PROFESSIONAL

TAXTALK

South Africa's Leading Tax Journal

Issue70 May/June 2018

WOMEN IN TAX

Take centre stage

sait

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The Tax Faculty

VAT RISKS AND ISSUES IN BUSINESS OPERATIONS

Have you connected the dots between VAT legislation and your VAT risk? Understanding your role in managing the VAT risk in your organisation

SEMINAR

4 HOURS

With the increase in the VAT rate on 1 April 2018, SARS is likely to intensify its focus on non-compliance with VAT legislation and potential avoidance schemes. The onus is on the taxpayer to ensure compliance with VAT legislation. This starts with an understanding of the legal framework within which VAT operates, the requirements of the VAT Act and linking this to the actual operations conducted by the organisation. This seminar is aimed at providing you with a better understanding of the critical areas of VAT risk in organisations. It also provides an overview on how adhering to the legal framework that governs VAT can protect your organisation from unnecessary VAT sanctions.

PRESENTER

Christo Theron - Founder - TradeTax

THE COURSE WILL DEAL WITH THE FOLLOWING:

- Managing risks in the registration process
- Managing risks in the identification of supplies process
- Managing risks in the time of supplies process
- Managing risks in the value of supplies process
- Managing risks in the international supply chain process
- Managing risks in the transition to the new VAT rate
- Managing risks in the input tax cycle

REGIONS

7 May | Kempton Park

8 May | Cape Town

9 May | Port Elizabeth

10 May | Durban

15 May | Johannesburg

16 May | Pretoria

17 May | Webinar

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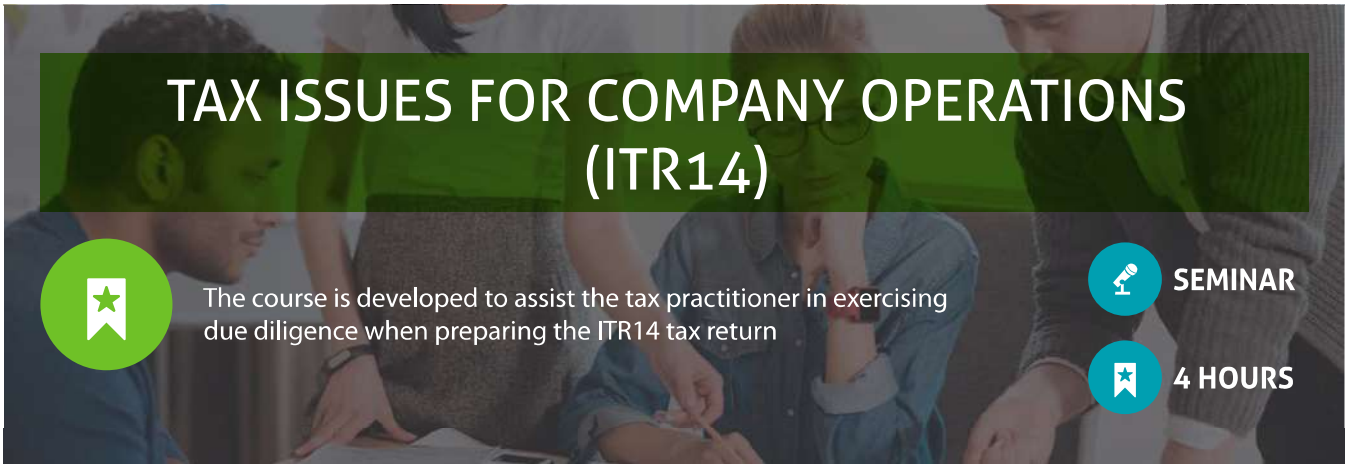

TAX ISSUES FOR COMPANY OPERATIONS (ITR14)

The course is developed to assist the tax practitioner in exercising due diligence when preparing the ITR14 tax return

SEMINAR

4 HOURS

The primary responsibility of the tax practitioner with regard to the submission of the ITR14 is to ensure that complete and accurate information is submitted to SARS and that defendable positions are taken whenever Uncertain Tax Positions arise. The tax compliance function is not simply an administrative function; the tax practitioner must exercise "reasonable care" when preparing the ITR14. Failure to do so may lead to an understatement penalty of 25% in a standard case – even where the taxpayer is in an assessed loss position.

PRESENTER

Johan Heydenrych - Director: Tax Services KPMG Services (Pty) Ltd

THE COURSE WILL DEAL WITH THE FOLLOWING

- Anticipating that an IT14SD may be required upon assessment and ensuring that the disclosure in the ITR14 facilitates the preparation of the IT14SD.
- Anticipating a SARS audit as and when the ITR14 is prepared.
- Interpreting annual financial statements and trial balances, and identifying tax risks and opportunities from a critical review of these. Under this section, we will discuss common issues encountered from a review of the annual financial statements and trial balances

REGIONS

7 June | Kempton Park

8 June | Port Elizabeth

11 June | Durban

12 June | Cape Town

13 June | Johannesburg

14 June | Pretoria

20 June | Webinar

WE DO E-LEARNING SO YOU CAN DO LIFE

2.45hrs
CPD in this issue

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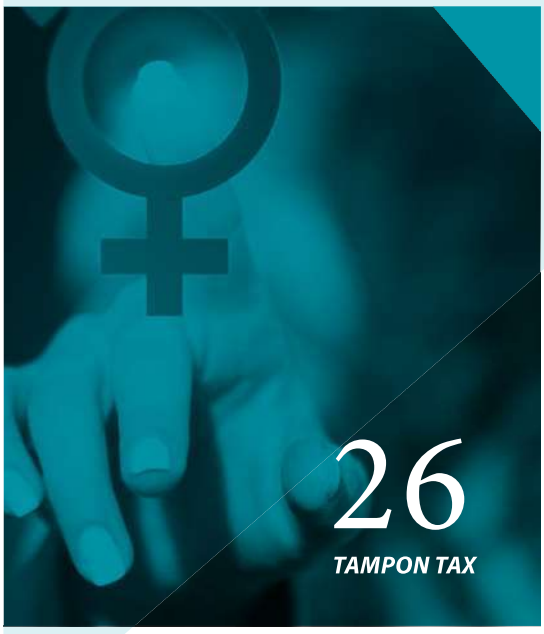
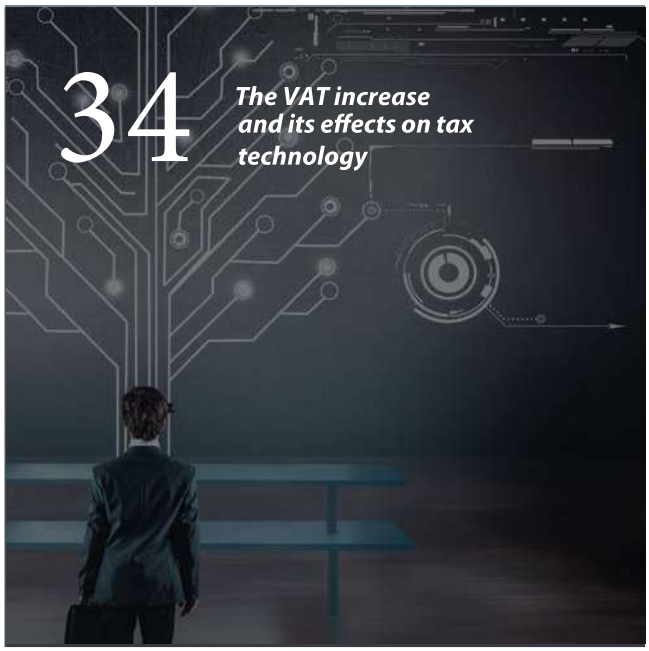


FEATURED!

WOMEN IN TAX

TOPICAL



THE OLD RELIABLES

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Submit your answer
and you could win a R500 book voucher, sponsored by Lexis Nexis!

Message From the Editor

Welcome to the May/June 2018 issue of *TaxTalk* which accentuates the accomplishments of women in tax (leading up to National Women's Day). Our main feature highlights a handful of successful tax leaders, and chronicles the achievements and challenges of women in the South African tax industry.

The theme unfolds into various issues that speak to the fairer sex. We include topics that cover taxes on sanitary products, and the tax implications of marriage contracts and divorce. Our Women in Tax surveys, launched in April, reveal some interesting facts about the progression of women in the tax world and the initiatives offered by firms that are aimed at empowering women in the workplace.

Over and above this theme, we have included other interesting developments in tax. We have a strong focus on the recently promulgated VAT increase and the effects on e-commerce and tax technology, and the reality of implementing the increase along with its effects on business profitability.

As a bonus, we have included a synopsis of the latest tax books offered by publishers. These are listed on page 52. We have arranged a 10% discount for *TaxTalk* readers, so please make use of that (details are listed on the same page). We are also offering one lucky reader a R500 gift voucher sponsored by LexisNexis. Simply participate in our competition on page 72 to enter.

PS Don't forget to look out for the next issue – our bigger and better July/August 2018 Special Income Tax Issue. It is the perfect companion for tax season!

Tania Wolson
Editor

Tell us what you think. Questions and suggestions can be sent to editor@thesait.org.za

THE TEAM

Editor at Large
Tania Wolson
editor@thesait.org.za

Supporting Editor
Jeanne Viljoen
taxtalk@thesait.org.za

Editorial Advisors
Keith Engel
Cherie Carstens-Petersen

Art Director
Nastassja Hewitt
designer@thesait.org.za

Design and Layout
Nastassja Hewitt
designer@thesait.org.za

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FIND US

Postal address
PO Box 712
Menlyn Retail Park
0063

Editorial head office
Riverwalk Office Park, Building A
C/o Garsfontein & Matroosberg Roads
Pretoria
South Africa
0081

Advertising sales consultant
Collette Evers

4Evers Marketing Solutions
collette@4evers.co.za
Cell: 082 349 9914

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GUEST CONTRIBUTORS

Eugene Buitendach
eugene.buitendach@kpmg.co.za / 082 7196 9342

Eugene is a Senior Manager at KPMG specialising in tax technology and innovation. He is a qualified CA (SA).

Dr Ferdie Schneider
fschneider@bdo.co.za / 082 771 4157

Ferdie is the National Head of Tax at BDO Tax Services in South Africa. He consults on all areas of tax, with a deep specialisation in VAT (earlier background is that of a taxation economist). He holds a Master's in Economics, Master's in Tax, and has a PhD in Tax.

Herman Viviers
herman.viviers@nwu.ac.za / 018 299 1474

Herman is an Associate Professor in taxation in the School of Accounting Sciences at the North-West University. He is the institutional subject head for taxation, and is a CA(SA) with a PHD in Accountancy and an MCom in Taxation.

Madelein van Zyl
madelein.vanzyl@kpmg.co.za / 082 718 8810

Madelein is a Partner at KPMG. Her area of tax specialisation is tax technology and innovation. She has an HDip (Advanced Programme in Taxation).

Michele Benetello
mbenetello@ensafrica.com / 011 269 7894

Michele is an Executive in ENSafrica's tax department. He specialises in corporate and international tax and mergers and acquisitions. His qualifications include: Bachelor of Commerce (Honours) (Accountancy) and CA(SA).

Nicky Combrinck
nicky.combrinck@psg.co.za / 073 005 2192

Nicky is a Technical Legal Adviser at PSG Wealth where she specialises in international tax. Her academic qualifications include: Bcom, LLB and Adip International Tax.

Kevin Burt
mail@kevinburt.co.za // 011 291 8659

Kevin is an Advocate and member of the Island Group of Advocates based in Sandton. He specialises in all areas of tax law (income tax, capital gains tax, VAT, estate duty etc.) and tax-administration law. He has an LLB degree, LLM (Tax) degree and MBA (cum laude).

Leanie Groenewald
leanie.groenewald@nwu.ac.za / 018 285 2434

Leanie is a Senior Lecturer in taxation in the School of Accounting Sciences at the North-West University. She is a CA(SA) with an MCom in Taxation and an MCom in Forensic Accountancy.

Lesley O'Connell
lesley.oconnell@pwc.com / 011 797 2524

Lesley is a Director, Indirect Tax at PwC South Africa. Her area of speciality is VAT. She holds Bachelor of Social Sciences and Bachelor of Laws degrees from the University of Cape Town.

Preshnee Govender
preshnee.govender@kpmg.co.za / 076 511 2536

Preshnee is a Senior Tax Manager at KPMG. She specialises in international and corporate tax, and has a Master's in Tax Law (UCT).

Shohana Mohan
shohana@taxauditor.co.za / 011 205 0535

Shohana is the Individual, Employment & Expatriate Tax Specialist at TaxAuditor Solutions Incorporated.

The tax environment has for many years been dominated by men. However, this has been changing rapidly. Women find themselves in leadership positions in all spheres of the economy. They are increasingly appointed in positions where they play an important part in shaping tax policy and decision making. We spoke to some tax leaders in the government, corporate and advisory sectors to celebrate their achievements.

WOMEN IN THE WORLD OF TAX

▶ **AMANDA VISSER**

"How we talk to [stakeholders] in a way that is understandable and accessible at their level is what makes the difference."

DR REBONE GCABO

Head of Policy Research for the Tax, Customs and Excise Institute at SARS

Dr Gcabo is a qualified Research Psychologist with a PhD in Organisational Behaviour from the University of Pretoria. She has 16 years' public and private research experience. She joined SARS in 2009 as a tax compliance research specialist, and then joined the Web Usability Team, responsible for customer user experience research. She is currently the Head of Policy Research for the Tax, Customs and Excise Institute (TCEI) in SARS.

Why choose the world of tax?

As a behaviourist, Rebone wants to understand why people make decisions the way they do. The culture of tax compliance piqued her curiosity while she was in the world of academia.

"In academia one does not have access to the data or the workings of SARS. Once inside the organisation, I was able to apply the data to the behavioural patterns of taxpayers."

Rebone has done a lot of customer research to understand what it is that taxpayers fear: If you understand their behaviour you can influence the communication message. Within the organisation she has been mentoring and coaching people to get to grips with the sheer size of SARS and what its strategy is. This enables them to better serve taxpayers. When people do not fear SARS they can negotiate with SARS. They have confidence to approach SARS with their issues.

Career challenges and rewards

"The most challenging aspect for me was to understand the tax language," says Rebone. She says SARS' stakeholders vary from students to large multinational companies.

"How we talk to them in a way that is understandable and accessible at their level is what makes the difference."

When everything is clear, with no "grey areas", people are able to trust and to own up to their own behaviour. It is a major challenge to get the language right for people to feel comfortable with it.

SARS is filled with technocrats and specialists. "You have to be patient with yourself, because it is not a world that is mastered in six months or one year – it can take up to four or five years to understand this big elephant."

The biggest reward is understanding and seeing the impact of policy on people's lives, and how policy should be influenced to achieve better outcomes for taxpayers.

Advice to young women considering the tax profession

One does not need to have a degree in tax to be included in the SARS fold. According to Rebone, the organisation also needs behaviourists, scientists, communication experts, and experts in law and human resources.

"The organisation wants to become more data centric or data focused, meaning IT skills will be in great demand."

Rebone feels if people are willing to be challenged, if they have a clear purpose and vision, there is a space in SARS for them.

A role for women in policy and decision making

Rebone has been with SARS for nine years. Initially the people pyramid had many women at the bottom, with a few in the middle and very few at the top.

"Over time I have seen women making inroads into middle management and a lot are getting into the executive level."

It is quite an achievement. It allows for diverse thinking which is critical in an organisation which represents the needs of all South Africans.

"It has been a remarkable journey to see women entering the levels where they can influence decision making. Women must stand up, and be strong enough to trust themselves."

Rebone says women must be willing to come to the table. "Showing up means you have to be brave and accountable. But you have to show up."

"By reaching out to taxpayers, we are able to raise awareness about their tax rights and obligations and the role and mandate of the Tax Ombud as a recourse mechanism."

PEARL SEOPELA

Senior Manager: Communications and Outreach at the Tax Ombud

Pearl has extensive experience in managing and implementing public relations, corporate communication and reputation management projects and campaigns. Over the years, she has worked in a range of sectors, including telecommunications, public sector auditing, and pension fund administration.

Currently she is doing her Master of Management in Strategic Marketing at Wits Business School.

Why choose the world of tax?

Pearl's passion for consumers and the protection of their rights attracted her to the Office of the Tax Ombud. She strongly feels that consumers should be able to make informed decisions.

"I have always seen tax matters as one of the services where consumers may not know their rights and do not easily comprehend the tax lingo."

The role of the Tax Ombud in a society with relatively low levels of financial literacy is critical. The Ombud's Office ensures that the rights of taxpayers are protected and that SARS fulfils its obligations in terms of being fair and just in applying tax legislation.

Career challenges and rewards

Pearl's greatest career challenge has been to work for a government department, mainly because of the bureaucracy (processes and procedures) as well as the culture within government.

"Today I am happy that I took that path because it helped me to understand how government works and how best to make an impact in improving service delivery."

She gained valuable experience at the Government Employees Pension Fund and pioneered engagement with stakeholders such as organised labour, government departments, pensioners and active members of the fund.

At the Office of the Tax Ombud Pearl changed the "look and feel" of an organisation that was still in a fledgling stage. Her aim was to ensure that the way the Tax Ombud communicates with taxpayers was more approachable. She wanted to establish the brand as one that delivers on its promises.

Pearl makes use of every opportunity in the form of stakeholder engagements, exhibitions, presentations, advertising and communication channels to make information on taxpayer rights and obligations more accessible.

"SARS is faced with numerous challenges, including taxpayer non-compliance, diminishing credibility

as an entity and a lack of taxpayer understanding of their rights and obligations," says Pearl. "By reaching out to taxpayers, we are able to raise awareness about their tax rights and obligations and the role and mandate of the Tax Ombud as a recourse mechanism."

Advice to young women considering the tax profession

Pearl feels young women should use every opportunity to fill knowledge and experience gaps. They can empower themselves by attending industry events, upgrading their qualifications and finding mentors willing to share their expertise.

She says it is important to provide exposure to young professionals while they are still at university. They should be encouraged to explore their career options through graduate programmes.

"I still believe that the future looks bright for women in the tax industry. When you empower a woman, you empower a nation."

A role for women in policy and decision making

There is still a gender barrier that needs to be taken down. There are many women who are well qualified, but they do not find themselves in roles where they can make their mark.

MARDELLE KELBRICK

Head of Tax for the Standard Bank Group

Mardelle is a qualified Chartered Accountant in South Africa and Australia with an MCom Degree in International Tax from the Rand Afrikaans Universiteit (now Johannesburg University) and a Master's in Taxation from Melbourne University. She has 18 years of tax experience, including tax consulting done for PwC in South Africa and Australia as Tax Manager, and as In-House Tax Manager at CGU, an Australian insurance company.

Why choose the world of tax?

Mardelle met Prof. Barry Spitz, a well-known international tax specialist, whilst doing her academic articles at university. He convinced her to assist him in developing material for a course in international tax in South Africa. This stimulated her interest in the field.

Tax is challenging because of the complexity. One has to use critical thinking and problem-solving skills. "You have to collaborate across a network of people – from regulators to business, as well as internal and external auditors."

Career challenges and rewards

Early in her career Mardelle was seconded to Australia. Her boss at the time stretched her abilities to capacity by giving her challenging assignments. "It was a difficult time, but I learnt a lot about myself."

"You have to collaborate across a network of people – from regulators to business, as well as internal and external auditors."

One of the biggest challenges for tax specialists remains effectively partnering with business stakeholders on an "infinitely complex" function, ensuring that they co-own accountability for tax matters.

"We take reputational risk quite seriously … Once we articulate the risk, in the context of the economic and political climate and tax collections, we can point out that certain transactions are not in the spirit of the law and we generally get the buy-in from the business not to proceed," she says.

"We take a balanced approach towards tax risk by applying the *Sunday Times* test." The business must realise what the reputational damage can be when a transaction ends up on the front page of a newspaper.

Mardelle is ultimately accountable for all matters pertaining to tax in the Standard Bank Group and revels in successful participation in industry bodies and lobbying on various matters affecting the business and the banking industry.

"I excelled, built a formidable team, had the right systems and fought the right issues with the tax authorities."

LUCIA HLONGWANE

Africa Tax Leader at EY

Lucia began her career at SARS as a legal adviser, then she moved into corporate tax, before joining the litigation department at head office. After a stint at PwC, Lucia rejoined SARS after two years. She headed Shell's tax affairs for seven years, then spent three years at Barclays, before joining Ernst & Young where she is currently the Africa Tax Leader.

Why choose the world of tax?

Tax found her at a career choice junction. She had done tax as part of her LLB. After completing her LLB she wanted to do civil law and litigation, but also needed to specialise.

"Seeing all the noise and injustices in the working space, I registered for a Master's in Labour Law, but three months into the gig I figured that was not what I wanted to do."

She wanted to "toyi-toyi" differently and then made the jump to attending tax lectures – in Afrikaans. "I survived. The rest is history."

Career challenges and rewards

At the start of her career she found herself to be a loner – both in race and in gender. In 1997 in Bellville, she was the only black person in the entire building.

"I was literally referred to as 'daardie swart vrou' and would have to constantly remind others that I have a name. It was very personal; people didn't want to use the bathrooms because there was a black woman in the building," she vividly remembers. "They resorted to the differently abled or handicapped ones until I got silly and used those too. The confrontation was hilarious…"

She also received, beyond her wildest expectations, wonderful support from others. She invested a lot of time and effort to be on top of the subject matter, the law, practices as well as the cases. "I had the confidence to disagree at any level." And she did.

A major career highlight for Lucia was when she led the very first-of-its-kind tax traineeship at SARS. Another big moment was becoming Africa Head of Tax for Shell. "I excelled, built a formidable team, had the right systems and fought the right issues with the tax authorities."

Lucia recalls Judge Dennis Davis complimenting her on her cross-examination skills while she was still litigating for SARS. "It was the most beautiful thing to hear from him."

