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VALUE-ADDED TAX
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TAX ADMINISTRATION
EXTENDING PRESCRIPTION PERIODS

ANTI-AVOIDANCE
BPR 398: HYBRID EQUITY INSTRUMENTS

8

16

22

ANTI-AVOIDANCE
0667. BPR 398: Hybrid equity instruments 03

DEDUCTIONS AND ALLOWANCES
0668. Energy incentive – section 12BA 06

INTERNATIONAL TAX
0669. Remote working in South Africa 08

RETIREMENT FUNDS
0670. Two-pot retirement fund system 11

TAX ADMINISTRATION
0671. Extending prescription periods 12
0672. Tax-related scams 14

TRANSFER PRICING
0673. Advance pricing agreements 16

VALUE-ADDED TAX
0674. Apportionment of input tax 19
0675. Freelance services 22
0676. Online shopping for imports 24

Editorial Panel:
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BPR 398: HYBRID EQUITY INSTRUMENTS

The tax treatment of interest is quite different from that of dividends. Generally, interest paid on money borrowed in the production of trading income is deductible for tax purposes, while the interest derived by the creditor from a loan or investment of money is taxable.

On the other hand, where a company declares a dividend, the dividend may be exempt from normal tax in the hands of the shareholder recipient; however, the company will not be able to deduct the amount as an expense. Further, the dividend may be subject to dividends tax (unless, among other things, the shareholder is a company), which burden is borne by the beneficial owner, ie, the person entitled to the benefit of the dividend attaching to a share.

The South African Revenue Service (SARS) issued Binding Private Ruling 398 (BPR 398) on 17 November 2023; this ruling provides a great opportunity to refresh one's memory of the anti-avoidance provisions contemplated in sections 8E and 8EA of the Income Tax Act, 1962 (the Act).

FACTS OF BPR 398

The applicant in BPR 398 was a resident company that wholly owned a resident property holding company (PropCo) which, in turn, owned land situated in South Africa.

In terms of the ruling, the applicant and another resident company (DevelopCo) intended to incorporate a joint venture for the purposes of developing the land owned by PropCo and "unlock[ing] the inherent value of the land".

It is noted in the ruling that given the uncertainty around the ability to "unlock the inherent value of the land", a third-party buyer would be unwilling to pay for the speculative value of the land.

As such, it was proposed that –

- PropCo would issue preference shares to the applicant as a capitalisation share issue which would give the applicant a preferential right equal to the speculative value of the land; and
- the applicant would, thereafter, dispose of 51% of the ordinary shares in PropCo to DevelopCo.

The preference shares to be issued to the applicant by PropCo would incorporate, *inter alia*, the following terms:

- The preference shares would rank in priority with respect to distributions by PropCo and the repayment of shareholder loans;
- each preference share would be or may be redeemable, as the case may be –
    - on a scheduled redemption date (which will be five years after the original date of issue); or

    - at the voluntary and sole discretion of the board of PropCo; or
    - if a trigger event, illegality event or a sanction event arises; and
- if a trigger event occurs, a dividend rate of 7% would be applied to any outstanding payments in respect of the preference shares.

The rationale for issuing the preference shares was to protect the applicant against divestiture of control in the shareholding of PropCo. In this context, the preference shares were intended to enable the applicant to have a preferential claim which would be secured by the land, enabling it to have direct access to the land as security in the event that the joint venture was not successful, and the preference shares could not be redeemed.

The ruling further notes that, on redemption, the preference shares would be redeemed out of profits and not out of capital.

RULING ISSUED BY SARS

Based on the above facts SARS' ruling noted, amongst other things, that:

- The preference share dividends and/or redemption amounts received by or accrued to the applicant would constitute "dividends", as defined in section 1(1) of the Act.
- The preference shares would not constitute "hybrid equity instruments" as defined in section 8E(1). As such, the dividends would not be deemed to be income under section 8E(2) .
- The preference shares would not constitute "third-party backed shares" as defined in section 8EA(1) either, and any dividends declared would not be deemed to be income under section 8EA(2).
- As soon as the applicant became entitled to compel PropCo to redeem the preference shares within three years of the date of issue, the preference shares would constitute "hybrid equity instruments" as contemplated in paragraph *(a)*(ii) of that definition in section 8E(1).

SARS also made some interesting rulings regarding the interpretation and application of paragraph 43A of the Eighth Schedule to the Act, which pertains to the so-called "anti-dividend stripping rules"; however, for the sake of brevity, these issues have not been addressed in this article although they do warrant further analysis.

