blindly using the Tax Administration Act without regard to the increased cost of administration on taxpayers such as third-party appointments; (e) refusing to apply its discretion favourably to taxpayers to increase temporary collections such as "pay now argue later"; and (f) linking tax collection targets and employee performance rewards.

NG
- SARS staff need to stop threatening taxpayers. It is alarming as to how tax officials subtly and at times overtly intimidate taxpayers. Taxpayers are very reluctant to escalate matters for fear of being victimised and further prejudiced. I had an instance when a SARS official told one of my team that they were not our personal tax consultants because the said member escalated matters to the TRM division. There are many other incidents where the SARS staff threatened to cancel a meeting if the taxpayer did not submit its questions ahead of time. This was considered highly unfair by the taxpayer because SARS itself had previously refused to submit its questions to the taxpayer when it called for employee interviews.
- Hire the wrong people in the wrong roles.
- Hold back on refunds, invoke unfounded "pay now argue later" for the sake of revenue collection.
- Pander to the unions, political pressure, etc.

What do you think is SARS' biggest challenge in years ahead?

EM Getting the right people in at the right levels in the organisation. I think that it's always a challenge in any large organisation to staff it with the right level of knowledge, experience and commitment, and in SA with its skills shortage and educational challenges this problem is exacerbated. Of the many civil service organisations, I would think that SARS is one of those where one needs the highest percentage of staff who have tertiary education, but who also have been well trained and have experience and corporate memory so as to be effective. There are others of course, e.g., the justice and medical fields, but SARS also has need of large numbers of such employees. And with business getting ever more sophisticated and technology driven, SARS needs to keep up or fall far behind. This is indeed something which must keep SARS management awake at night.

JB While SARS started off as a model of what a well-run public body could achieve, over the last decade it has lost many committed, highly qualified and experienced employees and its reputation has been tarnished. Its biggest challenge will be to replace those employees with competent, properly trained personnel, to restore its reputation as a well-run public body, and to build up a reputation as a public body which acts with integrity and which properly applies the tax laws.

TL The greatest challenge for SARS is the existence and continued use of business models that enable multinationals to carry out business in South Africa with no or very limited physical presence in South Africa. These represent a significant tax risk to South Africa. Other challenges include getting traction with the effects of the Fourth Industrial Revolution and virtual currencies.

Economic pressures internationally have seen many tax jurisdictions introducing new taxes in order to broaden their tax bases, often based on international trends but without regard to comparative incompatibility and often introducing multiple taxation levels of the same income of transactions. These result in taxpayers being disgruntled with the tax system and therefore tax authority. SARS' biggest challenge is that government, in consultation with SARS, recently introduced new taxes and tax instruments. To counter the negative effects of these developments, SARS should embark on measures that enhance transparency of taxpayers' obligations and liabilities; effectiveness in collection of tax payment; effectiveness and consistency of measures for taxpayer registration and assessments; and separation of the roles of National Treasury and SARS.

NG
- Meeting revenue targets due to lack of depth and breadth of competencies (few pockets of expertise) and the state of the economy.
- Rebuilding trust and credibility both internally and externally. It is clear that there is a divide and that staff internally do not support the new leadership.
- Creating sustainable succession planning – SARS is not an employer of choice and it will be difficult to attract the right skills and people with cause.
- Meeting service delivery standards – linked to right people in the right jobs, efficient systems and infrastructure.
- Making SARS the employer of choice.

AN ECONOMIST'S **VIEW**

Are you optimistic about South Africa's economic future?

DR I am extremely concerned about SA's economic future. The reality is that the average South African has been getting poorer for several years and the main reason is weak economic growth. Additionally, weak growth also suppresses the economy's capacity to create jobs. And, more poverty and more unemployment lead to more social and political tension, which in its turn creates fertile ground for political extremism. That is where we are, weak growth begets poverty and unemployment, which beget extremism, which begets weak growth … A horrible negative spiral.

What, in your opinion, are the best options to generate growth?

DR First, we must understand and accept that the state (read ANC government) has done a terrible job in "running" the economy. The SOEs, local authorities and national government have mostly been devastated financially. In fact, most of what we call the state failed dismally in all matters of service delivery. That goes for education, health services, infrastructure, just about everything.

It must be glaringly obvious to everybody that cares to see that "government" is not good at much. That must mean that a good starting point to get the economy growing again is to limit the role of a destructive state and to allow the private sector, which has proved itself many times in the past, to flourish and to grow and to take over most of the functions the state provides today. But for this to be successful, a prerequisite is an environment that is conducive to private sector participation.

A good starting point is to refrain from those actions that alienate the private sector, like excessive taxes, threats of confiscations and general hostility to the productive sector. Just stop digging!

Do you believe Government needs to alter its expenditure programme? If so, how, what, when?

DR Most certainly. The primary function of the state is to protect individuals and their property. Unfortunately, politicians often see "owners" and entrepreneurs as the enemy that needs to be controlled, expropriated, taxed and estranged and consider the primary functions of the state as "job creation", "redistribution" and generally as a "developmental state". Inevitably this means that the priorities of state spending are on the salary bill of an overstaffed and overpaid civil service and on inefficient and unproductive projects. Instead, spending should focus on the state's primary functions and the provision of an environment favourable to private sector participation.

Do you believe that much can be done on the tax side to improve growth or further desired revenue?

DR No. As a first step we must understand that the state does not need more money, it needs better management! Secondly, the tax burden must be reduced, and finally, the tax regimen must be simplified dramatically.

WOMEN IN TAX RISING TO THE TOP

▶ **KEITH ENGEL,** SAIT CEO

With August being the month in which South Africa celebrates women, we asked our CEO to write a piece from his perspective on the role of women in tax. We also interviewed some leading women in our tax community to get their perspectives.

When I was a young man entering the workforce in the early 1980s, women dedicated to the tax profession (let alone interested in the subject) were few and far between. The number of women in my master tax classes rarely exceeded 10% of the total number of students. They joined the initial entry tax courses but rarely continued. It was a time when women were said to be uninterested in tax or any related mathematical courses. Mathematic professions were seen as the primary domain of men while women were said to be more dedicated to professions focused on the liberal arts.

By the late 1980s and early 1990s, a few notable women had emerged who joined the elite of the tax profession. Most were in Government (in ever higher positions) given the toll that private sector firms had on family life. One by one the numbers steadily grew but men remained the mainstay of the tax profession. This status quo existed in both the United States and in the South African tax community throughout the early 2000s.

However, the picture has quietly changed in the past few years. Accounting graduate ceremonies increasingly recognise women as top of the class. Classrooms dedicated to tax and young tax professionals contain a growing army of women. Women are not just fully represented as entrants but also as mid-level associates and as tax partners and leaders. In-house female counsel has become the norm. Long gone are the days when whispers are heard in the hallways about how women lack commitment to the mathematical analytics of the tax law. Nowhere are these changes more evident than at the Tax Indaba with speakers containing a 50/50 male-female ratio.

A narrative exists in some circles that women still remain outcasts at the very top but even this narrative is changing. Heads of large firms and JSE-top companies include notable women in charge. Women are having a larger and larger say in management decisions and their say appears less and less subject to question.

All-in-all, one must say a job well done. Women in tax have arrived. More importantly, they have fully earned their way. Women in tax are hired because they fully offer the best and the brightest. Merit is the order of the day and their promotions are not driven as a grudge purchase required by external mandate. The question today is increasingly falling on men who must now keep up the pace.

PERSPECTIVES FROM THE LEADING LADIES IN TAX

Delia Ndlovu

Managing Director: Africa Tax and Legal, Deloitte

Q Has your career in tax been rewarding and what further accomplishments would you like to achieve?

My career has definitely been rewarding. I have had the opportunity within Deloitte to reinvent myself and keep growing. I have been fortunate throughout my career to have been surrounded by coaches and mentors (both locally and globally) who have helped me realise my potential.

I am honoured and humbled to be the leader of the Deloitte Africa Tax & Legal practice. I am grateful that this position has given me the opportunity to drive our strategic priorities, which involve growing our African practice, embracing digital transformation and leveraging off our brand.

My intention for the future is to leave the Deloitte Africa Tax & Legal business better than I found it. Going forward, I will seize any opportunity to live my purpose, which means making an impact that matters and ploughing back into my community.

Q As a woman, do you feel that all doors are now fully open in the tax profession or do you think there are a few doors that still need to be cracked?

The Deloitte Africa Tax & Legal business has made great strides to advance women leaders. Comprising approximately 55% women overall, we have achieved approximately 37% women ownership. The fact that I have managed to make it as an African black woman leader in our business speaks volumes as to our firm's commitment to promoting women leaders. I see myself as an advocate of promoting women in the workplace.

Q What advice would you give young women who are starting in the tax profession?

Be authentic and be the best version of yourself, but at the same time, strive to be excellent and deliver results in whatever you do. Embrace who you are and your femininity.

Continue improving yourself, continue growing, seize any opportunity to learn, surround yourself with mentors to encourage you and support you on your journey.

Doelie Lessing

Director, Werksmans Attorneys

Q Has your career in tax been rewarding and what further accomplishments would you like to achieve?
Yes, it has been rewarding, in that it combines my interests perfectly. I am interested in economics as well as law, and tax advisory requires a good commercial background but the context within which we operate is the law.

It is challenging in that it requires a good technical knowledge, the legislation changes every year so that it requires frequent studying of new laws. In that, though, lies the reward. The industry remains dynamic, the changes in the laws create a lot of work for us and we are often involved in talking to the legislative authorities about the laws, so that there is a sense of contribution to the legal field.

Tax advisory is a creative way of practising law in that transactions are often being put together and structured, rather than having to work with a set of facts which you cannot influence.

I have received several accolades in international publications and am happy with the financial performance in this area of law.

Further accomplishments I would like to achieve: build my practice further and engage with educational institutions in relation to tax.

Q As a woman, do you feel that all doors are now fully open in the tax profession or do you think there are a few doors that still need to be cracked?
Yes, I do not have an issue with gender discrimination.

Q What advice would you give young women who are starting in the tax profession?
Enjoy this – it is an intellectually challenging, but also creative area of the law. It is not as harsh as some other areas in law and working hours can be much more flexible than in litigation. Transaction-based work often results in time pressure, but tax structuring is normally the first leg of a transaction when the time pressures are not so severe yet. As a working mother my experience is that you can never underestimate the importance of flexible working hours.

Doné Howell

Director: Tax, BDO

Q Has your career in tax been rewarding and what further accomplishments would you like to achieve?
It has been a truly humbling experience looking back some 20 plus years! I say this from a personal and professional perspective, as I do not believe one can separate the two – they interweave and become one. There have been challenging times, moments of pride and accomplishment, sadness – always remembering those we lost – yet ultimately the comfort of knowing I was part of something bigger, a family.

When I joined the private sector – becoming part of the then Fisher Hoffman family – I was truly taken by the fact that one of the founders of the firm, the late Mr Rupert Hoffman, would each day make his rounds and greet the staff, irrespective of qualification and designation, by name. I knew that this was the kind of firm I wanted to be part of and would want my children to have the opportunity to be part of.

I have been privileged to share in this legacy and those similar to it, now with the duty to safeguard and further enhance this legacy to allow the next generation the same opportunity I had.

Q As a woman, do you feel that all doors are now fully open in the tax profession or do you think there are a few doors that still need to be cracked?

Speaking from a mid-tier auditing firm perspective and looking around as I write this article at our now sizeable Tax team, I am proud to say that of the seventy-odd team members two-thirds are women – with a wonderful demographic spread!

Unfortunately, I do think tax within an audit-centric environment is steered by audit policies and processes, including the career progression and professional development of our tax team. The tiered approach in the audit hierarchy is cumbersome and not necessarily suited to the dynamic, evolving tax environment. Perhaps it is time for a robust internal policy debate?

I believe the tax profession can be proud of its achievement to date, especially if I think of SAIT, our regulatory body leading the way with women, strong women, holding key positions in the organisation. However, we all know much is still to be achieved to ensure more women and, critically, more transformation is seen in leadership.

We all have a role to play in empowering women, through mentorship and coaching, in developing 'Thought Leadership' – then to see our ladies thriving in taking up this challenge!

Q What advice would you give young women who are starting in the tax profession?

Have passion for what you do, work hard and be true to this. Respect yourself and be respectful of others – we are not all the same. Thankfully, South Africans are a diverse bunch of wonderful people!

Learn, absorb, observe and adapt – there is no 'one-size-fits-all' approach. Challenge yourself to make a difference, to be the voice for those who do not have a voice, and question … always question!

Elzahne Henn

Director: Tax Consulting, Mazars

Q Has your career in tax been rewarding and what further accomplishments would you like to achieve?

The complexity of my work and the continued professional development required make it very rewarding.

My most rewarding experiences so far include becoming the first female tax director in Mazars South Africa and building a tax consulting team that focuses on the needs of private clients in a work environment where the focus is generally on corporate clients.

Further accomplishments I would like to achieve are more personal. I would like to further develop my coaching knowledge and skills and play a more active role in our commitment to social responsibility.

Q As a woman, do you feel that all doors are now fully open in the tax profession or do you think there are a few doors that still need to be cracked?

I am fortunate to work for a firm with very strong female top management and leadership and that values diversity and inclusion. Moreover our diversity goals are aligned with our recruitment and career development strategy.

My view is that doors are open to women in the tax profession, but there are still factors at play that prevent women from progressing in their career and that are not limited to the tax profession. Some of this may simply be organisational barriers and organisational bias.

The conflict with family responsibilities and commitments remain the main barrier to a woman's ability to progress and women are still often required to make a decision between work and family responsibilities. Although most organisations now provide flexibility in the workplace and cater for more work-life balance, there is still a perception that women are required to choose and cannot have both. Around the world, we are seeing a trend towards legislating longer, paid parental leaves for both mothers and fathers. Yet, evidence reveals that the longer new mothers are away from work, the less likely they are to be promoted or move into management.

The lack of female role models in the tax profession also serves as an obstacle.

In the tax profession networking is essential. The exclusion from traditional male dominated social networks makes it challenging for women to network and be accepted.

Q What advice would you give young women who are starting in the tax profession?

Be self-aware - focus on the development of your emotional intelligence as it enlarges your ability to cope with pressure in a career that is deadline driven and focused. It will also help you to build trust and to negotiate with and influence others. Finding a mentor and also a senior-level sponsor within your organisation that advocates for you is critical. Be brave – never be afraid or intimated to surround or associate yourself with the best and brightest in your team. It is sometimes hard but can be so powerful for your own growth and development.

Be a woman - cross gender networking can be difficult. Develop a gender neutral or pro-women network. Also start by showing up: for example, attend tax industry events such as conferences and seminars, build client relationships and connect to a network of women in the tax profession.

Take your continued professional development very seriously. Keeping up with the changes in tax laws, regulatory framework and new tools is crucial in our environment.

Always remember that you may be technically brilliant but if you lack practical intelligence you will not become a successful tax professional. When faced with a challenge you need to be able to read the situation and be practical, no matter how complex the matter is.

Hanneke Farrand

Director: Private Clients and Tax, ENSafrica

Q Has your career in tax been rewarding and what further accomplishments would you like to achieve?

The most rewarding aspect of my career has been the personal relationships that I have developed with amazing and interesting people from around the world.

The main focus of my practice is to advise families and individuals on a range of events, albeit when they get married, invest abroad or financially plan for their families. I believe that a good adviser needs to be a good listener first and as my clients have been successful in their own right, I have been able to learn from them too, which has been a fascinating experience.

Tax is an intellectually stimulating and dynamic practice area. I have been fortunate to grow with my clients as their business interests expanded locally and abroad. We now operate in a global environment. Whereas in the earlier years of my practice my focus was only on South African tax, I have had to upskill myself to obtain a thorough understanding of the relevant domestic requirements in other jurisdictions and how those interact with our law.

One's career is an ongoing journey. Personally, I want to continue to meet new people and learn new things.

Q As a woman, do you feel that all doors are now fully open in the tax profession or do you think there are a few doors that still need to be cracked?

The tax profession in South Africa is, in my mind, very open to women. It is, in my experience, gender neutral and not even a discussion point whether a practitioner is male or female.

Q What advice would you give young women who are starting in the tax profession?

If you follow your passion, the loose ends will fall into place. It is a demanding environment though, where things can go wrong. Should you wish to have a family, it is important to have good emotional support and a structured environment that gives you the flexibility to focus on your career.

Roula Hadjipaschalis

Partner: Corporate Tax and Legal, KPMG

Q Has your career in tax been rewarding and what further accomplishments would you like to achieve?

Most definitely. When I started my career as an attorney in a large law firm I never imagined that I would be leaving the legal profession and specialising in tax. I have never once regretted this decision. My career in corporate tax consulting has been intellectually stimulating and varied. I have travelled to many countries around the world, worked with amazing colleagues and have worked on ground-breaking transactions. All this with the flexibility of raising a family. Going forward I would like to contribute to thought leadership and policy –I do believe that the right tax policies can help grow the country and decrease unemployment.

Q As a woman, do you feel that all doors are now fully open in the tax profession or do you think there are a few doors that still need to be cracked?

I don't think it's the tax profession specifically that is keeping women off the top table, so to speak. I think it's across all professions. Things are definitely improving in that there is a conscious awareness but I still believe that men get the "benefit of the doubt" a lot more than women. As a partner in my firm I see it as part of my job to counter unconscious biases and ensure that women are provided with equal opportunities to men to advance their careers.

Q What advice would you give young women who are starting in the tax profession?

To tackle every task (no matter how minor it may seem) to the very best of their ability. This is how you gain the trust of the people you report to and will lead to bigger opportunities. Also, to keep an open mind. Tax is varied and exciting. Get exposure to all fields before you decide to specialise. Tax is also a very marketable skill.

Virusha Subban

Partner and Head of Indirect Tax, Baker McKenzie

Q Has your career in tax been rewarding and what further accomplishments would you like to achieve?

Given the chance, I would do it all over again. I enjoy solving problems and get tremendous satisfaction from making a difference to my clients' businesses. Imagine the difference it would make to a medium-sized business if a customs penalty is reduced from R20 million to R20 000. Or to a multinational where a penalty is reduced from 1 billion to 40 000. The impact of such numbers can be staggering.

Q As a woman, do you feel that all doors are now fully open in the tax profession or do you think there are a few doors that still need to be cracked?

I think that, as in any profession, your career is what you make of it. Don't settle for less. If you believe that you deserve better exposure, more challenging experiences or more promising career prospects, take your career into your own hands and look for opportunities for yourself.

The tax profession has come a long way, there are some very experienced women in key positions. It is important that we lift others as we grow.

Q What advice would you give young women who are starting in the tax profession?

Whatever you decide to be, make sure you are the best at it. It is never too early to start specialising. Tax is too vast and complex for anyone to claim to know everything. Pick an area and make it your niche.

Mareli Treurnicht

Director in the Tax and Exchange Control practice, Cliffe Dekker Hofmeyr

Q Has your career in tax been rewarding and what further accomplishments would you like to achieve?
Yes, it has been very rewarding. Working as a tax law attorney at a top tier law firm in South Africa has meant exposure to a wide variety of businesses, sectors, people and areas of the law. I have worked with clients in many interesting industries, for example banks, insurers, food and beverage companies and mining companies; and I have gained knowledge about how these different industries work. I have been fortunate enough to work on significant deals and leading tax litigation matters. My field of law has also allowed me to meet, work with and learn from incredible people along the way. I have learnt from the best.

I currently serve as a Director at Cliffe Dekker Hofmeyr Inc. Life is a journey and I am excited to see where my journey will take me next. My immediate aim is to continue to learn, grow and excel in everything that I do.

Q As a woman, do you feel that all doors are now fully open in the tax profession or do you think there are a few doors that still need to be cracked?
In my career I have been fortunate to work with a variety of inspiring and supportive people. I feel blessed by the fact that I have never felt marginalised because of my gender. I have never felt that my career has a ceiling based on the fact I am a female practitioner. As a result, I do believe that doors are fully open in the tax profession for women. I know wonderful women in tax who are well-respected and admired and who are considered pioneers in their field of law.

Q What advice would you give young women who are starting in the tax profession?
My best advice would be to work and study hard, and to believe in yourself even when times are tough. In addition, be kind to your colleagues, seize opportunities as they arise and be patient with yourself and those around you.

Mogola Makola

Partner, Bowmans

Q Has your career in tax been rewarding and what further accomplishments would you like to achieve?
It has been rewarding because of the type of work I have been able to do during that career. However, I do not believe that I have accomplished all of the goals that I have set for my career. I am still working on establishing a name for myself as an industry expert.

Q As a woman, do you feel that all doors are now fully open in the tax profession or do you think there are a few doors that still need to be cracked?
No I do not. In this industry, access to the type of work that I want to do depends very much on connections and willingness of others to get me close to the door or even give me the credibility to allow those behind the door to let me in. There are very few who are willing to do that – at least not without seeking to take credit for the trajectory of your career, assuming that it is a positive one. Unless someone takes a punt on you, one can spend most of one's productive years "working" instead of pursuing a career. Expect to have to prove yourself worthy repeatedly to your colleagues, your peers and clients.

Q What advice would you give young women who are starting in the tax profession?
Do not expect it to be easy. Do not expect everyone to want to make an investment in your career development. There will be times when you want to give up. There may even come a time when you will decide to throw in the towel and pursue other interests. If and when that day arrives, please make sure that you are satisfied that you fought to make it work.

Reinette Theart

Director, Crowe Tax & Advisory

Q Has your career in tax been rewarding and what further accomplishments would you like to achieve?

Working in the field of tax has definitely been rewarding! I come from an auditing background and made the choice to focus on a career in tax shortly after qualifying as a CA 10 years ago. At that time the firm I worked for did not have a division specialising in tax advisory and I was given the great opportunity to be part of starting such a division. Today I am very proud to still be at the same firm and being a director of their tax advisory entity.

Apart from the rewards that come from growing a new business, working in the ever-changing field of tax also requires one to constantly stay up to date with new developments, which means you learn something new almost every day. That is what is most rewarding to me – always learning and always expanding your knowledge. I can honestly say I have never been bored in my career and look forward to going to work every day. As far as further accomplishments go; I am currently busy furthering my studies in the field of Mining Tax at WITS as this is an area of tax where I think more tax professionals are needed. Further down the line I have not ruled out the possibility of doing a doctorate.

Q As a woman, do you feel that all doors are now fully open in the tax profession or do you think there are a few doors that still need to be cracked?

I think the tax profession in South Africa is one where women feature prominently, perhaps more than other professions. There are a number of leading female tax professionals in this country that are an inspiration to any young tax professional, particularly in the academic field.

Whether women have the same opportunities in the profession as men is a subjective question. In my view one has to create your own opportunities if you want to build a successful career, regardless of your age, race or sex.

I don't think you can never say "all the doors are fully open" as the world and the profession are constantly changing. Constantly looking for new "doors" and cracking them open is what will continue to grow and strengthen the profession.

Q What advice would you give young women who are starting in the tax profession?

I would definitely encourage any young woman starting in the tax profession to go for it. I think the challenges in this profession for women in particular are similar to challenges you would face in any other profession. Starting out as a young professional you need to earn respect from others you work with, not only as a woman but also as a young professional. This can be challenging, particularly as you will be required to work with colleagues, clients or other professionals with far more experience than you. My advice would be to learn as much as you can from others, but stand your ground firmly when needed and never compromise on your integrity.

As a woman the biggest challenge for me remains the constant struggle to balance work and family, and I think this impacts on women much more than men. I am however blessed to be working in an environment where family is valued and respected and I can manage my own time.

Shirleen Ritchie

Partner in the Tax Business Unit, Webber Wentzel

Q Has your career in tax been rewarding and what further accomplishments would you like to achieve?

Becoming a partner in the Webber Wentzel tax team is the fulfilment of my lifelong dream to be a legal professional in tax. I am deeply passionate about the intersection between law, tax and business and my career thus far has been incredibly rewarding. Tax law combines diverse disciplines and that makes it an exciting area of law filled with challenges.

Developing an understanding of how tax influences business and people is essential and requires curiosity and a willingness to learn from each client. I find the deep thought required to analyse complex tax considerations of transactions exhilarating. Each tax question poses a challenge unique to the parties involved and the nature of the issue. The smallest difference in tax profile affects the solution that a practitioner proposes.

I would love to give back to the tax profession by lecturing part time and being involved in think tanks about the future of taxation in the context of a digital economy at a South African and international level.

Q As a woman, do you feel that all doors are now fully open in the tax profession or do you think there are a few doors that still need to be cracked?

Personally, I have had the benefit of great mentors and sponsors over the course of my career, both male and female. Although some doors may be difficult to open I have always found that a bit of jimmying would crack it open with a skilful and considered approach.

As society redefines itself women will continue to open doors that were previously closed, but I feel that there is a deeper issue that is emerging from the debate around women in the workplace. I have come to realise that many of the issues identified as "women's" issues transcend the boundaries of gender and that the question that we need to be asking, in many ways, is how society values the service of care-giving. The position delineated by Anne-Marie Slaughter in her book "Unfinished Business" informed my thoughts around this.