Advice to young women considering the tax profession

Tax is an attractive option for women interested in finance and law. However, artificial intelligence will in the near future probably be able to fulfil some of the tax analytics, compliance and simple advisory functions. Literature from the US already indicates that machines are better than humans at giving certain legal and tax advice. The advice does not cover very complex matters, but on more basic questions it has surpassed human capabilities, being more accurate and much faster, simply because of the ability to search through thousands of documents for relevant legislation and case law.

"In the near future, leadership and strategic business advisory skills, complemented by IT and operational skills, will be paramount for any tax professional."

The role of women in policy and decision making

Women have always been well represented in the tax environment. We are already making a significant contribution towards tax policy development and lead decision making in various respects. This will continue to increase in the future. As it is a highly specialised area, women are treated as equals with no particular glass ceilings.

"Tax and the bigger policy issues facing South Africa have always intrigued me."

KUBASHNI MOODLEY

Tax Partner at PKF

Kubashni has Bachelor of Commerce and Bachelor of Commerce Honours degrees from the University of KwaZulu-Natal. She is a qualified Chartered Accountant and obtained a Master's in Taxation from the University of Pretoria. She was appointed as a Tax Partner at PKF Durban in 2013.

Why choose the world of tax?

Kubashni's affinity for and fascination with tax matters and the complexities of the field were triggered while she was studying at university. "Tax and the bigger policy issues facing South Africa have always intrigued me."

Career challenges and rewards

Kubashni finds being a female tax professional in her early thirties holds some "inherent" challenges.

"My tax advice is sometimes questioned due to a perceived assumption that I may be inexperienced in the tax field, even though the advice is appropriate."

She says it takes time to build credibility in the profession. People generally want to deal with tax professionals who are "well-known" in the industry or someone who comes "highly recommended."

The most rewarding experience for her is to assist taxpayers in their affairs, especially when there seems to be unfair treatment.

One of her first tax disputes involved a taxpayer whose business and personal taxes were subject to a SARS audit. The initial proposed adjustments by SARS were enormous with potential tax liabilities running into millions of rand. She and her firm were eventually able to reduce the adjustments to a fraction of the initial amounts.

"I felt a great sense of pride in having achieved what seemed to be an impossible task at the outset."

Advice to young women considering the tax profession

Kubashni prides herself on sharing her tax knowledge with those around her in the simplest manner possible.

"Tax is a diverse and ever-evolving industry. You never run the risk of doing mundane tasks. Each case or matter is always different and generally requires a great deal of intellect to arrive at the right answer."

A career in tax will challenge you on a daily basis and allows you to constantly learn, she says.

A role for women in policy and decision making

Government has women of "high calibre" in high-level positions at National Treasury and SARS. Several women are already involved in high-level decision making aspects of the legislative process.

"I personally think that we are making great headway in this regard, but of course there is always room for improvement."

Advice to young women considering the tax profession

It requires consistent time commitment. "You need to get the basics right at the beginning," she says. There is no substitute for knowing the tax laws and cases in depth when you start out in your career because that is what builds your credibility as a tax expert.

"I have taken every opportunity to ensure I talk about tax as a fulfilling career, and as being doable if you put the right effort in."

Lucia has been instrumental in developing a number of people who are in tax leadership positions and who are fulfilling roles because she made the right noise and choices.

A role for women in policy and decision making

We continue to require women to take up top positions in policy direction and decision making, says Lucia.

"We are still in the minority at the very top but this is changing. We need women to redirect the policy direction taken for so long."

Tax is a fulfilling career and the number of female role models in the profession has to increase. There is already an increase in the intake of young graduates. That is great.

"You should be patient because tax is not something you master in a year or even two…in fact it takes many years and still you will learn as you progress."

KRISTEL VAN RENSBURG

Tax Director at ENSafrica

Kristel specialises in corporate taxation in a number of sectors, including manufacturing, mining, financial services and private equity. She advises clients on tax efficient acquisitions, restructuring and funding structures. She has more than 12 years' experience which she gained at SARS in the Legal and Policy Department; and being Tax Manager of a major listed mining group of companies.

Why choose the world of tax?

While doing her articles to qualify as an attorney, Kristel was involved in a VAT case. She thoroughly enjoyed the experience and started to consider specialising in tax. A few weeks later she was reading a law magazine (*De Rebus*) and an advert for a tax consultant position caught her eye. It listed some characteristics of a tax consultant, which resonated with her. This included tenacity, being dynamic, being able to solve problems and to accept challenges on a daily basis. She applied for the position and it all fell into place.

Career challenges and rewards

Kristel says finding the balance between being a mother and having a career was quite challenging. It took her much longer than her male counterparts to get back into the swing of things following maternity leave.

"It was almost like a break in one's career, where a man is away for at most five days and picks up where he left off." Kristel has a life partner who supports her career and colleagues at work whom she trusts and who support her.

Kristel describes her secondment to Sydney, Australia, for three months as a highlight. It is rewarding to get involved in large merger and acquisition transactions, seeing the successful implementation and knowing you were part of it. A recent success with a declaratory order in the high court – against all odds – was a major victory for her and a colleague who worked tirelessly to get clarity for the mining industry.

Her expertise and knowledge have gained traction in the tax world and she is recognised by being invited as a speaker or panellist on tax related issues.

Advice to young women considering the tax profession

The tax profession is extremely rewarding and stimulating. It is ever changing so you have to keep up to date with changes all the time. "You must be adaptable and solution driven."

Kristel says young women have to take advantage of the benefits of being young: Having lots of energy and enthusiasm, being "study fit" and having no family obligations.

"Learn as much as you can and gain experience. Try to be involved in as many different projects – big or small – as possible.

"You should also be patient because tax is not something you master in a year or even two…in fact it takes many years and still you will learn as you progress."

Kristel is a mentor for women who are starting a career in tax. By sharing her own experience and what she has learnt, she supports other women in tax to progress while also starting with a family.

A role for women in policy and decision making

More women are making a career in tax. In the last decade there has been an increase in women heading up tax departments and becoming senior partners or directors in law and audit firms. Many also fill senior positions at SARS and National Treasury.

"I expect this will increase more and that we will hopefully see women in senior decision and policy making positions at National Treasury and SARS."

Kristel also expects women in the tax profession to drive more inclusive consultation, especially including other women for purposes of policy and decision making.

"I think there are probably more women entering the profession than there were a decade ago. I also think there are generally more opportunities, resources and support available for all tax professionals nowadays."

JOON CHONG

Partner in Webber Wentzel's tax practice

Joon deals with tax opinions, ruling applications, voluntary disclosure applications, SARS investigations and audit queries, objections and appeals, alternative dispute resolution, tax litigation and penalty and interest remission applications. She also has experience in group restructuring, due diligence investigations, structuring of offshore intermediary holding companies, employee share incentive schemes and mergers and acquisitions.

Why choose the world of tax?

Joon finds tax law a "fascinating" discipline. The main reason for this is the constant changes in terms of South African tax law and international jurisprudence.

"I think there are probably more women entering the profession than there were a decade ago. I also think there are generally more opportunities, resources and support available for all tax professionals nowadays."

Career challenges and rewards

Joon finds keeping up to date with developments in tax law – which has in recent years been changing quite frequently -- and balancing work and home demands tricky. She is the mother of two youngsters.

"However, being part of an excellent tax team who are supportive, and with whom you can discuss issues and share ideas assists in managing the juggle."

The most rewarding part of her career is being able to assist clients with finalising tax disputes and ensuring that their taxpayer rights are protected through "teamwork, persistence and strategy".

Advice to young women considering the tax profession

In Joon's team, more than 50% are women. She sees herself contributing towards the development and transformation of the tax professionals in the team.

"Being a tax professional is challenging and demanding, but it is also very rewarding," she says.

Tax legislation is a function of the political and economic landscape of the country. They change and evolve all the time. She finds it exhilarating to be a part of this.

A role for women in policy and decision making

Women will, in future, play a greater role in key policy decision making. This can already be seen in the transformation of their firm and tax team.

Women comprise 43% of Webber Wentzel's total partnership body and 48% of the senior leadership team.

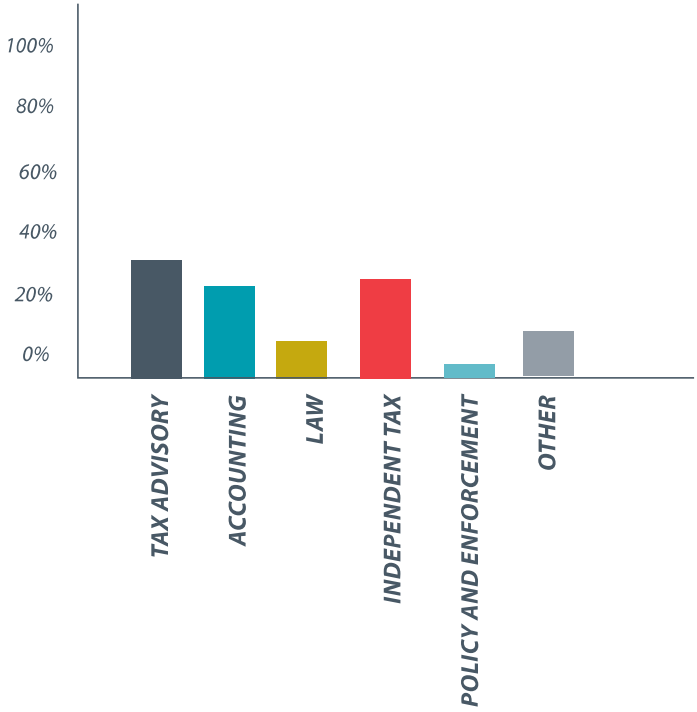
"I think that the statistics a decade ago were quite different to that."

WOMEN IN TAX SURVEY RESULTS

We received a tremendous response for our two Women in Tax surveys in April. In this article, we present the results to you: The first section showcases results received from tax professionals in the field; the second section reveals the statistics of women in the workplace of participating advisory firms.

TAX PROFESSIONAL SURVEY RESULTS

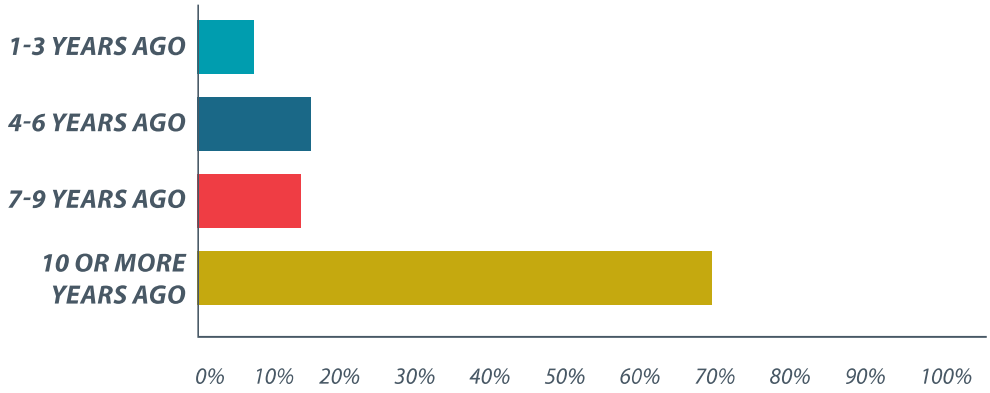
IN WHICH FIELD OF TAX DO YOU WORK?



Other prominent tax fields mentioned

Academia
Corporate tax
Payroll
Financial sector (banking)
Tax technology

WHEN DID YOU START YOUR CAREER IN TAX?



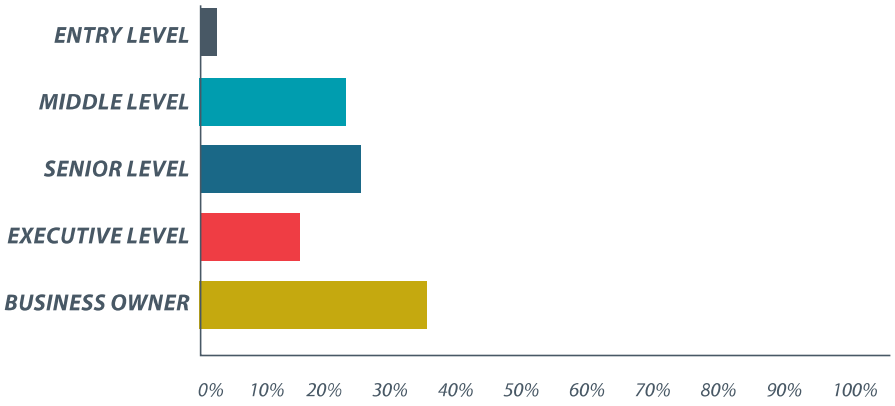
IN WHICH AGE GROUP DO YOU FALL?

HAVE YOU HAD INTERRUPTIONS IN YOUR CAREER?

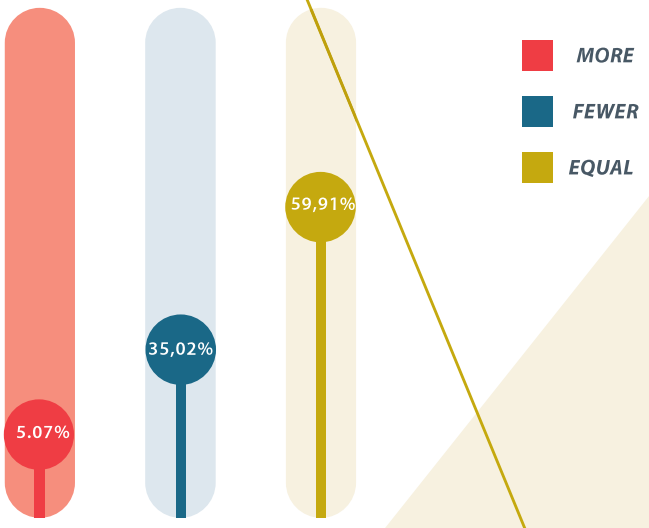
Reasons provided for interuptions

Maternity leave
Childcare
Retrenchment
Breast cancer
Aging parent care
Career change
Sabbatical
Travelling

WHERE DO YOU FIT IN TO THE STRUCTURE OF YOUR ORGANISATION?



IN YOUR ORGANISATION, DO YOU THINK WOMEN HAVE MORE, FEWER OR THE SAME OPPORTUNITIES AS MEN?



ARE YOU SATISFIED WITH YOUR CAREER ROGRESSION?

76.28%

23.72%

HAVE YOU EVER FELT THAT YOUR GENDER HAS PLAYED A ROLE IN YOU MISSING OUT ON A PROMOTION, KEY ASSIGNMENT, ETC.?

36.15%

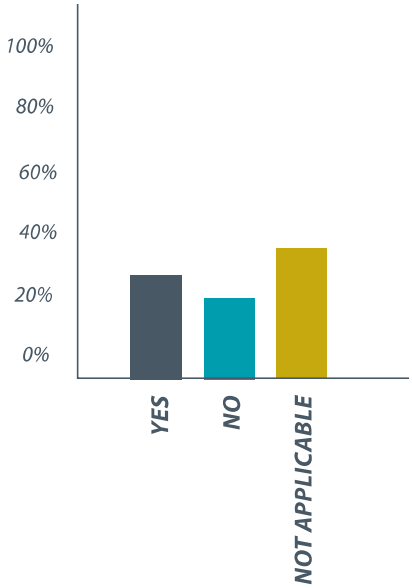
63.85%

WOULD YOU RECOMMEND TAX AS A CAREER OPTION FOR A YOUNG WOMAN TODAY?

93.12%

6.88%

IS YOUR ORGANISATION DEDICATED TO THE ADVANCEMENT OF WOMEN IN THE WORKPLACE?



Refer to page 21-25 for a summary of programmes on offer by various advisory firms that are dedicated to the advancement of women in the workplace.

DO YOU THINK GENDER INEQUALITY IN THE WORKPLACE IS A REAL ISSUE?

74.19%

25.81%

HAVE YOU EVER EXPERIENCED GENDER INEQUALITY IN TERMS OF YOUR CLIENTS?

38.43%

61.57%

ADVISORY FIRM SURVEY RESULTS

IS YOUR ORGANISATION DEDICATED TO THE ADVANCEMENT OF WOMEN IN THE WORKPLACE?

BAKER MCKENZIE JOHANNESBURG

Diversity and inclusion are part of Baker McKenzie's DNA and an integral part of the firm's corporate culture. We believe an inclusive workplace enables us to offer clients true insight and exceptional service. We recently launched a Diversity & Inclusion Committee in Johannesburg with the aim of fostering an environment where individuals from across all demographics, backgrounds and cultures may succeed professionally and fully contribute to the strategic objectives of the firm. As part of our Diversity & Inclusion initiative , Baker McKenzie has set aspirational targets for gender that focus on increasing female representation in partner and leadership roles. Globally, nearly 40% of its 3,800 lawyers are women. In South Africa, 61% of its staff are female.

The issues our female employees were facing, however, were to do with work-life balance and family responsibility; flexible working time was important to them. To address this, the Johannesburg firm implemented the bAgile programme, which promotes agile working. Agile working moves beyond the boundaries of traditional flexible working and enables informal and ad-hoc flexibility of hours and remote working. This programme aligns with Baker McKenzie's bAgile global initiative. Even though it is not specifically aimed at women, they have been some of the key beneficiaries of this programme.

Another issue working women face is the challenge of leaving practice to go on maternity leave and then transitioning back into practice. To help our female employees to adjust to coming back to work after maternity leave, we implemented a pre- and post-maternity coaching programme. Prior to, during, and after maternity leave, an external coach spends time with the employee, to help her with the transition from busy working professional to mother and then back to being a working professional and mother. This has been very beneficial for our female employees.

We have also implemented an intensive mentorship programme to support and help our female lawyers rise through the ranks of the firm so that they can be made principals and take up leadership positions in the future.

BOWMANS

In line with our culture and values, our firm spares no effort in striving to conduct business in an ethical and responsible manner and to the highest standards.

We offer maternity coaching to our female staff. Participants receive six to eight hours of individual and group coaching. In this way, women are supported during the life changing process of growing their families. Fifty-two people have been through the programme since 2015.

New constructs have been built the graduate recruitment selection process to counter possible gender disparity in selection and to reduce unconscious bias. These include the addition of certain exercises, the creation of a competency framework, the adoption of formal rating scales and the use of psychometric assessment. The new processes will be piloted during our next selection process.

The firm is collaborating with an executive coaching consultancy in the UK to run a pilot of the Women in Leadership Programme. The programme addresses constructs such as confidence, reputation and networking. The target audience is experienced associates, newly promoted senior associates and junior business service managers. The pilot date has been confirmed for July this year.

During the past year, Cape Town-based partner, Shamilah Grimwood-Norley, was promoted to head of banking and finance and Kelly Wright from Bowmans' Johannesburg tax practice was promoted to partner in 2018.

Further, of the 14 partner promotions in 2018, 11 were female.

EVERSHEDS SUTHERLAND

We only have one tax professional in the firm and she is female. We are looking at employing a female Tax Director.

EY

EY's transformation, in particular the advancement of women, remains at the top of our agenda, as a critical business imperative, underpinned by our commitment to build a better working world. As part of this agenda, EY's goal is to increase the number of women in positions of power to strategically manage the firm and determine the policy and the direction of business operations. As such, our leadership is comprised of 32% female members, of which 13% are black females. At EY we believe in promoting an inclusive culture that caters to the unique needs of women. Our flexible culture to integrate the world of work and personal life goes beyond the ability to work part-time or flexible working hours. It is key to allowing women to choose how, when and where to work to balance their professional and personal lives. Creating a flexible culture for women helps to eliminate biases about women and their careers, it also creates a supportive culture for our women to play an important role in their families and communities. In addition, we provide an enabling environment for our women, which includes maternity programmes, cancer awareness campaigns and a host of health classes including pilates, self-defence and yoga.

EY undertakes to continually redress the inequalities of the past by ensuring that recruitment is representative of the South African demographic with regards to gender and ensuring that structured development plans are in place for all female talent and actively drive internal promotion opportunities for female talent through career planning and career sponsorship. EY ensures that all leadership programmes geared towards supporting our top talent to partnership are representative of our female talent in addition to a number of globally run programmes that are targeted at female talent.

Our efforts in the advancement of women were showcased at this year's Gender Mainstreaming awards held by Business Engage to encourage the private sector to buy into achieving more meaningful representation of women in the mainstream of business. EY scooped first place in the Diversity and Transformation category and the award for Economic Empowerment.

EY also runs an Entrepreneurial Winning Women programme which is a customised executive leadership programme that identifies a select group of high potential women entrepreneurs, whose businesses show real potential to scale up and then help them do it.

HOGAN LOVELLS

Hogan Lovells is dedicated to the advancement of women. Our stats are as follows:

- 43.5% female ownership
- 57 % female professionals
- Female CEO since 2012
- Female Head of HR since 2007
- Female Head of Pro Bono since 2011
- Female-headed practice areas: Anti-trust and Competition, Banking and Finance, B-BBEE, Insurance, Commercial Litigation, and Real Estate and Tax

MAZARS

Mazars aims to shine the light on the women who are taking strides in their fields and celebrate excellence among the tax female professionals across the globe.

Women@Mazars is a central part of the firm's strategic plan to enhance the development and retention of women leaders, creating an environment where all of our best and brightest excel.

Women@Mazars is a long-term effort supporting the full potential of women leaders at Mazars through education, awareness, and improving visibility of and access to role models. We actively engage all men and women at the firm, building diverse teams to enhance the growth of the firm and the individual.

NOLANDS

Yes, we recently promoted our Tax Trainee to Tax Consultant and proud to say she is doing a great service to the company. Our department head Wasiema Adams is also dedicated in training and assisting with the advancement of all staff.

PKF

Yes, our Employment Equity Committee is focused on ensuring that we have proper representation at the various skill levels. Even though we do not currently have a formal gender diversity policy there is equal pay between genders as well as the same career opportunities available regardless of gender.

SNG

Yes, we are dedicated to advancing women in the workplace. The tax department regularly reviews procedures applied to performance reviews, targeted development mechanisms to change rules that were set in the world of man to take into account some of the general differences one would find between man and woman. This includes making an allowance for flexible work hours for working mothers, i.e. recognising that what is important is not the amount of time one spends in the office or client premises but the quality of work, revenue collection and the sustainable relationship with the client that matters.