RECAP ON APPLICABLE PROVISIONS

Sections 8E and 8EA are anti-avoidance provisions aimed at share-financing transactions (usually preference shares) that disguise otherwise taxable interest as tax-exempt dividend income.

In terms of section 8E(2), a taxpayer who, during any year of

> "This ruling also highlights the importance of reviewing the nature of a preference share or equity instrument on a regular basis as both sections 8E and 8EA will apply if the share or equity instrument constitutes a 'hybrid equity instrument' or 'third-party backed share' as the case may be, at any time during the year of assessment."

assessment, receives dividends or foreign dividends or to whom they accrue, in respect of a share or equity instrument, will be deemed to have received or accrued an amount of income to the extent that the share or equity instrument constitutes a "hybrid equity instrument" at any time during the year of assessment. The practical effect of this provision is that since the amount is deemed to be income, the basic dividend exemption in section 10(1)*(i)* of the Act will not be available.

The trigger for the applicability of section 8E is the presence of a "hybrid equity instrument".

The term "hybrid equity instrument" is defined in section 8E(1) and can be divided into five categories. However, for purposes of this article only two (out of five) of the paragraphs of the definition that are contemplated in section 8E(1) of the Act are included.

In this context, section 8E(1) defines a "hybrid equity instrument" as:

"(a) any share, other than an equity share, if –

(i) the issuer of that share is obliged to redeem that share or to distribute an amount constituting a return of the issue price of that share (in whole or in part); or

(ii) the holder of that share may exercise an option in terms of which the issuer must redeem that share or distribute an amount constituting a return of the issue price of that share (in whole or in part,

within a period of three years from the date of issue of that share; …

(c) any preference share if that share is –

(i) secured by a financial instrument;

(ii) subject to an arrangement in terms of which a financial instrument may not be disposed of,

unless that share was issued for a qualifying purpose;".

Section 8EA, on the other hand, is triggered by the existence of a "third-party backed share". Similar to section 8E, any dividends or foreign dividends received or accrued in respect of a share or equity instrument will be deemed to be income in the hands of the recipient to the extent that the share or equity instrument constitutes a "third-party backed share".

Section 8EA(1) defines a "third-party backed share" as:

> "[A]ny preference share or equity instrument in respect of which an enforceable right is exercisable by the holder of the preference share or equity instrument as a result of any amount of specified dividend, foreign dividend, return of capital or foreign return of capital attributable to that share or equity instrument not being received by or accruing to any person entitled thereto;"

The mischief that is sought to be eliminated by section 8EA is a situation where, instead of granting a loan, the lender acquires shares and stands to receive tax-free dividends – as opposed to interest – from the borrower, ie, it is the dividend and not the loan that is at issue. The objective is therefore to eliminate special purpose vehicles and other third-party guarantee mechanisms that allow the holder of preference shares to rely on guarantees from third parties, thereby avoiding the risk inherent in the issue of the preference shares itself. In essence, the concept of a "third-party backed share" is a preference share guaranteed or endorsed by a third party with regard to the specified dividend yield or return attached to it.

The difference between sections 8E and 8EA is that the focus in 8E is on the instrument itself, whereas in 8EA it is on the dividend yield.

COMMENTS

In terms of the facts of BPR 398, the preference shares are subject to a scheduled redemption date of five years after the original date of issue. However, the facts also signal the possibility of redemption prior to the lapse of the five years – ie, if the board of PropCo so decides or if a trigger event, illegality event or a sanction event arises. It is therefore no surprise that SARS ruled, in the first instance, that the preference shares do not constitute "hybrid equity instruments".

However, and more importantly, the ruling does note that:

> "[A]s soon as the applicant becomes entitled to compel PropCo to redeem the preference shares within three years of the date of issue, the preference shares will constitute 'hybrid equity instruments' as contemplated in section 8E(1)*(a)*(ii)...."

This ruling is important because it confirms that even though there is no upfront obligation on the issuer (ie, PropCo) in the first three years to redeem the preference shares (and concomitantly no right for the holder (ie, the applicant) to redeem the preference shares within the first three years, if certain events arise and the applicant becomes entitled to compel redemption, then the instrument becomes a "hybrid equity instrument". All dividends then declared in that year of assessment will be recharacterised as income.

Furthermore, even though there is a type of security provided for the preference share holder in the facts in this ruling, SARS implied that the preference shares would not fall within paragraph *(c)* of the definition of "hybrid equity instrument". This means that, in SARS' view, the security provided would not, among others things, be considered a "financial instrument" or a "financial arrangement in terms of which a financial instrument may not be disposed of".