Personally, my husband and I have to answer the question in relation to child-care and how we address the demands of both of our careers. However, a similar question can be asked in relation to elderly care, care for sick or special needs family members, which has been traditionally seen as the work of women.

Change is a slow process and I think we will revisit many current debates in different contexts in future.

Q What advice would you give young women who are starting in the tax profession?

I sometimes find myself looking for external validation of my abilities, but such validation is short lived and can be scarce. Sometimes the most powerful source of strength is to trust your innate abilities and to believe that you have something to contribute to the profession in the long run.

Tax is an incredibly demanding professional discipline and requires a deep-seated belief that one is capable. When there is nothing else, being able to listen to the still small voice that tells you to keep going will carry you through the more difficult aspects of your career.

Khanyisa Cingo-Ngandu

Tax Director, SNG Grant Thornton

Q Has your career in tax been rewarding and what further accomplishments would you like to achieve?
I decided to start specialising in tax while still doing my articles, it is this decision that resulted in a change from being an article clerk at one of the big four firms to a TOPP candidate at the South African Revenue Service. My career since that decision was made has been quite rewarding.

There is a lot of room to automate a lot that is currently done manually from a tax reporting perspective. I would like to lead the change in further automating the tax environment for business of all sizes in South Africa and in the African region. The SNG GT VAT analytical tool we introduced a couple of years back that assists organisations to not only meet all the compliance requirements (including a capability to check validity of tax invoices) but their management reporting as well was but a start.

Q As a woman, do you feel that all doors are now fully open in the tax profession or do you think there are a few doors that still need to be cracked?
There are a lot of opportunities for women in the tax field. I however cannot say that the doors are now fully open. Good progress is being made by business including organisations like yourselves, a lot more still needs to be done for us to achieve equity.

Q What advice would you give young women who are starting in the tax profession?
Be patient. The ability to read and interpreter the legislation is very important. You must learn everything there is in relation to these issues. Be willing to spend a bit more of your personal time teaching yourself. Do not limit your learning only to the work place.

Q Has your career in tax been rewarding and what further accomplishments would you like to achieve?
My career in tax is rewarding because I am professionally and personally challenged daily. The tax landscape is always evolving, and the clients' needs are constantly changing. It gave me the opportunity to shine from a junior level. And as long as you have the drive and ambition, there are no barriers to how quickly you can get to the top.

There is a lot that I still need to achieve, especially in industries that are mostly male dominated like the Mining and Metals sector. There are currently very few women in South Africa occupying roles in Mining and Metals, while there are many opportunities there.

Q As a woman, do you feel that all doors are now fully open in the tax profession or do you think there are a few doors that still need to be cracked?
I believe doors are open, women just need to step into these roles that have been opened up for them and be present for their careers. Yes, we do face intangible barriers. However we need to take initiative and take a proactive approach to the success and promotion of women in tax. Adding to this, women need to be informed about opportunities available to them.

Q What advice would you give young women who are starting in the tax profession?
It is very important to stop thinking about being a woman too much as a disadvantage, but rather, try to be the best person you can be, period. Invest in professional growth and find something that is going to make you stand out from the crowd because competition is real.

Khanyi Makhubela

Assistant Manager, EY

US Customs and Tax Rules:

SOUTH AFRICAN REVERBERATIONS

▶ **ALAN S. LEDERMAN,** ALederman@gunster.com

This article describes the US's application of tariffs against some South African exports, and the expanded sweep of the US corporate income tax applicable to US based multinationals with respect to their South African operations.

US customs developments

South Africa is a major beneficiary of the US African Growth and Opportunity Act of 2000. This US law generally provides for duty-free imports into the US for goods originating from South Africa. In 2018, goods exported from South Africa to the US totalled R120 billion, making the US the second largest importer of South African exports, behind only China.

The top categories of exports from South Africa to the US in 2018 were:

- Precious metals and platinum (R54 billion)
- Iron and steel (R11 billion)
- Vehicles (R8 billion)
- Aluminium (R7 billion)

"South African tax practitioners need to be aware that the US corporate income tax rate cut, GILTI, FDII and BEAT can influence transactions."

Thus, iron and steel, vehicles and aluminium exports to the US in 2018 totalled R26 billion or more than 20% of the exports from South Africa to the US.

In 2018, President Trump placed a 25% tariff on steel imports and 10% tariff on aluminium imports, based on national security concerns. Chinese manufactured products have been the most publicised target of President Trump's tariffs. However, these tariffs can also apply to South African manufactured steel and aluminium, notwithstanding the African Growth and Opportunity Act. Nevertheless, some but not all US importers of South African steel and aluminium — including about 200 items made by South African producer ArcelorMittal SA and others — have applied for and received US exclusions from these tariffs, based upon unavailability of substitute US steel and aluminium. In May 2019, President Trump postponed until November 2019 a decision on whether or not to impose a tariff, which could be at a 25% rate, on imported automobiles. President Trump's decision on whether or not to impose US tariffs or quotas on uranium, another import from South Africa to the US, is expected in July 2019.

2018 US corporate income tax rate cut

In 2018, a major overhaul of the US federal corporate income tax laws went into effect. The highlight was the dramatic cut in the US federal corporate income tax rate, from about 35% in 2017 to 21% beginning in 2018. However, US state corporate income taxes on income derived from that state, whose rates vary from US state to US state, were not affected by the federal tax legislation and still average about 6%. Since US state corporate income taxes are deductible from federal income taxes, the net result is frequently an effective combined US federal and state US corporate income tax rate of about 26%. By contrast, the South African corporate income tax rate is 28%.

As a result, from a corporate income tax viewpoint, US based multinationals may now find it somewhat more attractive to have subsidiaries located in the US, particularly in low US corporate income tax rate states, than in South Africa. Likewise, European and other non-US, non-South African, multinationals may now find it somewhat more attractive to have subsidiaries located in the US, rather than in South Africa. Indeed, South African based multinationals may themselves find it more attractive to have subsidiaries located in the US than in South Africa. Of course, many other non-tax and tax factors come into play in deciding where to locate operations, but the 2018 US corporate income tax cut has made the corporate income tax factor tilt in favour of the US.

Global intangible low-taxed income

The cornerstone of the new US international tax regime on US based multinationals that took effect in 2018 is the requirement that such US parent corporations include in their current income their share of the global intangible low-taxed income (GILTI) of their foreign subsidiaries, whether or not received by the US parent as distributions. GILTI is generally defined as the net income, as defined under US tax principles, of all the foreign subsidiaries to the extent it exceeds 10% of the depreciated tax basis of all the profitable foreign subsidiaries' buildings and equipment. As many US tax practitioners have observed, GILTI is a misnomer, because its application does not require that foreign subsidiaries have intangibles or low-taxed income. The simpler "global income" might rather be a better descriptor. Only the foreign subsidiaries' 10% return on the tax basis of their depreciated building and equipment generally escapes US taxation to the US parent, both when earned by the foreign subsidiaries and when received by the US parent as dividends.

Profitable US parent corporations are generally allowed a deduction for 50% of their GILTI, producing an effective US corporate income tax rate of 10.5% (50% x 21%) on GILTI. However, a US tax credit is allowed for 80% of the foreign corporate income taxes paid by the foreign subsidiaries on the GILTI. The US tax credit is generally limited to the pre-credit US tax related to the GILTI, after such GILTI is reduced by the US parent's own interest expense and other expenses allocated to that GILTI. GILTI has some features of enforcing a 10.5% minimum worldwide tax on non-US subsidiary income in excess of a 10% return on depreciated tax basis of building and equipment.

South African subsidiaries of US based multinationals might initially think that GILTI cannot adversely impact, and indeed must

help, their US parent's yield from the South African subsidiary. After all, 80% of the 28% of the South African subsidiary's income paid as South African corporate income tax generates a potential GILTI tax credit to the US parent of 21.6%. This would ordinarily be enough to shelter the 10.5% pre-credit US tax on the GILTI generated by the South African subsidiary itself. It would ordinarily also generate additional GILTI tax credits, which the US parent could then use to shelter from US tax the US parent's GILTI generated by its tax-haven foreign subsidiaries.

Unfortunately, however, in practice, many factors reduce or eliminate the GILTI tax credit generated from South African and other high-tax subsidiaries. For example, the US parent itself may have interest or other expenses allocated to the GILTI, which operate to limit the GILTI foreign tax credit.

Indeed, in some situations the US parent may effectively be taxed on GILTI generated by the South African subsidiary, notwithstanding that the South African subsidiary has already paid 28% South African corporate income tax on that same income. For example, suppose the US parent has an overall net operating loss in the current year, after its inclusion of GILTI, due to a temporary dip in its US business cycle. The US treats GILTI generated by the South African subsidiary as reducing, apparently rand for rand, the US parent's net operating loss carryforward from the current year, and thus as creating a US corporate parent tax in future years. However, no credit for the South African taxes paid on the GILTI generated by the South African subsidiary in the US parent's current loss year can be carried forward by the US parent for use in the US parent's profitable year.

The US in 2019 favourably proposed to allow a US parent corporation to elect, when advantageous, to exclude from GILTI the income of all its South African and other foreign subsidiaries which are taxed in their home country at least at a 18.9% foreign corporate income tax rate. The US proposed to make such election only prospective, however.

US Democratic Party legislators have introduced a bill to apply GILTI on a country-by-country basis. Similarly, the OECD, which is studying recommending a minimum tax on foreign subsidiary income, possibly along the lines of GILTI, is considering having this minimum tax apply on a country-by-country basis. These proposals would adversely eliminate the ability of multinationals to use excess tax credits from their South African and other high-tax foreign subsidiaries to reduce their home country tax on the income of their tax-haven subsidiaries.

Foreign-derived intangible income

Beginning in 2018, profitable US corporations are entitled to a special deduction, generally resulting in a reduced 13.125% effective tax rate, on their foreign-derived intangible income (FDII). FDII is generally the US corporation's net income, to the extent it exceeds 10% of the depreciated tax basis of its buildings and equipment, multiplied by the percentage of the US corporation's sales of goods, services, and intangibles to foreign customers for foreign use. South African companies may be concerned that FDII will make the US a more attractive base than South Africa for exporting to African and other third countries, and perhaps make the US a more attractive source for sales to South Africa than South Africa itself.

However, some US exporters are concerned in the long term about challenges to FDII that could lead to FDII's repeal. The primary concern is based on the World Trade Organization's Agreement on Subsidies and Countervailing Measures, to which both South Africa and the US are parties. That agreement bars prohibited subsidies, which include "the allowance of special [income tax] deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption."

The US position is that the FDII rate of 13.125% is no lower than the 10.5% rate applied to foreign subsidiary GILTI. That is, the GILTI rules are a stick meant to reduce any benefit to US taxpayers from operating in offshore tax-haven subsidiaries, whereas the FDII rules are a carrot intended to create a comparable benefit of basing international operations in the US. South African critics would point out this purported comparability of the FDII rate with the rate on offshore operations ignores South African taxes, which are far larger than the 13.125% FDII rate.

FDII regulations proposed in 2019 impose documentation requirements on US exporters, service providers and licensors to establish the foreign use by a foreign buyer. To comply, US companies may require contractual representations or internal commercial data from their South African and other foreign customers.

Base erosion and anti-abuse tax

In 2018, the US base erosion and anti-abuse tax (BEAT) also took effect. Generally, US corporate groups with at least $500 million of annual gross receipts and paying at least 3% of their deductible expenses in the form of certain interest, royalties, and certain service fees to foreign affiliates can be subjected to a minimum corporate income tax on their income. This tax would be at a 10% rate beginning in 2019, without regard to such deductions, and without any foreign tax credits.

The application of BEAT to payments to South African affiliates has typically not arisen with respect to South African based multinationals. US subsidiaries of South African parent corporations typically have less than $500 million of gross receipts.

Rather, BEAT has frequently arisen as an issue for payments to South African affiliates where a large US affiliate of a US based or foreign based multinational:

- interfaces with US customers to provide them services in locations that include, but are not limited to, South Africa;
- receives payments from those US customers; and
- then subcontracts the South African component of those services to a South African affiliate.

Such subcontract payments could trigger BEAT exposure to the US affiliate. Business solutions to this situation are often not evident: it is often impractical to have the South African and other foreign affiliates contract directly with the US customer or to have the US affiliate contract directly with the South African affiliate's unrelated South African service providers.

Into the future

South African steel, aluminium, automobile and uranium exporters to the US will have to carefully monitor the evolving US tariff situation. South African tax practitioners involved with their clients' transactions with US based multinationals need to be aware that the US corporate income tax rate cut, GILTI, FDII, and BEAT can influence those transactions.

AN ANNUAL WEALTH TAX IN SOUTH AFRICA?

45 minutes CPD

PROF. DEBORAH TICKLE, deborah@tickleontax.co.za

There has been renewed interest in imposing an annual wealth tax on South Africans. Our article makes a strong case against this proposal.

The simple case against

A wealth tax is a percentage-based tax based on the value of a person's net assets (assets less liabilities). The case against an annual wealth tax may be illustrated through the following simple example:

Four individuals (A, B, C and D) each have no money or assets at the age of 20 but each has a job. They will each earn R1 000 per month for the rest of their working lives (40 years if they retire at 60). Each individual needs R500 of the R1 000 to pay tax and to live with their spouse in a comfortable manner (e.g., pay rent and eat). Any additions to the family (children) will cost R200 to maintain and educate each child per month for 20 years. To keep the example simple, any money invested will not accrue any further income.

- A and spouse do not have any children and they put the R500 per month, which remains after tax and living expenses, into a bank.
- B and spouse have two children. Over the 40 years they put any money not spent on tax, living expenses and their children into a bank.
- C and spouse have five children over the course of their 40 years of working. They too, put any money not spent on tax, living expenses and their children into a bank.
- D and spouse believe in having a good time. They have no children and spend all of the amount remaining after tax and basic living expenses (i.e., R500 per month) on more rent (i.e., a bigger home in a "nice" area), fancy cars, parties, holidays, etc. Throughout their working lives, to their friends and colleagues they appear to be very "wealthy".

When they reach 60 our four individuals are in the following positions:

- A and spouse have R240 000 (40 years of R500 per month) in the bank waiting for them for their retirement. They will be comfortable in their retirement and because of this will be considered "wealthy" by those around them.
- B and spouse have R144 000 in the bank waiting for them for their retirement. They have spent R96 000 more than A and spouse (R200 x 12 months x 20 years x 2) to raise their children. They also have two children who will now go out and earn R1 000 each and who might (if B and spouse are lucky) provide them financial (and also emotional) support. They may thus potentially be viewed as "comfortable" in their retirement.
- C and spouse have R0 in the bank for their retirement. They have spent R240 000 more than A and spouse (R200 x 12 months x 20 years x 5) raising their children. However, they have five children who will now go out and earn R1 000 each and who (if C and spouse are lucky) will provide them with financial (and also emotional) support during their retirement.
- D and spouse have R0 in the bank and no children. They have led a life that looked "wealthy" but now they may need to turn to those who have saved some of their money (here A, B and C and their children) to look after them in their old age.

"The proposal to implement an annual wealth tax could be due to the political need to be seen to penalise the rich to appease the poor, in order to maintain social stability, and/or to potentially shift the balance of power."

Based on this simple example, the following questions arise:

What behaviours might an annual wealth tax instigate?

If you are person A or B and you know at age 20 that an annual wealth tax is to be imposed on your savings (net assets), might you continue to save in the manner set out, or might you rather choose to go the C or D route? Or might you leave the country to go somewhere where such taxes are not imposed? (This would also erode the tax base for other taxes.) Or might you hide your assets (result in a reduction in tax morality)?

On what should an annual wealth tax be levied, i.e., what is considered to be "wealth"?

This question has two sub-questions:

1. Even though A has more money, B and C may both also be considered to be "wealthy" at 60, in the sense that they have "invested" in their children who may provide for them, in more ways than just financial. In the second annual Modern Wealth Index from Charles Schwab, 62% of Americans were cited as indicating that "spending time with family was what made them feel 'wealthy'".

   The question to be asked is: Should there perhaps be a wealth tax on the benefit of this "investment", i.e., in children? (This question is somewhat dramatic, but it illustrates the point.)

2. Even if assets are considered to be the measurement of wealth, surely this is a fictitious measure until such time as those assets are realised or transferred to someone else. This can be demonstrated by way of another dramatic example, but which nevertheless illustrates the point:

If person A had invested in Steinhoff shares throughout his or her 40 years of saving, they would have qualified to pay wealth tax on the "value" of those shares had such a tax existed. However, where those shares were perhaps worth R240 000 on 28 February 2017 (annual wealth tax payable if it had been in place), by 28 February 2018 those same shares were worth around R5 000. The wealth was not "real".

This example is not unique as all shares, the value of our currency and the value of property are all subject to wide fluctuations in value due to economic and political influences. Consider also that in 2011, US$1 equalled ZAR7. Now US$1 equals between ZAR14 and ZAR15 depending on the day of the week. South Africans have thus seen their wealth, in global terms, more than halve over the period. The impact of South Africa's inflation rate on the value of assets is also relevant to this discussion.

On what is an annual wealth tax to be levied?
The majority of the wealth in South Africa lies in retirement funds. Should these be exempted from the wealth tax? And if they are, would it be reasonable to exempt person A and his spouse from an annual wealth tax if they had put their money into a retirement fund but to tax them if they had chosen to keep their money in the bank? For the sake of adhering to the basic tax principle of equity surely either such funds should be taxed or money in the bank should not. However, in the Davis Tax Committee (DTC) Wealth Tax report (issued March 2018) the point is made that, at the beginning of 2018, there were 6.79 million South Africans who were members of retirement funds. Of these, 5 million earned below the UIF ceiling of R178 000 per year and of these, 3 million earned below the income tax threshold at the time, R75 000. These are hardly "wealthy" people.

The Davis Tax Committee report

The DTC Report highlighted the fact that wealth and income disparities (measured through the Gini coefficient) between South Africa's wealthy and poor are amongst the highest in the world and that not addressing the problem of poverty in the country has a high probability of leading to social unrest.

In looking at wealth taxes in general as one of the solutions the DTC Report, however, set out the many problems associated with them, including details of why a number of countries have abandoned such taxes – from 1990 to 2017 eight out of twelve OECD countries. India, a BRICS country like South Africa, abandoned its annual wealth tax in 2015. It should be noted that China and Brazil also do not currently have an annual wealth tax.

The factors leading to abandonment of wealth taxes in other tax regimes are stated as including the following:

- The fact that the administrative costs tend to exceed the tax collected
- The implementation of the tax has led to migration of the wealthy
- The valuation of assets is too difficult and expensive to perform
- The increased incentive of the wealthy to 'hide' assets leading to decreased tax morality amongst this group, overall

In addition, the cash flow impact of an annual wealth tax can be distortive to an economy. It can potentially force the disposal of productive assets or change investment decisions – works of art and retirement funds are often exempted causing a move from, say, land or shares (usually included) to these assets.

The DTC Report ultimately concluded that South Africa's current wealth taxes, which comprise estate duty, donations tax, transfer duty on immovable property and securities transfer tax on share transfers, are adequate. However, estate duty and donations tax, in particular, need to be administered more effectively by SARS so as to ensure the full taxes are collected. In addition, SARS should simultaneously collect information on the value of assets held by South African taxpayers, through the mechanism of the tax return, before considering any change to the current wealth tax regime.

The most recent proposal

On 29 April 2019 an article was published in the academic journal *The Conversation*, which proposed the implementation of an annual wealth tax on South Africa's "wealthy". The article was then widely distributed via social media. The article was based on a chapter of a book called *The state of the nation: poverty & inequality: diagnosis, prognosis and responses* edited by Crain Soudien, Vasu Reddy and Ingrid Woolard and published by HSRC. The specific chapter referred to in the article was prepared by Samson Mbewe, Ingrid Woolard and Dennis Davis.

The article is somewhat surprising as Ingrid Woolard and Judge Davis sit on the DTC and were heavily involved in preparing the DTC Wealth Tax report. The chapter provides the same arguments regarding the negative aspects of an annual wealth tax. It, however, also focuses on the fact that with wealth comes power and influence.

In line with the conclusion of the chapter, the article advises that the authors of the chapter *"propose that the South African Government should consider creating an annual net wealth tax with three objectives. The first would be to collect reliable wealth data. This will reveal what people own and enhance the integrity of the income tax system by allowing SARS to compare people's income and wealth. The second would be to contribute towards curbing* *wealth inequality, albeit imperfectly. The third would be to generate government revenue, though we stress that international evidence suggests this is generally low".*

The response

On the first point, as suggested by the DTC, SARS could achieve this objective by requiring such information to be provided on the annual tax return, which currently asks for details of assets at cost but could ask for them at estimated current value. Non-disclosure of any information on a tax return can lead to non-prescription of the tax return, penalties, interest and potential criminal sanction. This should be sufficient incentive for taxpayers to provide the information accurately, especially if there is no threat of an annual wealth tax.

On the second point, the chapter clearly states that *"a wealth tax will not solve South Africa's inequality problem."*

On this point the chapter also states: *"It is clear from international evidence that the revenue from net wealth taxes is generally low, even in comparison with other wealth taxes such as inheritance and estate taxes".*

On this basis, one has to question whether the only reason why the authors reach the conclusion that they do is due to the argument regarding power and influence, at which point one needs to ask how much wealth is needed to wield this level of power? In the example above, might it be A that has such power? Or could it be D? In addition, would an annual wealth tax really change the balance of this power, in any event?

Whilst no one can deny the fact that there is a huge amount of poverty in South Africa (whilst 10% of the people own 90% of the wealth, 80% of the people have no wealth and there is virtually no middle class (the remaining 10%)) and that these imbalances need to be addressed immediately, the DTC report set out many other, far more effective, methods that the government may adopt.

Furthermore, in his article entitled "The Missing Middle" in the 20 June 2019 edition of the *Financial Mail*, Prof Haroon Bhorat (professor of Economics and director at the Development Policy Research Unit at the University of Cape Town) concludes:

"The missing middle in wage distribution is the new form of inequality in the country. It is representative of a failed schooling system, a sectoral growth path not creating enough medium-skilled jobs, and one that remains threatened by the onset of the fourth industrial revolution.

Engendering a growth strategy that creates a large number of jobs for workers in the middle of the distribution through, for example, labour-intensive manufacturing, remains at the heart of SA's long-run economic development."

Professor Bhorat makes no mention of a wealth tax as part of the solution, probably because, as demonstrated above, such a tax will simply add administrative strain to an already strained tax administration, collect little additional revenue, and add little to addressing inequality, anyway.

According to the South Africa Wealth Report 2019 issued by The AfrAsia Bank, $649 billion in private wealth is held in South Africa by 39 200 South Africans who have net assets of $1 million or more and 2070 South Africans who have net assets of $10 million or more. This number has decreased from 46 800 "wealthy" in South Africa in 2014 (according to the chapter). This decrease, according to the AfrAsia report, is due partly to emigration (and this is taking place even before an annual wealth tax is proposed to be implemented) and partly due to the fact that the South African Rand has deteriorated.

New proposal

The proposal to implement an annual wealth tax could be due to the political need to be seen to penalise the rich to appease the poor, in order to maintain social stability, and/or to potentially shift the balance of power. These are both noble causes. However, it is clear that the plight of the poor will not be significantly assisted by such a tax in the long run and they might even be detrimentally affected by impoverishing the country further.

It is, thus, proposed that further pondering on an annual wealth tax should cease and that the energy that would go into further investigation of such a tax should be put into collecting current wealth taxes more effectively (SARS) and finding the courage to make policy changes that will add to the number of jobs and improve education and health in the country (Government and business). Energy expended in this manner may enable the poor to move out of their poverty with pride and the knowledge of their own potential to become "wealthy".

IMPENDING CHANGES TO THE TAXATION OF FOREIGN EMPLOYMENT

15 minutes CPD

▸ **ARLETTE MANYI,** Arlette.Manyi@firstrand.co.za

How will the capped foreign employment income exemption work in practice? Is tax emigration the only option for South Africans working abroad? Our article takes us through the history and the remaining questions around this exemption and its now limited application.

"The capped exemption means that tax residents who earn foreign remuneration in excess of R1 million are taxable on the portion that exceeds this cap."

South Africa has a residency-based system of taxation, in terms of which South African tax residents are taxed on their worldwide income. Thus, foreign earned employment income, for services rendered outside South Africa, is taxable in South Africa, unless exempted by inter alia legislative provisions.

The foreign employment income tax exemption, contained in section 10(1)(o)(ii) of the Income Tax Act, exempts (from South African tax) foreign employment income received by a South African tax resident for services rendered outside South Africa, where specified criteria are satisfied. The services must have been rendered for or on behalf of any employer, the individual must have been outside South Africa for a period or periods exceeding 183 full days (in aggregate) during any 12-month period and there must have been one continuous period exceeding 60 full days during that 12-month period.

When releasing the Draft Taxation Laws Amendment Bill, 2017, for public comment, National Treasury announced its intention to repeal the foreign service exemption provision. This announcement marks the start of a highly contentious cloud of uncertainty that has plagued this provision to date. Following extensive and robust consultation with the public on this proposal, the Taxation Laws Amendment Act, No. 17 of 2017, was promulgated in December 2017, and it contained an amendment as opposed to a repeal of this provision, by introducing a monetary cap on the application of the exemption.