TAX SHOP

The Tax Shop is fully committed to gender equality and subscribes to the policy of gender diversity.
Our strategies and actions are designed to attract, enable and support people of any race or gender by providing them with the tools, resources and career opportunities to grow their practices and reach their full potential.
The franchise model of The Tax Shop is ideal and conducive to the promotion of career advancement of women and underwrites an approach of "Women winning in the profession".

WEBBER WENTZEL

As part of the firm's gender strategy and our commitment to supporting the development and advancement of our women, the Webber Wentzel Women's Internal Network (WWWIN) was established. The focus of the network is to share experiences, knowledge and support and dispel gender stereotypes through facilitated discussion covering a wide range of relevant topics. The network aims to expose our people to not only our own senior women within the firm, but also to senior women from various sectors across South Africa and beyond. A diverse range of women who are leaders in their respective fields are therefore invited, on a quarterly basis, to our Johannesburg and Cape Town offices, to address and engage us on topical issues.

The Webber Wentzel Maternity Support Programme was launched during FY17 to support, reintegrate and retain our working mothers. The Maternity Programme assists in strengthening our talent pipeline and deepening our gender diversity and is designed to support the firm's female staff in successfully managing the critical milestone of starting a family and the important transition that this brings within the context of their professional lives. The feedback received regarding this important initiative has been extremely positive. We also received the Africa Legal Award for Diversity in 2016 for the firm's Maternity Support programme. We are extremely proud of this positive step forward in providing a more supportive work environment for our women.

Webber Wentzel joined the 30% Club, a global group of senior business people and partners of private and state owned organisations that are publically committed to achieving and sustaining at least 30% women in senior leadership positions within a designated period. Our membership offers access to knowhow, resources and networking opportunities to further support the advancement of our women and to increase the profile and visibility of the firm's gender initiatives.

The firm also enjoyed increased visibility in respect of its gender initiatives in the press and otherwise – some examples include, press coverage around the maternity programme; a range of interviews with the managing partner; adverts placed in the *Financial Times* Gender Mainstreaming Supplement; and an article published in *Without Prejudice*.

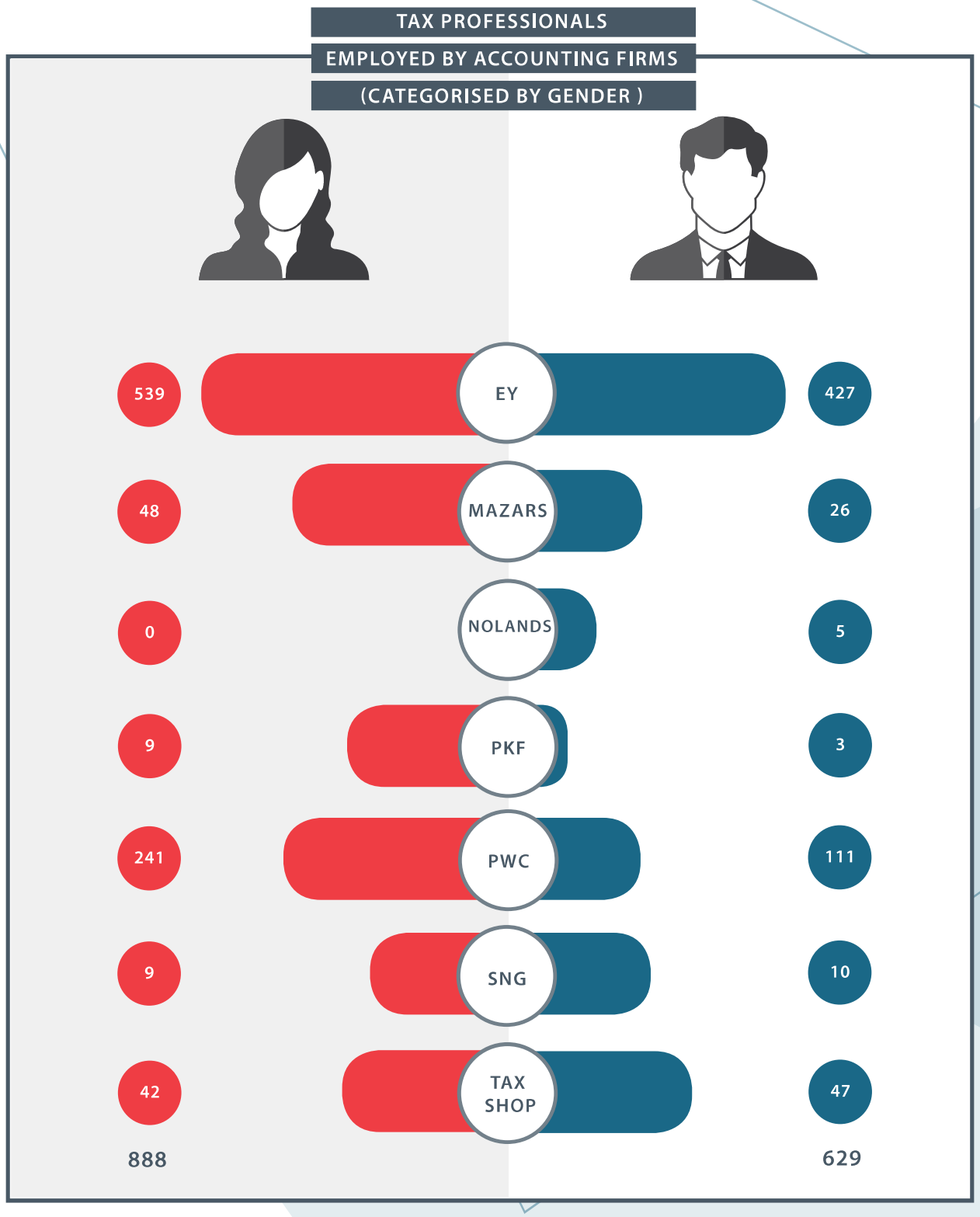
Managing Partner, Sally Hutton, named SA Professional Services Award I Woman Professional of the Year, 2016.

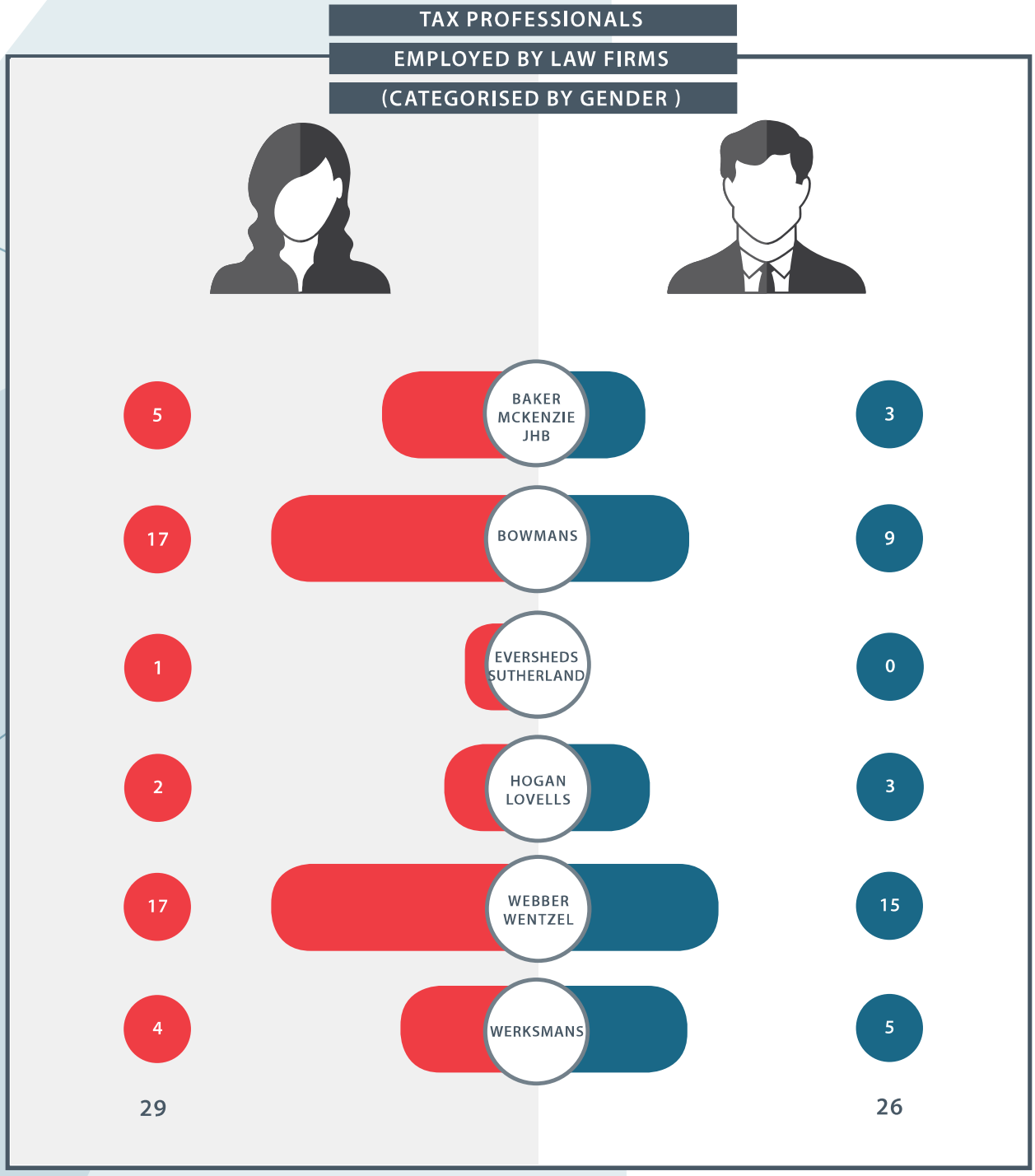
Webber Wentzel signed an Equal Representation in Arbitration Pledge during FY17.

WERKSMANS

We have policies in place to attract and retain woman at all levels, for example – generous paid maternity leave, flexible working hours, study bursaries. Over the past three years, of the ten promotions to director nine were women. We have female directors sitting on Exco and more than 70% of the Senior Operations Managers are female.

TAX PROFESSIONALS EMPLOYED BY ADVISORY FIRMS





Information presented is that which was supplied by participating firms only.

TAX ON WOMANHOOD

15 minutes CPD

PRESHNEE GOVENDER, preshnee.govender@kpmg.co.za

There was some disappointment that the recent hike in VAT was not used as an opportunity to zero rate essential female sanitary products, thereby limiting the financial cost to females of managing monthly periods throughout their menstruating life cycle.

"Women have the right to manage their menstruaion with dignity. It is only when this right is protected and respected that we can say we are living the values of the Constitution."

Throughout the ages, menstruation has been treated as taboo, surrounded by stigma and even myth. Thankfully, through the persistent work of activist organisations and individuals (including an Indian man who has been immortalised in a Bollywood movie, *Padman*), there is now more open and frank dialogue on menstruation and its various implications for women and girls around the world. One of these is an economic implication, i.e., the financial cost to a female of managing monthly periods throughout her menstruating life cycle.

When National Treasury recently announced a VAT increase of the standard rate from 14% to 15% from 1 April 2018, there was some public expectation that such an increase would be accompanied by further zero rating of certain essential goods to buffer poor households from the resultant increased living costs. There was disappointment that the so-called "tampon tax", i.e., a standard rate of VAT on feminine sanitary products, notably sanitary pads and tampons, was not replaced with a zero rate.

There is obviously a more urgent need to provide girl learners access to sanitary products so that they do not miss out on any school days due to their periods. This was acknowledged by South Africa's ruling party, the African National Congress, at its 2017 National Policy Conference when it endorsed a proposal to provide free sanitary towels to students. The implementation of this proposal, however, has not yet gained traction with the various departments tasked with the job. In the meantime, it would have been a quick win for women's rights in the country had National Treasury opted to get rid of the tampon tax on an item that women cannot do without. Instead, the tampon tax now costs more in South Africa with the April 2018 VAT increase.

"Our women and girls deserve a tax-free menstruation."

Luxury is found in yachts, not tampons

Simply put, VAT is an indirect tax on the consumption of goods and services. National Treasury has determined a list of goods that are zero rated, including 19 basic food items and certain other goods and services that are exempt from tax. Tampons and sanitary pads are placed in the same category as luxury or non-essential items and are therefore not currently included in either list. The absurdity of classifying sanitary products on a par with luxury or non-essential items is emphasised when comparing other items regarded as luxury or non-essential, such as perfumes, arcade games, and yachts and other vessels for pleasure or sports.

Women do not choose to consume or buy tampons and pads for the pleasure of it, as one might with the purchase of a yacht. This is an essential and compulsory purchase every girl and woman must make throughout their menstrual cycle lifetime. For many households, the purchase of this essential item often competes with the need for other existential essentials like food. Ideally, therefore, the cost of certain sanitary products should be subsidised and provided free in clinics in the same way condoms are. Zero rating these essential items is but a starting point. Other countries around the world are starting to make the necessary changes to tax legislation and hopefully National Treasury will follow suit soon.

According to the *African Independent*, in 2004, Kenya became the first nation in the world to end the tampon tax and Mauritius announced plans in 2017 to stop taxing its citizens on sanitary wear. In the UK, VAT is currently charged at a reduced rate of 5% on sanitary products, which includes panty liners and certain maternity pads. This lower rate (from almost 18% at one point) only came about in 2001 after much debate and lobbying. Plans are also afoot in the US to get rid of the tampon tax, with New York being the first State to do so in 2016.

Women's rights are human rights

There are two fundamental human rights enshrined in South Africa's Constitution that, in my view, are violated by a tampon tax. Firstly, section 9 of the Constitution provides that "Everyone is equal before the law and has the right to equal protection and benefit of the law". Secondly, section 10 provides that "Everyone has inherent dignity and the right to have their dignity respected and protected".

The tampon tax violates section 9 of the Constitution because of the inherent inequality associated with taxing women for the use of sanitary products. An inclusive approach is necessary to tackle menstruation challenges – either no one gets taxed for sanitary products or men also pay a levy for sanitary products since women's reproductive health is in the best interest of society as a whole.

Women have the right to manage their menstruation with dignity. It is only when this right is protected and respected that we can say we are living the values of the Constitution. Therefore, as a society, we have a responsibility to lobby Government to protect and respect the dignity of women and girls by promoting affordable sanitary product options. There are different ways Government can ensure this right to dignity is protected. One way is by providing female students with free essential sanitary products, thus enabling them to focus on their education.

Another is by removing VAT on sanitary products, as is the global trend. Or, preferably, both these options can be implemented.

Our women and girls deserve a tax-free menstruation.

TAX(ING) CONSEQUENCES OF MARRIAGE CONTRACTS

1.5 minutes CPD

SHOHANA MOHAN, shohana@taxauditor.co.za

Getting married has implications for a couple's finances and taxes. We look at different types of marriage contracts and what difference they make during a marriage and also when it ends in divorce or death.

A marriage contract, like any other contract, has concomitant legal and personal income tax consequences upon conclusion and termination of such a contract. Couples should seek guidance regarding the applicable consequences prior to commencing or terminating a marriage contract.

According to Statistics South Africa, 45.4% of divorces recorded in 2015 consisted of marriages that did not survive their tenth wedding anniversary.

Types of marriage contracts recognised in law

In South Africa, the Marriage Act recognises three types of marriages:

1. Customary marriages celebrated according to indigenous African customary law
2. Civil marriages performed by a government or civil official in accordance with the marriage laws
3. Civil unions that recognise a marriage or union between two individuals of the same gender

Different marriage regimes and tax

Marriage in community of property (ICOP)

This contract is automatically conferred in law where the couple do not enter into an antenuptial contract prior to commencement of the marriage. An antenuptial contract details the regime that would apply to the assets and liabilities and their distribution in case of divorce or death.

Assets and liabilities held by each of the spouses prior to the marriage will be combined into a joint estate of the spouses. For tax purposes, SARS will regard each spouse as having an equal share in the joint estate and in any income, profit or loss flowing from the estate.

Marriage out of community of property (OCOP) with accrual

The nominal value(s) of the respective estates are declared at commencement of the marriage. The difference between the net increases in the value of the estates during the marriage will be divided equally between the spouses upon termination of the marriage. In the example below, Spouse A's estate increased by R500 000 and Spouse B's by R400 000. A smaller amount accrued to Spouse B's estate and it therefore has a claim against Spouse A's estate for half of the difference in accrual (i.e., R50 000).

Calculation of Claim Upon Divorce

Married Out of Community with Application of the Accrual System

Spouse A	Spouse B
Value of Estate at commencement of marriage	Value of Estate at commencement of marriage
R2 000 000	R1 100 000
Vale of estate on termination of marriage	Vale of estate on termination of marriage
R2 500 000	R1 500 000
Increase in the estate	Increase in the estate
R500 000	R400 000 *Accrued by a smaller amount*

Difference between accrual in the two estates **R100 000**
Spouse B has a claim for 50% of the difference in accrual **R50 000**

Accrual divided equally	
Spouse A	[R500 000 - R50 000] = R450 000
Spouse B	[R400 000 + R50 000] = R450 000

For capital gains tax purposes, the accrual system does not result in a splitting of capital gains and losses between spouses. The spouse that owns the asset must therefore account for the capital gain or loss in respect of the disposal of the asset.

Marriage out of community of property with no accrual system

"What is yours, is yours, what is mine, is mine before and after the marriage" best describes this regime. Neither spouse will have a claim to any assets from the estate of the other, or to profit flowing from those assets.

Interplay of the definition of "spouse" for income tax and South African law

Common law marriages, also referred to as cohabitation or living together as a domestic partnership, are not recognised as legal relationships in South African law. Nonetheless, section 1 of the Income Tax Act defines spouses, for the purposes of that Act, as people who are married in accordance with the Marriage Act or according to religious rights or partners in a union that may be regarded as permanent. This suggests that a couple who have been cohabiting but have no intention of getting married are also "spouses" for the purpose of the definition.

According to the definition in the Act, "spouse" means, "i*n relation to any person, a person who is the partner of that person--*

a. *in a marriage or customary union recognised in terms of the laws of the Republic;*
b. *in a union recognised as a marriage in accordance with the tenets of any religion; or*
c. *in a same-sex or heterosexual union which the Commissioner is satisfied is intended to be permanent,*

and 'married', 'husband' or 'wife' shall be construed accordingly: Provided that a marriage or union contemplated in paragraph (b) or (c) shall, in the absence of proof to the contrary, be deemed to be a marriage or union out of community of property;"

Implications of marriage contracts for taxation purposes

The annual income tax return (ITR12) requires a taxpayer to indicate his or her marital status.

Not Married ☒

Married in Community of Property ☐

Married out of Community of Property ☐

Taxpayers, whether married or unmarried, file tax returns separately. In this regard, remuneration for services rendered is included in the taxable income of the spouse who rendered the service.

PERSONAL INCOME TAX TREATMENT IN RESPECT OF INCOME DERIVED FROM INVESTMENTS

MARITAL REGIME	NATURE OF INCOME	SPOUSE A	SPOUSE B
ICOP	Interest – jointly held bank account	50% of interest	50% of interest
OCOP	Interest paid to spouse B	Nil	100% of the interest income will be taxed in the hands of the spouse who holds the investment
ICOP	Foreign dividend paid to Spouse A	50% of dividend income	50% of the dividend income
OCOP	Foreign dividend paid to Spouse A	100% of the dividend will be taxed in the hands of the spouse who holds the investment	Nil
ICOP	Rental income	50% of rental income and expenses	50% of rental income and expenses
OCOP (rental property owned 100% by Spouse B)	Rental income	Nil	100% of the rental income and expenses
OCOP (each spouse owns 50% of the property)	Rental income	50% of the rental income and expenses	50% of the rental income and expenses

"According to Statistics South Africa, 45.4% of divorces recorded in 2015 consisted of marriages that did not survive their tenth wedding anniversary."

Tax relief for transactions between spouses

- *Donations tax:* Exemption exists in respect of donations between spouses.
- *Transfer duty:* Not applicable to transfer of property upon death or divorce.
- *Estate duty:* Not applicable in respect of bequest of assets.
- *Capital gains tax:* Roll-over provisions in respect of the disposal of an asset. Recipient spouse is deemed to acquire the asset to a value equal to the base cost of the disposing spouse.

Tax consequences flowing from divorce orders

The divorce order should be reviewed regarding jointly held property, pension arrangements, alimony and maintenance. The ITR12 must also be updated.

Section 10(1)*(u)* of the Income Tax Act provides that any amount received by a spouse or ex-spouse by way of alimony or allowance or maintenance of such person under any judicial order, written agreement of separation or under any order of divorce, is exempt from normal tax. In this regard, the settlement payment is not subject to tax.

Disposal of primary residence

Where the divorcing parties were married in community of property and owned and lived in a residence as their primary residence, the R2 million primary residence exclusion must be apportioned in relation to the parties' interest in the property. Each spouse may claim an exclusion up to R1 million if the property is sold.

Pension lump sum

The Pension Funds Amendment Act of 2007 provides that where a divorce order requires the payment of a pension fund lump sum to a non-member spouse before retirement, the member spouse can opt to take early withdrawal of part of the fund. The lump sum will be taxed in the hands of the non-member spouse as a withdrawal benefit. The non-member spouse may, however, transfer the lump sum to another equivalent fund without incurring an immediate withdrawal benefit tax liability.

Alimony and maintenance

Paragraph *(b)* of the gross income definition in section 1 of the Act requires that a receiving spouse include alimony or maintenance in their gross income. As specified above, section 10(1)*(u)* of the Act provides an exemption. Accordingly, the receiving spouse does not pay tax on this amount and the paying spouse is not entitled to a deduction.

Given the South African legal landscape coupled with fiscal laws, it is evident that a contract constituted by a marriage, or aimed at regulating one, gives rise to personal tax implications. These implications should be considered before entering into a marriage contract and exiting a marriage.