Additionally, SARS implied that the security mechanism would not result in the preference shares becoming "third-party backed shares". In this context, the security rights held by the applicant were importantly exercisable against the issuer of the preference shares itself and not a "third party".

> "Sections 8E and 8EA are anti-avoidance provisions aimed at share-financing transactions (usually preference shares) that disguise otherwise taxable interest as tax-exempt dividend income."

This ruling also highlights the importance of reviewing the nature of a preference share or equity instrument on a regular basis as both sections 8E and 8EA will apply if the share or equity instrument constitutes a "hybrid equity instrument" or "third-party backed share", as the case may be, **at any time** during the year of assessment. These provisions are complex technical anti-avoidance sections with many nuances and a taxpayer could unwittingly fall within these sections (with dire consequences – especially for the issuer) if professional tax advice is not sought prior to entering into the arrangement.

Puleng Mothabeng

Cliffe Dekker Hofmeyr

Acts and Bills

- Income Tax Act 58 of 1962: Sections 1(1) (definition of "dividends"), 8E(1)) (definition of "hybrid equity instrument": more specifically paragraph *(a)*(ii)) & (2); 8EA(1) (definition of "third-party backed share") & (2); Eighth Schedule: Paragraph 43A.

Other documents

- Binding Private Ruling 398 ("Disposal of shares pursuant to a property development arrangement") (issued on 17 November 2023).

Tags: production of trading income; resident property holding company; capitalisation share issue; preference shares; hybrid equity instruments; third-party backed shares; basic dividend exemption; financial instrument.

ENERGY INCENTIVE – SECTION 12BA

With load-shedding showing no signs of abating, South Africa's electricity crisis remains front of mind for both the government and ordinary South Africans. While there is a dire need to find alternative electricity sources, to drive this, buy-in incentives are essential to encourage taxpayers to invest in alternative energy generation as a matter of urgency.

Recognising this need, in his 2023 Budget Speech, Finance Minister Enoch Godongwana promised to incentivise investments in renewable energy. These incentives are intended to address South Africa's current shortage of generation capacity and help it meet its climate change commitments.

The current legislative framework already contains provisions to encourage private investment in the renewable energy sector. Yet, the government aims to supercharge this investment with the introduction, with retrospective effect from 1 March 2023, of a new section 12BA into the Income Tax Act, 1962 (the Act).

Section 12BA was introduced by section 16 of the Taxation Laws Amendment Act, 2023. The Act has been amended to allow for a deduction of 125% of the qualifying costs of any new and unused renewable energy-generating assets acquired by a taxpayer for the purpose of his/her trade, which are brought into first-time use on or after 1 March 2023 and before 1 March 2025.

Section 12B of the Act already allows taxpayers to deduct, on a 50%|30%|20% basis over three years, the qualifying cost of assets owned by the taxpayer – or acquired by the taxpayer under an instalment credit agreement – and brought into use for the first time, for the purpose of that taxpayer's trade. These assets must generate electricity from the following renewable energy sources:

- wind;
- solar energy above 1 megawatt (MW);
- hydropower not exceeding 30 MW; and
- biomass.

In addition, section 12B(1)*(h)*(ii)*(bb)*, read with section 12B(2)*(b)*, provides for a 100% deduction of the qualifying cost of a solar PV generating installation owned by the taxpayer – or acquired by the taxpayer under an instalment credit agreement – and brought into use for the first time for the purposes of that taxpayer's trade, provided that the energy generated from that solar installation does not exceed 1 MW.

The insertion of section 12BA into the Act will now temporarily enhance the tax incentive already contained in section 12B. It should –

- entice businesses who would not otherwise invest in renewables to do so; and
- encourage businesses that were planning to invest in renewables to invest sooner rather than later, to help alleviate pressure on the national electricity grid.

Section 12BA allows taxpayers to claim a deduction of 125% of the qualifying costs of assets that generate power from –

- wind;
- solar energy (both PV and concentrated);
- hydropower; or
- biomass.

The fact that there is no cap on the generation capacity of the asset makes this incentive that much more appealing.

To qualify for this deduction in the year of assessment in which the asset is brought into use, the following requirements must be met:

- The taxpayer claiming the deduction must own the power-generating asset or that asset must have been acquired by the taxpayer as purchaser under an agreement contemplated in paragraph *(a)* of the definition of "instalment credit agreement" in section 1(1) of the Value-Added Tax Act, 1991.
- The assets for which the deduction is being claimed must be "new and unused" which, according to National Treasury, means that they cannot be second hand and must have been recently acquired by the taxpayer.
- The asset must be brought into use for the first time on or after 1 March 2023 but before 1 March 2025.
- The asset must be acquired for the purposes of carrying on the taxpayer's trade.