In its revised form, only the first R1 million of a South African tax resident's foreign remuneration qualifies to be exempt from South African income tax. The criteria to be satisfied to qualify for the exemption remain unchanged, i.e., the individual must have been physically rendering services outside of South Africa for 183 days (in aggregate) in a 12-month period, with more than 60 of these days being continuous.

Foreign tax credits to the rescue?

The capped exemption means that South African tax residents who earn foreign remuneration in excess of R1 million are taxable on the portion that exceeds this cap. Individuals impacted by this legislation, who have a South African income tax liability on so much of their foreign earnings as exceed the cap, may find themselves in a double tax situation. This would mean that the same earnings are taxable both in South Africa and the country in which the foreign earnings were sourced or the services rendered.

Relief from such a double tax position may be available to these South African tax residents in the form of foreign tax credits – for foreign taxes paid on their foreign earnings – under section 6quat of the Income Tax Act. Section 6quat provides that foreign tax credits may be claimed to the extent that the foreign taxes are "paid or proved to be payable" in the foreign jurisdiction. This effectively means that such credits may only be available where affected tax payers provide adequate proof of the foreign taxes paid in respect of the foreign earnings subjected to double tax. Alternatively they are available where acceptable proof of a foreign tax liability on this income can be provided. Lack of clarity exists regarding what would constitute sufficient proof of foreign taxes paid or proof of foreign tax liability, where taxes have not yet been paid at the time the foreign tax credit is claimed. It is therefore questionable whether South African taxpayers impacted by this will be in a position to provide adequate and or timely proof of foreign taxes paid or the existence of a foreign liability on the foreign earnings in question. This lack of clarity is due to several factors briefly listed here below.

- Self-assessment taxes, such as personal income tax, do not require assessment from the revenue authorities in some countries such as the United Kingdom. Taxpayers earning foreign income from such jurisdictions will experience substantial difficulty in obtaining proof of foreign taxes payable.
- A substantial number of African countries do not have personal income tax filing obligations. This in effect means that individuals may not be in possession of assessments by revenue authorities to prove that foreign taxes have in fact been paid. It is not clear what form of alternative proof of the foreign taxes paid on a self-assessment basis will be accepted by SARS. Proof of payroll withholding may not be accepted, as payroll taxes are not considered to be a final tax in numerous foreign tax jurisdictions.
- The difference in tax years between countries is another added complexity that may mean the required proof of foreign taxes paid, or an assessment from revenue authorities, may not be available at the time of claiming the foreign tax credits.

Clarity is therefore required by taxpayers on what would constitute sufficient proof of foreign taxes paid or proof of a foreign tax liability, where taxes have not yet been paid at the time the foreign tax credits are claimed. Though this problem currently exists, it may be magnified by the introduction of the capped provision, due to the increased need for relief from double taxes that is anticipated.

Should the foreign tax credit be successfully claimed by taxpayers, they will be limited to the amount of tax the individual would have paid had the income been earned in South Africa. Further to this, no tax credit will be available for tax paid in a foreign jurisdiction if it does not qualify as a tax in South Africa, such as social security.

An individual seeking relief from double taxation by claiming foreign tax credits under section 6quat can ordinarily only do so when submitting a tax return. A welcome proposal was made in 2019 by National Treasury that will provide substantial cash flow relief for South African employers impacted by this amended legislation. Those who have a withholding tax obligation in respect of their employees' foreign remuneration will be able to claim these foreign tax credits via the payrolls. Their monthly local employees' tax withholding can be reduced by the amount of foreign taxes withheld on employment income in the foreign jurisdiction. However, lack of clarity exists around whether tax directives will be required by employers seeking such relief, whether such applications have to be made annually or monthly, as well as the requirements to be satisfied by employers in applying for such a directive.

Ceasing South African tax residency

The present amendment to the foreign service exemption may have a substantial impact on South African tax residents earning foreign remuneration in excess of R1 million. Breaking or ceasing South African tax residency has become a highly publicised and seemingly attractive consideration to those looking to fall outside of the negative impact that this legislative amendment could have on their tax affairs. However, ceasing South African tax residency can be a complex and expensive escape from the impact of this amendment. It is thus highly advisable that sound and professional tax advice is sought by South African tax residents considering this.

"With the effective date of this amended provision less than a year away, it is highly concerning that substantial uncertainty still exists."

Increased media coverage on this amendment has led to substantial inaccurate communications and advice being published on the matter. Some of these inaccurate communications have used the two concepts of financial emigration for purposes of South African exchange control and of ceasing South African tax residency synonymously, which is not necessarily correct. These two concepts are not synonymous and have different implications. In the context of the amended foreign service exemption, only ceasing or breaking South African tax residency may be directly relevant in potentially resulting in an individual falling outside the net of application of this now revised and capped provision.

Double taxation relief?

It will be interesting to see what form of relief will be available to South African tax residents impacted by this amended provision. Relief may be available under South Africa's extensive regime of Double Taxation Agreements, where the South African domestic legislation does not provide the required relief. It is questionable whether any relief will be available outside of possibly breaking an individual's tax residency status from South Africa through the tie-breaker clause.

Remaining uncertainty

With the effective date of this amended provision less than a year away, it is highly concerning that substantial uncertainty still exists amongst taxpayers, their affected employers, tax practitioners and the tax community at large.

LATEST GLOBAL TRENDS IN PERMANENT ESTABLISHMENTS

► **NATALIE MACDONALD-SPENCE,** natalie@taxgenius.co.za

Our article deals with the changing environment in which multinational enterprises operate and the effect this has had on the relevance of permanent establishments.

Tax authorities worldwide are increasingly focusing attention on multinational enterprise business activities and permanent establishments. For many years, permanent establishments have been a controversial topic for a number of reasons. This is, for example, due to claims that the concept of a permanent establishment is outdated, as well as the opportunities for artificial avoidance of a permanent establishment by various loopholes created by the definition of a permanent establishment. Such loopholes were typically exploited through the use of seemingly independent agents, splitting up of contracts, as well as fragmentation of activities to fall within the definition of activities that were "auxiliary" or "preparatory" in nature within the definition of article 5 of the 2017 Model Tax Convention on Income and Capital (the MTC) of the Organisation for Economic Co-operation and Development (OECD).

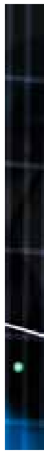
Of course, as we are in the era of the Fourth Industrial Revolution, technology is advancing at a rapid pace, which enables multinationals to conduct business electronically worldwide, provide electronic services in almost any jurisdiction and engage in online marketing. Their employees are able to work remotely anywhere in the world. In such circumstances, it is often not even necessary for an enterprise to have a fixed place of business at its disposal. In some instances, services and / or products can be offered completely online. This creates problems for countries as it is difficult to tax such business activities: a digital business engaging in such activities often does not fall within the definition of a "permanent establishment".

Permanent establishments

The business profits of a non-tax resident enterprise are not usually taxed in the source state unless the enterprise has developed a taxable presence in the source state, by way of its business activities in the source state creating a permanent establishment. Article 5(1) of the OECD MTC provides that a permanent establishment means "a fixed place of business through which the business of an enterprise is wholly or partly carried on".

In terms of the OECD Model Tax Convention Commentary, there must be a "fixed" place of business, in that there must be a degree of permanence to such place of business, and the place of business must be at the disposal of the enterprise. There must of course be business activities conducted at the fixed place of business, which can be partly or wholly carried on. Typically, "permanence" would, in terms of the OECD Model Tax Convention Commentary, mean a period of business for more than six months, although the Commentary does clarify that there is no set rule for a time period to indicate permanency, and the facts and circumstances of each matter should be examined prior to conducting business in a target country. In the Indian tax case of *Formula One World Championship Ltd vs Commissioner of Income Tax,* the Supreme Court held that the time period of three days of the year, for which Formula One World Championship had a race circuit in India at its disposal, was not entirely significant in examining the permanence of its business activities at the circuit. Rather the repetitive use of the circuit on an annual basis over the preceding five years indicated a degree of permanence and thus, together with the other facts of the case, Formula One World Championship was found by the court to have established a permanent establishment in India.

Articles 5(2) and 5(3) of the OECD MTC go on to list a number of activities that are regarded as permanent establishments, whilst article 5(4) lists a few deemed exclusions to the concept of a permanent establishment. Following the recommendations contained in the Base Erosion and Profit Shifting (BEPS) Action Report, the Multilateral Instrument has implemented a narrower version of article 5(4) of the OECD MTC.



Multilateral instrument

The Multilateral Instrument was developed by the OECD pursuant to the recommendations contained in action 15 of the BEPS Report. It was previously acknowledged that to manually update bilateral treaty agreements between countries to reflect changes recommended by the OECD would be a time consuming and onerous process, which could potentially take years to implement between contracting states. The Multilateral Instrument is an effective means to update bilateral tax treaties between states who are signatories to the Multilateral Instrument. As at 28 June 2019, 89 jurisdictions were signatories to the Multilateral Instrument and a further six jurisdictions have expressed intent to become signatories to the Multilateral Instrument. For clarity, the Multilateral Instrument will only update covered tax treaties, being the bilateral treaties between countries who have signed the Multilateral Instrument. The Multilateral Instrument cannot update a bilateral treaty where the parties or one party to the treaty is not a signatory to the Multilateral Instrument.

The definition of a PE has also been broadened by article 12 (not adopted by South Africa) of the Multilateral Instrument. A PE no longer simply arises where a dependent agent has the authority to conclude contracts on behalf of the enterprise. It will also arise where an agent continually plays a principal role in the conclusion of contracts or leading to the conclusion of contracts, and such contracts are concluded without substantial or any modification by the enterprise concerned. This targets artificial use of supposedly independent agents.

Action 7 of the BEPS Report targeted the artificial avoidance of PE status through the fragmentation of contracts, by recommending the narrowing of the provisions of article 5(4) of the OECD MTC. Article 13 of the Multilateral Instrument thus offered two options to be implemented, option B (which South Africa did not adopt) and option A, which replaces the prior version of article 5(4) of the OECD MTC. This narrowed the exceptions offered in article 5(4), unless each of and / or the whole of the activities are auxiliary or preparatory in nature. Furthermore, South Africa reserved its right not to adopt the changes proposed in Articles 12 and 14 of the Multilateral Instrument. As a result, all of the activities of related parties must be considered as a whole, to determine whether aspects of the activities may be auxiliary or preparatory in nature.

The challenges posed by the digital economy and the digital PE

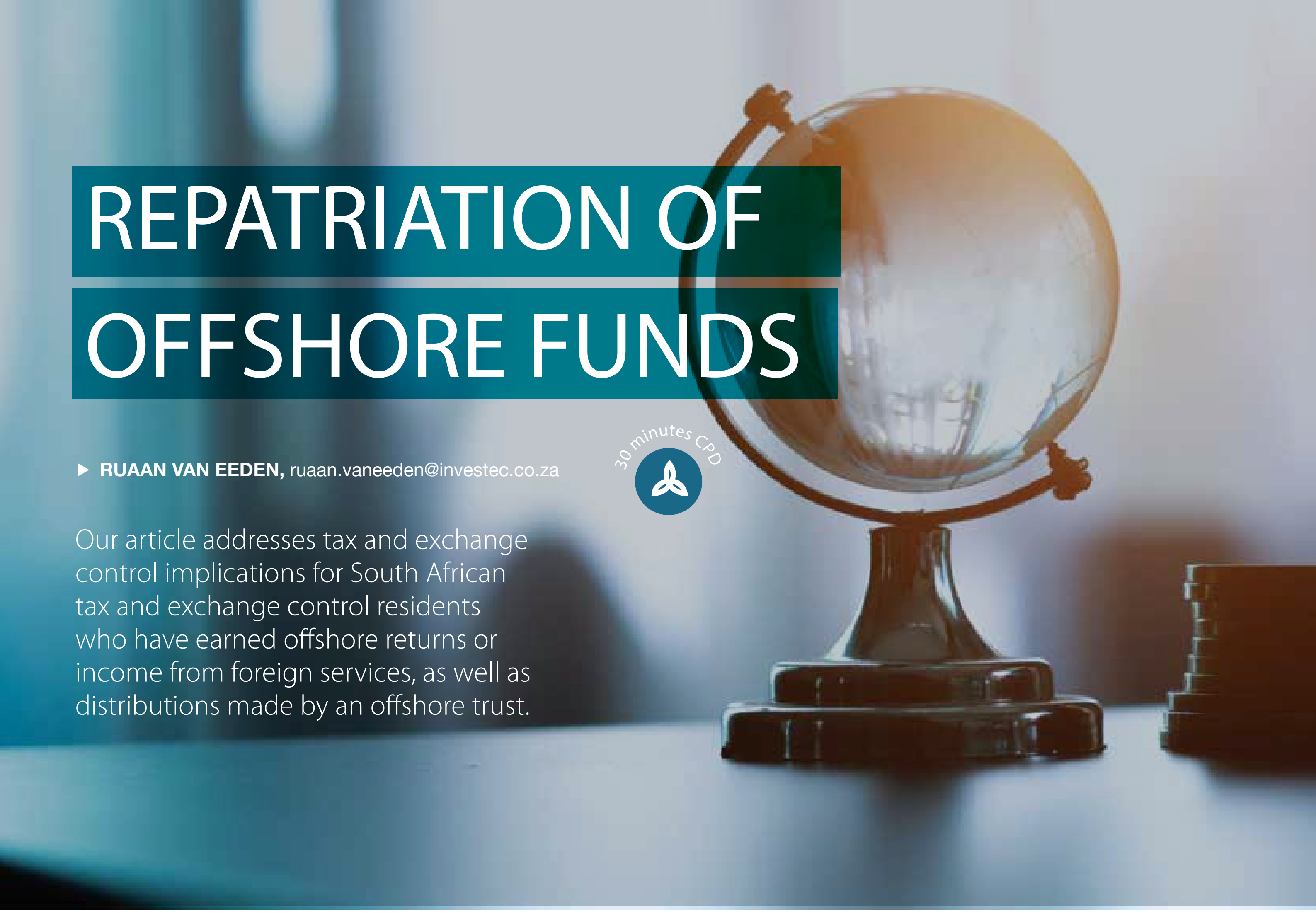
In the OECD's recent May 2019 Inclusive Framework publication on the BEPS Project *(Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy)*, it is mentioned that many countries are dissatisfied with the current system of taxation whereby the business profits of a multinational enterprise are only taxed if it has a physical permanent establishment in the state concerned. The problem arises in that many multinational enterprises are able to take part in the economic activities of various states, without having a fixed place of business in these countries. In this way they escape the tax net of the states in which such multinationals are conducting digital business activities. The result is that the jurisdictional nexus is difficult to prove, and furthermore revenue from such activities is either at risk of double non-taxation or, in other cases, subject to double taxation, especially where the attribution of profits is not correctly determined. It is expected that proposals for a final solution will be compiled by the OECD in the course of 2020. In the interim, the OECD has highlighted the risk in countries unilaterally implementing domestic legislation to target the profits from digital permanent establishments. Such unilateral actions create the risk of lack of co-ordination between countries and the treatment of the taxation of profits from digital businesses, which may ultimately result in double taxation of such profits, which the OECD seeks to prevent.

"Permanent establishments remain a risk for any enterprise that seeks to conduct business in any other country."

As technology advances at a rapid pace, including through the use of block chain technology (which at present is largely difficult to monitor) and artificial intelligence, it will no doubt become increasingly difficult to ascertain where value creation truly lies, i.e., where digital transactions occur. It will be difficult to not only ascertain the true source of the income but where in which tax jurisdiction it actually occurs and what aspect of the digital transaction creates value. It is hopeful that the OECD will address these aspects in its report due to be compiled in 2020. It should contain recommendations on how to ascertain where value is created and how states can work together in ensuring fair allocation of taxing rights. It is a concern of the writer that, for developing countries, attempts to ascertain the source of digital transactions as well as determine where value is created may require significant administration and advanced technology. Compliance will no doubt be a burden on developing countries, as will be obtaining the skills and technology to identify taxable events by multinationals conducting business in the digital economy of a developing country.

Beware the risks

Permanent establishments remain a risk for any enterprise that seeks to conduct business in any other country. With the changes brought about by the Multilateral Instrument, tax advisers now need to not only check whether a bilateral agreement is in place between the countries concerned, but also whether both countries are also parties to the Multilateral Instrument. With the digital economy on the agenda of many countries, multinationals would be well advised to seek professional advice prior to conducting any business, including that of an electronic nature, in any other country. This will ensure that the risks of it creating a permanent establishment in the other country are mitigated.



REPATRIATION OF OFFSHORE FUNDS

30 minutes CPD

▶ **RUAAN VAN EEDEN,** ruaan.vaneeden@investec.co.za

Our article addresses tax and exchange control implications for South African tax and exchange control residents who have earned offshore returns or income from foreign services, as well as distributions made by an offshore trust.

Repatriation of offshore funds needs to be considered from both a tax and exchange control perspective. In practice, however, it is also a psychological predicament for South African residents, given the cartwheeling nature of the Rand, coupled with economic and political uncertainty. Invariably these factors result in the smart-money remaining offshore in hard currency.

On this particular topic, there is often a tax and exchange control naivety, which manifests in a basic misunderstanding of the mandates given to SARS and the Financial Surveillance Department (FSD) of the South African Reserve Bank.

In simple terms, SARS is tasked with the collection of taxes and enforcement of tax legislation, whether or not funds are repatriated to South Africa, whereas the FSD's mandate is to police the cross-border flow of funds, without regard to the tax consequences of a particular transaction. There is an element of cross-pollination between the two departments, especially on information flow but a mutually exclusive relationship exists pertaining to the issue of repatriation of funds to South Africa.

Following on the above, the purpose of this article is to address the typical tax and exchange control implications for individuals who have invested funds offshore and earned returns, earned income from foreign services, as well as distributions made by an offshore trust in favour of individuals who are South African tax and exchange control residents. As will be unpacked in this article, a material level of FSD subjectivity on repatriation of offshore funds creeps in, as it relates to South African tax and exchange control resident beneficiaries of an offshore trust.

Individuals investing offshore

Individuals over the age of 18 and in good standing with SARS are allowed to externalise funds from South Africa utilising their respective foreign investment allowances, up to R10 million per annum and special allowances, in excess of R10 million. Individuals may further utilise their respective discretionary allowances of up to R1 million per year, without the need to obtain a tax clearance certificate from SARS.

Important to understand, and a common theme in relation to these allowances, is that no FSD obligation exists to

repatriate active or passive income, as well as capital gains generated through legitimately externalised funds, back to South Africa. It is not necessary to provide an overly technical analysis of the aforementioned FSD policy save to state that, in order to enjoy the dispensation to retain funds offshore, the initial investment must have been made through the utilisation of legitimate processes laid down by the FSD and authorised dealers.

Having regard to the above, an individual utilising his or her foreign investment allowances, special allowances or discretionary allowances may legitimately retain funds offshore. The question that arises is, should they? Notwithstanding the tax consequences, which will be discussed below, there are various non-tax benefits of retaining funds offshore, including but not limited to an effective ZAR-hedge and the ability to freely deploy capital offshore without having to go through a potentially cumbersome FSD process.

From a tax perspective various matters need to be considered, which are distinct from the concept of physical repatriation of offshore funds. On the assumption that the relevant individuals are 'resident', as defined in section 1 of the Income Tax Act, he or she will be subject to tax in South Africa, on a worldwide basis, on the earlier of receipt or accrual. Physical repatriation of funds is therefore not a prerequisite to taxation in South Africa, as the amounts would in most cases have already 'accrued' to the relevant individual. The individual could therefore end up in a position of having to settle the attendant South African tax liabilities with domestic ZAR-based funds, where a decision is taken to retain funds offshore.

It follows that, depending on the nature of the offshore returns (and the list below is not exhaustive), the individual would need to consider the following potential tax consequences:

- Gains from the disposal of the individual's investments held on capital account will likely be subject to a maximum effective rate of 18%, whereas investments disposed of with a profit motive will attract a South African tax liability at the individual's marginal tax rate. The individual could potentially rely on the so-called 'participation exemption' where he or she held at least 10% of the equity shares in a foreign company and the disposal is at market value and to an un-connected non-resident. In that case the capital gain is excluded for South African tax purposes.
- Foreign dividends will be taxed at a maximum effective rate of 20%, unless the individual is able to rely on the so-called 'participation exemption', by holding at least 10% of the equity shares and voting rights in a foreign company, in which case the foreign dividends will be exempt from normal tax in South Africa.
- Other types of income, such as foreign interest, rental income and profits from a permanent establishment offshore, would generally be taxable at the individual's marginal tax rate.

Individuals rendering services offshore

With effect from 1 July 1997, South African exchange control residents physically rendering services abroad are not obliged to repatriate income earned in respect of those services back to South Africa.

From a South African tax perspective, the individual may have been able to claim an exemption under section 10(1)(o)(ii) of the Act, a provision which is not dependent on the physical repatriation of funds from offshore.

With effect from 1 March 2020, the physical repatriation of funds from offshore may become more relevant, particularly where South African tax residents physically rendering services offshore are not able to avoid the potential 'top up' of South African taxation where their remuneration exceeds the first R1 million exemption threshold.

The affected taxpayer would need to utilise domestic funds or repatriate foreign earnings back to South Africa in order to settle the potential South African tax liabilities, which is not ideal.

Distributions from an offshore trust

The repatriation of offshore funds becomes more complicated as it relates to the exercise of an offshore trustee's discretion in favour of South African exchange control resident beneficiaries, in the case of beneficiaries who have not formally emigrated from South Africa.

> *"It is important for South African tax and exchange control residents to be aware of the various FSD and SARS regulations affecting offshore funds."*

It is quite common in practice for trustees of offshore trusts to ascertain from the South African exchange control resident beneficiary where distributions should be deposited. A common misconception is that South African exchange control resident beneficiaries of offshore trusts are automatically allowed to retain such distributed funds offshore.

Current FSD policy only allows a South African exchange control resident beneficiary to retain the distributed funds offshore if that beneficiary is also the original settlor or funder of the offshore trust and externalised funds legitimately through his or her foreign investment allowance or discretionary allowance, to settle or fund the offshore trust. As stated above, a certain level of subjectivity creeps in for the balance of South African exchange control resident beneficiaries, due to the fact that they are not permitted to automatically retain the distributions offshore. Instead, upfront approval must be obtained from the FSD to retain any distributions offshore, based on subjective policy applicable at that point in time.

In general, the FSD currently allows for so-called 'third generation planning' whereby distribution to South African resident beneficiaries, other than the settlor, are allowed to be retained offshore subject to upfront approval being obtained. In essence, upon upfront FSD approval being obtained, the South African exchange control resident beneficiaries are availed similar treatment to that of the original settlor of the offshore trust and will be allowed to retain their respective distributions offshore. Similar to individuals investing directly abroad, retaining funds offshore provides an effective ZAR-hedge for the South African beneficiaries.

From a South African tax perspective, various and in many cases complex issues arise. Assuming the beneficiaries of the offshore trust are South African tax residents, it is important for beneficiaries to be able to distinguish between the different types of income or capital that a particular distribution is made up of. Offshore trustees generally segregate the different 'sources' or 'pots' from which a particular distribution is made, which is important, as it has a direct bearing on the disclosures required to be made to SARS and the rates at which a distribution should be taxed, if at all.

Again, the taxation principles are based on worldwide income and the earlier of receipt or accrual. This means that where a trustee exercises discretion in favour of a South African tax resident beneficiary to distribute trust income or capital, an accrual arises and, barring any further suspensive conditions attaching to that distribution, a declaration must be made to SARS. By applying the provisions of the Income Tax Act, the distribution will then either be subject to or potentially exempt from normal tax.

Although the scope of this article excludes an in-depth analysis on the taxation of offshore trust distributions, in general, the following considerations should be taken into account by South African tax resident beneficiaries:

- Segregation of income sources is important given that, in its absence, SARS would invariably argue that the relevant distribution should be taxed at the beneficiary's marginal tax rate.
- Whereas the distribution of trust corpus would likely not be subject to tax in South Africa, the distribution of amounts sourced from the foreign dividend 'pot' or the capital gains 'pot', will likely be subject to tax at a rate of 20% and a maximum effective rate of 18%, respectively. The ability to utilise the foreign dividend and capital gain participation exemptions has largely been sterilised by way of recent amendments to the Income Tax Act.

Be aware

It is important for South African tax and exchange control residents to be aware of the various FSD and SARS regulations affecting offshore funds, as it pertains to the repatriation and taxation of these funds. They should ensure that repatriation and taxation is each dealt with on a mutually exclusive basis.

The Tax Faculty

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2019 EFFECTIVE HANDLING OF SARS QUERIES, AUDITS AND DISPUTES

The focus of this workshop will be on the administrative aspects of the dispute and controversy process, from the initial SARS query to the SARS appeals process.

WORKSHOP

5.5 HOURS

OVERVIEW

Issues under discussion will be the law itself, including the Tax Administration Act and the rules of dispute resolution.