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THE WINDING & COSTLY ROAD OF THE VAT RATE INCREASE

15 minutes CPD

▸ **LESLEY O'CONNELL,** lesley.oconnell@pwc.com

We look at the impact of the VAT rate increase, the reality of implementing the increase and its impact on a business's profitability.

Life has moved on and the increased VAT rate of 15% has been accepted as the norm. Having the benefit of hindsight, the impact of the rate change was underestimated. The initial shock of the short implementation period of a mere 38 days (including weekends and public holidays) gave rise to a host of reactions which ultimately revolved around an acceptance: the necessary changes to all affected business systems could be achieved before the implementation date of 1 April 2018 or the additional 1% would have to be funded by VAT registered businesses until such time as the requisite changes could be made so that the additional VAT would be correctly paid by customers.

Revenue gain for the fiscus

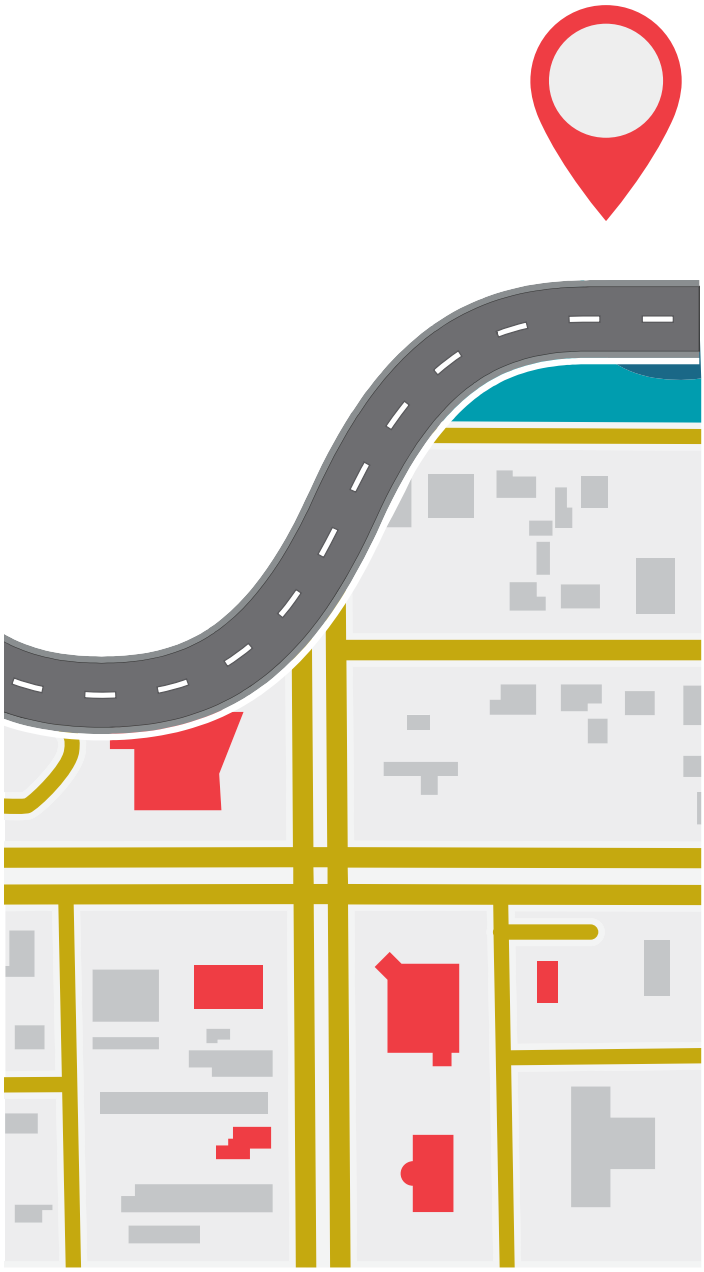
The reality is that the increased VAT rate will bring in an estimated R22 billion in the current fiscal year. The much needed revenue gain was, for all intents and purposes, the most viable option available to the then Minister of Finance to plug the ever widening revenue shortfall. The short implementation period is proof of this. The impact on business has, however, been costly for various reasons.

The real cost of the rate increase

VAT registered businesses have had to incur significant expenses to ensure their readiness for the rate increase. Staff training, payroll, accounting and pricing system changes (where required) and the concomitant testing to ensure their completeness and correctness are but a few examples of the reality of implementing a rate increase. The reality faced by many businesses with custom built accounting systems is that the systems were often designed without considering the likelihood of a VAT rate increase. Changing these "hard coded" rates is therefore a time consuming and complicated task. The management and concomitant cost of a project of this size and nature therefore cannot go without mention.

The design of a VAT system of taxation

The cost to be borne by business where the additional 1% VAT cannot be recovered from the customer, for whatever reason, is a deviation from the manner in which a VAT should optimally function. The beauty of a VAT system of taxation is



that VAT should not, unless by design, be a cost to wholly taxable VAT registered businesses. In other words, VAT should flow through the business chain, allowing VAT on expenses to be offset against the VAT collected on sales, until the point at which the supply is made to a final consumer (or non-VAT registered business). At this point, no deduction of the VAT incurred on expenses is possible, resulting in a final revenue gain for the fiscus, and the goal of taxing final consumption is achieved. The VAT cost that will have to be borne by VAT registered businesses that have not implemented the increased rate therefore contradicts the very nature of a VAT as it requires the additional VAT due on sales to be paid (and borne) by the supplier of the goods or services.

Impact on profitability

The harsh reality is that in many instances, the additional VAT cannot practically be recovered from the customer, resulting in an immediate negative effect on businesses' profitability because the additional 1% of VAT has to be borne by the VAT registered supplier. For those businesses with very narrow profit margins, the additional VAT to be "funded" by the VAT registered business, which cannot be deducted as input tax, may have serious implications. The only way in which businesses can reduce this cost is to implement the requisite changes as a matter of urgency to ensure that the VAT is correctly borne by their customers.

The current debate on extending the list of zero-rated foodstuffs

A discussion of the impact of the VAT rate increase would not be complete without a reference to the call for a relook at the list of zero-rated foodstuffs. The aim of zero rating certain foodstuffs is to provide relief to the poor, despite the fact that the non-poor will also receive a significant financial benefit when purchasing zero-rated foodstuffs. What has to be borne in mind is that any exception to standard rating of goods or services that are consumed locally, in the form of the application of a zero rate, negatively affects revenue collections. Balancing the interests of the poor by granting additional zero ratings whilst taking into account the negative impact on revenue collections is not a task for the faint hearted. The possibility of the removal of foodstuffs from the current list of zero-rated items can also not be eliminated. At the end of the day, what is relatively certain is that the current list of zero-rated foodstuffs will not remain in its current form.

It is apparent that the cost to business as well as the rest of society of the additional 1% VAT has been a difficult and rather costly road to travel.

"What is relatively certain is that the current list of zero-rated foodstuffs will not remain in its current form."

THE VAT INCREASE & OVERCOMING TAX TECHNOLOGY CHALLENGES

MADELEIN VAN ZYL, madelein.vanzyl@kpmg.co.za &
EUGENE BUITENDACH, eugene.buitendach@kpmg.co.za

15 minutes CPD

An increase of 1% in the standard VAT rate was announced during the February budget speech. With an implementation date of 1 April 2018, businesses were hard pressed to make the IT changes necessary to implement the new rate on time. Our authors highlight the importance of coordinating information technology with the overall business strategy.

The Budget announcement of a 1% increase in the VAT rate gave businesses just one month to prepare and ensure that they were ready to implement this change.

With such a tight deadline, this increase may be more of an issue than first meets the eye and is not necessarily a simple change to the VAT rate in your system. This is reminiscent of the changeover to the year 2000 when the so-called Y2K bug caused uncertainty in businesses. Then, as now, they placed high dependency on their IT professionals to give them comfort that everything would go smoothly.

There is increasing urgency for all tax professionals to take the journey towards becoming "tech-savvy". They should be comfortable to move from being compliance task-focused to becoming strategic business partners, thus adding more value to the business.

The activities required by your business should encompass a combination of processes and systems in order to bridge the gap between the tax transitional rules in the VAT Act and formal implementation in the enterprise resource planning (ERP) systems, to ensure effective management of the VAT increase.

For the present big "bug", businesses and tax professionals should consider the impact of the VAT increase from three angles:

1. What is the impact on my business? (e.g., How much, if any, of the increase will be passed on to my customers? Which communications should be pushed to my customers on the new pricing?)
2. Which before and after VAT rate change rules should be considered for our business? (e.g., time of supply vs transitional trigger points, issuing of credit notes, return of goods.)
3. Which system changes are required to effectively manage the two VAT rates as systems are generally not set-up with validity dates? (e.g., Can our ERP system account for both 14% and 15% VAT rates? How will the system be able to deal with supplies that span 1 April?)

The spotlight has been placed on ERP systems to manage the impact of this change. However, tax executives require an understanding of how the change would impact such systems, enabling them to work with IT more effectively and to better address business needs.

A technical ERP system evaluation is important for businesses to understand the current way the ERP system is designed to record VAT transactions and how this should look for future business operations.

Type of System Changes

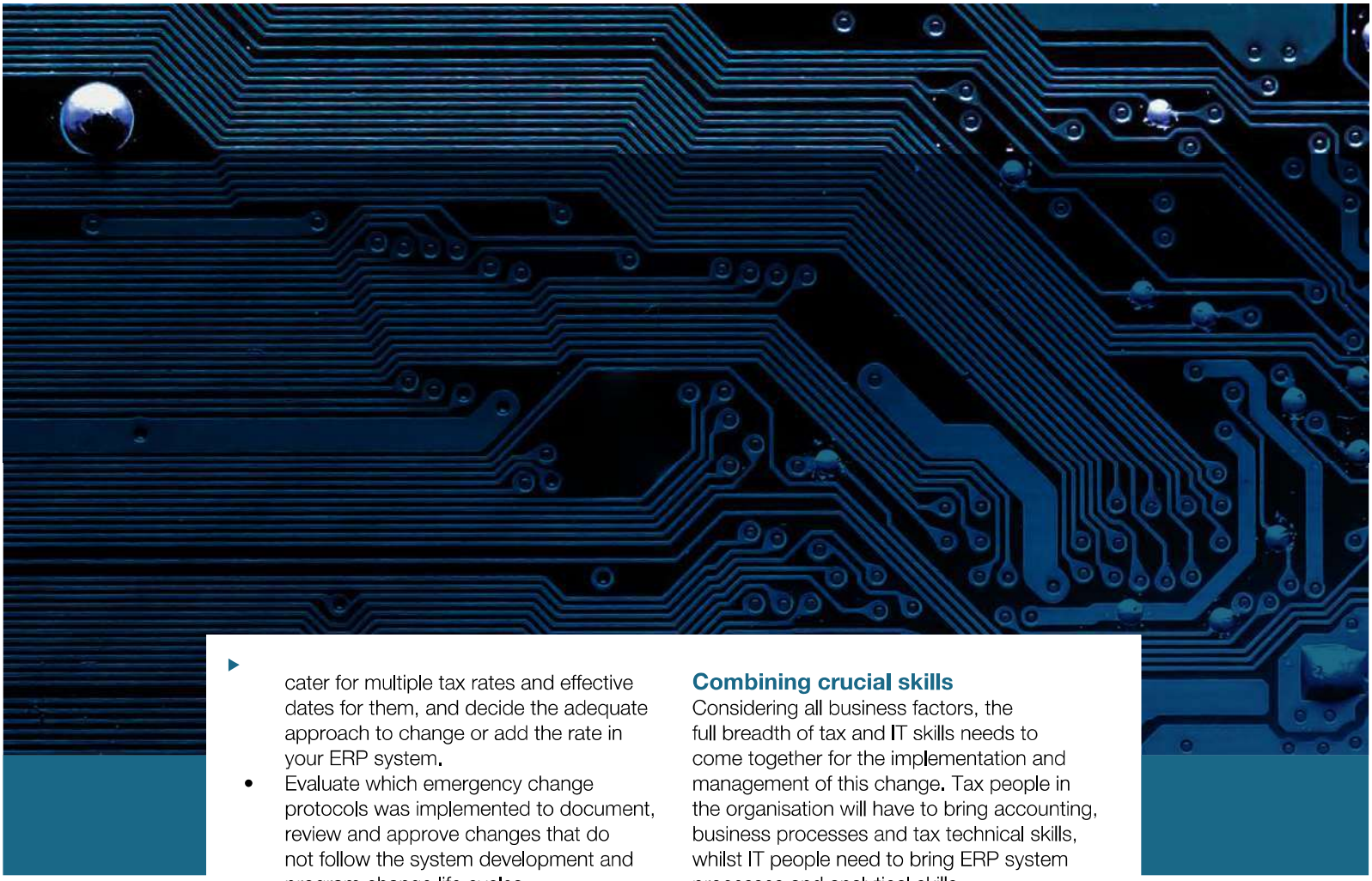
The type of changes that should have been considered in ERP systems to accommodate an increase in the VAT rate to 15% include the following:

- System configuration related master data
- Customer and supplier related master data
- Material pricing related master data
- Program logic in cases where the VAT rate is hard-coded
- Forms and templates that define the layout of source documents created by ERP systems
- The inclusion of additional information on invoices and credit notes that allow users to identify the correct VAT treatment in terms of the transitional rules

Overcoming these challenges and continuous monitoring

In order to overcome or manage these challenges, businesses should consider the following approaches:

- Obtain a complete understanding of the IT landscape and flow of information within the organisation to be able to identify all affected accounting systems and interfaces that need to be changed.
- Perform scenario analysis to identify transactions, where the time of supply may be misinterpreted or VAT rate apportionment may be triggered based on the before and after VAT rate change rules, and implement adequate audit trails to monitor these transactions for the application of the correct VAT rate.
- Assess the functionality within the system to



cater for multiple tax rates and effective dates for them, and decide the adequate approach to change or add the rate in your ERP system.

- Evaluate which emergency change protocols was implemented to document, review and approve changes that do not follow the system development and program change life cycles.
- Evaluate controls and audit trails over end-user computing to govern manual workarounds for correcting VAT rates outside the accounting system (e.g., Excel);
- Critically assess supplier invoices for the correctness of VAT rate applied, based on the before and after VAT rate change rules.
- Obtain full visibility over VAT transactions processed in ERP systems before and after the VAT rate increase to identify potential errors in the VAT rates applied, whether due to system or interpretational errors.

Combining crucial skills

Considering all business factors, the full breadth of tax and IT skills needs to come together for the implementation and management of this change. Tax people in the organisation will have to bring accounting, business processes and tax technical skills, whilst IT people need to bring ERP system processes and analytical skills.
The combination of these crucial skills will assist with business readiness for the change and eliminate future "bugs".

This is certainly the single biggest IT change that affects all South African companies at the same time since Y2K and, with little-to-no time to implement, the importance of the change should not be underestimated.

The key to overcoming problems is, now more than ever, the ability to view and monitor transactions using data analytics, visualisation and exception handling tools and methodologies.

AUTHORS' NOTE
To assist with the management of the VAT transition, we recommend you work your way through KPMG's VAT Rate Checklist which provides a practical framework.

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2018 CROSS-BORDER CONSIDERATIONS FOR THE GLOBAL CLIENT

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EVENT

4 HOURS

Local advisors must be ready to comply and manage the twists and turns of foreign rules and the impact of non-compliance. The 2018 Cross-border Considerations for the Global Client workshop intends to ignite industry awareness, and although it has an international angle, it will have a definite South African perspective, given the current tax, wealth, succession and compliance landscape. The multi-layered world of tax planning and global compliance has created a new professional playing field. The advisory sector is an ever-changing, digitalised and transparent area which triggers certain unique challenges for clients and advisors.

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WE DO E-LEARNING SO YOU CAN DO LIFE

APPLYING VAT TO E-COMMERCE

15 minutes CPD

▶ **FERDIE SCHNEIDER,** fschneider@bdo.co.za

Supplies of goods and services are subject to VAT. However, levying VAT can be challenging when the supplies are made via ecommerce. This is even more complicated when transactions take place across borders.

The global economy is increasingly moving towards e-commerce. This is spurred on by rising consumer confidence to transact online, and traditional businesses expanding into the online medium. The Organisation for Economic Co-operation and Development (OECD) has done a tremendous amount of work on VAT and e-commerce, although many countries have not yet implemented effective measures. It remains a struggle for tax systems to keep up with globalisation as tax originated at a time when reliance could still be placed on border controls to protect the fiscal coffers. These barriers are no longer enough to protect tax revenue. One of the major challenges for tax authorities in taxing e-commerce transactions is to establish the nature of supplies and to identify the transacting parties.

E-commerce in South Africa

The value of e-commerce in South Africa is estimated at approximately R10bn for 2017. South Africa formally introduced VAT on foreign providers of electronic services on 1 June 2014. These provisions require suppliers from a place in an "export country" (any country other than South Africa) to account for VAT on the supply of "electronic services" if two of the following apply:

- The recipient is a South African resident;
- Payment for these services is made from a registered bank; and/or
- The recipient has a business, residential or postal address in South Africa.

The Minister of Finance gazetted certain qualifying "electronic services" on 28 March 2014. The term "electronic services" includes internet-based auction services; games and games of chance, including electronic betting or wagering; e-books, music, audio visual content and still images; subscription services, such as magazines, newspapers, journals, social networking services, websites, and blogs; and educational services, such as internet-based courses or education programmes.

"One of the major challenges for tax authorities in taxing ecommerce transactions is to establish the nature of supplies and to identify the transacting parties."

"A review of this nature would be incomplete without considering recommendations on introducing a general place of supply rule (which could potentially be linked to residency);"

The VAT system requires foreign suppliers to register as VAT vendors if they provide electronic services to South African consumers or receive payment for such electronic services from a South African bank to a value of more than R50 000 per annum. The Davis Tax Committee recommended (DTC VAT Report, 7 July 2015) the exclusion of supplies between group companies; defaulting to the invoice basis of accounting for VAT; and not distinguishing between supplies made between businesses and business-to-consumer.

Changes to the ecommerce space

National Treasury recently issued for comment draft amendments to the Regulations prescribing electronic services for the purposes of the definition of "electronic services" in section 1 of the VAT Act. It also issued an explanatory memorandum to the draft Regulations, which states that the intention of the new law is to "include software and other electronic services and to broaden the scope of electronic services". The intent is also "to widen the scope of the Regulations to apply to all "services" as defined in the VAT Act that are provided by means of an electronic agent, electronic communication or the internet for any consideration." These changes aim to reduce trade distortion resulting from VAT between foreign and domestic suppliers.

The draft Regulations set out the ambit of "electronic service" as defined in section 1(1) of the VAT Act. In essence, all services supplied by way of electronic means are included in the definition of "electronic services", except "telecommunication services" (as defined in the draft Regulations) and certain educational services.

Some of the changes to reflect the new regime are contained in the Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill of 21 February 2018 in the form of amendments to the VAT Act. These changes are effected by adding a new paragraph (vii) to the definition of "enterprise" in section 1(1) and by defining the term "intermediary". A new section 54(2B) is introduced which deems intermediaries to be carrying on the South African VAT enterprise on behalf of a non-resident supplier of electronic services under certain circumstances. It is also proposed to amend section 23(1A) to require a supplier of electronic services to register as a VAT vendor if the total value of the taxable supplies made by that person in the Republic has exceeded R50 000 within any consecutive 12-month period.

Holistic review needed

These proposals and any other efforts to address potential VAT leakage and distortion caused by the VAT system are welcomed. However, VAT systems need to be looked at holistically from an inter-jurisdictional supply perspective to increase certainty for governments and taxpayers. South Africa's VAT system has been around for 27 years, and although we have seen many ad hoc amendments, we have not had a holistic review and revamp, especially with regard to inter-jurisdictional transactions. A lack of effective rules can lead to double-, multiple-, and non-taxation in a cross-border context.

A review of this magnitude would need to deal with the legal provisions relating to the VAT registration of non-resident suppliers, the various interpretational and other issues relating to the inter-jurisdictional VAT rate, the intricacies of imported services (and perhaps learning something from the "reverse charging" applied in other VAT systems), and the intention of the legislator to tax final utilisation or consumption. A review of this nature would be incomplete without considering recommendations on introducing a general place of supply rule (which could potentially be linked to residency); specific place of supply rules for electronic, broadcasting, telecommunication, and other intangible difficult-to-tax services; and the zero rating provisions for these services provided to non-resident suppliers by resident suppliers for services initiated outside South Africa.

VAT EFFECT ON LEASEHOLD IMPROVEMENTS

30 minutes CPD

LEANIE GROENEWALD, leanie.groenewald@nwu.ac.za
& **HERMAN VIVIERS,** herman.viviers@nwu.ac.za

We discuss the new provisions regulating the VAT effect on the supply of leasehold improvements and the VAT position of both lessees and lessors.

New provisions regulating the VAT effect on the supply of leasehold improvements at no consideration were introduced into the VAT Act in terms of the Taxation Laws Amendment Act of 2017. These new provisions, effective from 1 April 2018, impact the VAT position of both lessees and lessors and are unfortunately no April fool's joke.

It is general practice that lease agreements allow lessees to, either voluntarily or involuntarily, effect improvements that will be permanently attached to leasehold properties rented from lessors. As these properties, together with the affixed leasehold improvements, will eventually revert back to the owner (lessor) upon expiry of the lease agreement, the right to these improvements becomes questionable. Although improvements permanently attached to a leasehold property are regarded, in terms of common law, to become the property of the lessor, the VAT treatment of leasehold improvements by vendors (both lessees and lessors) leads to inconsistencies in practice. The latter necessitated new regulations to clarify the VAT treatment of the supply of leasehold improvements for no consideration.

The purpose of this article is to explain the different VAT effects, for both the lessee and the lessor, where leasehold improvements are supplied for consideration, as opposed to for no consideration. As the newly introduced VAT provisions specifically pertain to the "for no consideration" scenario, a detailed discussion on this will be provided.