Taxpayers claiming a deduction under section 12BA cannot claim a deduction under section 12B as well. If the taxpayer disposes of the asset before 1 March 2026, the deduction granted under section 12BA will be subject to an enhanced recoupment under section 8(4)*(n*A*)*. The effect of this recoupment is that if the asset is sold for proceeds equal to or above cost, the full 125% allowance will be included in income. If sold below cost, the amount to be included in income will be 125% of the proceeds.

If the asset is sold on or after 1 March 2026, the recoupment will be equal to the lesser of the proceeds and the 125% allowance.

Section 12BA also applies to a lessor who installs qualifying assets that are brought into use by the lessor's lessee. However, the lessor's deduction will be limited to the rental income under section 23A. Taxpayers that do not let the assets but instead charge for the electricity generated under a power-purchase agreement will not be subject to the ring-fencing of the 125% allowance.

Although the new incentive in section 12BA is welcomed, one has to ask: Will this be a proverbial plug in the hole, or will it lead to the desperately needed buy-in from the private sector to invest in alternative electricity generation?

Nirvasha Singh & Sakiwe Canca

Webber Wentzel

What you need to know about South Africa's new section 12BA solar asset deduction	
1. Taxpayers that carry on a trade and own solar assets which are used in the production of income can claim the 12BA deduction against income.	6. A lessor can claim the deduction if the lessee brings the solar system assets into use for the first time. However, the lessor's 12BA deduction is limited to taxable income arising from the rental income.
2. The 12BA deduction amounts to 125% of the arm's length cost of the qualifying solar assets used in the generation of electricity (solar system assets).	7. The owner of the solar system assets will claim the 12BA deduction against electricity sold in a power purchase agreement (if any) and other trading income.
3. The solar system assets must be brought into use for the first time on or after 1 March 2023 and before 1 March 2025.	8. If the solar system assets are sold before 1 March 2026, an enhanced recoupment of the 12BA deduction will occur. If sold at or above cost, the recoupment will be equal to the full 12BA deduction. If sold below cost, the recoupment will be 125% of the proceeds received.
4. The 12BA deduction must be claimed in the year of assessment when the solar system assets are brought into use for the first time.	9. If the solar system assets are sold on or after 1 March 2026, the recoupment will be equal to the lesser of the proceeds received and the 12BA deduction.
5. The 12BA deduction does not have an electricity generation limit (unlike the existing 12B deduction).	10. The 12BA qualifying solar system asset expenses include foundation or supporting structures, costs of all PV panels and parts, voltage solar cells and panels, bi-directional utility meter, AC inverters, batteries, power optimisers, DC combiner, DC boxes and feeder lines, racking, cables, wiring, and planning, installation and delivery costs of these items. Stand-alone batteries and inverters not used with solar panels will not qualify as they do not generate electricity.
joon.chong@webberwentzel.com, duncan.mcallister@webberwentzel.com and jess.fung@webberwentzel.com SOURCE: Draft Explanatory Memorandum, Taxation Laws Amendment Bill [B 36–2023] (dated 1 November 2023) and BPR 311, BPR 172 and BCR 085 on section 12B. Date of infographic: 29 November 2023.	

Acts and Bills

- Income Tax Act 58 of 1962: Sections 8(4)*(nA)*, 12B (more specifically subsection (1)*(h)*(ii)*(bb)*), 12BA (proposed new section), 23A & 24H;
- Value-Added Tax Act 89 of 1991: Section 1(1) (definition of "instalment credit agreement" (more specifically paragraph *(a)*).

Other documents

- Draft Explanatory Memorandum on the Taxation Laws Amendment Bill [B 36 – 2023] (dated 1 November 2023);
- Binding Private Ruling 311 ("Photovoltaic solar energy plants" – section 12B);
- Binding Private Ruling 172 ("Plant used in the production of renewable energy" – section 12B);
- Binding Class Ruling 085 ("*En commandite* partnerships investing in photovoltaic solar energy plants" – sections 12B(1)*(h)* & (2) & 24H).

Tags: alternative energy generation; renewable energy-generating assets; instalment credit agreement.

REMOTE WORKING IN SOUTH AFRICA

The global remote working trend provides South Africa with the opportunity to become a jurisdiction of choice for employees wishing to work in South Africa for their foreign employer.