The workshop will specifically deal with the following:

- Responding to SARS where a request for verification of the return, or an IT14SD was received
- How to correct errors made in a return
- Responding to requests for relevant material during the verification or audit process, and the document detailing the outcome of the audit
- The dispute process itself, including:
  - » when and how the process must be started
  - » what to do when the process is started late
  - » the request for reasons and the delivery of the objection
  - » dealing with the notice of invalid objection
  - » the appeal against the assessment
  - » electing the alternate dispute resolution or set down of the appeal before the tax board or tax court
- What to do when SARS doesn't adhere to the timelines
- Alternatives to the objection and appeal process

PRESENTERS

Piet Nel
CA (SA)

REGIONS

10 Sep	|	Johannesburg
11 Sep	|	Pretoria
12 Sep	|	Kempton Park
17 Sep	|	Durban
18 Sep	|	Cape Town
19 Sep	|	Port Elizabeth
26 Sep	|	Webinar

30 minutes CPD

CHANGING THE RULES OF THE GAME: ECONOMIC SUBSTANCE & HARMFUL PREFERENTIAL REGIMES

CYNTHIA FOX, cynthia.fox@kpmg.co.za

New legislation requiring adequate economic substance and annual reporting has changed the rules of the game in key offshore jurisdictions. Our article provides some background information on harmful preferential regimes and updates on the state of play.

The Economic and Financial Affairs Council (ECOFIN) of the European Union (EU) expanded its efforts to persuade jurisdictions to find solutions to the issues identified by the EU Code of Conduct Group (COCG) during December 2017 in relation to tax transparency, fair taxation and implementation of anti-Base Erosion and Profit Shifting (BEPS) standards.

The EU "tax haven" blacklist was also created in December 2017 with the aim of encouraging tax transparency and fair tax competition while also discouraging tax evasion, tax fraud and tax avoidance. Jurisdictions are blacklisted if they are identified as being "non-cooperative" under certain criteria which include inter alia transparency, exchange of information standards, fair tax competition and no harmful tax practices or regimes. Those jurisdictions that commit to change their rules by a set deadline are removed from the EU blacklist.

In March 2019 Bermuda was one of the 10 jurisdictions to be added to the EU blacklist by ECOFIN for failing to comply with good tax governance standards, only to be removed again in May 2019.

As at 28 May 2019, 12 jurisdictions remained on the EU blacklist: American Samoa, Belize, Dominica, Fiji, Guam, Marshall Islands, Oman, Samoa, Trinidad and Tobago, United Arab Emirates, US Virgin Islands and Vanuatu.

Blacklisted jurisdictions face reputational damage, EU sanctions (although no sanctions have yet been agreed on by EU member states) and limited access to EU funding.

Bermuda has now been placed on the EU grey list as it is still required by the EU to complete certain tasks in relation to addressing economic substance concerns in relation to collective investment funds. In essence the EU grey list is an EU watch list for jurisdictions that have taken various positive steps to comply with the EU requirements but still need to complete certain tasks by the end of 2019 to meet their commitments to the EU in order to avoid being blacklisted next year. These jurisdictions will be closely monitored by the EU until they successfully follow through with their commitments.

With the commitment made by Mauritius to reform its tax regime and remove all preferential tax measures that the EU considers harmful by the end of 2019, Mauritius avoided being blacklisted. However, Mauritius remains on the EU's grey list.

The EU noted with concern that in certain jurisdictions harmful preferential tax regimes had merely been replaced by measures of a similar effect and cautioned that no further replacement with such measures or delays will be accepted when their assessment is performed at the beginning of 2020. Mauritius appears to be one of the aforementioned jurisdictions referred to by the EU. Mauritius has recently introduced tax changes which include the replacement of the category 1 Global Business Licence (GBL1) regime with a general regime giving 80% exemption for foreign sourced income and the GBL2 company regime with a new Authorised Company regime.

A GBL2 company is a company that is incorporated in Mauritius or registered as a branch of a foreign company. It can only conduct business with persons who are resident outside

Mauritius. It is exempt from tax in Mauritius and is not a tax resident of Mauritius (as it would only receive income from a source outside Mauritius). Strict confidentiality requirements also surround the disclosure of information relating to GBL2 companies.

While the annual filing requirements in respect of an Authorised Company appear to be enhanced when compared to those of a GBL2 company, the Authorised Company regime appears to be mainly similar to that of the GBL2 regime. An Authorised Company is also a Mauritian incorporated company that must conduct its business outside Mauritius, as well as have its place of effective management (POEM) outside Mauritius, i.e., it must also not be tax resident in Mauritius. As an Authorised Company is not a Mauritian tax resident, its foreign source income would fall outside the scope of the Mauritian tax system and accordingly not be subject to tax in Mauritius.

While a GBL2 company was only required to file a financial summary with the Mauritius Financial Services Commission, an Authorised Company is also required to file an annual tax return with the Mauritius Revenue Authority within six months of its year end.

With the requirement for the company's tax residency to be outside Mauritius under both the GBL2 and Authorised Company regimes, no substance requirements exist in Mauritius for a GBL2 or an Authorised Company even though they are Mauritian incorporated companies. It follows that the company would need to register for tax in the jurisdiction where it is tax resident and comply with any requirements of that particular jurisdiction. Under the GBL2 regime such registration for tax by the company, in the jurisdiction of its tax residency, was never monitored and many GBL2 companies were simply not registered for tax in any jurisdiction. It remains to be seen what further measures Mauritius will introduce to address the EU's concerns. These concerns are that harmful preferential tax regimes were merely replaced by measures of a similar effect prior to the EU's assessment at the beginning of 2020.

So how much substance is enough to ensure that the objectives are met?

During June 2018, the COCG published the Code of Conduct (Business Taxation) Guidance which sets out that the expected substance requirements for various geographically mobile activities should mirror those used by the OECD's Forum on Harmful Tax Practices.

Accordingly, economic substance legislation, independently drafted by each of the governments of Bermuda, British Virgin Islands, Cayman Islands, Isle of Man, Jersey, Guernsey, Mauritius, Bahamas and Seychelles, was enacted. This legislation became effective on 1 January 2019 and introduced enhanced economic substance requirements for tax purposes in order for these jurisdictions to avoid reputational damage and to meet their commitments to the EU as well as their obligations under the OECD's BEPS (action 5), Harmful Tax Practices. A six-month grace period was provided to relevant entities in order for them to take steps to ensure their compliance by 1 July 2019.

The legislation has changed the rules of the game for groups managing, using and operating entities in key offshore jurisdictions. It requires entities carrying on specific types of business to demonstrate adequate economic substance in the relevant jurisdiction as well as to comply with certain annual reporting requirements.

The legislation applies to Relevant Entities that are conducting Relevant Activities. The scope of a Relevant Entity essentially includes domestic and foreign companies as well as partnerships incorporated or registered in the relevant jurisdiction. However, certain entities are carved-out as being a Relevant Entity, for example, an entity that is tax resident in another jurisdiction (that is not a no or nominal tax jurisdiction) by reason of its domicile, residence or other similar criteria. Each jurisdiction's legislation specifies that particular jurisdiction's Relevant Activities. Such activities would usually include banking, insurance, shipping, fund management, financing and leasing, headquarters, holding companies, intellectual property as well as distribution and service centres.

"The EU noted with concern that in certain jurisdictions harmful preferential tax regimes had merely been replaced by measures of a similar effect …"

Although the scope of the legislation varies from jurisdiction to jurisdiction, there are similarities between each jurisdiction's legislation. Generally speaking the legislation imposes five key requirements on a Relevant Entity that undertakes Relevant Activities in order to demonstrate its economic substance:

1. Direction and management: The entity will need to be directed and managed in the jurisdiction. This could be achieved by ensuring aspects such as the directors of the company possessing the necessary knowledge, skills and expertise to manage the company; conducting board meetings with the required frequency in the relevant jurisdiction; a quorum of directors being physically present at such meetings; maintaining minutes of the meetings in the relevant jurisdiction; and implementing strategic and key decisions in the jurisdiction are met.
2. Core income generating activities: The entity will need to demonstrate that the relevant core income generating activities applying to it have been undertaken in the jurisdiction, having regard to the level of income derived from the Relevant Activity. It should be noted that it is possible to outsource these core income generating activities to a service provider in the jurisdiction, provided that the entity will be able to monitor and control the carrying out of these activities. In such cases, the resources of the service provider will be taken into account in determining whether the core income generating activities requirement is met.
3. Adequate full-time and suitably qualified employees: The entity will be required to have an adequate number of suitably qualified employees in the jurisdiction.
4. Adequate expenditure: An adequate amount of operating expenditure will need to be incurred in the jurisdiction by the entity which is proportionate to the level of activity.
5. Adequate physical presence: The entity must maintain adequate physical presence in the jurisdiction: for example, the entity should have offices and facilities in the jurisdiction.

The requirements under 3, 4 and 5 above are not prescriptive. Therefore, what is considered to be adequate should be determined on a case-by-case basis taking into account the relevant facts and circumstances together with the Relevant Activities of the entity.

While there are some schools of thought that the aforementioned non-prescriptive test leaves the substance requirements being too weak, it is possible that as a result thereof a pure investment holding company could have a reduced level of substance requirements. Where relevant, each jurisdiction has issued guidance in this regard.

Compliance and penalties for non-compliance

Entities will be required to submit prescribed information on an annual basis to enable tax authorities to monitor whether they are complying with the relevant economic substance requirements.

Sanctions in respect of non-compliance include financial penalties that could become progressive where there is repeated failure to meet substance requirements with the ultimate sanction leading to the strike-off of the entity from the corporate registry.

Automatic exchange of information mechanisms that facilitate automatic notifications to foreign tax authorities regarding any company that is found to be in breach of the substance requirements may also be put to use.

What you can do next

Groups should assess their structures in order to identify any potential entities that are incorporated in jurisdictions that may give rise to compliance challenges.

Should such entities be identified, the purpose of the particular entity as well as whether the entity's existence is still required should be considered. To the extent that the entity is no longer required, the entity could be carved-out from the group. Where it is not possible for such a carve-out, the additional level of substance that is necessary for the entity to comply should be evaluated.

Aspects such as whether substance can be created for the entity or whether it can be outsourced, the costs versus benefits of maintaining the entity in the particular jurisdiction as opposed to migrating its residence or transferring its business to another jurisdiction should also be considered. Should the migration / transfer option be selected, it would be important to obtain an understanding of any potential commercial, legal, tax and other implications that would arise therefrom prior to its implementation.


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COMPLETING the corporate TAX RETURN

▶ **ADÉLE DE JAGER,** adele.dejager@bowmanslaw.com

Our article provides guidance on the information to be submitted when filing ITR14s, all supporting information necessary to ensure full and proper disclosure and requests to provide relevant material.

The completion of tax returns has become a challenge (and perhaps a headache) for many taxpayers. South Africa's corporate income tax return for companies (ITR14) has become well developed over the past number of years and requires detailed disclosure of the companies' tax position in order to allow for SARS to assess the taxpayer correctly.

Failure to disclose the correct information to SARS or adopt a position that has not been properly considered by the taxpayer may have dire implications for the taxpayer.

Submission of information to SARS as part of filing the tax return and the impact of prescription

A corporate taxpayer is required to file and submit its ITR14 12 months after the company's financial year-end. Supporting documents should be retained for a period of five years.

It is important to understand the information requirements to ensure all relevant supporting information is obtained and disclosed to SARS. Although SARS at this stage only has a limited list of required information to be submitted when filing the ITR14, the taxpayer should consider all supporting information necessary to ensure full and proper disclosure is made to SARS. In terms of section 46 of the Tax Administration Act, SARS is permitted to request a taxpayer to provide relevant material. Section 1 of the Tax Administration Act defines relevant material as "any information, document or thing that in the opinion of SARS is foreseeably relevant for the administration of a tax Act".

SARS currently requires only certain information to be submitted when filing the ITR14, which includes the taxpayer's AFS and IT10B returns. Where a company is dormant, the submission of AFS is optional. However, where a company forms part of a group that prepares a consolidated AFS, SARS now requires a copy of the consolidated AFS for the taxpayer's group to be submitted. Taxpayers therefore need to be very aware of what information is disclosed in the group AFS, and need to ensure that the disclosure in the group AFS is aligned to that of the individual statutory AFS prepared and submitted for the taxpayer.

Failure to submit the compulsory information will result in the tax return reflecting as outstanding and penalties for administrative non-compliance in terms of section 210 of the Tax Administration Act will be levied. These penalties can vary from R250 to R16 000, depending on the tax position of the company.

The prescription rules set out in section 99 of the Tax Administration Act may be ignored by SARS (in terms of section 99(2)) to the extent that an amount was not assessed for tax and the full amount of tax was not assessed due to fraud, misrepresentation or non-disclosure of material facts by a taxpayer. Stated differently, SARS will be able to issue income tax assessments beyond the standard prescription period of three years. SARS may in terms of section 99(4), by prior notice of 60 days, request a taxpayer to extend prescription by a period of three years in the case of an assessment by SARS. This therefore allows SARS a period of potentially six years in order to finalise an audit or investigation into the tax affairs of a company.

Taxpayers therefore need to prepare the ITR14 with great diligence to ensure they can rely on prescription.

Completing the ITR14

Insofar as completion of the ITR14 is concerned, taxpayers should carefully assess each question in the return. The manner in which a specific question is answered, will determine whether additional questions will be populated on the return. Should these questions not be answered correctly, there is a risk that SARS will not assess the taxpayer for the correct amount of tax, and accordingly SARS could rely on section 99(2) to argue prescription does not apply. The position will equally apply should certain amounts not be completed or disclosed correctly in the ITR14. Furthermore, where a taxpayer adopts an incorrect position in the tax return, SARS may levy understatement penalties according to the table provided for in section 223 of the Tax Administration Act.

Aspects for consideration

Is the company dormant?

SARS classifies a dormant company “as a company that has not actively traded for the full year of assessment”. Therefore, insofar as the company partially traded during the year of assessment, the company will not be regarded as a dormant company. This specifically needs to be considered in the context of companies that receive passive income during a year of assessment.

Did the company have any transactions or events which resulted in a locally sourced capital gain or loss?

Specific disclosure is required in the ITR14 where the company has transactions resulting in either a capital gain or loss during the year of assessment. Should the information not be disclosed in the ITR14, the company will not be assessed correctly by SARS. Similar to an assessed loss, SARS will carry forward the balance of capital losses available for set-off against future capital gains. Therefore, insofar as a capital loss arose during the year of assessment, the company may potentially forfeit this capital loss should it not be disclosed correctly in the tax return.

Did the company enter into any reportable arrangement?

Companies need to be aware of which transactions fall within the ambit of the reportable arrangement provisions set out in sections 34 to 39 of the Tax Administration Act, as well as sections 80M to 80T of the Income Tax Act. A transaction needs to be reported to SARS within 45 business days of the transaction becoming reportable (section 37 of the Tax Administration Act). The reportable arrangement number also needs to be provided in the ITR14.

Is the company a member of a multinational entity group as defined in the country-by-country regulations?

A taxpayer will need to carefully consider the meaning of a multinational entity MNE group as defined in the regulations, which will require a proper consideration of the operations of the entire group.

Was any foreign income received or accrued or did the company incur any foreign expenditure?

Again, a taxpayer will need to carefully assess the nature of cross-border income and expenditure. The ITR14 requires specific disclosure where transactions were entered into with foreign connected and non-connected parties.

Controlled foreign companies

Where a company holds more than 10% of the participation rights in a controlled foreign company (CFC) as defined in section 9D of the Income Tax Act, SARS requires specific disclosure. More importantly, a separate return, namely the IT10B, needs to be completed by the taxpayer and submitted to SARS as part of the compulsory supporting information to be uploaded. SARS recently introduced a new IT10B that caters for multiple CFCs. In order to complete the IT10B return, a proper analysis and understanding of the CFC's business, tax and financial position is required. The questions are specific as to the diversionary income rules contained in section 9D of the ITA.

Did the company change its financial year end during the year of assessment?
This generally results in difficulties with filing tax returns where the company has two years of assessment during one calendar year. The SARS e-filing system and ITR14 can only accommodate the filing of one ITR14 during a calendar year and SARS needs to be approached to make the necessary arrangements for filing of the tax return.

Contributed tax capital
Contributed tax capital (CTC) is defined in section 1 of the Income Tax Act. Generally, CTC constitutes the share capital and share premium of a company; therefore the consideration received by or accrued to a company for the issue of shares of that class. The Income Tax Act contains various provisions which require a restatement of a company's CTC. These adjustments are disclosed separately in the ITR14 and are often complex.

It therefore becomes important for a company to keep a CTC register in order to maintain and keep record of the adjustments made to CTC in the event of an enquiry from SARS.

Balance sheet and income statement
The disclosure of the company's financial information in the ITR14 needs to agree to the information per the AFS of the company. The disclosure becomes important, specifically in the context of the tax adjustments per the 'tax computation' section of the ITR14. Several of the line items are pre-populated based on the information included in the balance sheet or income statement. For example: should a company have made donations qualifying for deduction in terms of the provisions of section 18A of the Income Tax Act, this will pull through automatically to the 'tax computation' section of the ITR14 as well as populate the additional disclosure requirements SARS has in this regard. Failure to disclose this expense in the income statement will result in the taxable income of the company not being calculated correctly. The taxpayer will not have the ability to manually input the donation in the 'tax computation' section. One area that often results in challenges is the disclosure of trading stock and cost of sales. The breakdown required by SARS in the ITR14 often does not align with the disclosure and classification in the AFS. Furthermore, should the reconciliations with regards to "gross income" and "total assets" not reconcile to the information entered, a taxpayer will not be able to save or print the tax return.

Tax computation
When a taxpayer selects the relevant categories from the pop-up list to create the tax computation on the ITR14, careful consideration should be given to each item to ensure the tax calculation is accurate and deductions, for example, are claimed under the correct category or section of the Income Tax Act. Failure to disclose the tax adjustments against the correct category (either as a debit or credit adjustment) may compromise the accuracy of the disclosure in the tax return. Should this result in the company not being assessed for the correct amount of tax, the prescription of the tax return may be compromised.

Corporate rules
The ITR14 contains certain questions as to whether a company entered into any transaction contemplated in sections 42 to 47 of the Income Tax Act during the year of assessment. Should a company neglect to select the relevant box, in the instance where a transaction was concluded in terms of the provisions of one of these sections, one needs to assess the implications of not disclosing this to SARS. It also raises the question as to what disclosure should be provided to SARS as part of the submission of the ITR14 to ensure full and proper disclosure on the transaction is given to SARS to enable it to assess the taxpayer correctly.

Learnership allowances
Recently, SARS included separate disclosure schedules in the ITR14 in respect of the calculation of the qualifying section 12H learnership allowances claimed in respect of a year of assessment. Disclosure should be provided for learners with and without a disability and whether the learnership agreements were entered into on or after 1 October 2016.

Specialised industries
Companies involved in the mining and quarrying, construction, wholesale and retail trade and financial and insurance sectors are required to complete separate questions on the ITR14. These questions are driven by the industry selections made by the taxpayer on the ITR14.

Adopting a tax position in the tax return

Taxpayers should carefully consider the tax positions taken in filing the ITR14 and ensure that these are in line with the provisions of the Income Tax Act and any schedules thereto. Failure to do so will result in SARS levying understatement penalties, which may vary from 25% to 200%, depending on the behaviour category of the taxpayer. In certain instances, a taxpayer may be protected from SARS levying understatement penalties, for example, where the company was in possession of a tax opinion from a registered tax practitioner, issued in terms of the provisions of section 223(4) of the Tax Administration Act.

Care and diligence

It is evident from the above that the process for completion of the ITR14 requires great care and diligence. It is crucial that companies are aware of the consequences of providing SARS with inaccurate information or adopting an incorrect position on filing the ITR14.

MANAGING PROVISIONAL TAX RETURN PAINS

JOHN JONES, John.Jones@rsmza.co.za

Do you have your share of "provisional" headaches? Read on for more information about the technicalities and how to cope with them.

As tax practitioners we are all inherently familiar with those times of the year when provisional tax returns need to be completed and filed. These are the February, August and September periods when stress levels are off the charts and conversations with your clients always start with "I don't think…".

If you have a large corporate client base, with diverse financial year ends, then these periods never seem to end. And, as in my case, if those year ends happen to be mainly 31 December then Christmas and New Year are not really the time to go on vacation.

Companies, trusts and individuals who have income which is of a non-remuneration nature need to file provisional tax returns every six months, with the exception of taxpayers who have February year ends where the top-up third provisional timeframe is extended to seven months.

The requirements specific to filing these returns are set out in the Fourth Schedule to the Income Tax Act.

The technical aspects

Although it is not the intention of this article to deal with the technical aspects as set out in the Income Tax Act, certain aspects are relevant when we start to consider and assess the reasons for, and nature of, the issues that arise around these tax returns.

Paragraph 19(1) to the Fourth Schedule in particular, requires all provisional taxpayers to file a provisional tax return while paragraph 17 creates an obligation for such taxpayers to make two compulsory payments, the first within six months of the year end and the second by no later than the year end. There is then a further option available to make a third, voluntary top-up payment, if deemed necessary.

The first provisional tax payment

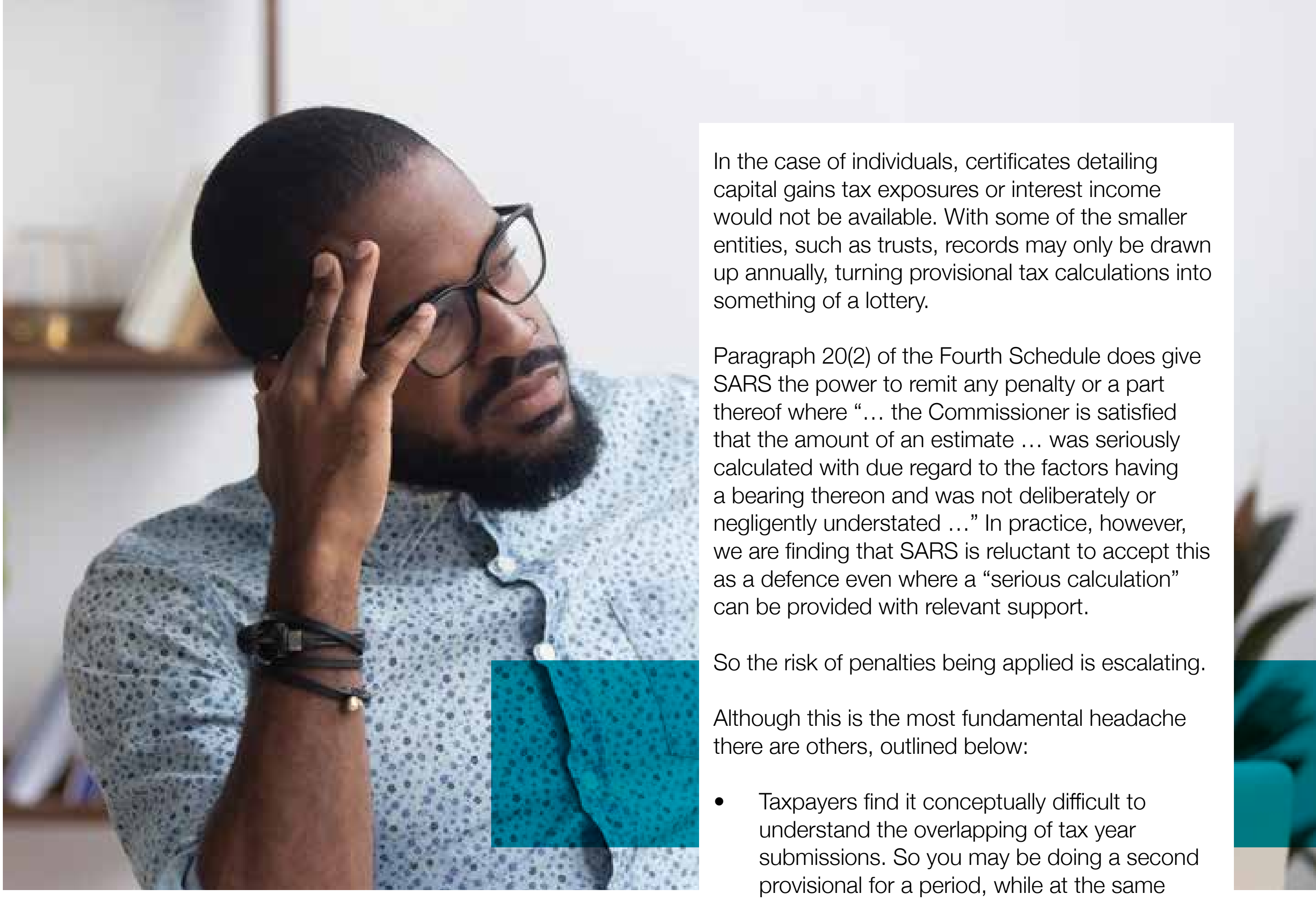
In terms of paragraph 19(1)(c) of the Fourth Schedule you cannot make a first provisional estimate of taxable income at a level below the basic amount unless agreed to by the Commissioner.