The Supply of Leasehold Improvements for Consideration

To meet the definition of an "enterprise", as defined in section 1 of the VAT Act, a vendor needs to supply goods or services for a consideration. Therefore, the supply by a lessee of leasehold improvements to a lessor for a consideration qualifies as a normal supply of goods in the course of furtherance of an enterprise in terms of section 7(1)(a) of the VAT Act.

Consequently, the lessee will be able to claim input tax on the expenditure incurred in effecting the

leasehold improvements, but only to the extent that it will be used by the lessee in the course of making taxable supplies. The lessee then needs to levy output tax on the supply of the leasehold improvements for a consideration to the lessor in terms of section 7(1)*(a)* of the VAT Act.

However, if the lessee uses the leasehold improvements wholly in the course of making exempt supplies, no output tax should be levied on the supply of the leasehold improvements for a consideration to the lessor. The lessor will pay the consideration for obtaining the leasehold improvements and will be able to claim input tax to the extent that it will be used by the lessor in the course of making taxable supplies. Thus, the normal VAT rules apply where leasehold improvements are supplied for a consideration.

The Supply of Leasehold Improvements for No Consideration

The new VAT effect for both lessees and lessors on the supply of leasehold improvements for no consideration (effective from 1 April 2018) is as follows:

VAT effect for the lessee

The newly introduced subsection (29) of section 8 of the VAT Act determines that a lessee (vendor) who incurs expenditure to effect leasehold improvements to a leasehold property will be deemed to make a supply of goods to the owner of the property, to the extent that the improvements are supplied for no consideration. However, the deeming provision will not apply where the lessee uses the leasehold improvements wholly (100%) for the making of exempt (non-taxable) supplies.

In addition, the new section 9(12) of the VAT Act determines that the time of the deemed supply under section 8(29) is the time that the leasehold improvements are completed. In practice, this date is determined by way of reference to the completion date stated in the lease agreement or, where no such date is stated, with reference to third party information such as the actual approved occupation date or the date an architects' certificate is issued.

The value of the deemed supply under section 8(29) is determined in terms of the new section 10(28) of the VAT Act which stipulates that the value of such supply will be deemed to be

- nil. Despite the nil value of the supply, the lessee still effectively levies output tax for supplies that are 100% taxable supplies on a value of nil, in terms of section 8(16)(a) of the VAT Act because of the deemed supply rule under section 8(29).

Example

A lessee (a vendor company) that incurs expenditure to effect improvements to a leasehold property that will be used 80% for taxable supplies (i.e., 80% commercial and 20% residential use) will only claim input taxes to the extent that the improvements will be used in the course of making taxable supplies. As a company is obliged to account for VAT on the invoice basis, input taxes on leasehold improvement expenditure will be claimed at the earlier of invoices received or actual payments made by the lessee. Thus, input taxes will be claimed to the extent of 80% taxable supplies over the period during which the improvements are effected (i.e., from the start of the lease agreement up to the time of completion of the leasehold improvements).

Once the leasehold improvements are completed on or after 1 April 2018, section 8(29) will trigger a deemed supply of the completed leasehold improvements by the lessee to the lessor (if supplied for no consideration) at the value of nil. As output tax is levied at 100% taxable supplies, the lessee will qualify for a section 16(3)(h) input tax adjustment in terms of the VAT Act to the extent of the percentage non-taxable use by the lessee immediately before the section 8(29) deemed supply (in this case, 20%).

It should be noted that the tax fraction to be applied in calculating the section 16(3)(h) input tax adjustment will depend on whether the lessee incurred and was invoiced for the original leasehold improvement expenditure either before or on or after 1 April 2018. Due to the fact that the South African VAT rate increased from 14% to 15% on 1 April 2018, leasehold improvement expenditure incurred by and invoiced to lessees before 1 April 2018 will qualify for the section 16(3)(h) input adjustment at a tax fraction of 14/114, while the new tax fraction of 15/115 will only be applicable to leasehold improvement expenditure incurred by and invoiced to lessees on or after 1 April 2018.

VAT effect for the lessor

Section 18C (also effective from 1 April 2018) is applicable to the lessor. In terms of the Explanatory Memorandum on the Taxation Laws Amendment Bill (2017:79) the purpose behind introducing the new section 18C into the VAT Act is to put the lessor in the same position that the lessor would have been in if the lessor effected the leasehold improvement itself.

As soon as the lessee makes a deemed supply under section 8(29) to the lessor (i.e., at the time that the leasehold improvements are completed) a section 18C output tax adjustment is triggered in the hands of the lessor. The output tax will only be accounted for to the extent that the lessor will use the leasehold improvements in making non-taxable supplies. If the lessor therefore uses the leasehold improvements for the making of at least 95% taxable supplies, there will be no section 18C output tax adjustment. (The so-called de minimis rule, in terms of proviso (i) to section 17(1) of the VAT Act, will take effect and will deem the use to be wholly (100%) for the making of taxable supplies.). The section 18C output tax adjustment therefore effectively puts the lessor in the same position as if he or she personally (or a company itself) effected the leasehold improvements. If the lessor personally effected the leasehold improvements, the lessor would only have been able to claim input tax to the extent that the improvements were used for making taxable supplies and also to the extent that input tax is not denied in terms of section 17(2) of the VAT Act. The output tax adjustment in terms of section 18C is based on the amount stipulated in the leasehold agreement. Where no amount is stipulated, the open market value of such leasehold improvements must be applied.

It is submitted that the lessor (vendor) could never argue that its percentage of taxable use of the leasehold improvements differs from that of its lessee. The percentage of taxable use of the lessor will be determined by how the lessee uses the leasehold improvements in the course of making taxable supplies. The latter principle is also applied in an income tax context where the lessor can only qualify for a section 12C or section 13(1) capital allowance on an asset or building if its lessee uses it in a process of manufacture.

Conclusion

Although the Income Tax Act has governed the normal tax treatment of leasehold improvements for numerous years, the VAT Act never provided any guidelines on the treatment of leasehold improvements at no consideration for VAT purposes. It is important for VAT vendors (especially lessors) to take cognisance of and to carefully consider the impact of the new provisions regulating the supply of leasehold improvements at no consideration from 1 April 2018 as it could result in unforeseen output taxes to be paid.

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DIVIDENDS AS PROCEEDS ON DISPOSAL OF SHARES

▶ MICHELE BENETELLO, mbenetello@ensafrica.com

Since the introduction of the Taxation Laws Amendment Bill of 2017, the landscape for the use of subscription and buy-back as a tax planning tool has changed and dividends are to be treated as proceeds on disposal of shares.

15 minutes CPD

The landscape prior to amendment

A number of transactions were entered into and concluded prior to 19 July 2017 on the basis of what is commonly referred to as a "subscription and buy-back" mechanism. In its most simplistic form this entails a party (the purchaser) subscribing for shares in the target company, with the target company subsequently buying back its own shares from an existing shareholder (the seller), which must be a company, using the cash derived from the subscription. The end result, ignoring potential substance over form and tax avoidance considerations, would be a tax free disposal for the seller on the basis that it had received a tax exempt dividend (exempt from both dividends withholding tax and income tax).

Amendments and core concepts applicable

The status quo was tempered somewhat by the introduction of the new section 22B in the Income Tax Act (transactions on revenue account) and the new paragraph 43A of the Eighth Schedule to the Act (transactions on capital account) with effect from 19 July 2017 (the new provisions). In broad terms, the new provisions treat the exempt dividend as part of the taxable proceeds on disposal of the relevant shares. The new provisions, however, only apply to shares which constitute a "qualifying interest" and on which an "extraordinary dividend" is received or accrued. It is in the application of an interpretation of these two definitions where most of the tax planning will no doubt occur in future.

For these purposes, a "qualifying interest" is defined as an interest held, alone or together with a connected party, by a company (A) in another company (B) that constitutes:

- in the case of an unlisted company (B), at least—
  - 50% of the equity shares or voting rights in that other company (B); or
  - 20% of the equity shares or voting rights in that other company (B) if no other person (alone or together with a connected person) holds the majority of the equity shares or voting rights in that other company (B); or
- In the case of a listed company (B), at least 10% of the equity shares or voting rights in the other company (B).

The "qualifying interest" test will be satisfied if A at any time within an 18-month period prior to the date of disposal of the relevant B shares held a "qualifying interest" in B.

It is thus still possible (subject to the transaction(s) withstanding substance over form scrutiny and not having

as their sole or main purpose the avoidance of tax) for certain transactions to benefit from the tax exempt dividend treatment merely because the "qualifying interest" requirement is not satisfied. An example would be the buy-out of a 49% minority shareholder. The concept of an "extraordinary dividend" is defined in the case of:

- a preference share, the dividends in respect of which are determined with reference to a rate of interest, as so much of the amount of any dividend received or accrued as exceeds an amount determined at a rate of 15%;
- any other share, as so much of the amount of any dividend received or accrued—
  - within a period of 18 months prior to the disposal of that share; or
  - in respect, by reason or in consequence of that disposal,

  as exceeds 15% of the higher of the market value of that share as at the beginning of the period of 18 months and as at the date of disposal of that share.

There are a couple of noteworthy comments with regard to the concept of an "extraordinary dividend". In the first instance, paragraph (b) of the definition would apply to preference shares in respect of which the dividends are not determined with reference to a rate of interest. Secondly, the new provisions are broader than just "subscription and buy-back" transactions and apply equally to so-called "value suppression" transactions in terms of which dividends are declared prior to a contemplated transaction so as to reduce the value of the equity shares of a company prior to sale to (or a subscription by) a third party. (In the context of a subscription transaction there would be no immediate tax consequence other than for the existing shareholder not to dispose of their shares within 18 months of receipt or accrual of the said dividend and being cognisant of what is said in the third comment). Thirdly, the use of the words "in respect, by reason or in consequence of that disposal" widen the ambit of the new provisions considerably and it is arguable that it could extend to amounts received or accrued outside of the 18-month period provided the relevant connection is present (see below for discussion on corporate relief provisions).

"The new provisions treat the exempt dividend as part of the taxable proceeds on disposal of the relevant shares."

The interplay of the new provisions with the corporate relief provisions (Part III of the Act)

The operation of the corporate relief provisions has been made subject to the new provisions. This qualification should result in negative tax consequences for transactions that would otherwise be free of tax as a result of specifically tailored legislation. Most notably, transactions such as amalgamation transactions (section 44), unbundling transactions (section 46) and liquidation transactions (section 47) would be impacted by the qualification as each of these provisions contemplate distributions *in specie* of shares or other assets which could, if the facts permit, trigger an adverse application of the new provisions. It could be argued that (in the case of sections 44 and 47) one merely needs to wait out the 18-month period before deregistration or liquidation becomes effective to overcome the issue. Given the wide application of the new provisions, especially having regard to subparagraph (b)(ii) of the definition of "extraordinary dividend", this argument may be questionable. This is especially so where there is a connection between the distribution and the disposal. What then is the solution?

From a conceptual perspective, the new provisions should not override the corporate relief provisions as the very provisions of sections 44, 46 and 47 require distributions to be made for the respective sections to function, thus making them of necessity susceptible to the new provisions without tax avoidance being in any way contemplated! It is also to be remembered that any impermissible tax avoidance can also be dealt with in terms of Part IIA of the Act, should the relevant requirements be met.

TRUST REGIMES AND OFFSHORE TRUSTS

15 minutes CPD

We look at the ongoing changes in the South African trust regime and its effects on offshore trust and company structures.

▶ **NICKY COMBRINCK,** nicky.combrinck@psg.co.za

"It recognised the pertinent issue around secrecy of the ultimate beneficial owner and failure to disclose direct and indirect interests in foreign trusts."

Over the years, a popular choice for South African residents with international wealth is to establish an offshore trust which in turn holds shares in an offshore company which houses the assets and investments. The foreign assets are thus held in a foreign company accruing foreign profits, with the dividends declared to the offshore trust as the shareholder of the company.

Ongoing changes in the South African trust regime

The ongoing review on the misuse of trust structures in South Africa has seen major changes over the past few years, both from a national and international perspective. The issues around offshore trusts holding shares in offshore companies have received attention in a number of budget reviews since 2015, and the intention to introduce countermeasures to discourage the abuse of such structures was specifically mentioned.

Taxation Laws

Tax reforms and amendments to the Taxation Laws Amendment Bill were again raised in the 2018 Budget after issues around interposed foreign trust and company structures were postponed last year as a result of industry push back.

In 2017, proposals were made to amend the Taxation Laws Amendment Bill around foreign trusts which hold shares in a foreign company. The initial proposals had sought to tax the distributions of these foreign wealth structures in the hands of South African residents.

Davis Tax Committee

The Davis Tax Committee's Second and Final Report on Estate Duty in paragraph 10 briefly dealt with discretionary offshore trust arrangements where no vested right exists and hence no tax event is triggered

in South Africa. The report makes recommendations around the taxation and criminalisation of offences (as per the first report) regarding the non-disclosure of the true nature of the ownership of such structures. It recognised the pertinent issue around secrecy of the ultimate beneficial owner and failure to disclose direct and indirect interests in foreign trusts.

Controlled foreign company rules

The 2017 proposed changes to controlled foreign company (CFC) rules and in particular section 9D of the Income Tax Act are of particular interest when considering offshore trusts and company wealth structures. The proposed changes are receiving new interest this year with the effect of considering broadening its scope to include these structures.

In short, a foreign company is regarded as a CFC if a South African resident directly or indirectly holds more than 50% of the participating or voting rights. The result is that section 9D of the Income Tax Act attributes the net income of a CFC to the South African resident shareholder. The current section 9D, however, does not extend to foreign companies held by foreign trusts and the loophole created by these structures to circumvent the operation of section 9D. The proposed changes are to broaden the definition of a CFC as per section 9D as follows:

- To include a foreign company held by a foreign trust under certain circumstances;
- To provide clarity on the net income to be attributed to the CFC; and
- To provide rules around the classification of distributions from a foreign trust as income.

Base erosion and profit shifting

Similarly, on an international level, over the past five years the OECD's measures to counter base erosion and profit shifting (BEPS) have received a lot of attention in the tax world. Under the 15 Actions, the themes of CFCs seek to strengthen measures in combating structures or legal entities taxed at low tax rates or not at all. It has become common to use trusts with interlinked companies to hold assets, as a way to shelter assets and hide the identity of the owners. In some instances this arrangement completely erases taxes and effectively erodes a country's tax base. The BEPS principles are designed to assist in disclosure and transparency issues around these tax planning practices.

Section 25BC

A further proposed change is the addition of section 25BC to the Income Tax Act to deal with distributions to a South African resident from a foreign trust which holds a participation right in a foreign company. It deems the foreign trust to be a South African resident for tax purposes where the income was derived by a CFC. There are still many unintended implications from these proposals which will need to be considered and extensive feedback from the tax industry is expected.

FICAA 2017

Other considerations and developments which indirectly affect the use of these structures are contained in the Financial Intelligence Centre Amendment Act, signed into law on 27 April 2017. The main purpose of this Act is to combat abusive financial practises ranging from illicit financial flows and money laundering to terrorist funding. The Act seeks to provide identification measures for beneficial ownership issues, including that of trust or corporate structures.

Common reporting standard

Lastly, with the implementation of the common reporting standard (CRS), aggressive tax planning and non-disclosure practices are shrinking and putting pressure on jurisdictions to incorporate transparency in reporting on non-resident financial and tax activities. The OECD has laid down rules to cover the reporting obligation in terms of both avoidance structures and opaque offshore structures.

Mitigating the effects of changing tax policy

From the above it is clear that there are various local and global developments which are directly aimed at combating certain tax planning practices.

In mitigating the effects of these changes, tax professionals will need to actively engage in both local and global wealth structuring trends with a focus on encouraging parties to come clean with tax authorities. Tax compliance will drive offshore structuring trends, with transparency in clients' affairs at the forefront.

Restructuring clients' affairs to bring them in line with changing tax policy will be a priority as non-compliance carries major risks and serious penalties for both the professionals involved and the clients.

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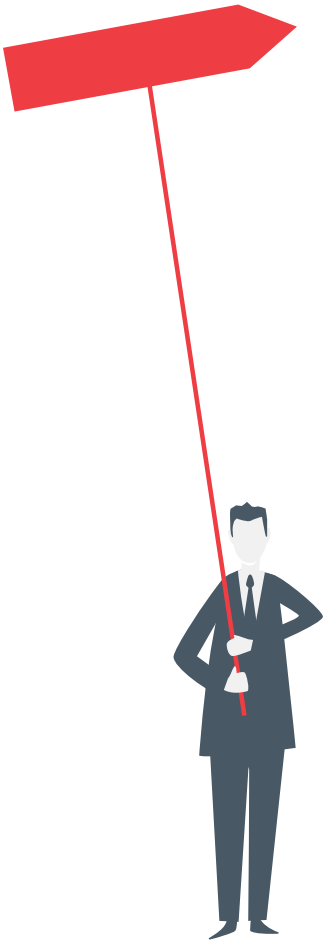
IMPOSING UNDERSTATEMENT PENALTIES: ADOPTING THE RIGHT APROACH

30 minutes CPD

The approach being adopted by the Tax Court in the hearing of appeals against understatement penalties is questionable.

▶ **ADVOCATE KEVIN BURT,** mail@kevinburt.co.za



This article starts with a brief account of the issue relevant to the dispute in *ITC No.14247* that arose between a company and SARS and that was heard by the Gauteng Tax Court on 3 August 2017. The dispute had to do with the imposition of understatement penalties, more particularly the rate at which they had been imposed by SARS. SARS had imposed understatement penalties of 100% for shortfalls of income tax and VAT by the taxpayer.

For present purposes, it is by the bye that the taxpayer's appeal against the imposition of the penalties was dubious. In terms of the undisputed facts found by the Gauteng Tax Court (the judgment, delivered on 18 August 2017, may be accessed at *http://www.sars.gov.za/Legal/DR-Judgments/Tax-Court/Pages/2019-2017.aspx)*, the appeal certainly appeared to be somewhat of a hopeless cause. The taxpayer's case that the relevant omissions and misstatements in the income tax returns and the default rendering VAT returns *had not* resulted in any prejudice to SARS or the *fisc* is hard to fathom. Moreover, the taxpayer's objection to the imposition of the understatement penalties had been largely successful in that SARS had agreed to reduce them appreciably. On the particular facts of the case, it is, thus, rather surprising that a better result on appeal to the Tax Court could have been held out to the taxpayer as being a realistic prospect. However, it is the approach adopted by the Tax Court in the appeal that is worth discussing in this article.

Approach of the Tax Court in an appeal against an understatement penalty

The approach of the Gauteng Tax Court, to the question of what approach is to be adopted in an appeal against the imposition of an understatement penalty, was to adopt the approach that had been adopted by the Full Court of the Gauteng Local Division in *CSARS v Afri-Guard (Pty) Ltd* (the judgment may be accessed at *http://www.saflii.org/za/cases/ZAGPJHC/2016/144.html)*. The Full Court had accepted, in that case (see at paragraphs [60] and [65] of the judgment), that the court below (the Tax Court) was correct to adopt the approach laid down in *CIR v Da Costa* (1985) 47 SATC 87 (A). This was in spite of the fact that the legislation that was considered in *Da Costa* was section 76 (now repealed) of the Income Tax Act 1962 and that the dispute between the parties in *Afri-Guard* arose from the imposition of additional tax under section 60 of the VAT Act 1991. What is more even though section 60 did not, in contrast to section 76, give SARS a discretion to remit additional tax, the Tax Court in *Afri-Guard* had nonetheless held that the decision to impose additional tax under section 60 *was* discretionary.

A little more than a month after the Gauteng Tax Court delivered the judgment in *ITC No. 14247*, the Kwa-Zulu Natal Tax Court, (the judgment of the Kwa-Zulu Natal Tax Court in *ITC No.* 14055 was delivered on 20 November 2017 and may be accessed at http://www.sars.gov.za/Legal/DR-Judgments/Tax-Court/Pages/2019-2017.aspx), after asking the question as to the approach to be adopted by the Tax Court in considering whether

to interfere with a decision to impose an understatement penalty under the provisions now contained in the Tax Administration Act 2011, saw no reason to doubt that the approach of the Tax Court was any different to that of the special court for hearing income tax appeals under the legislation considered in *Da Costa*.

But, a closer look at the legislation that was considered in *Da Costa* and the question that arose in that case reveals that the Tax Court in *ITC No. 14247* and *ITC No. 14055* was not correct in adopting the approach laid down in *Da Costa*.

Da Costa

The dispute in *Da Costa* arose after an investigation of the affairs of the taxpayer between 1971 and 1977 had been completed and he was eventually assessed for additional tax of R15 950 and was also required, under section 76, to pay a penalty of R15 950. The taxpayer paid the additional tax but appealed to the special court against the extent of the penalty. The special court reduced the amount of the penalty to R3 000. Being dissatisfied with that decision, the Commissioner for Inland Revenue (whom I will refer to as SARS), with the leave of the special court, appealed direct to the (then) Appellate Division of the Supreme Court.

At the time of the dispute, section 76(1)(b) provided that, if a taxpayer omitted from his tax return any amount which ought to have been included in his return, he was required to pay, in addition to the tax chargeable in respect of his taxable income, "an amount equal to twice the difference between the tax as calculated in respect of the taxable income returned by him and the tax properly chargeable in respect of his taxable income as determined after including the amount omitted".
Sections 76(2)(a) and (b) read:

> *"(a) [SARS] may remit the additional charge [i.e. the penalty] imposed under subsection (1) or any part thereof as [it] may think fit: Provided that, unless [it] is of the opinion that there were extenuating circumstances, [it] shall not so remit if [it] is satisfied that any act or omission of the taxpayer referred to in paragraph (a), (b) or (c) of subsection (1) was done with intent to evade taxation.*
> *(b) In the event of [SARS] deciding not to remit the whole of the additional charge imposed under subsection (1), [its] decision shall be subject to objection and appeal."*

Van Heerden JA, who delivered the judgment of the Appellate Division in *Da Costa*, after referring to the approach of the Appellate Division in *Rand Ropes (Pty) Ltd v CIR* (1944) 13 SATC 1 (A), affirmed that, in cases involving the exercise of a discretion by SARS, the special court is called upon to exercise its own, original discretion. The learned judge's affirmation of the proper approach to be adopted by the special court in an appeal against the extent of a penalty under section 76 settled a long-running controversy regarding the proper approach to be adopted on appeal to the special court.

As is apparent from the provisions of section 76, quoted above, SARS had a power to remit a penalty and the exercise of that power was clearly discretionary. Section 76(2)(a) contemplated two different situations: (i) where the act or omission of the taxpayer

was accompanied by an intention to evade taxation SARS was to form an opinion as to whether there were extenuating circumstances and unless SARS formed such an opinion it had no power to remit the penalty; (ii) where, however, the act or omission of the taxpayer was not intended to evade taxation the proviso in section 76(2)(a) did not apply at all and SARS could remit the penalty as it saw fit. The oft-quoted observation made in *Rand Ropes* that an appeal to the special court is a rehearing of the whole matter by the special court and that the special court may substitute its own decision for that of SARS was made in the specific context of provisions of the Income Tax Act which left the decision to the discretion of SARS, much in the same way as the provisions of section 76 left the decision to remit the penalty to SARS.

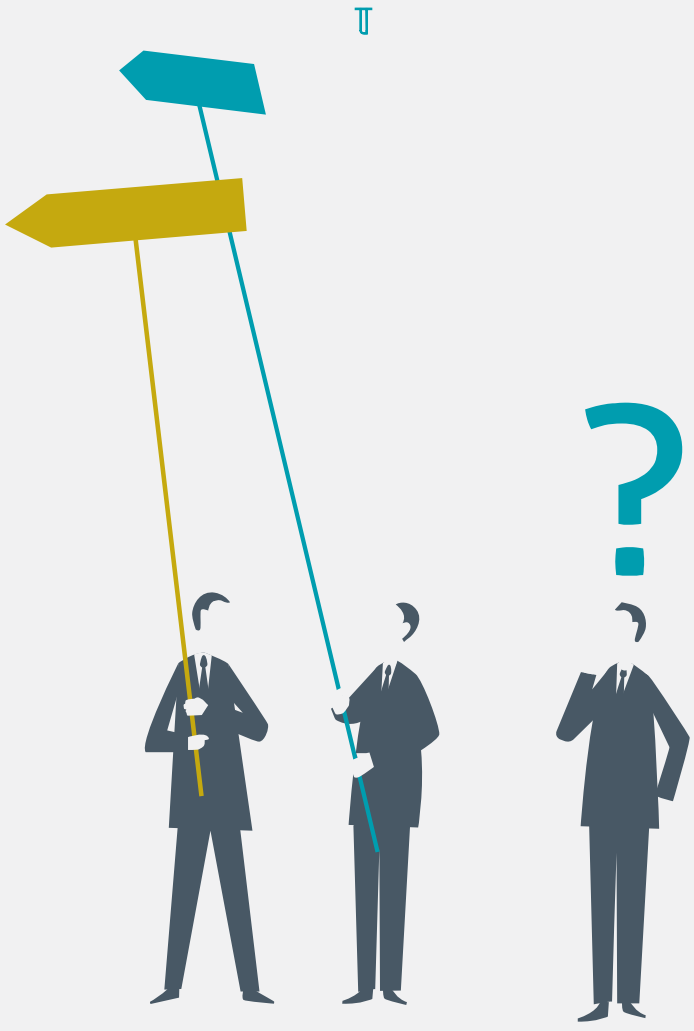
In contrast, Part A of Chapter 16 of the Tax Administration Act, in accordance with which an understatement penalty must be imposed, enacted a totally different penalty regime. The main difference is that, in contrast to section 76 which left the decision to the discretion of SARS, the extent of an understatement penalty is not derived from the exercise of a discretion in the strict sense. As was explained in *Knox D'Arcy Ltd and others v Jamieson and others* [1996] 3 All SA 669 (A) (cited with approval in *Oakdene Square Properties (Pty)Ltd and others v Farm Bothafontein (Kyalami) (Pty) Ltd* [2013] 3 All SA 303 (SCA)), a discretion in the strict sense is confined to those instances where the decision-maker can legitimately adopt any one of a range of options. Since all those options would be legitimate, the choice of any one of them cannot be said to be a wrong choice, providing the choice was properly made.

Owing to the fundamental differences between the two penalty regimes, it is submitted that the Tax Court is not at large to reduce, confirm or increase the amount of an understatement penalty, to the same extent as the special court had been, unfettered by the discretion exercised by SARS under section 76. As I have attempted to show with reference to the provisions of section 76, the extent of an understatement penalty imposed under the provisions of section 222 does not constitute the exercise of a discretion in the strict sense. Rather it is the exercise of a value judgement by SARS. When SARS decides to apply one of the behavioural standards contemplated in items (ii), (iii) or (v) of the understatement penalty percentage table, it is making a value judgement. The position is comparable to the decision whether or not the conduct of the defendant in a case based on negligence met the standards of the reasonable person, or whether negligent conduct should attract delictual liability and thus be regarded as wrongful. It can hardly be said, in my view, that the imposition of an understatement penalty at the rate of 25%, 50% or 100% in a particular case, is a choice from a range of choices that SARS can legitimately make; about which there may well be a justifiable difference of opinion as to which one would be the most appropriate and of which none can be described as wrong. On the contrary, the answer to the question of whether the conduct of the taxpayer in relation to the making of an "understatement" is "reasonable care not taken in completing return", "no reasonable grounds for tax position taken" or "gross negligence", as the case may be, can only be "yes" or "no". These answers cannot both be right.

Conclusion

The frequent referencing of the judgment of the Appellate Division in *Da Costa* by the Tax Court where the question that has arisen in the proceedings before the Tax Court is the proper approach to be adopted in considering whether to interfere with the decision made by SARS under section 222, read in conjunction with section 223 of the Tax Administration Act, is highly questionable. I question whether the correct approach on appeal to the Tax Court against the imposition of an understatement penalty *is* that of the special court in *Da Costa*.

Unlike the approach of its predecessor, which had to exercise its own, original discretion under section 76, the Tax Court is duty-bound to interfere with the decision under section 222, read with item (ii), (iii) or (v) of section 223 if it disagrees with the decision of SARS. That is because the decision would be either right or wrong. The Tax Court, when it interferes with the decision, is not exercising an administrative discretion. Therefore, notwithstanding the contrary view expressed by the Full Court in *Afri-Guard*, the question on appeal to the Tax Court *is* whether SARS' decision is correct or not on the proven facts of the case. In no sense is, in my view, the Tax Court, on an appeal to it against the imposition of an understatement penalty, being called upon to exercise the administrative discretion that is conferred on SARS by sections 222 and 223.



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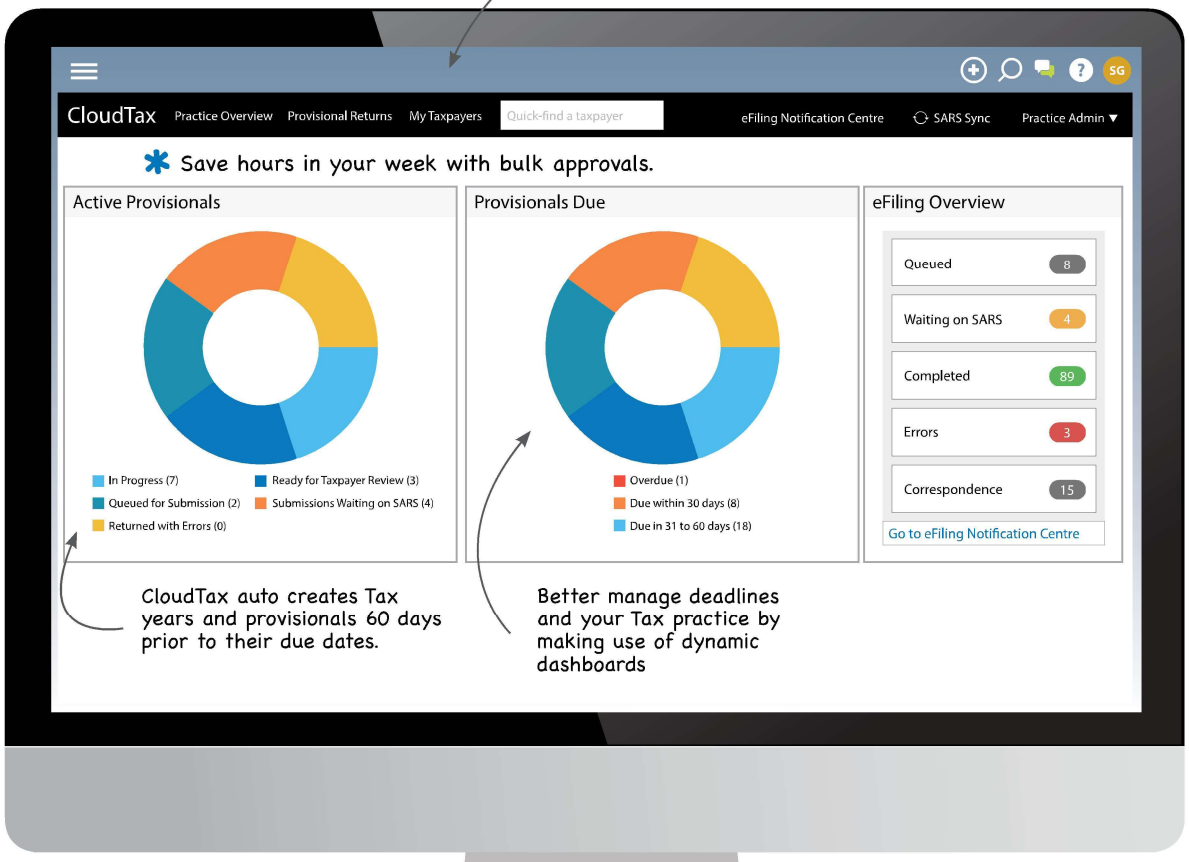

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* Work faster and smarter than ever before by automating your Tax practice. CloudTax automates the provisional process from start to finish. Designed to minimize any errors from being sent to SARS.

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adapt IT

TAX BOOKS for 2018

Calling all tax students! Wondering which tax books are relevant to you? Then look no further; we have collated a comprehensive collection of must-have tax books currently on the market.

TAX LEGISLATION

SAIT Compendium of Tax Legislation 2018

JUTA'S LAW EDITORS
R719.25 // JUTA

This tax legislative compendium incorporates all promulgated and proposed amendments relevant as at 1 January 2018, aided by Juta's prelex and pendlex. Related supplementary material has been incorporated online in Volume 2.

JUTA's Indirect Tax 2018

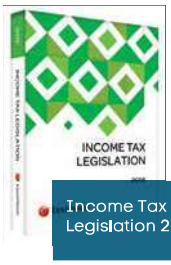
JUTA LAW EDITORS
R590.40 // JUTA

This book is a consolidated source of all current and pending indirect tax Acts as at 1 January 2018. Juta's prelex and pendlex enable the reader to view the legislative history at a glance. Supplementary material to the indirect tax Acts is also included.

Professional Tax Handbook 2018

LEXISNEXIS EDITORIAL STAFF
R1069.50 // LEXISNEXIS

This set includes two comprehensive legislative handbooks which contain all the direct tax and VAT acts, regulations, practices and interpretation notes.



Income Tax Legislation 2018

LEXISNEXIS EDITORIAL STAFF
R546,25 // LEXISNEXIS

This is a legislative handbook containing only the Income Tax and Tax Administration Acts.

Indirect Tax Handbook 2018

LEXISNEXIS EDITORIAL STAFF
R661.25 // LEXISNEXIS

This book comprises indirect tax acts, such as transfer duty and VAT, as well as tax administration law. It also includes the related regulations' interpretation notes and practice notes.

MOST-USED STUDENT TAX BOOKS

SILKE: South African Income Tax 2018

STIGLINGH, MD; KOEKEMOER, AD; VAN ZYL, L; WILCOCKS, JS & DE SWARDT, RD
R908.64 // LEXISNEXIS

The objective of the authors and publishers of Silke: SA Income Tax is to provide a book that simplifies the understanding and application of tax legislation in a South African context for both students and general practitioners. Please take note that, from this edition, Silke: SA Income Tax will only be available in English.

SILKE: First Touch to Tax 2018

STIGLINGH, M; VAN ZYL, L; KOEKEMOER, A; WILCOCKS, JS & DE SWARDT, RD
R757.66 // LEXISNEXIS
** Also available in Afrikaans*

The objective of the authors and publishers of this book is to provide an authoritative and comprehensive, yet readily accessible, textbook on income tax in South Africa for use by students of the subject as well as people who work in the tax field.

Tax Law: An Introduction

JUTA'S LAW EDITORS
R590.40 // JUTA

This book covers the basic policy rationale for the Income Tax Act and other key tax acts.

CASE BOOKS

Income Tax Cases and Materials

EMSLIE, T & DAVIS, D
R1 071.60 // THE TAXPAYER

This book offers students abbreviated cases supplemented by notes.

**The above rate is a reduced rate applicable to students and academics only.*

Income Tax in South Africa: Cases and Materials 4th Edition

WILLIAMS, RC
R988.53 // LEXISNEXIS

The primary objective in this work has been to assist students of income tax, including those studying at post-graduate level, not just to understand each judicial decision in isolation, but to gain insight into underlying (often unarticulated) general principles, and to grasp the inter-relationship between the Income Tax Act and the principles of common law.

Tax Workbook 2018

MITCHELL, LD; NIEUWOUDT, MJ & STARK, K
R376.96 // LEXISNEXIS

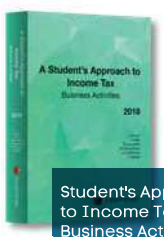
The Tax Workbook has been designed to be used by students and lecturers, to provide the maximum benefit to each user. Each chapter deals with a specific topic or topics and the chapter contents progress from relatively easy questions to more difficult questions dealing with integrated problems. Each chapter contains examples with detailed solutions, which students can use as an aid to their studies, and questions without answers, for the use of lecturers. Lecturers who prescribe the workbook will be provided with a set of solutions to all the questions.

HANDBOOKS, GUIDES, INTRODUCTIONS AND STUDENT-SPECIFIC APPROACHES TO TAX LEGISLATION

South African Income Tax Guide 2018

DIVARIS, C & STEIN, ML
R517.50 // LEXISNEXIS

This book offers a concise and practical overview of income tax legislation. It enables you to discover which income tax is free, check your assessments, solve many of your tax problems as well as calculate the taxes you or your company will have to pay. It will also help you understand PAYE.



Student's Approach to Income Tax: Business Activities 2018

BRUWER, L; CASS, SC; KOEKEMOER, A & OOSTHUIZEN, A
R681.07 // LEXISNEXIS
** Also available in Afrikaans*

This book was written with the specific purpose of combining in one concise volume the provisions of the Income Tax Act 58 of 1962 (the Act) as it applies to business activities. The provisions of the Act regarding natural persons are dealt with in a separate book, *A Student's Approach to Income Tax: Natural Persons.*

Student's Approach to Income Tax: Natural Persons 2018

BRUWER, L; KOEKEMOER, A; OOSTHUIZEN, A; DE HART, KL & COETZEE, K
R664.46 // LEXISNEXIS
** Also available in Afrikaans*

This book was written with the specific purpose of combining in one concise volume the provisions of the Income Tax Act 58 of 1962 (the Act) as it applies to individuals. The provisions of the Act regarding business activities are dealt with in a separate book, *A Student's Approach to Income Tax: Business Activities.*

Taxation of Individuals: Simplified 2018

DE HART, KL; HAMEL, E; SMULDERS, S & STEENKAMP, LA
R672.83 // LEXISNEXIS

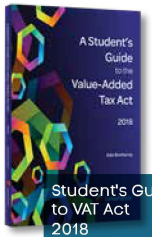
The publication is aimed at an entry level of Taxation studies. The title is ideal for more practical and rudimentary tax courses.

LexisNexis Concise Guide to Capital Gains Tax

CLEGG, D
R402.50 // LEXISNEXIS

An easy-to-understand guide that identifies frequently misunderstood areas, explains the law in clear, non-technical terms and cross-references every statement made through footnotes to the act.

HANDBOOKS, GUIDES, INTRODUCTIONS AND STUDENT-SPECIFIC APPROACHES TO TAX LEGISLATION

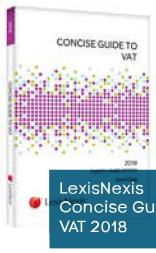


Student's Guide to VAT Act 2018

BRETTENNY, A

R387.04 // LEXISNEXIS

The guide has been written with specific reference to the Examinable Taxation Pronouncements (the tax syllabus) for the Initial Test of Competence (ITC) of the South African Institute of Chartered Accountants (SAICA).

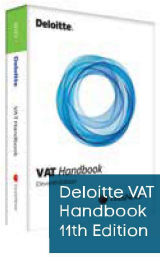


LexisNexis Concise Guide to VAT 2018

CLEGG, D

R379.50 // LEXISNEXIS

This is a quick guide for finance and accounting practitioners who are seeking to obtain clarity on the complexities of the VAT system.



Deloitte VAT Handbook 11th Edition

SILVER, M

R672.75 // LEXISNEXIS

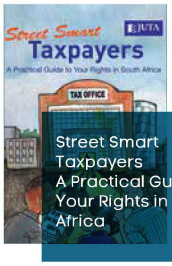
This book offers a comprehensive guide to the application of the provisions of the VAT Act. It facilitates an understanding of the mechanics of the VAT system through the act, regulations, interpretation notes and practice notes, VAT forms and SARS guides. It also includes a synopsis of all reported decisions of our courts which deal specifically with VAT issues.

Tax Administration

B CROOME & L OLIVIER

R1,044.90 // JUTA

This book sets out the rules of tax collection, showing how areas of law interrelate and noting best international practice. It provides clear and authoritative guidance on aspects such as the registration and submission of tax returns, assessments, requests for information, penalties and interest, privilege, reportable arrangements, dispute resolution, advance tax rulings and remedies.

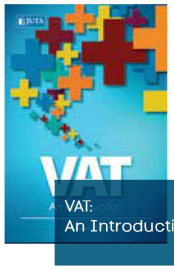


Street Smart Taxpayers A Practical Guide to Your Rights in South Africa

B CROOME & J CROOME

R295,50 // JUTA

This book explains the processes SARS must follow when working with taxpayers throughout the various stages of the tax process, and identifies the remedies available to taxpayers.



VAT: An Introduction

M BOTES

R458.25 // JUTA

The book will help students understand the practical mechanics of the South African VAT system.

SAMPLE TAX PROBLEMS

MABUTHA M, SINGH D

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This is the second publication in the Questions on SA Tax series designed to provide comprehensive tutorial coverage to taxation students. This book covers foundational topics and those typically dealt with in the study of tax at an undergraduate level.

S PARSONS, A BECKER, R CARPENTER, M MABUTHA, L STEENKAMP, M UNGERER

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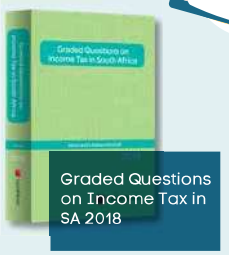
This the third and final publication in the Question on SA Tax series designed to provide comprehensive tutorial coverage to taxation students. This book covers advanced topics and integrated questions. Its complementary publications, Introductory Questions on SA Tax and Questions on SA Tax, cover foundational topics and those typically dealt with in the study of tax at an undergraduate level.



MITCHELL, K & MITCHELL, LD

R783.05 // LEXISNEXIS

The questions are based on the Income Tax Act 1962, the Tax Administration Act 2011, the Value-Added Tax Act 1991 and the Estate Duty Act 1955 – incorporating amendments up to and including the Rates and Monetary Amounts and Amendment of Revenue Laws Act 14 of 2017.

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RECRUITERS IN TAX

Our research unveiled the following recruitment agencies that work in the tax arena. We hope this information provides tax students and advisory firms with a starting point when tax vacancy opportunities arise.

Q&A with selected recruiters

A Q&A with a few tax recruiters reveals some vital information for both applicant and employer.

ASA

Africorp Soutions and Advisory
www.africorpsolutions.co.za
JHB: 011 467 0810

AP

Afrizan Personnel
www.afrizan.co.za
JHB: 011 884 8010
CPT: 021 418 1787

AAAA

AtripleA Recruitment & Temps
www.aaaa.co.za
PTA: 082 921 2439

DAV

DAV
www.dav.co.za
JHB: 011 217 0000
CT: 021 468 7000

NR

Network Recruitment
www.networkrecruitment.co.za
BRUMA: 011 622 9526
MENLYN: 012 348 7559 / 4940
SUNNINGHILL: 011 234 0600
STELLENBOSCH: 087 353 5836

RPO

RPO Services
www.rposervices.co.za
CT Head Office : 010 900 4087
PE : 010 900 4352

TAX PLACEMENTS MADE IN 2017

ASA	±12	AP	5 – 10	AAAA	9
DAV	4	NR	34	RPO	±10

TAX ROLES FILLED IN 2017

ASA
- Tax practitioners
- Tax accountants
- Tax lawyers
- Tax specialists

DAV
- Tax accountant
- Tax administration specialist
- Tax manager
- Tax specialist

AP
- Trust tax
- Transfer pricing
- Tax accountant

NR
- Tax accountant
- Tax specialist
- Tax manager

AAAA
- Bookkeepers

RPO
- Tax consultant
- Transfer pricing
- Tax management

TO WHICH ORGANISATIONS WERE PLACEMENTS MADE?

ASA
- Advisory
- Corporate
- NGO

DAV
- Corporate

AP
- Largely corporate (specifically banking but also media)
- Government

NR
- Corporate

AAAA
- Insurance

RPO
- Advisory and accounting

AT WHAT LEVEL ARE THE BULK OF PLACEMENTS MADE?

ASA

- Mid-level associate to partner level
- Executive/Director

AP

They range from junior to very senior

AAAA

Mid-level to senior

DAV

Mid-level

NR

We hardly place graduates; however, our candidates are mostly junior associates who have completed SAIT articles to senior management level

RPO

Junior to mid-level associate

WHAT CHALLENGES DO YOU FACE IN FINDING THE RIGHT CANDIDATE FOR A POSITION?