The basic amount is in principle the taxable income represented in the latest assessment issued by SARS, excluding any capital gains or certain specified lump sum amounts that might have arisen in determining this taxable income. The assessment must have been issued outside 14 days of the date at which the provisional payment was due and if older than eighteen months, an 8% escalation per annum is applied. Although using the basic amount in principle is not a substitute for a factual estimate of taxable income, it helps to simplify the process of calculating the first provisional if you do not go below this amount.

Specific to first provisional payments, no penalty is applicable on underestimation or late submission but a late payment penalty of 10% does apply.

The second provisional tax payment

The basic amount can also be utilised when determining the second provisional if the taxable income is below R1 million. Where this is applied, any underestimation penalties are not applicable. So in short this option does provide something of a safe harbour.



In the case of individuals, certificates detailing capital gains tax exposures or interest income would not be available. With some of the smaller entities, such as trusts, records may only be drawn up annually, turning provisional tax calculations into something of a lottery.

Paragraph 20(2) of the Fourth Schedule does give SARS the power to remit any penalty or a part thereof where "… the Commissioner is satisfied that the amount of an estimate … was seriously calculated with due regard to the factors having a bearing thereon and was not deliberately or negligently understated …" In practice, however, we are finding that SARS is reluctant to accept this as a defence even where a "serious calculation" can be provided with relevant support.

So the risk of penalties being applied is escalating.

Although this is the most fundamental headache there are others, outlined below:

- Taxpayers find it conceptually difficult to understand the overlapping of tax year submissions. So you may be doing a second provisional for a period, while at the same time needing to assess a third provisional for a different tax year of assessment.
- There is often limited understanding of timelines and deadlines and the consequences around not meeting these, which means information flow is very often just in time. This adds to the stress factors and creates an environment where the probability of error is increased.
- There are some practical issues in dealing with SARS eFiling and some of its idiosyncrasies. At a corporate level, if you have ever had a client change year end you will understand a level of frustration which is difficult to explain. The system just does not cater for something which, in practice, actually happens quite frequently.
- Dealing with payment channels with some banking institutions (which will remain unnamed as we are not sure if the issues arise from SARS or the banks) can prove challenging and again, given the timeframes, can expose you to the late payment penalty regime.
- Dealing with paragraph 19(3) requests from SARS. Paragraph 19(3) gives SARS the power to request that a provisional taxpayer justify any estimate made by a provisional taxpayer. If SARS is dissatisfied with the estimate they then have the power to increase the amount thereof to an amount they consider to be reasonable.

In the case of second provisional payments, where taxable income is likely to exceed R1 million it is imperative that a proper calculation is performed in order to ensure as accurate an estimate of taxable income as possible is made. This is required as in such cases the basic amount cannot be applied.

What is important to understand is that, where the estimate of taxable income filed for the second provisional is less than 80% of the taxpayer's final taxable income, SARS may impose a fixed percentage penalty of 20% of the difference. In addition late payment penalties apply.

The headaches

When we look at the legislative requirements set out in the Fourth Schedule the first fundamental headache we face becomes apparent. Provisionals, particularly second provisionals, are estimates.

An estimate is defined in the Collins English Dictionary as "an approximate calculation of a quantity or value". So when you are applying approximation utilising budgets, forecasts and, in some cases, judgment the probability of the estimate being different from final actual taxable income is a certainty. You can merely hope that the calculations are within the defined parameters and that therefore you are not exposed to the penalty provisions.

All of us have at some stage, particularly in the corporate environment, had numbers change dramatically as a result of post year-end adjustments or audit adjustments which sometimes significantly alter final results. And these adjustments always happen after we have filed the provisional returns.

- To further add salt to the wound, the adjustment above is not subject to objection and appeal. If the adjustment proves to be totally off the mark this can only be resolved at the point of submitting the annual tax return and receiving your assessment.

  You can also only object to any penalties raised on provisional tax payments at the point an assessment is raised, so if these are levied by SARS they stand until such time as the formal objection and appeal processes can be applied.

"When you are applying approximation utilising budgets, forecasts and, in some cases, judgment the probability of the estimate being different from final actual taxable income is a certainty."

The issues raised in this article are ones which in my experience have caused the most difficulty. They are by no means exhaustive and I am sure many of my fellow professionals have others which I have not mentioned or considered.

Provisional tax returns do create headaches, mainly because as a taxpayer you are forced into a position where you need to guess (hopefully on an educated basis) a number, and use this to pay a portion of, if not most of, your taxation in advance. And if you get it wrong, the consequences can be significant financially.

So that old adage of being between a rock and a hard place is very much applicable when discussing provisional tax returns.

The reality is that this is the legislative framework within which we have to operate and with proper record keeping, appropriate judgement and maybe a little luck at times it is a framework that can be managed to mitigate any risk exposures.

Further, although the legislation, in my view, is clearly drafted in favour of SARS, factually in practice we do find them open to dialogue and relatively reasonable, particularly where facts can be clearly presented and supported.

I do make this statement with the proviso that it is clear that SARS is becoming far more specific in its application of the legislation and less inclined to adjust unless there is good reason.

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2019 TRUSTS AND BENEFICIARIES: LOAN ACCOUNTS, FOREIGN DIVIDENDS AND DEDUCTIBLE EXPENSES

The 2018 Taxation Amendments have created an entirely new set of limitations when using local and offshore trusts for tax planning

WORKSHOP

5.5 HOURS

OVERVIEW

In this seminar we will focus on these far-reaching changes and their impact.

A further amendment to section 7C, which causes an annual donation to arise from low- or interest-free loans to trusts and companies, has made the section more onerous for companies held by trusts. New rules in respect of debt waivers will ensure the tax-free annual reduction of loans to trusts by R100 000 is no longer possible. Detailed disclosure in the Income Tax Return for a Trust (ITR12T) and Income Tax Return for Individuals (ITR12) allows SARS to accurately assess the deduction, allocation and disclosure of expenses in the hands of the trust and beneficiaries of the trust.

The tax consequences of foreign dividends flowing into offshore trusts and back to South African tax residents have fundamentally changed and the impact of these changes on specific offshore tax structures must be understood.
In this seminar we will not revisit the basic taxation rules for trusts in great detail, but will look specifically at the application of those rules and amendments to them.

PRESENTERS

Di Seccombe
National Head of Taxation: Mazars Academy

REGIONS

20 Aug	|	Johannesburg
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10 Sep	|	Port Elizabeth
11 Sep	|	Durban
12 Sep	|	Cape Town
25 Sep	|	Webinar

30 minutes CPD

THE CONSUMER PROTECTION ACT VS THE VALUE-ADDED TAX ACT: AND THE WINNER IS?

▶ **DES KRUGER,** Des.Kruger@webberwentzel.com

How do the definition of "gross income" in the Income Tax Act, and the VAT time of supply rules for gift cards and pre-paid tokens interact with the Consumer Protection Act? Our article elucidates some aspects.

Game-changer – the only way to describe the recent Tax Court judgement by Binns-Ward J. In fact, the learned Judge himself noted that "the introduction of the (Consumer Protection Act) meant that it was not business as usual."

The taxpayer (a retailer) derived amounts on the sale of gift cards. The issue before the court was whether these amounts constituted "gross income" as defined in section 1(1) of the Income Tax Act in the tax year in which the amounts were so derived. In essence, the crisp issue was whether the amounts derived on disposal of the gift cards were received by the taxpayer in the relevant tax year as contemplated in the definition of "gross income", or would only be received by the taxpayer once the gift cards were redeemed or, not having been redeemed, expired.
It is clear that the decision in IT 24510 not only has relevance in the context of income tax, but also as to when a liability for value-added tax (VAT) is triggered under the Value-Added Tax Act. A liability for VAT is generally triggered when an amount of consideration is received by a vendor, or the vendor has become entitled to the amount. That means the amount is due to the vendor or the recipient of the supply has an obligation to make payment. The judgement also has implications for other tax Acts.

The case and judgement

As noted, IT 24510 related to the income tax treatment of amounts derived by the taxpayer on the sale of gift cards. The question was in which tax year did the amounts constitute "gross income" in the taxpayer's hands? "Gross income" is defined in relation to any tax year, in the case of a tax resident, as–

> *"… the total amount, in cash or otherwise, <u>received by or accrued to</u> or in favour of (a) resident … <u>during (the tax) year</u> … excluding receipts or accruals of a capital nature." (My emphasis.)*

As noted by the learned judge in relation to the amounts paid by the customers for the gift cards, *"the moneys in question are on any approach eventually appropriated by the taxpayer, the question practically in issue between the parties is one of timing; it is ultimately a matter of determining at what stage, rather than whether, the revenue in question falls to be included in the taxpayer's gross income."*

SARS sought to treat the amounts paid for the gift cards as having been received by the taxpayer in the tax year in which the amounts were paid by the customers for the gift cards. The implications of adopting this characterisation of the transaction would be that the purchase price would be received by the taxpayer when the sale was concluded.

In relation to SARS' argument that the sale of the gift cards constitutes a sale of merchandise in exchange for a purchase price, Binns-Ward J held that:

> *"Notwithstanding the reference in common parlance to the 'sale' of gift cards, it is clear that the transactions in terms of which the taxpayer's customers acquire them are actually not contracts of sale properly so characterised. They entail the customer making <u>a prepayment in respect of the supply by the taxpayer of as yet unidentified goods when the gift card is redeemed later.</u> Neither the identity of the goods to be supplied when the gift card is presented,*

nor their price, is determined in the transaction in terms of which the card is issued. It is a term of the transaction that the beneficiary of the prepayment is whomsoever happens to be the bearer of the card when it is redeemed. The bearer is entitled to the benefit of the prepayment in lieu of payment of the whole or part of the purchase price if he or she presents the card when purchasing goods at any of the taxpayer's stores. A sale in the true sense only takes place when the card is presented in partial or complete redemption of the purchase price of goods selected by the consumer who is the bearer of the card at the time. The card is nothing more than a piece of paper that vouches for the existence of the bearer's personal right against the taxpayer for the redemption of the prepayment. It is not a thing (res vendita) that is the subject of a sale." (My emphasis.)

Turning then to the provisions of the Consumer Protection Act, the learned Judge noted that it was common ground that the sale of the gift cards is regulated by the Consumer Protection Act (i.e., being a prepaid certificate, card, credit, voucher or similar device (hereinafter referred to as a 'prepaid card')), and specifically sections 63 and 65 of that Act. Section 63(2) of the Consumer Protection Act expressly provides that a prepaid card does not expire until the earlier of the date the prepaid card is redeemed in exchange for goods or services, or future access to services, or three years after the date it is issued, or at the end of a longer or extended period agreed to by the supplier at any time. Importantly section 63(3) of the Consumer Protection Act provides that–

"Any consideration paid by a consumer to a supplier in exchange for a prepaid … card … is the property of the bearer of that … card … to the extent that the supplier has not redeemed it in exchange for goods or services, or future access to services." (My emphasis.)

It is clear that prepaid devices in whatever guise fall within the ambit of the Consumer Protection Act and the consideration paid by the consumers for such prepaid devices remain the property of the consumer until exchanged for goods or services, or for a period of three years from the date of their issue (unless a longer period is agreed upon by the supplier). Should the cards not be redeemed within the three-year period, they expire and, per Binns-Ward J, the supplier (taxpayer) "is entitled to retain the prepayment whilst being relieved of any obligation to accept it in lieu of payment for goods sold; in other words, in those circumstances the bearer's personal right against the card issuer lapses by effluxion of time."

Section 65(2)(a) of the Consumer Protection Act in turn provides that when "a supplier has possession of any prepayment … or any other property belonging to or ordinarily under the control of a consumer, the supplier … must not treat that property as being the property of the supplier". The supplier is required (section 65(2)(b) of the Consumer Protection Act) to exercise due care and diligence in handling the prepayment amounts and is liable for any loss resulting from the loss of such amounts (section 65(5) of the Consumer Protection Act). Importantly, while required to act with due care and diligence in the "handling, safeguarding and utilisation" of the prepayments received by the supplier from a consumer, there is no requirement that the moneys must be held separately from the supplier's own funds, for example, in a separate trust account. This despite the fact that it is apparently the way in which such moneys are dealt with here and in the United Kingdom in certain instances.

In this specific instance, prior to redemption or expiry of the gift cards, the monies derived from the sale of the gift cards were discretely accounted for by the taxpayer in its financial accounts as unredeemed gift card liability and such amounts were only accounted for as revenue ("gross income") by the taxpayer when it supplied the goods or services in exchange for the gift card.

"Vendors need to consider how the analysis and decision by Binns-Ward J impact the time of supply rule adopted by them in relation to their specific supplies."

Binns-Ward J accepted that had the monies derived from the sale of the gift cards been held under some form of entrustment the monies would, on the basis of general income tax principles, not have been received by the taxpayer. However, he was "not persuaded that the mere segregation of the receipts in respect of unredeemed gift cards in a separate banking account identified for that purpose by the taxpayer gave rise to a cognisable legal context that would sustain a determination that they had not been received by the taxpayer for itself and its own benefit". Accordingly he held that, absent the provisions of the Consumer Protection Act, the monies received on sale of the gift cards would have been received by the taxpayer in the tax year in which the gift cards were disposed of.

However, of great importance are the findings of the court in regard to the application of the provisions of the Consumer Protection Act in this context, and specifically the provisions of sections 63 and 65 of the Consumer Protection Act (discussed above). Binns-Ward J held that as the monies paid for the gift cards remained the property of the bearer of the (prepaid card) until redemption or the lapse of the three-year period from the date of the sale (section 63(3) of the Consumer Protection Act), the monies were not received by the taxpayer as contemplated in the definition of "gross income" until redemption or they lapsed.

While much emphasis in the case was placed on the first inclusion in the definition of "gross income" – receipt of the gift card payments – the court also addressed, albeit very briefly, the other inclusion in the definition, namely the accrual of an amount. Binns-Ward J held that "it is only when the card is redeemed or expires that the proceeds of its 'sale' accrue to the taxpayer, for it is only then that it becomes legally entitled to them." As will become evident, this aspect of the judgement has important implications in the determination of a liability under the VAT Act.

Implications for the VAT Act

The application of sections 63 and 65 of the Consumer Protection Act in the context of the definition of "gross income" results in amounts derived by a taxpayer in respect of a prepaid card (section 63(1) of the Consumer Protection Act) not being regarded as "gross income" until redemption of the card or statutory expiration. It must be noted that section 63 is of application to any prepaid certificate, card, credit, voucher or similar device. The inclusion of any similar device significantly broadens the ambit of the application of section 63 of the Consumer Protection Act. It is important to note that the provisions not only apply to physical prepaid cards, but also any prepaid credit, that is, any amount that may be credit to a customer's account. It is apparent therefore that the provisions would apply to such things as cell phone airtime, vouchers redeemable for the supply of services (such as hotel accommodation), and the crediting of a customer's account on the return of goods or where there has been overpayment of a purchase price.

While not dealt with in IT 24510, section 64 of the Consumer Protection Act is also of importance in the context of the VAT Act. This section applies where terms of any agreement a consumer agrees to or is required to pay:

- a one-time or periodic membership fee or similar charge, or
- any amount in respect of services or access to services to be provided at a date more than 25 business days after the payment is made, otherwise than in terms of a prepayment device contemplated in section 63.

As in the case of section 63 of the Consumer Protection Act, an amount paid by a consumer to a supplier in the circumstances provided for in section 64 of the Consumer Protection Act "remains the property of the consumer until the supplier makes a charge against it in accordance with the provisions of section 64(2)" of the Consumer Protection Act. As in the case of prepaid devices contemplated in section 63 of the Consumer Protection Act, the supplier may not treat the monies paid by the consumer in these circumstances as its own and is required to exercise due care and diligence in "handling, safeguarding and utilisation of that property" (section 65(2) of the Consumer Protection Act).

In essence, a supplier can only make a charge against the payment contemplated in section 64(1) of the Consumer Protection Act, and the payment can therefore be said to have been received by or accrued to a taxpayer, "once each month in advance of the pro-rata portion of the amount so held, as required to pay the ensuing month's cost of the membership or service."

While a liability to account for VAT only generally arises when a supply has been made or deemed to have been made (section 9 of the VAT Act), a supply is generally deemed to have been made (section 9(1) of the VAT Act) on the earlier of when an invoice has been issued in respect of the supply, or the "time any payment of consideration is received by the supplier in respect of that supply." An "invoice" is defined as any "document notifying an obligation to make a payment."

It is strongly arguable on the basis of the analysis of the Consumer Protection Act and the decision by Binns-Ward J in IT 24510 that any amounts derived by a vendor as consideration for a prepaid certificate, card, credit, voucher or similar device will only be received by the vendor as contemplated in section 9(1) of the VAT Act when "the full value represented by it … has been exchanged for goods, services or future services."

But can it be said that the issue of such a prepaid certificate, card, credit, voucher or similar device amounts to the issue of an invoice as contemplated in section 9(1) of the VAT Act, which would trigger a supply notwithstanding that no amount can be said to have been received by the vendor? In my view, not. In order to constitute an "invoice" as defined, the prepaid certificate, card, credit, voucher or similar device would need to notify an obligation to make payment. However, the prepaid certificate, card, credit, voucher or similar device merely represents amounts paid to the vendor under a quasi-statuary trust arrangement in anticipation of an obligation to make payment of the consideration for the supply that will only arise sometime in the future. That is, the customer only becomes obliged to make payment once the prepaid device is redeemed or the three-year statutory period provided for in the Consumer Protection Act has lapsed.

As regards the specific value of supply rules relating to the issue of a token, voucher or stamp as contemplated in section 10(18), (19) and (20) of the VAT Act, it is submitted that they constitute a prepaid certificate, card, credit, voucher or similar device as provided for in section 63 of the Consumer Protection Act. Their application is accordingly subject to the decision in IT 24510. The treatment of any token, voucher or stamp in terms of section 10(18) of the VAT Act accords with that provided for in the Consumer Protection Act as no VAT liability will arise until the token, voucher or stamp is applied against the consideration payable for the goods or services acquired by the consumer.

Section 10(19) of the VAT Act in turn provides that where a token, voucher or stamp is issued for consideration in money and the holder is entitled on the surrender thereof to receive goods or services specified on the token, voucher or stamp without further charge, the value of the supply of the goods or services specified on the token, voucher or stamp is deemed to be nil. It is apparent that this treatment is predicated on the supply of the token, voucher or stamp being a taxable supply – which would only be the case once the token, voucher or stamp (qua prepaid certificate, card, credit, voucher or similar device as provided for in section 63 of the Consumer Protection Act) is exchanged for the specified goods or services or the three-year statutory expiry period has lapsed. Prior to that date, it is arguable that no supply has been made under the general time of supply rule as discussed above.

Section 10(20) of the VAT Act is of application where a token, voucher or stamp is issued for no consideration and the holder is entitled on surrender of the token, voucher or stamp to a discount on the price of goods or services supplied to the holder without any further charge. In these circumstances the consideration in money for the supply of the goods or services is deemed to include the monetary value stated on the token, voucher or stamp (inclusive of VAT). This section in essence is only triggered once the token, voucher or stamp is tendered in exchange for the goods or services supplied at a discount to the consumer, which would coincide with the general time of supply rule provided for in section 9(1) of the VAT Act and section 63 of the Consumer Protection Act.

As regards deposits, the VAT Act is clear. A deposit given in respect of a supply is deemed not to be consideration for a supply of goods or services "unless and until the supplier applies the deposit as consideration for the supply or such deposit is forfeited". As a deposit is not regarded as consideration until the happening of the specified events, no liability to account for VAT can arise until then as no taxable supply is triggered in the absence of any consideration. This treatment would seem to align with that advanced by the Consumer Protection Act for a "prepaid certificate, card, credit, voucher or similar device".

The issue of whether any consideration has been received by a supplier also has application in relation to certain of the special time of supply rules provided for in sections 9(3)(a) (services supplied under a rental agreement or agreement or law providing for periodic payments), section 9(3)(b) (periodic supplies and goods or services supplied directly in any construction, repair, maintenance, erection, manufacture, assembly or alteration of any goods), section 9(3)(d) of the VAT Act (supply of fixed property) and others. Vendors need to consider how the analysis and decision by Binns-Ward J – in relation to the provisions of the Consumer Protection Act relating to a "prepaid certificate, card, credit, voucher or similar device" as provided for in section 63 of the Consumer Protection Act – impact the time of supply rule adopted by them in relation to their specific supplies.

SETTLING WITH SARS revisiting some practical perspectives

30 minutes CPD

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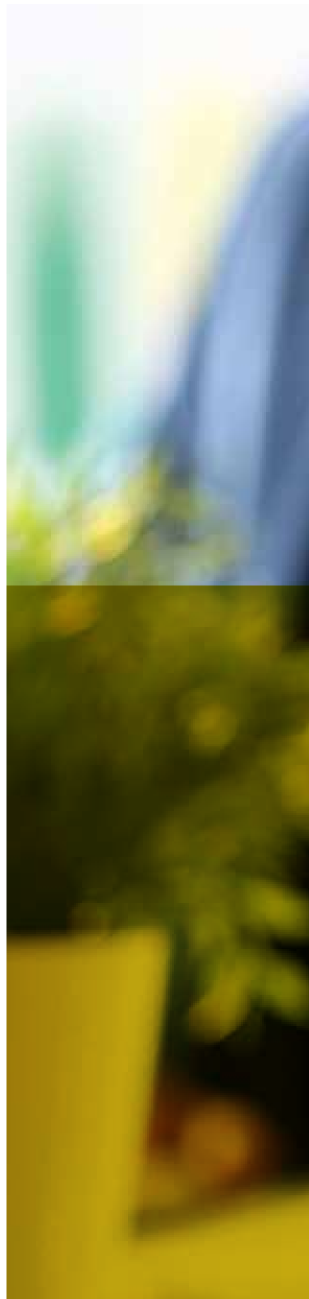
Can there be a settlement with SARS if an objection was raised out of time? What are the advantages of reaching a settlement? What are the costs of not resolving a dispute? Our article provides enlightenment.



Under the right circumstances, negotiating a settlement with SARS can save a taxpayer a lot of proverbial blood, sweat and tears – not to mention money, or the angst inevitably instilled in its victims by the litigious process.

Less visceral considerations are also likely to be crucial: what will investors think should they come to read about senior management's inability to deal with tax liabilities in a reported judgment? What might this imply about other less conspicuous aspects of how the taxpayer's financial affairs are being managed?

Reaching a successful settlement with SARS is a taxpayer's only hope of finding the litigant's holy grail: the make-it-all-go-away-button. So, unless the taxpayer is very certain indeed about its prospects in court, settlement should always be included in strategic planning when a court battle with SARS appears on the horizon.

It is therefore useful to brush up on the requirements that must be met before SARS and the taxpayer may validly commence settlement negotiations.

Disputes and prospects of settlement in terms of the Tax Administration Act

Chapter 9 of the Tax Administration Act deals with dispute resolution and covers everything from the objection and appeal stage through the various forums of the tax board, tax court and appeal courts, culminating in Part F which contains the legislative framework for the settlement of disputes.

A dispute is defined in section 142 as *"a disagreement on the interpretation of either the relevant facts involved or the law applicable thereto, or both the facts and the law, which arises pursuant to the issue of an assessment or the making of a 'decision'".*

To "settle" means *"to resolve a 'dispute' by compromising a disputed liability, otherwise than by way of either SARS or the person concerned accepting the other party's interpretation of the facts or the law applicable to those facts or of both the facts and the law, and 'settlement' must be construed accordingly."*

The fact that a dispute is a threshold requirement for a settlement gives rise to the first issue often encountered by taxpayers, namely, SARS' approach to objections that have been filed late (see in this regard Interpretation Note 15 Issue 5).

In terms of the Act, an objection must be submitted within 30 business days of the impugned assessment (or other decision). Where this is not done, provision is made for the taxpayer to request an extension of the period within which to lodge the objection, provided that reasonable grounds can be demonstrated to explain the failure to lodge timeously. A senior SARS official may not, however, grant an extension in excess of a further 30 days unless exceptional circumstances are found to exist.

In practice, where objections are filed far outside the range of these time periods – as they sometimes are months afterwards – SARS tends to adopt the position that the objection is too late to be viable and that no valid dispute has therefore arisen.

This leads directly to the taxpayer's next disappointment: SARS deems itself unable to consider settlement as no settlement can take place in the absence of a dispute.

In our view, this approach is unjustifiable for two main reasons:

- "Dispute" is defined with reference to the existence of a disagreement, not the filing of an objection
- Section 104 of the Act (on strength of which all such condonation decisions are made by SARS) says nothing about certain objections being too late for consideration.

As mentioned above, the only qualification (contained in section 105) is that the extension may not be for a period exceeding another 30 days unless exceptional circumstances are present.

The fact that the Act makes provision for the existence of exceptional circumstances surely leaves the door open for the bona fide tardy taxpayer. This argument is fortified by section 93(2) of the Act which provides that SARS may reduce an assessment despite the fact that no objection has been lodged or appeal noted.

Bearing in mind, however, the dire consequences and additional battles that the late submission of objections is likely to precipitate, taxpayers should guard against such eventuality at all costs.

Once an objection has been filed and accepted as valid, sections 145 and 146 of the Act describe the circumstances under which settlement will be inappropriate or appropriate, respectively.

According to section 145, settlement will be inappropriate where:

- The circumstances envisaged in section 146 do not exist and–
  - » intentional tax evasion/fraud has been perpetrated;
  - » settlement would be contrary to the law or a practice generally prevailing in the absence or exceptional circumstances to justify a departure therefrom; or
  - » the taxpayer has failed to comply with the provisions of a tax Act, and such non-compliance is serious in nature;
- It is in the public interest to have judicial clarification of the issue and the case is appropriate for this purpose; or
- The pursuit of the matter through the courts will significantly promote taxpayer compliance with a tax Act and the case is suitable for this purpose.

Two aspects are noteworthy: firstly, the three instances in which section 145 will be triggered are listed disjunctively and the presence of any one will thus be sufficient to render settlement inappropriate under the circumstances. Secondly, serious non-compliance with a tax Act does not per se preclude settlement and will only do so if the circumstances envisaged in section 146 are additionally not found to be present.

On a more positive note, settlement will be appropriate in terms of section 146 if it is to the best advantage of the state and it is fair and equitable to both parties, having regard to–

- Whether the settlement would be in the interest of good management of the tax system, overall fairness, and the best use of SARS' resources;
- SARS' cost of litigation in comparison to the possible benefits with reference to the prospects of success in court;
- Whether there are any–
  - » Complex factual issues in contention; or
  - » Evidentiary difficulties,

  which are sufficient to make the case problematic in outcome or unsuitable for resolution through the alternative dispute resolution procedures or the court;
- A situation in which a participant or a group of participants in a tax avoidance arrangement has accepted SARS' position in the dispute, in which case the settlement may be negotiated in an appropriate manner required to unwind existing structures and arrangements; or
- Whether settlement of the dispute is a cost-effective way to promote compliance with a tax Act by the person concerned or a group of taxpayers.

"Time-consuming litigation may well engage many taxpayer employees – often those most crucial to the decision-making operations of the business – and preoccupy them with non-income-generating tasks."

The circumstances which are conducive to the conclusion of a settlement agreement are therefore cast in broad terms and should, in theory at least, create ample room for successful negotiations outside of court. In practice, however, as with any settlement, much will depend on the human factor.

Considering settlement from the taxpayer's point of view

Moving beyond the technicalities of the Tax Administration Act, there are at least three other factors which a taxpayer would do well to consider when deciding whether or not to attempt settlement in a dispute with SARS.

Confidentiality

The first consideration harks back to what was said in the introduction regarding the possible reputational damage that a taxpayer risks when litigating against SARS. Although proceedings in the tax court are confidential (the court sits in camera and its judgments do not name the taxpayer), it is in practice often rather easy for those in the know to deduce who was involved. Indeed, the avid reader can gain a lot of practical experience (vicariously of course) relating to the structuring and strategising of big business transactions (and big businessmen and women) by keeping a close eye on the jurisprudence of the tax court and the appeals flowing from it.

The confidentiality that the taxpayer enjoys in the tax court is moreover unique to that court and does not extend to courts of appeal (either a full bench of the High Court or the Supreme Court of Appeal).

Concerns for confidentiality may thus be a valid reason for tax managers to opt for settlement, perhaps especially so in the case of unlisted companies that are not obliged to issue cautionary SENS announcements.

Reporting contingent liabilities

The second factor worthy of consideration relates to the dictates of International Financial Reporting Standards (IFRS), which require provisions to be raised in financial statements having regard to the prospects of success of litigious disputes. Contingent liabilities stemming from pending litigation serve to create financial uncertainty that could span years and are unwelcome additions to any financial statements.

Hidden costs

This aspect leads directly into the final, and perhaps most obvious, consideration: the inevitably high cost of litigation. This cost should not only be gauged in Rands and cents but taxpayers should be mindful of the hidden costs of human capital. Time-consuming litigation may well engage many taxpayer employees – often those most crucial to the decision-making operations of the business – and preoccupy them with non-income-generating tasks. These tasks include consulting with attorneys and counsel, preparing to enter the witness box (which is likely to exert stresses of its own) and then spending days, if not weeks, in court.

Final thought

Settlement can therefore be an attractive and effective mechanism of the dispute resolution machinery of the Tax Administration Act. Astute taxpayers should take time to consider all the disadvantageous consequences and costs of litigation carefully before marching off to court, for, to borrow from Steinbeck: "all war is a symptom of man's failure as a thinking animal".

Q&A

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SAIT

The latest questions and answers to provide our readers with insight into tax technicalities

Q A company had a December year-end for the 2017 year and the IT14, for the period 1/1/2017 to 31/12/2017, was submitted and assessed. The company then changed their year-end to February 2019. To submit their next return for the 14 months (incorporating Jan and Feb 2019) they will use the 2019 ITR14. Is that correct and how would the IT14 2018 then be submitted?

It is important to remember that the change in the year end date at CIPC is not acted on by SARS. In terms of the Income Tax Act, the definition of financial year in section 1(1), the company must obtain approval from SARS to end its financial year on a date other than the last day of February. We accepted that the company had approval from SARS to end its financial year on the last day of December and have also requested SARS to now also change that to the last day of February.

Remember also that, in addition to this approval the company must also specifically request SARS to change the provisional tax dates. If this is not done SARS will not be able to process the IRP6s for the correct periods as it will not have issued them.

The company's financial year, if approved by SARS, for the year of assessment during which the year-end date was changed, will end on the last day of February 2019 (and will be for 14 months, as you indicated).

In terms of the notice to submit returns, for 2018 (number 600), "… 2018 year of assessment" means: *"(a) in the case of a company, the financial year of that company ending during the 2018 calendar year; …"*

That would then mean that the company had no financial year that ended during the 2018 calendar year. No return is therefore required for 2018, and the return for the 2019 year of assessment will be used for the February 2019 submission, the 2020 one for February 2020 and so on.

That will however, only be so if the company approached SARS before the end of December 2018. If not, we suspect that SARS will, in future, see the 2018 return as outstanding. We do not believe that a nil return should be submitted to correct this, and using the 2018 return for February 2019, would also be incorrect.

Q My client is a private company with credit shareholder loan accounts. They are contemplating to capitalise the loan accounts. Will the capitalisation of the loan accounts have any tax implication for the company and also for the shareholders personally?

In terms of section 40 of the Companies Act, the board of a company may issue authorised shares only for adequate consideration to the company. Before a company issues any particular shares, the board must determine the consideration for which, and the terms on which, those shares will be issued.

In the 2009 Explanatory Memorandum to the Taxation Laws Amendment Bill, it was stated that: *"CTC would also include … the cancellation of a loan account owed by the company as consideration for the issue of shares."* (Note: CTC refers to contributed tax capital.)

Tax consequences for the company can only arise when section 19 of, or paragraph 12A of the Eighth Schedule to, the Income Tax Act applies. For purposes of section 19(1), or paragraph 12A, and with effect from 1 January 2018,

"concession or compromise' means any arrangement in terms of which … a debt owed by a company is settled, directly or indirectly —

i. *by being converted to or exchanged for shares in that company; or*
ii. *by applying the proceeds from shares issued by that company;*

and,

'debt benefit', in respect of a debt owed by a person to another person, means … in the case of the settling of that debt by means of an arrangement described in paragraph (b) of the definition of 'concession or compromise', where the person who acquired shares in a company in terms of that arrangement held an effective interest in the shares of that company prior to the entering into of that arrangement, the amount by which the face value of the claim held in respect of that debt prior to the entering into of that arrangement exceeds the amount by which the market value of any effective interest held by that person in the shares of that company immediately after the implementation of that arrangement exceeds, solely as a result of the implementation of that arrangement, the market value of the effective interest held by that person in the shares of that company immediately prior to the entering into of that arrangement …"

You indicated that these are shareholder loans – in other words, the person who advanced the loan is a holder of a share in the company. The phrase 'effective interest' is not defined in the Income Tax Act and there is no intention to do so – see the 17 January 2019 *Final Response Document on Taxation Laws Amendment Bill*.

For the holder of shares and the person to whom the debt is owed, there is a disposal, the conversion of the asset – see paragraph 11(1)(a) of the Eighth Schedule. The consideration, in respect of this disposal (see paragraph 35(1)(a)), will be the arm's length price, or market value of the shares received on issue by the company. There will then be a capital gain or loss if this value is more or less than the base cost of the debt (instrument).

For the holders of shares, this is essentially a conversion of an asset. The loan account is converted into shares, further shares issued by the company. This, in itself, is a disposal for purposes of the Eighth Schedule to the Income Tax Act. A capital gain, or loss, will arise if the value of the loan differs from the value of the shares received in exchange. It is the market value of the shares, and under paragraph 38 of the Eighth Schedule, this value must be an arm's length one at the time of the disposal. This is because the parties are connected persons in relation to each other.

Q I know that per the legislation, when one operates a trade from one's primary residence and claims home office expenses as expenses on the trade and then sells the primary residence, the capital gain first needs to be apportioned to the percentage used for trade purposes, and the remainder is then subject to the R2 million primary residence exclusion.

In this instance the taxpayer owned the primary residence for 12 years but only used it for their trade of providing accounting services for two of those 12 years. Is there an apportionment of the 10% not being subject to the R2 million exclusion?

If you could please explain how the new ITR12 makes provision for the trade vs the domestic portion? Must one use code 6504, or do codes 6516 and 6518 need to be used? Do you then for code 6518 need to put in the R2 million exclusion manually?

It is not when the individual claims home office expenses as expenses on the trade, but *"where that person … used the residence … or a part thereof for the purposes of carrying on a trade for any portion of the period on or after the valuation date during which that person … held that interest"* – see paragraph 49(b) of the Eighth Schedule.

We understand that the ITR12 return in fact will allow for this to be provided to SARS as such. If it does not, the taxpayer is forced to disclose the sale as two separate disposals: one dealing with the trade part and the other with the domestic use part.

For the purposes of the Income Tax Act, *"trade" includes every profession, trade, business, employment, calling, occupation or venture …"* The earning of commission is certainly the carrying on of a trade and, where the individual used a part of his or her residence for the purposes of deriving the commission, it would constitute the use thereof "for the purposes of carrying on a trade" as envisaged by paragraph 45.

As was indicated above, the fact that the person made, or was entitled to make, a deduction in respect of the expenses related to that part is irrelevant in this regard. SARS agrees with this view – see paragraph 11.8 of their CGT guide. They state there that "it is irrelevant whether the person is or was entitled to any deduction for the expenditure relating to the part used for trade purposes."

The provision of an "accounting service" would constitute a profession and therefore constitute a trade.

The issue is specifically dealt with in the legislation. The principle is that the primary residence exclusion (of R2 million provided for in Part VI of the Eighth Schedule) does not apply where the individual used that residence (or a part thereof) for the purposes of carrying on a trade – see paragraph 49(b) of the Schedule. The use of the property to derive the income from the rendering of the professional service would constitute carrying on a trade.

So, in this instance an apportionment of the capital gain will have to be made under paragraph 49. The result would be that the capital gain attributable to the trade use will result in a capital gain that does not qualify for the R2 million exclusion.

There is an example in paragraph 11.8 of the SARS guide which deals with the scenario where only a part of the primary residence was used for a part of the period of ownership for purposes of a trade. Essentially, there will be two apportionments required here. The first is for the part of the residence that was used for trade purposes, the 10% that you refer to. The second will be for the period that the part was so used, the two years over the full period of ownership of 12 years.

The taxpayer declares this, on the ITR12, by capturing the amount of the paragraph 45 exclusion, as calculated after the apportionment on the return. Code 6518 must be used for the trade-related capital gain portion – see paragraph 53(3)(b) of the Eighth Schedule to the Income Tax Act. The residence, as immovable property, is not a personal use asset for purposes of the Eighth Schedule.

Code 6504 is then used for the primary residence part and the amount of the primary residence exclusion, as calculated but limited to the R2 million, is then captured here.

Q I have two clients who are both older than 77 years and who receive very small annuities. They are struggling financially and getting the annuity each month does not really help. The values of their annuities are R32 819 and R23 773 respectively. How do we go about getting SARS to authorise the insurer to close down their portfolios and pay them the proceeds?

It is, to the best of our knowledge, not an instance where SARS must authorise the insurer to pay out the annuities.

For purposes of the Income Tax Act,
"living annuity" means a right of a member or former member of a … retirement annuity fund, or his or her dependant or nominee, or any subsequent nominee, to an annuity purchased from a person or provided by that fund on or after the retirement date of that member or former member in respect of which …

a. *the value of the annuity is determined solely by reference to the value of assets which are specified in the annuity agreement and are held for purposes of providing the annuity;*
b. *…;*
c. *the full remaining value of the assets contemplated in paragraph (a) may be paid as a lump sum when the value of those assets become at any time less than an amount prescribed by the Minister by notice in the Gazette;"*

The value prescribed in Notice 1164 in *Government Gazette* 31554 of 30 October 2008 is currently:

- R50 000 if an amount was previously commuted at retirement; or
- R75 000 in any other case.

We believe the member, or annuitant, will have to apply to the fund to have the amount paid to him or her. The fund, or provider of the living annuity, will then apply to SARS for a tax directive and then make payment to the annuitant. This assumes that "the value of assets which are specified in the annuity agreement and are held for purposes of providing the annuity" (paragraph (a) above) is less than the relevant amounts.

BINDING RULINGS

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The rulings we present deal with debt reduction by means of set-off, and an equity-linked note.

BINDING PRIVATE RULING 323
Debt reduction by means of set-off

Issue
The applicant and co-applicant approached SARS for a ruling to determine the tax consequences of a proposed settlement of a shareholder's debt and the subsequent issue of ordinary shares.

Facts
The applicant and co-applicant are resident companies, and the co-applicant holds 100% of the shares in the applicant. The applicant is indebted to the co-applicant, a major portion of this debt having been incurred prior to 1 January 2011.

The liabilities of the applicant to the co-applicant, which the applicant wishes to settle, are interest-free and arose from:
- the co-applicant advancing proceeds of a rights issue to the applicant on loan account (liability 1);
- the co-applicant disposing of a going concern to the applicant on loan account (liability 2); and
- the applicant declaring dividends to the co-applicant in the 2008 and 2009 financial years, which were left outstanding on the loan account and of which the applicant wishes to settle a portion (liability 3).

The applicant seeks to reduce its balance sheet liabilities by settling the abovementioned debt in terms of a set-off, as follows:
- The issuing of shares by the applicant to the co-applicant at a value equal to market value thereof and leaving the share subscription liability outstanding on the loan account.
- The liability to be owed by the co-applicant to the applicant for the share subscription to be set-off against liabilities 1 to 3 as mentioned above.

Ruling
SARS issued this ruling on the assumptions and conditions that:
- the market value of the effective interest held by the co-applicant in the shares of the applicant after the proposed set-off of the above liabilities will exceed the market value of the effective interest of the shares before set-off, and that the difference between these two market values will be less than the cumulative face value of liabilities 1 and 2 prior to the set-off; and
- the amounts of liabilities 1 and 2 were used by the applicant, either directly or indirectly, to fund expenditure for which deductions or allowances were granted in terms of the Income Tax Act.

SARS ruled that section 19 and paragraph 12A of the Eighth Schedule to the Income Tax Act, which primarily deal with the taxation of 'debt forgiveness', will not apply to the set-off of liabilities 1 and 2, due to the operation of sections 19(8)(e) and (f), as well as paragraphs 12A(6)(f) and (g). These latter provisions respectively state that section 19 and paragraph 12A will not apply in, amongst others, the following circumstances:
- A debt reduced or settled between companies within the same group of companies, by means of an issue of shares; or
- Where a debt which does not consist of an interest element is settled by way of the debt being converted to or exchanged for shares in that company, or from applying the proceeds from shares issued by that company.

SARS further ruled that liability 3 does not constitute "debt" as defined in section 19(1) and paragraph 12A(1), and therefore section 19 and paragraph 12A will not apply to the set-off of liability 3.

BINDING PRIVATE RULING 322
Equity-Linked Note

** Please note that there are two conflicting versions of BPR 322, and as such the most comprehensive version has been elected to be included.*

Issue
This ruling determines the nature of an amount received or which accrues as a redemption amount of an equity-linked note (ELN). The ruling also determines that the ELN is not an "instrument" for purposes of section 24J(1) of the Income Tax Act.

Facts
The applicant, a resident company carrying on business as a long-term insurer, intends to issue long-term equity linked insurance policies to certain policyholders (being the beneficiaries of long-term equity linked insurance policies). The applicant invests an amount, being the "subscription amount", to obtain an ELN from resident Company A in respect of a particular tranche of policies issued by it.

The ELNs are underlying assets which cover the applicant against its liability arising from the issuing of the long-term equity linked insurance policies to the policyholders. Each ELN is also a financial asset held by the applicant, the value of which determines the value of the maturity benefit or liability the applicant anticipates it will pay to the policyholder.

On the maturity date of the ELN, the applicant will receive the redemption amount in terms of the ELN from company A. This amount is in each case determined with reference to a specified index or indices, or basket of shares, subject to a minimum redemption payment which is equal to a significant percentage of subscription amount.

The maturity benefit due to the policyholder under the linked policy is determined with reference to the value of the ELN at maturity. The proceeds of the ELN are payable to the policyholder at maturity.

The applicant charges a fee to the policyholder for the administration of the policy. This is the only return that the applicant derives from the linked policy.

Ruling
This ruling was not subject to any additional conditions or assumptions and is valid for a period of five years from 16 July 2019.

In relation to the proposed transaction, the ruling stated the following:

- The receipt or accrual of the redemption payment to the applicant on the maturity date will not form part of the "gross income" of the applicant. The receipt or accrual will be of a capital nature.
- Redemption will constitute a disposal of the ELN as contemplated in paragraph 1.
- Any fee the applicant charges the policyholder for administering the linked policy will be of a revenue nature.
- The subscription amount for the ELN will not be deductible. It will be expenditure of a capital nature.
- The amount received by or accruing to the applicant on disposal of the ELN will constitute "proceeds" as defined in paragraph 1, read with paragraph 35(1) of the Eighth Schedule to the Income Tax Act.
- The subscription amount will constitute the base cost of the ELN as defined in paragraph 1 read with paragraph 20(1)(a) of the Eighth Schedule.
- The ELN will not constitute an "instrument" as defined in section 24J(1) of the Income Tax Act.

Case Law
Wrap-up

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We summarise two cases dealing with issues such as when income from the sale of gift cards should be included in a taxpayer's income and the effect of a DTA on the percentage of dividends tax to be paid.

ABC Proprietary Limited v C:SARS
IT 24510

Issue
Whether amounts received from the sale of gift cards by the taxpayer constituted part of its gross income as soon as they were received by the taxpayer or would only become such upon the gift cards being redeemed by customers or expiring.

Facts
The taxpayer is a retailer that sells, inter alia, gift cards. Following an audit, SARS issued an additional assessment to the taxpayer for the 2013 tax year of assessment after deeming the amounts received by the taxpayer for unredeemed gift cards to form part of the taxpayer's gross income.

The taxpayer, after receipt, transfers the amounts received from the sale of gift cards to a separate bank account which does not service the daily operations of the taxpayer. It treated such amounts as a liability in its books until such time that the gift cards were redeemed. It therefore argued that the monies were not received for the taxpayer's own benefit, but rather to be held for the benefit of another and thus do not form part of its gross income.

The taxpayer then, in its second line of argument, submitted that in terms of sections 63 and 65 of the Consumer Protection Act (the CPA), amounts received from the sale of gift cards are the property of the bearers of such gift cards until full or partial redemption thereof. Further, in terms of sections 63 and 65, such amounts received must be treated in a certain manner which includes a degree of diligence and care, which ABC had exercised by holding the amounts received in a separate bank account. SARS, however, contended that the inclusion of amounts for purposes of gross income is not subject to other legislation not specifically provided for in the Income Tax Act (the ITA), and that the CPA had the purpose of promoting consumer rights, not deferring tax liability.

Outcome
The taxpayer's appeal succeeded, resulting in the additional assessment (issued by SARS and relating to the 2013 year of assessment, and which was the subject of the dispute) being set aside by the Court.

Core Reasoning
It was accepted by the Court that the amounts in question were eventually appropriated by the taxpayer, and the main question for purposes of taxation was simply when the amounts received formed part of the taxpayer's gross income.

On the taxpayer's first argument, the Court had regard to the *Geldenhuys* (1947) case for guidance on what the words "received by" meant for purposes of inclusion of an amount in gross income. It was held that these are amounts which are received by the taxpayer "on his own behalf for his own benefit" or "received by him in circumstances that he becomes entitled to it", which approach was later adopted in the Appellate Division in the case of *SIR v Smant* (1973). The Court further held that the monies must be held by the taxpayer as a 'trustee' in a manner which segregated the funds from the taxpayer's property.

In regard to the above the Court held that merely segregating the amounts received from the sale of its gift cards in another bank account was not sufficient. The taxpayer had not shown that it held such income in a legally effective manner and in a fiduciary capacity as the trustee of those amounts on behalf of the customer, and the taxpayer could do with these amounts as it wished. Therefore, this argument was rejected by the Court.

The Court then addressed the taxpayer's second argument, and held that notwithstanding the amounts received from the sale of gift cards having been received along with other income, in terms of the CPA it was received on behalf of the bearers of the gift cards and further the taxpayer took steps to comply with the provisions of the CPA by separating these amounts and holding such in a separate bank account.

The Court further added that the effect that the CPA has in regard to the deferral of a beneficial receipt by the taxpayer was to be expected, and that the argument by SARS that the ITA takes precedence over the CPA is without foundation.

Take-Away

This decision confirms that not all amounts received in the ordinary sense are to be included in the gross income of a taxpayer. Careful consideration must be had as to whether amounts are 'received' for the taxpayer's own benefit within the context of the ITA and the definition of 'gross income', when determining tax liability.

Further, regard must be had to the provisions of the CPA (or any other applicable legislation), to determine whether in certain circumstances there is an obligation to treat income received in a particular way.

ABC (Pty) Ltd v C:SARS

IT 14287

Issue

Whether a most favoured nation (MFN) clause, whose operation is subject to the conclusion of a subsequent double tax agreement (DTA) with another state, may be affected indirectly by the operation of a DTA concluded prior to its commencement.

Facts

The appellant, a wholly owned subsidiary of a resident of the Netherlands, paid dividends tax on the dividends it declared and undertook that it was liable to pay 5% dividends tax to SARS, in accordance with the DTA between South Africa and the Netherlands (the Netherlands DTA). However, on 12 August 2013, a declaration and undertaking were presented by the appellant to SARS, recording that the liability for such dividends thereafter would be subject to a rate of 0%, in terms of Article 10(10) of the Netherlands DTA. Later, on 25 November 2014, the appellant sought a refund from SARS for the dividends tax paid from 1 April 2012 to date.

The Netherlands DTA contained an MFN clause in Article 10(10), which had the effect of reducing the 5% rate applied in terms of that DTA, in parity with a more favourable rate agreed to in a subsequent DTA between South Africa and another state. Following the commencement of this agreement with the Netherlands on 28 December 2008, South Africa concluded a further agreement with Sweden, which commenced 18 March 2012 and also contained an MFN clause to the same effect as the one in the Netherlands DTA.

However, the MFN clause in the agreement with Sweden did not limit its application only to an agreement concluded following its commencement. This was material, due to the fact that South Africa was party to a DTA with Kuwait, which commenced 25 April 2006 and which imposed 0% dividends tax liability on the residents of that state.

The appellant's (taxpayer) case

The taxpayer relied on the wording of the DTAs between South Africa and Sweden respectively, in light of the DTA with Kuwait. The taxpayer contended that, while the MFN in the Netherlands DTA would only be triggered as a consequence of the conclusion of a future agreement between South Africa and another state, the MFN in the DTA with Sweden did not contain this limitation. As a result, the DTA with Sweden made provision for a dividends tax rate of 0%, due to the prior agreement between South Africa and Kuwait. As the DTA with Sweden was concluded after the commencement of the Netherlands DTA, the 0% therefore applied to dividends paid to residents of the Netherlands.

SARS' case

SARS contended, inter alia, that the MFN clause in the Netherlands DTA must be read restrictively to the extent that it is limited to prospective preferential treatment afforded directly to another state, rather than indirectly by virtue of the operation of a provision in a subsequent DTA that presupposes the existence of a prior agreement. Therefore, the court should also have regard to the intention of the parties within the context of the surrounding facts and circumstances.

SARS also asserted that the taxpayer was exploiting an unanticipated, unforeseen and unfortunate occurrence in order to avoid paying tax in South Africa, despite the fact that this could not have been the intention of the contracting states. Further, it was also asserted that the consequences of this scenario could potentially be financially disastrous for South Africa.

Outcome

The court ruled in favour of the appellant. The Commissioner was ordered to refund the amounts claimed by the appellant with interest, and a costs order was granted in favour of the appellant which is payable by SARS.

Core Reasoning

The court outlined the fact that, while a DTA has the force of statute in terms of section 108 of the Income Tax Act, it is nevertheless the product of an agreement between the contracting states thereto. The court was therefore required to apply the legal principles applicable to the interpretation of written agreements within the context of international law. The court further confirmed the principle that contextual evidence should be considered conservatively in relation to a given agreement. Based on this, it was held that the wording of the relevant provisions of the DTAs concerned were clear and unambiguous, and accorded with the interpretation put forward by the appellant.