ASA

We often find the "perfect candidate" – on paper. However, when asked technical questions on their experiences or skills, they are unable to answer or give examples of past experience.

There are times where we come across candidates who are "just looking around" and do not commit to the recruitment process seriously.

We have had circumstances of dishonesty. This is where background checks and confirming all information is imperative (past employer references, reasons for leaving, salary slips, credit and criminal checks, etc.)

AP

The field encourages specialisation to such a degree that there are many nuanced specialist niches in tax. Candidates are not always sufficiently specific about this on their profiles which makes identifying the right person difficult for head hunters (for instance, a candidate might indicate on their LinkedIn in profile that they are a "tax associate", but fail to specify personal or corporate.). The usual difficulties of a skills scarce market like ours apply to tax as to other areas of recruitment.

AAAA

Salaries that clients offer are too low.

DAV

- Skills shortages in certain fields: Unfortunately, in some instances, skills shortage makes it difficult to put a time scale on the delivery of the right candidate.
- Shortage of equity candidates at a C suite level who meet the requirements required by the business: There ends up being a compromise on the right skilled candidates so as to meet a BBBEE status.

NR

Tax is a much-specialised field, and if we delve deeper, you'll find more specific tax niches such as life insurance tax, mining tax and international tax. It is therefore challenging to find tax professionals who have this specific experience with an accounting or CA background.

RPO

Whilst assessing technical ability and qualifications can be easy on paper, finding the correct cultural and personal fit within our clients' teams is an area that can only truly be assessed by the client in the interview itself.

We strive to complete thorough screenings of our candidates which indicate both technical ability as well as their approach to work and type of environment/role that they see themselves in, giving us some insight into how the candidate will fit into our client's firm as an employee and not just an individual who has the technical ability that was set out in the job description.

WHAT DEFINES A SUCCESSFUL CANDIDATE VERSUS AN UNSUCCESSFUL CANDIDATE?

ASA

Successful candidates would be able to articulate their goals for the future and the additional skills they could offer the company they are interviewing at. They will be able to discuss on a professional level what they would expect from the company they are joining as well as be able to commit to the expectations of the company.

Unsuccessful candidates are often unsure of what they are looking for in a new opportunity and jump into new positions for the wrong reasons, i.e., usually a salary increase. They often take the first thing offered to them without making an informed decision – typically, these candidates move on from a company very quickly.

AP

In tax specifically, specialisation is important – the ideal candidate has both vast knowledge in the overall workings of tax as well as the specific skill set and exposure required for the position in question. More generally, successful candidates have solid track records with clear career progression. They have relevant degrees and professional qualifications. In terms of employment, they have solid exposure to market leaders. They have excellent references and a proven track record of achievement in their field.

AAAA

We try to send clients exactly what they want – if the client sends great specs then there are no problems.

"Successful candidates would be able to articulate their goals for the future and the additional skills they could offer the company."

DAV

A successful candidate would:

- Have a postgraduate degree in tax, i.e., BCom and HDip Tax. A Master's in Taxation is advantageous
- Have specialist skills, i.e., direct tax, indirect tax, transfer pricing versus your general tax
- Be a strong AA candidate
- Have an audit background followed by commercial environment and experience
- Have a stable track record
- Have an understanding of international tax, which is beneficial to investments or cross-border transactions

NR

A successful candidate would generally be an individual who has completed a BCom Accounting and a tax qualification (e.g., Higher Diploma in Tax / MCom in Tax) and has three years' corporate or international tax experience within one of the Big 4 or medium-sized audit firms. It is definitely an advantage if the candidate is a qualified CA (SA) or if the candidate has commercial experience. Further to this, if the person has gained both corporate and international tax experience it would be a bonus.

RPO

The biggest factor in being a successful/ unsuccessful candidate is the interview process. Successful candidates are invited to an interview or assessment as they meet the requirements on paper. These candidates can walk out of an interview as either successful or unsuccessful due to how they have come across in an interview. The interview is not necessarily focused on the candidate's personality, but their ability to answer an interviewer's questions and their responses to key questions/scenarios that are discussed often provide feedback on this area. Candidates who perform well in interviews tend to be the most successful, which is why RPO strives to prepare candidates, not for questions, but for what is to be expected (i.e., location, dress code, who will be in the interview and at times will even include the link to the interviewers' LinkedIn page for extra familiarity during the interview).

WHAT ARE THE MAIN BENEFITS FOR AN ORGANISATION TO USE A RECRUITMENT AGENCY?

ASA

The benefits of using an external services provider include:

- Decreasing time costs
- Specialist knowledge and quality of candidates

AP

Recruitment is time consuming and therefore expensive. Screening countless applicants and interviewing unsuitable candidates is often a drain on internal resources coming at a cost to core business functions. Moreover, the cost of the training and inevitable replacement of bad hires poses significant risk for business. Making use of the right recruitment agency can mitigate these. Expert sourcing by industry specialists who have taken the time to gain a thorough understanding of your culture ensures reduced time to fill.

Access to resources and databases (not typically available to line or HR) means greater access to a fair spread of talent in the market – specifically passive candidates (those not actively in the job market) who recruiters / head hunters are trained to find.

Expert screening means that candidates submitted to you have been thoroughly vetted in terms of qualifications, experience and identity but also for attitude, culture fit and competencies.

All of these reduce time to fill and add to the likelihood of new hire success in the long run, saving time and money.

AAAA

Getting candidates who have been thoroughly checked (background, criminal etc.); quicker placements; and guarantee – quick replacement time if needed.

DAV

The main benefits of working with a recruitment agency such as DAV are as follows:

- Volume handling: We are constantly sourcing the best talent for our clients
- Experience: Our combined expertise makes us highly efficient. This means you spend less time on your hiring process whilst getting a better return on investment
- EE contribution: Our success in placing EE candidates proves that we can help you achieve your EE goals
- Effectiveness / Track record: Your search is in the hands of an expert who understands the pressures of delivering bottom line results so the client can get on with their core business
- Repeat business

NR

Firstly, the company will save a lot of time to fill the role and limit the chances of losing excellent skills to another company (this has happened so many times). If a hiring manager uses internal recruitment resources via HR or advertising, it usually takes two weeks for the hiring manager to receive a shortlist of candidates. In this two-week period, they could lose some of the candidates due to other companies extending offers in the interim. If a hiring manager uses Network Finance's services, we usually deliver a shortlist of candidates within 48 hours.

Secondly, Network Finance has been recruiting tax professionals for 10 years and therefore has a strong 10-year database oh high-calibre tax candidates. We also understand the requirements from a technical perspective as well as the tax terminology, which results in a shortlist of 4-5 candidates that tick 90-100% of the requirements. Further to this, we have useful knowledge of the tax market in terms of what skills and experience are available, how much these skills cost and advise our clients accordingly.

Lastly, due to being in the industry for 10 years we receive many referrals from previously placed candidates. The candidates who were referred to us are not always active on job portals such as PNet and Career Junction; however, all our clients will have access to these dormant profiles.

RPO

As a team, we often say that we don't strive to make placements, we strive to help our clients grow their teams. The reason we emphasise this is because our recruiters put a great deal of research into understanding both candidates and clients; this results in a service that benefits our clients through time saving, cost saving, and high-quality employees being recruited for their teams.

A thorough understanding of what is needed in each role saves our clients time by performing the search, advertising for the role, screening candidates and presenting profiles in a neat and easy-to-read format. Due to the number of portals we have access to, a great LinkedIn reach and an SEO-optimised website, we have access to fantastic professionals and use our systems to save our clients time that would be spend wading through a heap of CVs, by simply doing this for them and presenting only the best of the best.

Hiring the incorrect person for a role can be detrimental to a firm's reputation as well as become a costly affair. References and background checks are performed by RPO Services to ensure that the firm has all the required information before making a hiring decision.

Other recruiters in tax

We understand that the below recruitment agencies include tax recruitment as part of their service offerings.

ABSOLUT CAREER PERSONNEL	www.absolute1.co.za	PTA: 012 993 4114
BLUE RECRUITING	www.bluerecruiting.co.za	JHB: 010 110 1550
CA SUPPORT	www.casupport.co.za	CT: 021 913 0828
DIVERSIFIED BUSINESS SOLUTIONS HUMAN CAPITAL	www.dbshc.co.za	JHB: 010 492 5080
FUZION GROUP	www.fuziongroup.com	CT: 021 434 6366
HIRE RESOLVE	www.hireresolve.co.za	JHB: 011 807 8064 CT: 021 551 8638 PE: 041 364 2735 DBN: 031 350 4405
LATITUDE RESOURCE	https://latitude-resource.co.za	CT: 021 854 4418
OMEGA SEARCH ASSIGNMENTS	www.facebook.com/pages/Omega-Search-assignments/298850610256753	CT: 021 200 2055
OUTSIDE CAPITAL	www.outsidecapital.co.za	JHB: 011 513 3514 CT: 021 001 4377
PATON PERSONNEL	https://patonpersonnel.co.za	JHB: 011 325 5400
PEOPLE SOLVED	www.peoplesolved.com	JHB: 021 003 1900
PROFESSIONAL APPOINTMENTS	profapp.co.za	PTA: 012 348 2282/3
PROFESSIONAL RECRUITMENT NETWORK	https://prnstaffing.co.za	CT: 021 001 0600
PROFESSIONAL SOURCING	https://prosourcing.co.za	PTA: 012 991 5854
PROSPERITAS PERSONNEL	www.prosperitaspersonnel.co.za	PTA: 086 236 8243
RECRUITMENT SOLUTIONS	https://recsol.co.za	CT: 021 422 3570/1
TAYLORED APPOINTMENTS	www.facebook.com/TayloredAppointments	JHB: 011 469 2011
TUMAINI STAFFING & RECRUITING	www.tumaini.co.za	JHB: 011 462 3018 CT: 021 551 2621 DBN: 031 350 4018
ULTIMATE SEARCH CONSULTANTS	www.ultimatesearch.co.za	CT: 021 701 1736
WEXFORD	www.wexford.co.za	JHB: 011 785 4930

PROFESSIONAL ASSOCIATION

The South African Graduate Employers Association (SAGEA) is a not-for-profit professional association dedicated to connecting and advancing graduate employment. Their contact details: 021 712 6168 or www.sagea.org.za.

Q&A

The Tax Helpline service is available exclusively to SAIT members. Log your tax-related technical queries via www.thesait.org.za

Some queries received by the SAIT Technical Department and their responses regarding VAT invoices, a travelling allowance and contingency fees.

Q Our client registered for VAT in November 2017 and is adamant that he advised suppliers of the VAT number. One of the suppliers maintains that they were not advised and is refusing to provide valid VAT invoices reflecting the VAT number. We requested that the supplier issue credit notes and issue new invoices but they maintain that they are not able to do so. Are they correct in terms of the VAT Act?

Section 20(1) of the VAT Act requires that a registered VAT vendor, who made a taxable supply of goods or services to a person, must issue the recipient of the supply with a tax invoice within 21 days from the date of the supply.

Section 234*(d)* of the Tax Administration Act determines that a person who, wilfully and without just cause refuses or neglects to issue a document to a person as required under a tax Act, is guilty of an offence and, upon conviction, subject to a fine or to imprisonment for a period not exceeding two years.

Section 234*(g)* of the Tax Administration Act determines that a person who, wilfully and without just cause issues an erroneous, incomplete or false document required to be issued under a tax Act to another person, is guilty of an offence and, upon conviction, subject to a fine or to imprisonment for a period not exceeding two years.

Based on the specific requirements of section 20(1) of the VAT Act, the supplier must issue a tax invoice that complies with section 20 of the VAT Act. If the tax invoice is issued to a registered VAT vendor and the consideration for the supply is more than R5 000, the tax invoice must reflect the VAT registration number of the recipient. Should the supplier refuse to issue a compliant tax invoice, the supplier will be guilty of an offence as envisaged in section 234 of the Tax Administration Act, and on conviction exposed to the sanctions provided for in that section. Your client's supplier should be advised of the governing law and the impact if it continues to refuse to comply with this.

Q A client receives a travel allowance from his company. The vehicle used by the client is in his wife's name. No lease agreement exists between husband and wife but they are married in community of property. The husband's travel allowance deductions were disallowed by SARS because the vehicle is in the wife's name. An objection has been lodged. Would SARS accept the in community of property marriage contract as being supporting documentation for objection if no lease agreement is in place and, if a lease agreement is provided, would this then flag the wife for audit?

We accept that the grounds, provided in the additional assessment, for the disallowance of the amount to be excluded (under section 8(1) of the Income Tax Act from the allowance, as actually expended) is that the purchase document of the vehicle submitted is not in the name of the taxpayer. We understand that to mean that SARS' view is that the taxpayer did not incur cost with regard to the acquisition of the vehicle used for purposes of the taxpayer's trade.

There is no indication of whether the amount expended by the taxpayer on travelling on business was determined by using accurate data. If the reduction was done based on accurate data, section 8(1)*(b)*(iiiA) of the Act applies. If accurate data was not furnished, section 8(1)*(b)*(ii) of the Act applies.

There is no indication of how the vehicle was acquired and we accept that the motor vehicle was acquired by the spouse under a *bona fide* agreement of sale or exchange concluded by them dealing at arm's length. In other words, we accept that it was NOT held by them under a lease.

When section 8(1)*(b)*(ii) of the Act applies – in other words where the recipient applied the rate per kilometre determined in the *Gazette* to calculate the amount expended for business purposes, the "value" of the vehicle is relevant. In terms of the 1 March 2016 *Gazette*, "value" in relation to a motor vehicle used by the recipient of an allowance as contemplated in section 8(1) *(b)*(ii) of the Act will be:

> *"(a) where that motor vehicle (not being a motor vehicle in respect of which paragraph (b)(ii) of this definition applies) was acquired by that recipient under a bona fide agreement of sale or exchange concluded by parties dealing at arm's length, the original cost thereof to him/her, including any value-added tax but excluding any finance charge or interest payable by him/her in respect of the acquisition thereof;*
> *(b) …; or*
> *(c) in any other case, the market value of that motor vehicle at the time when that recipient first obtained the vehicle or the right of use thereof, plus an amount equal to value added tax which would have been payable in respect of the purchase of the vehicle had it been purchased by the recipient at that time at a price equal to that market value."*

The vehicle must therefore either have been "acquired by that recipient" or the recipient must have "obtained the vehicle or the right of use thereof". The wear and tear, for purposes of section 8(1)*(b)*(iiiA) and where accurate data is used, refers to the cost of the vehicle and to "the date of original acquisition by that recipient". The law therefore requires that the vehicle must have been acquired by the recipient of the allowance (or leased).

Judge Nugent, in *Du Plessis and others v Pienaar NO and others*, said that "one of the ordinary consequences of marriage in community of property is that the property of the spouses is brought together in a joint estate that is owned by them in equal undivided shares." Whilst section 7(2A) deems the allowance to have been received by the recipient spouse only, the vehicle itself is jointly owned by both the spouses. This follows from them being married in community of property. The fact that the motor vehicle is registered in or the acquisition documents may be in the other spouse's name is then irrelevant. The recipient will have acquired or obtained the vehicle and you should base your ground of objection on that.

Q I have a query regarding fees. It is understood that a practitioner is not allowed to charge a fee based on a percentage of the refund received by the client. Is there a law against that or is it just unethical to do so?

The SAIT code of conduct deals with fees. Paragraph 4.54 of the code sets out the general rule and requires that fees charged for work undertaken on behalf of a client must be commensurate with the nature and complexity of the task at hand.

Paragraph 4.55 of the SAIT code of conduct specifically states that charging of a contingency fee, for the completion of tax returns, is not an acceptable form of remuneration for tax practitioners. It reads further that "the principles of the Contingency Fees Act, 1997, should be considered when a contingency fee is to be agreed upon in other circumstances." Section 2 of that Act deals with contingency fees agreements. It is copied here for ease of reference:

> *"(1) Notwithstanding anything to the contrary in any law or the common law, a legal practitioner may, if in his or her opinion there are reasonable prospects that his or her client may be successful in any proceedings, enter into an agreement with such client in which it is agreed--*
> *(a) that the legal practitioner shall not be entitled to any fees for services rendered in respect of such proceedings unless such client is successful in such proceedings to the extent set out in such agreement;*
> *(b) that the legal practitioner shall be entitled to fees equal to or, subject to subsection (2), higher than his or her normal fees, set out in such agreement, for any such services rendered, if such client is successful in such proceedings to the extent set out in such agreement.*
> *(2) Any fees referred to in subsection (1)(b) which are higher than the normal fees of the legal practitioner concerned (hereinafter referred to as the 'success fee'), shall not exceed such normal fees by more than 100 per cent: Provided that, in the case of claims sounding in money, the total of any such success fee payable by the client to the legal practitioner, shall not exceed 25 per cent of the total amount awarded or any amount obtained by the client in consequence of the proceedings concerned, which amount shall not, for purposes of calculating such excess, include any costs."*

The Act then continues to, amongst others, prescribe the form and content of contingency fees agreements.

It is accepted that when one reads the Contingency Fees Act, one must replace the word "legal"' in "legal practitioner" with the word "tax" and the term "professional controlling body" with "recognised controlling body"

Case Law Wrap-up

RUAN BOTHA,
Tax Consulting South Africa

We review two Tax Court cases dealing with the imposition of late submission and understatement penalties and a taxpayer's right to be informed of audits and other administrative processes

Tax Court Judgment ITI13726

Issue

Whether or not the appellant could claim a reduction in tax in terms of the Income Tax Act for a lump sum payment received from his employer upon the termination of his employment relationship.

The appellant however, raised a *point in limine* as to whether the audit that preceded the issuing of an additional assessment was valid and therefore whether the ensuing additional assessment was valid.

Facts

The appellant was a chief executive officer of a company for over 16 years until his employment came to an end in 2016. The appellant also traded as a cattle farm. The appellant submitted his 2012 income return, which specifically indicated two different income streams. The first being farming expenses amounting to R 1 781 604.00, which were disallowed by the respondent (SARS) and, in terms of this appeal, would stand over for argument at a later stage.

The second source of money declared by the appellant, was a severance package paid to him by his employer when he resigned. This amount was in accordance with the company's retrenchment policies and defined as a lump sum payment for separation package in his income tax return for 2012.

SARS subsequently issued an additional assessment on 31 January 2013, in which the claim was disallowed as the appellant did not satisfy the requirements in terms of section 11(a), and 23(g) of the Income Tax Act and SARS was of the view that the lump sum must be taxed as "other income".

On 24 and 26 April 2013, the appellant lodged a letter of objection and notice of objection which was disallowed. On 7 October 2013 and 27 November 2014, he filed the present appeal against SARS. On 25 May 2017 the parties agreed that only the following two issues would be argued in the appeal:

1. The point *in limine*, raised by the applicant whether the audit conducted prior to the additional assessment is valid, and whether the subsequent additional assessment is valid; and

2. Whether the lump sum payment received by the appellant at the termination of his employment was a *"severance benefit"* as defined in the Income Tax Act.

Outcome

The court held that SARS' non-compliance with sections 40 and 42 of the Tax Administration Act, read in conjunction with section 33 of the Constitution, favours the appellant's case and that the additional assessment be set aside and thus the entire assessment for 2012 is set aside.

Core Reasoning

The relevant year of assessment, for purposes of this appeal, is 2012. SARS raised an additional assessment on 27 March 2013, after the appellant submitted some returns. The core of the matter is whether the appellant was retrenched, which resulted in him receiving an amount from his previous employer.

The appellant's reasoning

The appellant argued that the amount in dispute is a lump sum and should not be taxed as normal income, but rather be taxed according to the tax table for retirement and retrenchment lump sums. The appellant furthermore raised a point *in limine* which revolves around whether an audit was conducted.

The respondent's reasoning

In terms of the personal income tax audit conducted by SARS, the payment received was incorrectly declared as a *"lump sum payment"* for a *"separation package"*. SARS contends that in terms of the additional assessment, the amount received must be taxed under *"other income"* under code 4214 because SARS contends that it was not a *"severance benefit"* as defined in the Income Tax Act.

According to SARS the appellant did not provide sufficient proof of the retrenchment, even though it requested to see his IRP5 certificate, which the appellant could not produce.

Point in limine

The appellant avers that he never knew about a personal audit, and only received notice of it in SARS' *"Statement of Grounds of Assessment"* in terms of rule 31 of the rules promulgated under section 103 of the Tax Administration Act. This in the appellant's view resulted in a new ground of assessment as contained in rule 31(3).

An additional assessment is an administrative action referred to in section 33 of the Constitution and in terms of that section everyone whose rights have been adversely affected has the right to receive written reasons. In this spirit section 42(1) of the Tax Administration Act requires the SARS official responsible for an audit to issue to the taxpayer a report indicating the stage of completion of the audit. The appellant did not receive any notice of the audit as described above. He was also deprived of the opportunity to respond to any of the issues raised because he only received the grounds for the proposed assessment envisaged in section 42(2).

Lump sum

A *"severance benefit"* is defined in the Income Tax Act and, read in accordance with the definition of *"gross income"*, the Court held that the appellant did not receive the opportunity to explain his position that the lump sum fell to be classified in terms of paragraph (c)(ii) of that definition.

SARS, however, was of the view that the appellant's services were terminated in terms of his employment contract. In this, SARS only relied on a letter received from the appellant's employer. The Court however described SARS' reliance on the letter as very selective. The Court further held that the outcome of the audit would have been different if SARS conducted the audit in terms of sections 40, 41 and 42 of the Tax Administration Act.

Takeaway

It can therefore be noted that a taxpayer has a constitutional right to be informed and kept updated throughout any administrative processes, which include any audit conducted and assessment made by SARS.

TC IT13727 & VAT1096

Tax Court: Durban

For a full overview, this summary should be read in conjunction with Case Numbers IT13725 and VAT1426, dealing with income tax years 2011 to 2012 and VAT tax periods 9/2010 to 1/2013. This summary deals with the facts, law, application and orders made in respect of Case Numbers IT13727 and VAT1096 for income tax years 2007 to 2010 and VAT periods 4/2006 to 2/2010.