Take-Away

This case provides an indication of the approach which is taken by the courts in relation to the interpretation of a DTA. Indeed, it should suffice to note that SARS and National Treasury will likely appeal the decision of the court or seek to rectify the status of the treaty in place between South Africa and Kuwait.

Onwards & Upwards

How Thandiswa Khunga is Shaping Up to Face Our Future

In the highly competitive tax landscape of South Africa, taking steps to ensure you stay on top of the game is no longer an additional measure, it has become essential part of preparing for what is to come. Furthering yourself and your professional toolkit has proven to be the best way to gear yourself to stay professionally relevant during times of incessant change and technological advances.

There is so much talk of future proofing, succession planning and curating the workforce of the future that the process of professional development can seem more daunting than it need be. But as Thandiswa Khunga has recently learned, the easiest way to start is to take the first step.

After undertaking the task to gain her Tax Professional Qualification via SAIT and The Tax Faculty, Thandiswa has proven herself an exemplary individual more than capable of facing the future head on. By succeeding in the qualification, Thandiswa will be registered as a Tax Advisor (SA).

We sat down with Thandiswa to talk about her experience and her vision of the years that lay ahead.

Firstly, tell us a bit more about yourself, where were you born, where did you study and where do you currently work?

I am originally from Mpumalanga, and completed my matric there. I am proud to say that I was one of the top performers in my year. After matric I was faced with a bit of a dilemma as my family was unable to fund my tertiary tuition and originally the idea was for me to go and do a paramedic course as this was a surefire way to guarantee employment and the course was something we could afford.

I was completely unaware of the wealth of bursary options available for people in positions like me, and when I finally heard about it I rushed to fill in a late application at the University of Johannesburg. I was absolutely delighted to get accepted for a BCom in Accounting, as economics and business science was my primary interest in high school and I finally had the opportunity to explore these avenues at a tertiary level. None of this would have been possible had SARS not blessed me with a bursary to pursue my dreams.

After graduating, I joined SARS as a graduate trainee and after being offered a permanent position in 2017, I never looked back! Now I'm completing my final year for a postgraduate diploma in taxation at Unisa as well as doing the Tax Professional Qualification with SARS. It's been quite a journey, to say the least.

My bursary was funded by SARS, and thus funded by the taxpayer's money, so I hold the world of tax in high esteem and my experience is an example of just how amazing tax can be if used and allocated to social development in productive ways.

There is so much stress and anxiety about the future of the workplace and adequately preparing yourself to be of an employable standard. What do you think are practical ways to go about dressing the need to 'future proof' your resumé?

Future proofing myself and making sure I pursue a career that will stay in demand was very important to me from the get-go and I think that regardless of technological change the world will always need an authority of some sort on tax in order to successfully work with tax. I don't see tax practitioners ever becoming totally redundant.

You have to be able to adapt and you have to stay on your toes, otherwise the world will slip out from under you. Continuous study and upskilling is an absolute must, in my opinion.

If you want to be a tax decision maker, you need to know how to make those decisions, and the only way you're going to be able to do so is if you stay informed and on top of your game.

COURSE DELIVERY

The qualification is delivered via The Tax Faculty's virtual campus and webinar platforms whilst the final exam is administered by the South African Institute of Tax Practitioners (SAIT).

The Tax Faculty recognises that learning is achieved through past experience and therefore the learning journey will begin with a diagnostic from which tailored learning journeys are implemented, giving you the best opportunity to gain your qualification without having to start from scratch.

QUALIFICATION: TAX PROFESSIONAL (RPL)

This occupational qualification is a formal structured online learning programme that leads to a professional occupational qualification that is registered on the National Qualification Framework (NQF 8).

This 18-month bridging programme covers the knowledge and practical skills components of the qualification, and together with experience gained in the workplace, allows you to write the SAIT External Integrated Summative Assessment (EISA).

COURSE PROGRAMME

The occupational tasks of a Tax Professional include the demonstration of the following competencies at an advanced level:

- Registering a taxpayer
- Finalising income tax, payroll tax and VAT returns.
- Reviewing or auditing tax balances.
- Mediating tax disputes.
- Writing tax opinions.

You are studying in various capacities while actively working in the industry, both of which are quite impressive. Do you feel the need to create a brand for yourself beyond your accomplishments or are you an 'actions speak louder than words' kind of person?

I guess it's a bit of both for me. I want my accomplishments to be my brand, in that whatever I do here at SARS must stand as a testament to my dedication and abilities. Who knows, maybe I successfully closed a loophole or helped make a productive change in legislation. Eventually I would like to break into international tax and transfer pricing, and I think the best way to do so is to prove myself through my achievements here and now.

You were selected after very strict criteria to participate in The Tax Professional Programme, which is funded through a bursary programme called Ithuba. This qualification uses recognition of prior learning and as you have achieved so much thus far, you have been given the opportunity to fast-track the qualification, which is normally 3 years, to a mere 10 months. Tell us a bit more about this.

It has been very beneficial, but I will be honest in saying that after the submission of my first assignment the diagnostic made it clear that there was a big knowledge gap that I had to make up for in order to successfully undertake the qualification.

But luckily SAIT's approach to learning puts the responsibility of your growth in your hands and I was able to get my skills sharpened in a much shorter period of time.

Speaking of the bursary, how did you find the application process and would you recommend others working at SARS to follow suit?

I would definitely recommend it! The application was fair, reasonable and the response was speedy, which I appreciated. More importantly the team was very understanding and they made me feel like they believed in me and my ability to do this course before I really believed I could.

We have it on good authority that you are an intuitive and progressive professional, what are some of your personal predictions about where we are headed in terms of our shared industry?

I think we are starting to see both businesses and individuals start to take tax more seriously, and that there is an understanding taking place that by doing taxes correctly you are able to operate more efficiently.

I also predict that compliance is going to become a bigger issue than ever before, and that the future of the South African tax landscape and specifically SARS' role therein will see less squabbles and in-fighting, and increased focus on reducing risks and revenue leakages.

Even though you are not yet finished with your qualification, can you already see the course aiding you in your competencies and functions at your work at SARS?

Most certainly! Allow me to brag for a second, if you will. My manager is of the opinion that I am operating at a much higher level already and I am even used as an example of how to write a thorough and accurate report. It feels good, I won't lie.

I am in a much better position already, as my work with SAIT has forced me to get very well acquainted with the acts and through this I've come to realise that knowing your way around a calculation isn't sufficient, you also need to know why those calculations are important in the first place.

Lastly, do you have any words of encouragement or tips for your fellow young professionals on how to prepare for their future and face it head on?

Whether you are a graduate or still a student, you have to find your passion and lead with that. Don't study or pursue a career because of money. It might seem like a good idea now, but you will end up regretting it later. You need to weigh your strengths and weaknesses and plan where you want to be. You might not be exactly where you want to be right now in terms of your role or position, but know where you want to go and what you are going to do to get there.

TAX DIRECTORY

The Tax Directory connects you to key contacts in the tax industry, from national accounting and law practices to independent tax practices.

PART 1

NATIONAL ACCOUNTING PRACTICES

BDO

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Nicoline is an Associate Director and part of the Individual, trust and estates compliance team. Nicoline has over 20 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.

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 24 years' experience in tax and specialises in all aspects of corporate income tax, and corporate tax compliance. Henk holds a B. Com, B. Com (Hons), and Advanced Certificate in Tax.

Marcus Botha

Head of Corporate Tax (JHB)

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Marcus previously headed up PWC's Tax Reporting and Strategy Leader and Nedbank's Tax Risk. Marcus heads up the BDO JHB Corporate Tax Consulting 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 B.Com (Acc), B.Com Hons (Acc), CTA and M.Com (Tax).

Hylton Cameron

International Tax Director (JHB)

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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 B. Com, LLB, LLM (Tax) and H. Dip (International Tax).

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 of 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 the UK resident individuals.

Ilsa Groenewald

Associate Director – Tax (DBN)

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Ilsa has over 37 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.

Ilsa heads our tax compliance division in Durban and is responsible for corporate and individual compliance. Ilsa has extensive experience in Income and PAYE compliance, including the administration of monthly tax payroll.

Doné Howell

Individual, Trust and Estates Director (JHB)

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On leaving university, Doné joined the South African Revenue Service for three years, working in the PAYE Inspections and Individual Assessing departments. Thereafter Doné joined the private sector and now nearly 20 years on, and through various mergers of Audit firms, holds the position of Tax Director of BDO South Africa. Doné has been a partner since 2008.

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

James Hourigan

Global Employer Services Director (JHB)

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James relocated to South Africa from Ireland in 2007 and joined the firm as a director in 2016.

He has over 25 years of experience assisting both corporates and individuals on all expatriate tax and employees' tax matters. He has extensive knowledge providing advice on global and Africa expatriate tax consulting, assignment contracts and global mobility policy design, expatriate shadow payrolls, employee incentive schemes, PAYE health checks and SARS PAYE audit assistance.

Anton Kriel

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Anton has more than 29 years' of experience in tax. He started his career in Tax in 1990 at SARS and gained valuable experience in VAT and Corporate Tax. Anton heads up the BDO CT Tax Compliance Unit. 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 a H. Dip Tax.

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Seelan is an admitted Attorney with 23 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 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 B.Proc, LLB, LLM (Tax), and Certificate in Customs and Excise.

Bruce Russell

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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.

Chris Smith

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Joining the firm in June 2015 as Tax Director, Chris, a CA, specialises in corporate transactions, mergers and acquisitions and capital gains tax. He has been appointed to the SAICA Southern Regional Tax Committee and is an External Examiner for the UCT Master's Program. Chris joined PwC in 1996 after graduating from UCT. He became a Corporate Tax Manager in 2001 being responsible for managing Practice Risk Management. He also specialises in international tax, structured finance transactions and in the corporate banking unit.

Marcus Stelloh

Transfer Pricing Director (JHB)

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Marcus has 12 years' experience in Transfer Pricing, cross-border structuring and international tax gained at BDO South Africa and previously PwC, Deloitte Australia, EY, Grant Thornton and SARS. He has extensive knowledge in Transfer pricing planning within South Africa, Australia and Africa; Transfer pricing compliance within South Africa, Australia and Africa; Transfer pricing defence strategies and litigation support and Transfer pricing negotiations with SARS. Marcus's experience in specific sectors includes mining, oil and gas, financial services, information technology, manufacturing, distribution, telecommunications, services, shared services and cooperatives.

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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 4 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).

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Marcelle joined PWC in 1999 and in 2001 Uniqum Consulting Inc. 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 EMP 501 reconciliations. She holds a B.Com 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 value added tax, 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, re-structuring, due diligence investigations, tax reviews, liaison with SARS and dispute resolution among others.

David Warneke

Head of Corporate Tax Consulting (CTN)

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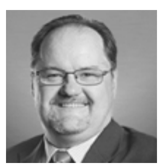
David has more than 20 years' tax experience and consults to large listed and unlisted multinationals. David heads up the BDO CT Tax Consulting Unit. He is a Tax Professor at UCT and was appointed to the Tax Court. He is a member of SAICA's National Tax Committee and its Southern Region Tax Committee. David holds a B. Com (Hons) (Acc), H. Dip (Tax), M.Com (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.

MAZARS

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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.

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 4 environment. 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.

Diane Seccombe

National Head of Tax Training for Global Audit

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Diane is an admitted Attorney with a Master's degree in taxation and has been involved in tax for over 10 years. Di is based in Cape Town and is currently the National Head of Tax Training and Presentations at Mazars. She provides tax training to partners, staff and clients on a national basis. Di also consults on income tax matters including corporate, individual and international tax as well as VAT.

CAPE TOWN AND PAARL

Bernard Sacks

Tax Partner

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Bernard is a Partner at Mazars Cape Town, a qualified Chartered Accountant and TEP. He specialises in corporate taxation, 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 experience with the taxation of trusts and serves as trustee to a number of trusts.

Elzahne Henn

Tax Consulting Director

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Elzahne is a Tax Consulting Director at Mazars Cape Town. She specialises in personal tax including global mobility services and international tax planning for individuals. 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.

DURBAN

Tertius Erasmus

Managing Partner

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Tertius is the Managing Partner of Mazars Durban and a qualified Chartered Accountant. He specialises in external assurance engagements, business structures and re-structuring, valuations, taxation and governance consulting in the private sector. Tertius also has experience in audits including various aspects of listed entities, independent reviews and compilations in terms of IFRS and IFRS for SME.

GAUTENG

Louwrens Basson

Senior Tax Manager

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Louwrens is a Tax Consultant at Mazars Pretoria. He services a number of South African and multinational clients providing them with tax planning, structuring, ad hoc transactional services as well as the submission of their annual income tax returns. His experience includes providing advice on all aspects of international tax including cross border investments and transactions, double tax agreements and exchange control regulations.

David French

Tax Consulting Director

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David is a qualified Chartered Accountant and Tax Consulting Director at Mazars Gauteng. He specialises in corporate and international tax. David spent 18 years at a Big 4 firm working in tax consulting. Thereafter, he spent over 7 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.

GEORGE AND PLETTENBERG BAY

Jacques du Plessis

Managing Partner

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Jacques is the Managing Partner of Mazars Garden Route and is a qualified Chartered Accountant. He specialises in external audit and assurance engagements, internal audit (compliance and VMF), business process improvement, internal control enhancement exercises, business continuity planning and risk management. Jacques serves on the National Tax Committee and his clients range from privately-held businesses to larger owner-managed businesses.

PORT ELIZABETH

Jonathan Comley

Managing Partner

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Jonathan is a qualified Chartered Accountant. He was previously seconded to Mazars London, where his primary focus was on the group audit reporting of large multinational entities in the insurance, banking and defence sectors.

He is on the National Board of Mazars and is currently the Chairperson of the Port Elizabeth District Association of the South African Institute of Chartered Accountants – Southern Region.

BLOEMFONTEIN, KATHU AND KIMBERLY

Walter Blake

Director

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

Nolands TAX

Graeme Saggers
Tax Director

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

Chenay Carelse
Tax Consultant

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Chenay Carelse is a Tax Advisor (SA) & 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 & has experience in advising clients on VAT, TAA & CIT queries.

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Simphiwe Mili is a Tax Advisor (SA) & 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 & has experience in advising clients on VAT, TAA & CIT queries.

PKF chartered accountants

Paul Gering
Partner: Tax

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Paul Gering 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 nation-wide. He specialises in trusts & estate planning & provides clients with tax opinions on various tax-related issues. He also assists clients in dealing with complex SARS audits & dispute resolution which includes representing clients at the Tax Court.

Kubashni Moodley
Partner: Tax

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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 & SARS which includes the submission of objections & 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 & frequently compiles tax-related articles for public distribution.

Alexa Muller
Tax Specialist

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Alexa Muller provides tax advice to clients on diverse matters – including South African & cross-border corporate restructures & trust & estate planning for individuals. She assists clients with advance tax ruling applications, voluntary disclosure programme applications as well as exchange control compliance.

the tax shop ACCOUNTANTS

Bennie Groenewald
Executive Director

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Bennie Groenewald (LLM Tax Law, BProc, HDip Tax) qualified as a commercial lawyer and master tax practitioner. He worked in banking & financial services for 25 years across multiple market segments in South Africa, Sub-Saharan Africa & the UK. He spent 15 years in senior & executive leadership positions & dealt extensively with cross-border banking & finance including corporate tax, project finance, asset finance, debt capital markets & all legal aspects.

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Veli Ntombela

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Veli Ntombela: Head of Tax Services

Affiliations: South African Institute of Chartered Accountants (SAICA)
Industry/Department: Veli has a solid 28 years of tax experience including domestic and international tax as well as indirect taxes. He is involved in State Owned Companies (SOC's) as well as large private sector clients across all sectors, i.e. mining, financial, industrial etc. Veli is also an admitted Advocate of the High Court of South Africa

Azwinndini Magadani CA(SA)

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Azwinndini is a qualified Chartered Accountant with over 14 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 18 years of tax consulting experience and 8 years spent in commerce, AJ is a rounded dedicated transfer pricing (TP) practitioner with 12 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 CA(SA)

Director – Tax Consulting

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With more than 10 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 digitization amongst other corporate tax areas. She works with a dedicated team of Value-Added-Tax, Employee's Tax specialists.

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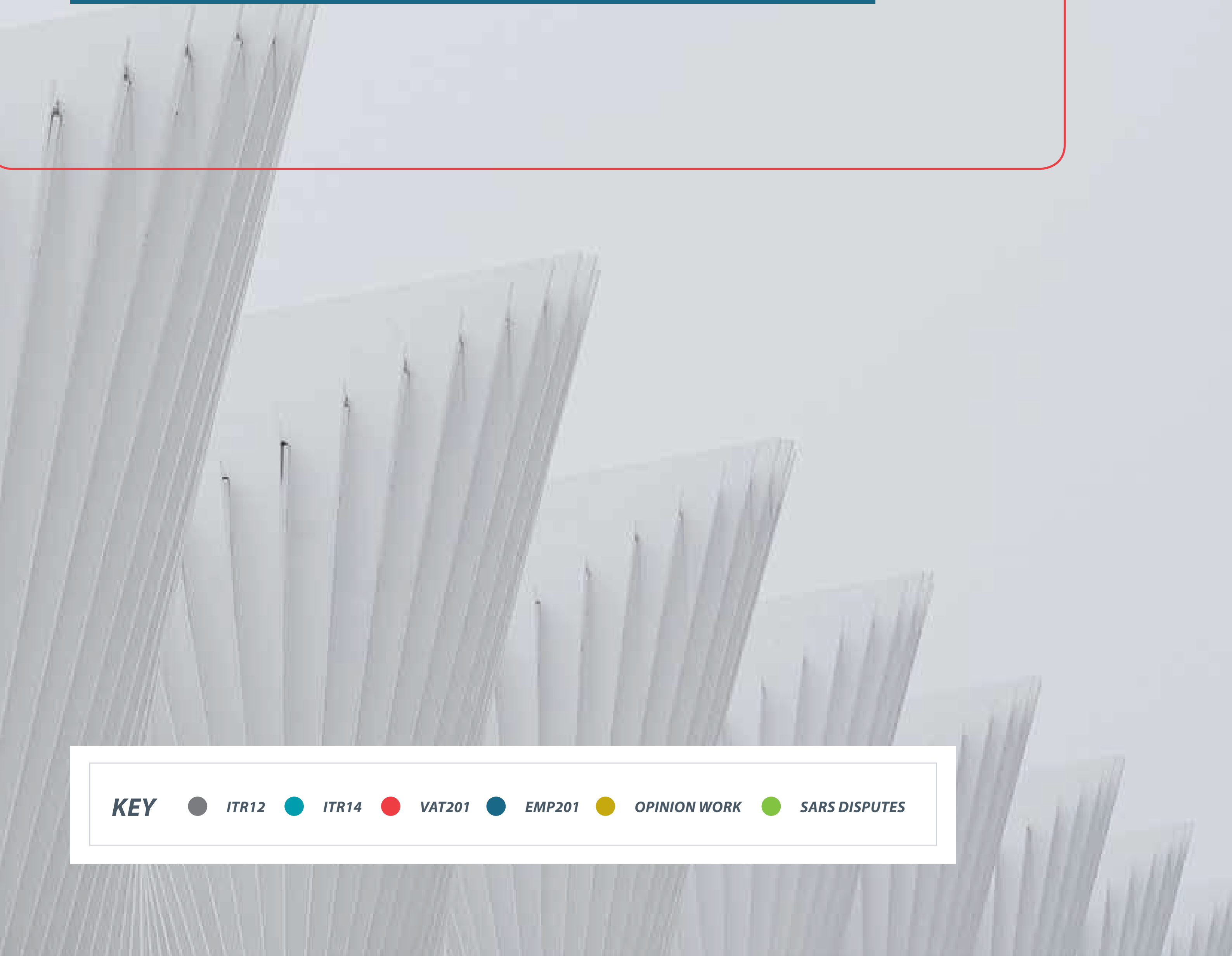
PART 2

INDEPENDENT TAX PRACTICES



KEY ITR12 ITR14 VAT201 EMP201 OPINION WORK SARS DISPUTES

FREE STATE

GC Cloete Accounting and Tax Services Inc
Dr Corrie Cloete, CEO

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CATS INC. practices as professional tax advisors & public accountants. Specialist services include uniquely developed forensic services that form the solid foundation for SARS dispute resolutions, SARS rescission applications, tax opinions & tax compliance/compromises. We provide complete accounting services for a number of smaller clients & also implement internal accounting &costing systems for larger clients.

Ranking of standard tax offerings:

Business Evolution
Michelle Homann, Managing Director

082 445 4108 | michelle@bevolve.co.za | bevolve.co.za

We provide effective tax planning services. At Business Evolution we want to help you evolve your company. We strive to provide the professional service you require to build your business. We believe that there is always room for improvement.

Ranking of standard tax offerings:

FinApex Financial Services
Zana Potgieter, Director

074 990 4484 | zana@finapex.co.za | finapex.co.za

FinApex strives to provide an accurate & timely record of all your taxation & other financial transactions. FinApex promises that our client will be aware of all the necessary compliance guidelines during these transactions. FinApex has the ability to bring a comprehensive knowledge of the financial sector that changes from time to time.

Ranking of standard tax offerings:

Crest Trust Holdings Inc.
Ian Brink, Managing Director

012 643 1049 | info@ctrust.co.za | ctrust.co.za

We offer specialised tax advice on estate duty, VAT, CGT, transfer duty & related taxes as a supporting service to our core business of fiduciary services, such as drafting of wills; administration of deceased estates; setting up, legal audit & management of trusts; comprehensive estate planning & structuring; & the drafting of fiduciary-related contracts & agreements.

GAUTENG

Africorp Accounting
Lelanie Murphy, Director

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Africorp Accounting is a niche tax & accounting firm that has existed for over 14 years, with a multidisciplinary team of tax attorneys, tax practitioners, chartered accountants & professional accountants, offering a holistic, client-centric & fully compliant approach.

We offer technical expertise & advice for a range of accounting functions for companies &/or practitioners wishing to hand off certain financial & administrative matters. Our good standing with SARS & our long-time experience with their procedures relieve you of various time-consuming obligations, such as tax compliance, registrations & submissions.

Our unique approach of adding a robust tax layer to your existing accounting function sets us apart from other providers. This enables us to structure your accounts around tax optimisation, taking advantage of the allowances afforded in tax law. Tax is planned proactively & not a mere afterthought.

Specialised tax offerings: Corporate tax returns and compliance, expedited SARS administration, individual tax returns, VAT registration, VAT returns, SARS disputes, remission of VAT penalties, preparing AFS, CIPC and COIDA registrations, Section 18A applications, EMP201 returns and IRP5 reconciliations & independent reviews.

Ranking of standard tax offerings:

Deceased Estate Tax Administration
Rhea Muller-Wolff, Admitted Attorney and Notary Public

084 910 1072 | rhea@deceasedestatestax.co.za | deceasedestatestax.co.za

We are a specialist deceased estate division with experienced tax attorneys & chartered accountants. The finalisation of a deceased estate holds unique challenges, especially where the SARS tax affairs of the deceased were not up to date or properly planned; high net worth estates; or simply complex deceased estates including international beneficiaries & complex structures. The executor is often caught in dealing with tax complexities outside their core areas of expertise &/or frustrating delays in process, whilst the beneficiaries are unable to understand the delays in finalising the estate.

Our typical clients are professional estate executors, attorneys, accountants or bankers who have the scars to show & know that the SARS estate tax process requires a different skill set. We also assist where the executor is a family member or professional, who is unable to finalise an estate due to complexities with SARS &/or the taxes of the estate, deceased or beneficiaries.

Our services are unique in the market, being that we have operated for over 14 years, with over 70 professionals & no subcontracting of services. We are well versed on dealing with SARS, with a know-how of SARS systems, requirements & processes for expedited conclusions.

Specialised tax services: SARS administration at branch & LBC level, tax profile correction, SARS registrations, tax clearance certificates, SARS matters including tax filing, dispute resolution, objections & appeals & re-activation of expatriate tax reference numbers for tax directives, IRP6, admin penalties, notice of objections, & post-death tax returns.

etiMAX
Gareth Hardy, Managing Director

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We are Employment Tax Incentive (ETI) specialists. There is a high probability that you are under claiming on your ETI. We assist you in recovering ETI shortfalls and rectify your current claims. Contact us to find out how we can help you.

Ranking of standard tax offerings:

KCE Consulting Inc
Kim White, Director

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KCE is a firm of registered accountants & auditors with a personal & professional focus to your statutory needs.

Highly competent in the understandings surrounding South African tax law, we maintain an up-to-date working knowledge of the legislation & will look after your personal & company taxes with the utmost confidence & care.

Our exceptional team strives for excellence in all aspects of accounting, whatever your needs from monthly / daily accounting to audit, tax advice & submissions to payroll we have you covered. Integrating our services with the cloud we add value to the day-to-day needs of your business, allowing you to keep a finger on the pulse of your company while we attend to the accounting & tax admin giving you 100% compliance with SARS.

Ranking of standard tax offerings:

Unicus Tax Specialists SA
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Unicus Tax is a tax only service firm specialising predominantly in corporate income tax & VAT & more specifically in the context of tax dispute resolution, advance tax rulings, VDPs, opinions & non-binding private opinion applications.

Ranking of standard tax offerings:

Thinking Financial Planners
Jose Proenca, Master Tax Practitioner

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Holistic independent financial planning family office. We ask, we listen attentively, we brainstorm, we think strategically, we plan, we implement & we take diligent care of our client's financial strategy so they can focus on their own areas of expertise & importance.

Ranking of standard tax offerings:

Shamu Bookkeeping Services (Pty) Ltd
Mike Herholdt, Managing Director

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We offer comprehensive tax & accounting services to both personal & corporate clientele. We specialise in preparation & submission of simple & complex personal tax submissions to SARS. Our tax professionals & practitioners are on hand to assist you with any SARS matters & to assist you with registering on SARS eFiling.

Ranking of standard tax offerings:

Tax Consulting South Africa
Jean du Toit, Senior Tax Attorney

079 523 4252 | jean@taxconsulting.co.za | taxconsulting.co.za

Tax Consulting South Africa has been in existence for over 14 years, with over 70 professionals including tax attorneys, tax practitioners & chartered accountants, who assist fellow professionals & high-value taxpayers on complex tax related matters that require a multidisciplinary approach.

As a dedicated tax practice, we are deeply experienced in working with SARS, with the know-how of SARS systems, requirements & processes for expedited conclusions. This allows us to absorb the administrative burden & frustration that is often faced when dealing directly with SARS, whilst ensuring client matters are resolved optimally.

All legal engagements are protected by legal professional privilege. This provides a safe & constructive environment to assess risk & provide advice on tax compliance & the corresponding tax implications.

Specialised tax offerings: Individual and corporate tax returns, SARS engagements including audits, rulings, VAT refunds, disputes, VDPs & tax clearances; corporate tax compliance; international tax and cross-border transactions; accrual reviews; payroll audits; tax optimised remuneration package structuring; & tax technical advice.

Ranking of standard tax offerings:

Tax Refine
Lucky Makhubela, Tax Practitioner

076 581 7565 | luckymakhubela32@gmail.com

Tax Refine refines all taxpayer issues. We are the solution to your tax compliance requirements.

Ranking of standard tax offerings:

NK Accounting Services
Nikki Kennedy, Co-owner

012 665 3574 | nikki@nkaccounting.co.za | nkaccounting.co.za

We provide financial & management accounting, taxation & payroll services. Contact us for your personal income tax return – we will guide you to ensure all relevant income & deductions are covered. We pride ourselves in providing professional quality services.

Ranking of standard tax offerings:

KEY ITR12 · ITR14 · VAT201 · EMP201 · OPINION WORK · SARS DISPUTES

KWAZULU-NATAL

Revelation Consulting Incorporated
Mr Leslie Chetty, Director

031 207 6675 | lbchetty@revcon.co.za | revcon.co.za

Revelation Consulting Inc. is a professional accounting & tax firm that has existed over the last 20 years. Our clients acknowledge both our sound business judgement & application of specialist skills, where quality of delivery includes not just our technical expertise, but also a cost-effective & pragmatic approach. Our service offerings include, but are not limited to tax services & payroll services.

Ranking of standard tax offerings:

Deceased Estate Tax Administration
Rhea Muller-Wolff, Admitted Attorney and Notary Public

084 910 1072 | rhea@deceasedestatestax.co.za | deceasedestatestax.co.za

We are a specialist deceased estate division with experienced tax attorneys & chartered accountants. The finalisation of a deceased estate holds unique challenges, especially where the SARS tax affairs of the deceased were not up to date or properly planned; high net worth estates; or simply complex deceased estates including international beneficiaries & complex structures. The executor is often caught in dealing with tax complexities outside their core areas of expertise &/or frustrating delays in process, whilst the beneficiaries are unable to understand the delays in finalising the estate.

Our typical clients are professional estate executors, attorneys, accountants or bankers who have the scars to show & know that the SARS estate tax process requires a different skill set. We also assist where the executor is a family member or professional, who is unable to finalise an estate due to complexities with SARS &/or the taxes of the estate, deceased or beneficiaries.

Our services are unique in the market, being that we have operated for over 14 years, with over 70 professionals & no subcontracting of services. We are well versed on dealing with SARS, with a know-how of SARS systems, requirements & processes for expedited conclusions.

Specialised tax services: SARS administration at branch & LBC level, tax profile correction, SARS registrations, tax clearance certificates, SARS matters including tax filing, dispute resolution, objections & appeals & re-activation of expatriate tax reference numbers for tax directives, IRP6, admin penalties, notice of objections, & post-death tax returns.

WESTERN CAPE

Africorp Accounting
Lelanie Murphy, Director

083 234 5092 | lelanie@africorpaccounting.co.za | africorpaccounting.co.za

Africorp Accounting is a niche tax & accounting firm that has existed for over 14 years, with a multidisciplinary team of tax attorneys, tax practitioners, chartered accountants & professional accountants, offering a holistic, client-centric & fully compliant approach.

We offer technical expertise & advice for a range of accounting functions for companies &/or practitioners wishing to hand off certain financial & administrative matters. Our good standing with SARS & our long-time experience with their procedures relieve you of various time-consuming obligations, such as tax compliance, registrations & submissions.

Our unique approach of adding a robust tax layer to your existing accounting function sets us apart from other providers. This enables us to structure your accounts around tax optimisation, taking advantage of the allowances afforded in tax law. Tax is planned proactively & not a mere afterthought.

Specialised tax offerings: Corporate tax returns and compliance, expedited SARS administration, individual tax returns, VAT registration, VAT returns, SARS disputes, remission of VAT penalties, preparing AFS, CIPC and COIDA registrations, Section 18A applications, EMP201 returns and IRP5 reconciliations & independent reviews.

Ranking of standard tax offerings:

FIDATO (Pty) Ltd
Morné le Roux MTP SA

021 201 6700 | mdleroux@fidato.co.za | fidato.co.za

Maximise growth, minimise risk, save time & money.

FIDATO (Pty) Ltd was founded in Cape Town almost two decades ago with a focus on tax legal advice & business restructuring.

Today, we have a track record of delivering superior long-term returns to our clients across South Africa & abroad with a value-driven approach to maximise growth & reduce risk.

Pro-actively in tune with market trends & tax regulations, we anticipate new entrants & disruptive trends, & ensure your business can respond to regulation in both a pragmatic & optimistic manner.

Our industry expertise extends across corporate governance, tax risk, holistic payroll tax structures, asset optimisation, individual compliance & investor support across South Africa & abroad.

We focus on mitigating your tax exposure, improving operational efficiency & enhancing overall cash flow to help you lead in the markets where you compete.

Our promise to you – The savings our advice affords will far outweigh the cost.

Ranking of standard tax offerings:

KEY ITR12 ITR14 VAT201 EMP201 OPINION WORK SARS DISPUTES

WESTERN CAPE

Fin Tax

Diane Pardoe, Director

021 782 5575 | dianedavpic@iafrica.com | fin-tax.co.za

Along with our standard bookkeeping, payroll, financial reporting, company registrations & full spectrum tax services, we are now proud to introduce two new divisions to our existing repertoire.

Our special projects division is geared to assist in many technical tax issues:

- Section 200 compromise applications
- SARS debt deferment arrangements
- Guidance & assistance in long-standing non-compliance with SARS
- Special objections & appeals
- Financial emigrations
- Tax opinions
- Advice on tax residency matters
- Assistance with tax structuring & tax administration
- Corporate tax restructuring
- Audit assistance
- Business valuations

We now also offer a special service to UK taxpayers who require navigation & assistance with submission of HM revenue & customs self-assessment returns (this service is for personal tax submissions only).

Ranking of standard tax offerings:

Tax Consulting South Africa

Jean du Toit, Senior Tax Attorney

079 523 4252 | jean@taxconsulting.co.za | taxconsulting.co.za

Tax Consulting South Africa has been in existence for over 14 years, with over 70 professionals including tax attorneys, tax practitioners & chartered accountants, who assist fellow professionals & high-value taxpayers on complex tax related matters that require a multidisciplinary approach.

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Specialised tax offerings: Individual and corporate tax returns, SARS engagements including audits, rulings, VAT refunds, disputes, VDPs & tax clearances; corporate tax compliance; international tax and cross-border transactions; accrual reviews; payroll audits; tax optimised remuneration package structuring; & tax technical advice.

Ranking of standard tax offerings:

LPH Services (Pty) Ltd

Leia van der Horst, Tax Director

021 448 1360 | leia.vanderhorst@lph.co.za | lph.co.za

We are committed to providing our clients with original, creative & practical solutions. Whether it is for a company or an individual, we can combine sound local knowledge with wide international experience & connections. This approach not only deals with the present, but helps clients plan for the future.

Ranking of standard tax offerings:

NATIONAL

PKF SA

Paul Gering, Tax Partner

031 573 5000 | paul.gering@pkf.co.za | pkf.co.za

PKF is one of the largest mid-tier accounting firms in South Africa, providing multi-disciplinary auditing, accounting & business advisory services.

The member firms have 64 directors & consultants & over 740 staff to provide clients with focused, quality personalised service & support at director level.

In addition to our full range of advisory services, PKF has the ability and the capacity to service large, complex transactions. Our directors are accessible to our clients on each engagement, & are unwavering in our commitment to provide straightforward advice.

Our clients acknowledge both our sound business judgment and our innovative and disciplined application of specialist skills, where quality of delivery includes not just technical expertise but also focused attention and a pragmatic, cost-effective approach.

Our worldwide network enables the sharing of expertise and experience, and underpins the ability of local teams to offer our clients globally relevant advice, grounded in local knowledge.

Ranking of standard tax offerings:

PART 3

INDEPENDENT LAW PRACTICES

CDH

Emil Brincker
Director and National Head of Tax and Exchange Control
011 562 1063
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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 2003-2018. The Legal 500 EMEA series 2018 ranked Emil as a "leading individual" for tax.

Dries Hoek
Director
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dries.hoek@cdhlegal.com

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.

Gerhard Badenhorst
Director
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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 2009-2018 ranked him in Band 1 for indirect tax. Legal 500 EMEA 2014-2018 recommended Gerhard in tax.

Mark Linington
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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, including tax due diligence reviews, tax opinions and tax dispute resolution.

Chambers Global 2017-2018 ranked Mark in Band 1 for tax consultants. Chambers Global 2007-2016 ranked him in Band 2 for tax consultants. The Legal 500 EMEA 2016-2018 recommended Mark for tax.

Petr Erasmus
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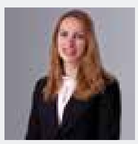
Petr Erasmus is a Director in CDH's Tax and Exchange Control Practice. He specialises in customs and excise law. Petr started his career as a Customs and Excise Officer at SARS: Customs in 1996. He was deployed across a wide range of customs and excise positions and offices before being appointed as 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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Mareli Treurnicht is a Director in CDH's Tax and Exchange Control Practice. She has experience in applying for advanced tax rulings, drafting opinions and advising on general tax matters, and in particular corporate restructures, trusts, international tax, exchange control, and share incentive schemes. Mareli also has experience in general and tax litigation, has advised on commercial transactions and has experience in drafting commercial agreements.

Baker McKenzie.

Stephan Spamer

Partner

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International tax & structuring, corporate tax, tax dispute resolution, tax for M&A and reorganisations, tax planning, trust law, exchange control, Black Economic Empowerment structuring.

Arnaaz Camay

Senior Executive: Tax

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Pan-African tax due diligence reviews, global reorganisations, corporate tax and international tax with a specific focus on advising global multinationals on mitigating permanent establishment and effective management risks

Virusha Subban

Partner

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A niche practice focusing on customs, excise, including customs litigation and export controls, including a cradle to grave offering 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, and training to companies that wish to avert customs and excise risk.

BOWMANS

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TAX MOVES

Tax industry career moves over the past 12 months.

BAKER MCKENZIE

- ***Virusha Subban***, previously from Bowmans, joined Baker McKenzie in Johannesburg on 1 May 2019 as Partner and Head of Indirect Tax.
- ***Okkie Kellerman***, previously from ENSafrica, joined Baker McKenzie Johannesburg on 1 August 2018 as a Senior Executive in the Tax Practice.

BOWMANS

- ***Mogola Makola***, previously from SARS, joined Bowmans in February 2019 as Partner.
- ***Yasmeen Suliman***, previously from KPMG, joined Bowmans in January 2019 as Executive: Tax.
- ***Robyn Berger***, previously from Bravura, has joined Bowmans as Executive: Tax as from July 2018.
- ***Rone La Grange***, Previously from KPMG, has joined Bowmans as Executive: Tax as from September 2018.
- ***Nikhil Hira***, previously from Deloitte Kenya, has joined Bowmans as Partner from August 2018.

ENSAFRICA

- ***Carli Aldrich*** was promoted from Tax Manager to Executive, with effect from 15 March 2019.
- ***Lavina Daya*** was promoted from Principle Associate to Executive, with effect from 15 March 2019.
- ***Ntebaleng Sekabate*** was promoted from Senior Associate to Executive, with effect from 15 March 2019.

EY

- ***Larry Enyinla*** joins as Africa Tax Leader, with effect from 1 May 2019.
- ***Ekow Eghan*** was promoted to <South African Tax Leader and Deputy Leader for Africa Private Equity, with effect from 1 May 2019.
- ***Mohammed Jada*** joined EY Africa on 3 October 2018 as Business Tax Advisory Services Leader.
- ***Alwina Brand*** joined EY Africa on 1 July 2019 as Partner in Financial Services Tax.
- ***Stefan Botha*** joined EY Africa on 1 July 2019 as Partner in Financial Services Tax.
- ***Mohammed Mayet*** joined EY Africa on 1 August 2018 as Executive Director in Financial Services Tax.
- ***Candice Van Den Berg*** was promoted to Partner: Business Tax Advisory Services, with effect from 1 July 2019.
- ***Emile du Toit*** was promoted to Partner: Business Tax Advisory Services, with effect from 1 July 2019.

PWC

- ***Elle-Sarah Rossato***, previously from KPMG, has joined PwC on 1 February 2018 as Lead: Tax Controversy & Dispute Resolution.

SNG GRANT THORNTON

- ***Craig Bain*** joined SNG Grant Thornton's Transfer Pricing team on 15 July 2019 as a Principal. Craig was previously employed at Deloitte.

WEBBER WENTZEL

- ***Cor Kraamwinkel***, previously from PwC's International Tax Practice has joined Webber Wetzel on 1 June 2019 as Equity Partner.
- ***Rudi Katzke*** was promoted from Senior Associate to Partner with effect from 1 March 2019.
- ***Shirleen Ritchie*** was promoted from Senior Associate to Partner with effect from 1 March 2019.

WERKSMANS

- ***Erich Bell*** was promoted from Senior Associate to Director, with effect from 1 March 2019.

CORPORATES AND OTHER

- ***Nishana Gosai***, previously from Baker McKenzie, has joined Adcorp Group on 1 February 2019 as Group Tax Executive.
- ***Erika de Villiers*** joined Aveng as Senior Tax Manager as from April 2019.
- ***Beatrie Gouws*** joined SAIT as Head of Stakeholder Management and Strategic Development.

NEW FIRM LAUNCHES

WALENA AFRICA CAPITAL

Lucia Hlongwane has recently launched Walena Africa Capital which specialises in delivering exceptional end-to-end business solutions for both the public and private sectors. Service offerings include: change management, executive coaching, information communication and technology, internal audit, leadership development, law, risk and governance, strategy and execution, supply chain management, talent advisory and tax.

Ferdie Schneider, previously National Head of Tax at BDO South Africa (and ex Deloitte and KPMG Tax Partner), has recently launched STA Konsult, a company specialising in tax, advisory, wealth, and assurance. STA Konsult's main focus initially will be to build a solid boutique firm specialising mainly in tax services, such as direct taxes and indirect taxes, and build on the additional services lines in the medium term.

PROGRAMME

TAX INDABA 2019

26 - 30 AUGUST 2019

SANDTON CONVENTION CENTRE, JOHANNESBURG

MONDAY | 26 AUGUST 2019

TAX POLICY: REJUVENATING GOVERNMENT AND THE ECONOMY	
08:30 – 08:40	OPENING OF CEREMONIES
08:40 – 09:20	KEYNOTE SPEAKER: SARS COMMISSIONER, EDWARD KIESWETTER
09:20 – 10:00	FUTURE PROSPECTS: THOUGHTS FROM THE FINANCE FAMILY
10:00 – 10:30	**Break**
10:30 – 11:15	ECONOMIC OUTLOOK: WILL THE ECONOMY GROW SUFFICIENTLY TO SATISFY NATIONAL TREASURY'S BUDGET PROJECTIONS?
11:15 – 11:45	THREE SHADES OF CORRUPTION – PART ONE: THE ROLE OF THE PARTICIPANTS
11:45 – 12:30	THREE SHADES OF CORRUPTION – PART TWO: THE ROLE OF THE INTERMEDIARIES
12:30 – 13:30	**Lunch**
13:30 – 14:15	THREE SHADES OF CORRUPTION – PART THREE: CAN WE GET THE MONEY BACK?
14:15 – 15:00	GLOBAL CRIMINALISATION OF TAX OFFENCES: ILLEGAL TAX MITIGATION IS NO LONGER VIEWED AS A CIVIL VIOLATION
15:00 – 15:30	**Break**
15:30 – 16:30	SOUTH AFRICAN CORPORATE SURVEY OF SARS INTERACTIONS

TAX INDABA
2019

TUESDAY | 27 AUGUST 2019

DAY-TO-DAY EXPERIENCE OF COMPANY TAX COMPLIANCE//CROSS-BORDER AFRICA

08:30 –09:30	TAX SETTLEMENTS: BUSINESS AND REPUTATIONAL TRADE-OFFS	
09:30 – 10:30	FLASHPOINTS ON THE ITR14 CORPORATE TAX RETURN	
10:30 – 11:00	**Break**	
	STREAM ONE	**STREAM TWO**
11:00 - 11:45	THE ONGOING HEADACHES OF PROVISIONAL TAX RETURNS (FROM LARGE TO SMALL)	INTRA-AFRICA ECONOMIC RELATIONS: OVERCOMING BARRIERS TO CROSS-BORDER TRADE AND INVESTMENT
11:45 – 12:30	CONTRACT MINING AND OTHER DEVELOPMENTS IN THE MINING INDUSTRY: ANY HOPE FOR RENEWAL?	SUBSTANCE ON THE BEACH: HOW MUCH SUBSTANCE IS NEEDED TO JUSTIFY YOUR OFFSHORE HOLDING / HEADQUARTER COMPANY?
12:30 – 13:30	**Lunch**	
13:30 – 14:00	NEW FINANCING TRENDS IN COMPANY ACQUISITIONS	THE MIS-INVOICING DEBATE: ARE MULTINATIONALS REALLY TO BLAME FOR AFRICA'S LOST BILLIONS?
14:00 – 14:30	DUE DILIGENCE CHECKS FOR COMPANY ACQUISITIONS: IS THE TARGET GENUINELY SAFE TO ACQUIRE?	CbC REPORTING: IMPLEMENTATION CHALLENGES FOR DEVELOPING COUNTRIES – AS THE 2020 INCLUSIVE FRAMEWORK REVIEW LOOMS
14:30 – 15:00	PERSONAL LEAKAGES ON THE COMPANY INCOME TAX RETURN	ZAMBIAN SALES TAX: INSTITUTIONALISED HOSTILITY TO VAT REFUNDS
15:00 – 15:30	**Lunch**	
15:30 – 16:30	TOWN HALL SESSION: TAXPAYER-SARS SESSION / REGIONAL AFRICA *Town hall sessions are designed to solicit questions from the audience for discussion with SARS and leading tax practitioners. These sessions provide a useful assessment of the latest SARS operational issues and trends.*	

WWW.TAXINDABA.CO.ZA

26 - 30 AUGUST 2019
SANDTON CONVENTION CENTRE, JOHANNESBURG

WEDNESDAY | 28 AUGUST 2019

PERSONAL TAX COMPLIANCE // LARGE BUSINESS (DOMESTIC AND INTERNATIONAL)

08:30 –09:30	GAP IN THE TAX BASE: WHERE IS THE MONEY?	
09:30 – 10:00	BEE OWNERSHIP STRUCTURES: LATEST CHALLENGES AND POSSIBLE RESPONSES	
10:00 – 10:30	SASOL CASE	
10:30 – 11:00	Break	
	STREAM ONE	STREAM TWO
11:00 - 11:45	INDIVIDUAL TAX RETURNS: KEEPING THE PROCESS SMOOTH AND SIMPLE	US CUSTOMS AND TAX RULES: GLOBAL AND AFRICAN REVERBERATIONS
11:45 – 12:30	NEW eFILING SYSTEM: IMPROVEMENTS AND TEETHING PROBLEMS	GLOBAL REORGANISATIONS
12:30 – 13:30	Lunch	
13:30 – 14:30	PENSIONS AND OTHER LUMP SUMS	TO PROVISION THE TAX RISK OR NOT TO PROVISION, THAT IS THE QUESTION
14:30 – 15:00	TAX DEBTS: MANAGING TAXPAYER OBLIGATIONS ONCE ADMITTEDLY IN ARREARS	TECHNICAL SERVICES: A SOUTH AFRICAN OUTBOUND AND A REGIONAL INBOUND AFRICAN PERSPECTIVE
15:00 – 15:30	Break	
15:30 – 16:30	TOWN HALL SESSION: INDIVIDUAL RETURNS *Town hall sessions are designed to solicit questions from the audience for discussion with SARS and leading tax practitioners. These sessions provide a useful assessment of the latest SARS operational issues and trends.*	

TAX INDABA
2019

THURSDAY | 29 AUGUST 2019

MANAGING VAT AND PAYE // WEALTH PLANNING		
08:30 –09:00	VAT OPERATIONAL ISSUES: STATE OF PLAY	
09:00 – 09:30	HENLEY & PARTNERS PRESENTATION	
09:30 – 10:30	**PENDING CHANGES TO THE SECTION 10(1)(O) EXPAT EXEMPTION: IS YOUR PAYROLL TEAM READY?**	
10:30 – 11:00	**Break**	
	STREAM ONE	**STREAM TWO**
11:00 - 11:45	RECURRING HOT TOPICS IN PAYROLL	YOU SENT THE MONEY ABROAD BUT CAN YOU EVER BRING IT BACK?
11:45 – 12:30	VAT APPORTIONMENT: THE UTILITY OF THE TURNOVER AND OTHER METHODS	DOMESTIC DISCRETIONARY TRUSTS: VIABLE FUNDING AND ALLOCATIONS
12:30 – 13:30	**Lunch**	
13:30 – 14:00	EMP501: SIX-MONTHLY RECONCILIATIONS	WEALTH TAXES: STILL COMING?
14:00 – 14:30	RESPUBLICA CASE: THE SALE AND LETTING OF STUDENT ACCOMMODATION	PLANNING THE FINAL EXIT: THE POTENTIAL PITFALLS OF LEAVING SOUTH AFRICA
14:30 – 15:00	THE INTERACTION BETWEEN THE CONSUMER PROTECTION ACT AND VAT	TRANSFER PRICING AND CROSS-BORDER FAMILY PLANNING
15:00 – 15:30	**Break**	
15:30 – 16:30	**TOWN HALL SESSION: THE PRACTICALITIES OF WEALTH PLANNING** *Town hall sessions are designed to solicit questions from the audience for discussion with SARS and leading tax practitioners. These sessions provide a useful assessment of the latest SARS operational issues and trends.*	

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FRIDAY | 30 AUGUST 2019

08:00 TO 13:00 FREE TAX EXPO DAY – A FIRST FOR THE TAX INDABA!

WE'VE PARTNERED UP WITH SOME AMAZING SPONSORS AND PROFESSIONAL BODIES TO BRING YOU AN EXPO DAY DEDICATED TO SOLVING YOUR TAX, ACCOUNTING AND SOFTWARE NEEDS. VISIT THE EXHIBITOR STANDS TO LEARN MORE ABOUT THEIR PRODUCT OFFERINGS AND SERVICES

DON'T FORGET TO PICK UP YOUR TAX INDABA TREASURE MAP

YOU COULD WIN A 3-NIGHT STAY FOR 2 PEOPLE IN A MOUNTAIN VIEW SUITE AT ANTBEAR LODGE IN THE DRAKENSBERG, INCLUDING DINNER AND BREAKFAST, VALUED AT R11 700!

HERE'S HOW:

1. JOIN US AT TAX INDABA 2019
2. RECEIVE A TREASURE MAP AT REGISTRATION
3. VISIT EACH OF THE LISTED STANDS TO GET A STAMP/STICKER/SIGNATURE
4. DROP YOUR FULLY COMPLETED TREASURE MAP IN THE TREASURE CHEST ON THE EXHIBITION FLOOR
5. THE LUCKY WINNERS WILL BE DRAWN ON FRIDAY, 30 AUGUST

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