Issue

The matter revolved around failure by a taxpayer to submit income tax and VAT returns for various tax periods, leading to the imposition of substantial understatement penalties. At issue was whether the taxpayer could be found to have understated tax if no return was submitted.

Facts

Mr A was the sole proprietor of XYZ during the tax years 2006 to 2010. He failed to submit income tax and VAT returns for this period. Mr A applied for tax amnesty in terms of the Small Business Tax Amnesty and Amendment of Taxation Laws Act 9 of 2006, and this amnesty was approved for the tax return for the year ending 2006.

In June 2012, Mr A was notified of an audit of his income tax and in October 2012 of an audit relating to his VAT returns. Mr A and his accountant, Mr K, failed to co-operate with the initial audit process by not submitting all relevant financial statements. Mr A interrupted the audit before it was completed by applying for voluntary disclosure relief. This relief was denied. The audit process then continued, and Mr A and Mr K submitted additional statements, although Ms T, the auditor, believed these were not all the financial statements.

An understatement penalty of 150% was imposed for Mr A's behaviour as a standard case of "intentional tax evasion" in the third column of the table in section 223 of the Tax Administration Act. A further understatement penalty was imposed for disallowed medical expenses in the years 2008 to 2010. Mr A objected to all the understatement penalties. When his objections were dismissed, he appealed against the dismissal and the appealed assessments were referred to the alternative dispute resolution process. During this process, SARS reduced the penalties from 150% to 100% but, instead of classifying the non-submission as one standard case, it was proposed to treat successive instances as repeat cases. This attempt was abandoned by SARS and they reverted to a 100% penalty for a standard case of gross negligence.

Mr A's grounds of appeal in terms of Rule 32 were that he and Mr K at worst failed to take reasonable care, which results in a 25% penalty. Their administrative capacity was not up to standard but there was no intention to evade tax. Mr A further argued that there is no understatement "in a return" when the understatement is established by a default in rendering a return, i.e., if no return is submitted there is no understatement and the conduct does not qualify for the imposition of understatement penalties.

Mr A also objected to his VAT assessment and penalties. However, the objection was not referred for alternative dispute resolution. Thus, the imposed penalties were 150% as SARS was of the view that Mr A's behaviour was classified as intentional tax evasion. The penalty was later reduced to 100%.

Mr A did not call any witnesses in order to demonstrate the averred lack of administrative capacity and he failed to discharge the burden of proof in terms of section 102(2) of the Tax Administration Act. SARS therefore established a *prima facie* case that Mr A withheld the tax returns intentionally and without any discernible excuse.

Outcome

A. Mr A: Case No. IT13727

- Each understatement penalty of 150% imposed in respect of the assessed income tax for the tax years 2007, 2008, 2009 and 2010 is set aside and replaced with an understatement penalty of 100%.
- Each understatement penalty imposed in respect of "disallowed medical expenses" in the assessments for the 2008, 2009 and 2010 income tax years is set aside.
- The assessments are otherwise confirmed.

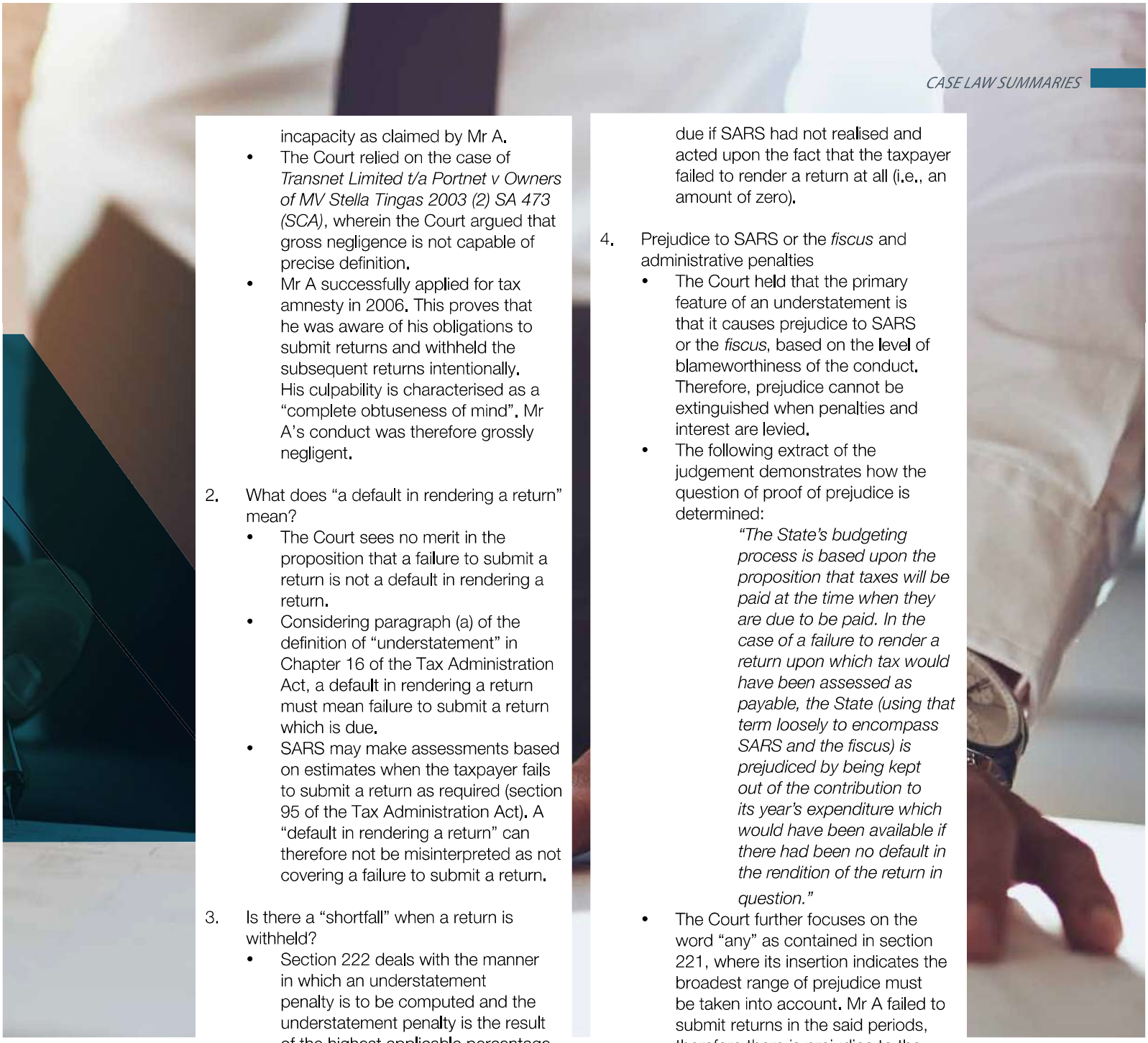
B. Mr A: Case No. VAT1096

- Each understatement penalty of 150% imposed in respect of the assessed VAT for the periods 4/2006 to 2/2010 is set aside and replaced with an understatement penalty of 100%.
- The assessments are otherwise confirmed.

Core Reasoning

The Court's reasoning stated that to determine the contentions of Mr A, the following four points must be looked at:

1. Was gross negligence proven?
   - The onus is on SARS to prove the conduct of Mr A constituted gross negligence, and that the conduct is properly classified under the table in section 223. The Court is of the view that there was no administrative



incapacity as claimed by Mr A.
- The Court relied on the case of *Transnet Limited t/a Portnet v Owners of MV Stella Tingas 2003 (2) SA 473 (SCA)*, wherein the Court argued that gross negligence is not capable of precise definition.
- Mr A successfully applied for tax amnesty in 2006. This proves that he was aware of his obligations to submit returns and withheld the subsequent returns intentionally. His culpability is characterised as a "complete obtuseness of mind". Mr A's conduct was therefore grossly negligent.

2. What does "a default in rendering a return" mean?
   - The Court sees no merit in the proposition that a failure to submit a return is not a default in rendering a return.
   - Considering paragraph (a) of the definition of "understatement" in Chapter 16 of the Tax Administration Act, a default in rendering a return must mean failure to submit a return which is due.
   - SARS may make assessments based on estimates when the taxpayer fails to submit a return as required (section 95 of the Tax Administration Act). A "default in rendering a return" can therefore not be misinterpreted as not covering a failure to submit a return.

3. Is there a "shortfall" when a return is withheld?
   - Section 222 deals with the manner in which an understatement penalty is to be computed and the understatement penalty is the result of the highest applicable percentage in accordance with the table in section 223. The Court interpreted this as, save for a default in the case of a *bona fide* inadvertent error, the default must attract a penalty.
   - The Court is of the view that "a default in rendering a return" has no place in the definition of an understatement.
   - The Court further reasons that SARS proceeded in the correct understanding of the legislation that where a return is not rendered when due, the shortfall is the difference between the tax found to be due and the amount that would have been due if SARS had not realised and acted upon the fact that the taxpayer failed to render a return at all (i.e., an amount of zero).

4. Prejudice to SARS or the *fiscus* and administrative penalties
   - The Court held that the primary feature of an understatement is that it causes prejudice to SARS or the *fiscus*, based on the level of blameworthiness of the conduct. Therefore, prejudice cannot be extinguished when penalties and interest are levied.
   - The following extract of the judgement demonstrates how the question of proof of prejudice is determined:

     "The State's budgeting process is based upon the proposition that taxes will be paid at the time when they are due to be paid. In the case of a failure to render a return upon which tax would have been assessed as payable, the State (using that term loosely to encompass SARS and the fiscus) is prejudiced by being kept out of the contribution to its year's expenditure which would have been available if there had been no default in the rendition of the return in question."
   - The Court further focuses on the word "any" as contained in section 221, where its insertion indicates the broadest range of prejudice must be taken into account. Mr A failed to submit returns in the said periods, therefore there is prejudice to the fiscus.

Takeaway

Taxpayers should be aware that they bear the burden of proof when any income tax and VAT returns are submitted. SARS may assess the returns and impose understatement and late submission penalties. The Court will look at the intention of the taxpayer when failing to submit returns and take into consideration the default and shortfall of the return as well as the prejudice to SARS and the *fiscus*.

BINDING RULINGS

▶ ALICEA VAN DER RYST, RUAN BOTHA & TENIELLE PANTHER, Tax Consulting South Africa

Summarised are three binding rulings issued by SARS, dealing with the definition of "monthly remuneration", disposal of assets by a limited partnership to its sole member and conversion of share block companies to private companies.

BINDING GENERAL RULING 47

Definition of "monthly remuneration" under section 1(1) of the Employment Tax Incentive Act.

Issue

What constitutes a "month" in the definition of "monthly remuneration", as determined in section 1(1) of the Employment Tax Incentive Act, for employers remunerating employees on a weekly or fortnightly basis.

Facts

Section 2 of the Employment Tax Incentive Act provides that an employer who is eligible to receive the employment tax incentive relating to a qualifying employee in respect of a "month", may reduce the employees' tax payable by that employer in an amount determined under section 7 of the Act.

The meaning of a "month" is fundamental to establish firstly whether an employer is eligible to claim the employment tax incentive and secondly to determine the value of the incentive.

The word "month" is, however, not defined in the Employment Tax Incentive Act and it is therefore necessary to refer to the Interpretation Act 33 of 1957 in which "month" is defined as "a calendar month". The Collins Dictionary further defines a "calendar month" as "one of the twelve months of the year". A calendar month may vary in duration between 28 and 31 days. A calendar month can therefore not be specified in terms of a fixed number of days.

Outcome

The ruling defines a "month" as follows:

- Eligible employers that pay employees on a weekly or fortnightly basis may interpret a "month" referred to in the definition of "monthly remuneration" under section 1(1) to align with the period used for purposes of employees' tax.
- Employers electing to use this method must apply it consistently throughout all periods during which weekly or bi-weekly payrolls are run.
- Should an employer at any time decide to revert to a calendar month, this ruling will no longer be available to such an employer.
- Reference to "month" in any other section of the Employment Tax Incentive Act is interpreted and applied to mean a "calendar month".
- This ruling constitutes a Binding General Ruling issued under section 89 of the Tax Administration Act.

Core reasoning

Subject to meeting all the other requirements under the Employment Tax Incentive Act, an eligible employer is entitled to claim the employment tax incentive only in the "month" in which the monthly remuneration is paid or payable to a qualifying employee.

"Monthly remuneration" is defined as the amount paid or payable in respect of a "month" that an employer employs and pays remuneration to a qualifying employee for at least 160 hours in a "month", or if an employer employs and pays remuneration to an employee for less than 160 hours in a "month" the amount as determined under section 7(5) of the Employment Tax Incentive Act.

Interpreting the word "month" in the definition of "monthly remuneration" as a calendar month results in practical challenges where employees are paid on a weekly or fortnightly rather than a monthly basis. Depending on how the payroll is split, a week at the end or beginning of a calendar month may fall over two calendar months. A portion of the week's wage will relate to the one calendar month's remuneration while the other portion relates to the following calendar month's remuneration for purposes of the employment tax incentive.

A misalignment between the periods used for claiming the employment tax incentive and those used for reporting employees' tax creates a risk for employers as well as SARS.

The practical challenges resulting from using different periods for the employment tax incentive and employees' tax can be resolved by applying the reference to month in the definition of "monthly remuneration" as set out in the outcome above.

Applying the reference to month in this definition differently from the reference to month in all the other sections in the Employment Tax Incentive Act may affect eligibility to claim the employment tax incentive in some instances.

Takeaway

Although a contentious issue, this Binding General Ruling will alleviate confusion on what constitutes a "month" for purposes of an employer having to determine eligibility for and value of the employment tax incentive.

BINDING PRIVATE RULING 296

Disposal by a German limited partnership of its assets to its sole member

Issue

This ruling determines whether the disposal by a German Kommanditgesellschaft limited partnership of its assets to its sole member and the immediate disposal of the assets by that member to another German Kommanditgesellschaft limited partnership of which that person is also a sole member results in a disposal for that member, a resident, for capital gains tax purposes (as set out in the Eighth Schedule to the Income Tax Act).

Facts

The applicant is a South African resident (a person as defined in section 1(1) of the Income Tax Act) and the two German Kommanditgesellschaften are limited partnerships (foreign partnerships under section 1(1)). KG A and KG B intend entering into a proposed transaction in terms of which the applicant has 100% interest as a limited partner in both KG A and KG B. The general partner of both KG A and KG B is a company incorporated and tax resident in Germany.

The general partner holds nil percent of the interest in the assets of KG A and KG B, and KG A holds mainly listed shares. Only the commercial income received by KG A and KG B is subject to trade tax levied by municipalities, which would make them liable for German income tax. However, KG A and KG B do not receive commercial income and neither does it accrue to them. They are therefore not liable for the trade tax.

The applicant is required to take into account the income and gains of KG A and KG B for purposes of the applicant's personal German income tax liability, in accordance with the applicant's member's interest in KG A and KG B. Any German tax liability that will arise from the income of KG A and KG B will therefore be due by the applicant and not KG A and KG B.

The proposed transaction is described as follows:

1. A withdrawal agreement is entered into between the applicant and KG A
2. A contribution agreement is entered between the applicant and KG B in terms of which-
   a. The applicant will make a withdrawal of the assets from KG A which will be against the applicant's capital account at book value; and
   b. The applicant will immediately contribute the assets withdrawn from KG A to KG B at market value.

The applicant had already been taxed on the assets when the applicant ceased to be a German tax resident, therefore no German tax liability will arise. Furthermore, the applicant's interests in the assets will remain the same as it has similar limited partnership interests in KG A and KG B.

Ruling

The ruling is an interpretation and application of section 1(1) – the definition of "company", "foreign company" and "person"; section 24H; and paragraph 11 of the Eighth Schedule. The ruling made on the proposed transaction is as follows:

The proposed transaction will not result in disposals for purposes of the Eighth Schedule as each Kommanditgesellschaft qualifies as a "foreign partnership", as defined in section 1(1), and is not regarded as a "person" as defined in that section. The applicant is treated as the owner of the partnership assets for purposes of the Act.

BINDING PRIVATE RULING 297
Amalgamation transaction involving conversion of share block companies to private companies

Issue
The determination of the tax consequences of an amalgamation transaction involving the conversion of share block companies to private companies in a group of companies controlled by a REIT company.

Facts
The applicant is a South African resident public company listed as a REIT on the Johannesburg Stock Exchange (JSE). The applicant intends entering the proposed transaction whereby various properties owned by subsidiaries of the applicant are to be transferred from either of Company A or Company C (the amalgamated companies) to Company B or Company D (the resultant companies). The amalgamated companies and the resultant companies are all South African resident companies.

The proposed transfers of the assets and liabilities from the amalgamated companies will be made to the resultant companies without any shares being issued by the amalgamated companies as consideration for the transfer in accordance with section 113 and section 116 of the Companies Act.

The proposed transaction comprises the following:

1. Registration as vendors: The share block companies will be registered as VAT vendors in accordance with the Value-Added Tax Act.
2. For every share block company, the adoption of a new memorandum of incorporation in accordance with section 16 of the Companies Act, which will be achieved as follows:
    a. Each share block holder will be required to enter into an agreement of assignment with the share block company whereby the share block company will acquire all rights of use and occupation of the property and corresponding obligations of the member. The share block company will also acquire all lease agreements in existence where the member is a landlord at the time the agreement becomes effective;
    b. The members will be required to pass special resolutions authorising the conversion, the adoption of the new memorandum of incorporation, the name change of the share block company to a private limited company and the cancellation of shares in the share block company and issue of ordinary shares in the private company; and
    c. The resolutions and new memorandums of incorporation must be submitted to the Companies and Intellectual Property Commission (CIPC).
3. The amalgamation transactions will take place without any shares being issued as consideration for the transfer of all of their assets and liabilities to the resultant companies.

Ruling
The ruling is based on the interpretation and application of section 1(1) – the definition of "dividend" and "REIT"; section 25BB; and section 44 of the Income Tax Act; and paragraph 11 of the Eighth Schedule to that Act. The ruling made on each step of the proposed transaction is as follows:

a. The proposed transaction will be considered as a disposal by the shareholders under paragraph 11 of the Eighth Schedule. The capital gains or losses triggered by the disposal must be disregarded in terms of section 25BB(5)*(c)* of the Income Tax Act.
b. The transfer of assets and liabilities to the resultant companies will be regarded as an "amalgamation transaction" as defined under paragraph *(a)* of section 44(1) of the Income Tax Act.
c. The transfer of assets and liabilities of the amalgamated companies will not be regarded as a "dividend" as defined in section 1(1) of the Income Tax Act.

SIPHO'S ADVENTURES IN TAX LAND

▸ **JEANNE VILJOEN,** Supporting Editor

A cautionary tale about the dangers of wading into uncharted tax waters on your own.

Sipho ticked all the right boxes. He was smart, hard-working and likeable. After four years at UCT he joined WeDesignStudio, a startup creative design studio in town, as a copywriter. In between his copywriting work he managed a basic accounting and tax system. He was living his dream: he had an amazing job, a beautiful girlfriend and a cute apartment that he shared with an old classmate.

Until that terrible evening when he received a phone call from his father. His mother was in hospital, the cancer was back and she was in severe pain. A phone call to his girlfriend and an email to his colleagues later, Sipho packed a bag and tried to sleep until the next morning when there was enough light for him to drive safely. By late that afternoon, he was at the hospital in Port Elizabeth. A week later when his mother passed away, he was at her bedside with his father and they could offer each other some comfort. With the funeral over and the last visitors leaving, for the first time in three weeks, Sipho thought about Cape Town and his life there.

WeDesignStudio was eerily quiet when he walked in. The receptionist told him they might have to shut down. Some important tax thing had to be done and he hadn't been there to do it. Something about a 501. Now they had been fined 10% and no-one was getting paid this month, she said. "I spent all my cash on the trip," he said. "I can't not get paid." "Well," she said, "maybe you should have seen to it that the tax was paid." "The tax was paid," he tried to explain. "It was just a return that had to be filed."

Sipho walked over to his favourite coffee shop across the street. What was he to do? Perhaps caffeine would help him come up with a plan. It was a relief to see the owner of the coffee shop's friendly face.

"Man, Sipho, why are you looking so glum?" asked Trevor.
"I was away from work because my mother passed away and now the studio might be closing down because I didn't file a stupid EMP501 return on time."
"That's heavy, Sipho, my man. Did you get a penalty?"
"Apparently 10%. But I don't even know 10% of what."
"Shouldn't you have a professional to take care of your taxes? No offence, Sipho but you're not really qualified in tax, are you?"
"No, I'm not. Pete and Andrew got an accounting and tax system thrown in when they bought the company but they're clueless about tech. Since I joined, they've relied on me to take care of all that. I've picked up a few tax basics from the SARS website but this is way beyond me. Anyway, I'm still struggling to focus on being back."
"You should get hold of Ayanda," said Trevor. "She does tax consulting for small firms and helps us with our tax matters. Here's her card. Sounds like you guys could do with some expert help."
"Thanks, Trevor, that's a brilliant idea."

Some weeks later Sipho was back in the coffee shop.
"How are you doing after your mother's passing, Sipho?"
"I'm learning to live with it, you know. Very glad I was there for my dad, though."
"Of course. So, what happened with your penalty?"
"Oh, Ayanda sorted it out for us. She wrote SARS a letter about my mother's passing and how I wasn't able to file the return. And how it was a first incidence. And then SARS remitted the whole thing."
"No way, Sipho!"
"Serious, Trevor. Sometimes a tax adviser is your best friend."

SUDOKU CHALLENGE

You know the drill! Ensure that each row, column and 3x3 block contains all the digits from 1-9 (without repeating a digit). Good luck! Level of difficulty: Medium

We need you to send us these 9 numbers here!

		9						
7			9	5		2	3	
				1				
	5		4	9			8	
6	9				8			
			2					
3						7	2	
					4		9	
		4				6		3

I have completed the puzzle. Now what?

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