The international travel restrictions during 2020 opened a new world of possibilities for many employees who realised that improved technology permits many of them to continue working for the same employer, but from a foreign jurisdiction. In most instances of remote working, the employer does not intend to establish a presence or to commence operations in the foreign jurisdiction.

Instead, an employee prefers to work in a foreign jurisdiction for personal reasons, such as employees in the Northern Hemisphere wishing to escape the cold winter season and work in sunny South Africa, or individuals who prefer to work in South Africa for personal or family reasons, even if they are employed by a non-resident employer. This may also permit South Africans who are unable to find employment in South Africa, to work for a foreign employer, earning foreign currency, without having to leave the country.

These examples generally do not involve South African job vacancies. Instead, these are "foreign" jobs that the individual can perform remotely, from South Africa, if permitted to do so by the foreign employer.

Remote working offers a unique opportunity to bolster South Africa's tax coffers, both through the income tax on the employees' remuneration, as well as the indirect benefits of the individuals paying rent or purchasing property in South Africa, shopping at local shops and eating in South African restaurants, thus creating indirect employment and boosting economic growth, without sacrificing any South African jobs.

So, what can be done to make South Africa a more attractive destination for remote workers, or to at least remove some of the current obstacles? This article explores some tax proposals to do just that.

EMPLOYEES' TAX, UNEMPLOYMENT INSURANCE FUND (UIF) CONTRIBUTIONS AND SKILLS DEVELOPMENT LEVIES (SDL)

An employer who wishes to establish a presence in a foreign country generally accepts that there will be compliance obligations (including tax compliance obligations) in the foreign jurisdiction. On the other hand, a foreign employer who does not plan to expand to a foreign jurisdiction but simply permits an employee to work remotely generally prefers not to have to register with tax and other authorities in the foreign jurisdiction and to have to submit returns.

PERMANENT ESTABLISHMENT

Another issue which often comes up in the context of remote working is the potential risk that the employees could generate income from a South African source for the foreign employer. If the foreign employer derives income from a South African source, and if the foreign employer is tax resident in a jurisdiction that has concluded a double tax agreement (DTA) with South Africa, then the next question is whether the employee creates a PE for the foreign employer. If yes, SARS will be entitled to tax the foreign employer on its business profits, to the extent that the business profits are attributable to such PE; if not, SARS will not be entitled to tax the business profits of the foreign enterprise.

A PE is defined in most DTAs to mean "a fixed place of business through which the business of an enterprise is wholly or partly carried on". A foreign employer with a PE in South Africa would not only be obliged to register as a taxpayer and pay income tax, but also to register as an employer for employees' tax withholding purposes. SARS has not yet issued any guidance on whether an employee's home office could constitute a "fixed place of business" for purposes of the interpretation of the PE definition. Accordingly, there is some uncertainty for foreign employers whether their remote working employees could constitute a PE for the foreign business. Providing guidance in this regard would be extremely helpful for foreign businesses employing or seeking to employ remote workers in South Africa.

In the Draft Tax Administration Laws Amendment Bill, released in July 2023, it was proposed that all foreign employers should register with the South African Revenue Service (SARS) and withhold employees' tax (also referred to as PAYE). Fortunately, National Treasury revised this, and the Tax Administration Laws Amendment Act, 2023, amending paragraph 2(1) of the Fourth Schedule to the Income Tax Act, 1962, now provides that foreign employers must register with SARS if they conduct business through a permanent establishment (PE) in South Africa. In instances where the employer is not conducting business through a PE in South Africa, the collection mechanism for the payment of income tax on the employees' remuneration would be via the provisional tax system.

A practical problem for foreign employers is in respect of the obligation to pay UIF contributions and SDL. Currently, a foreign employer could be obliged to pay UIF contributions and SDL even if the employer is not obliged to withhold employees' tax. While most foreign employers do not in principle have any objection to paying UIF and SDL, the obligation to pay these amounts gives rise to substantial practical difficulties: While the payment of UIF contributions directly to the UIF is possible but difficult, it is impossible to pay SDL unless the employer registers with SARS as an employer. Aligning an employer's obligations in respect of employees' tax, UIF and SDL would thus be very helpful. Alternatively, provision should be made for a simple mechanism for the payment of these amounts by employees rather than by foreign employers.

DIGITAL NOMAD VISAS

While this is not a tax issue, the delay in the implementation of digital nomad visas forms part of the inability to establish South Africa as an excellent remote working jurisdiction. It has become notoriously difficult for foreigners to be granted work and other types of visas. In the remote working space, we have lagged behind countries such as Canada, Mauritius, Namibia and Spain that offer special visas for so-called digital workers working remotely for foreign employers.

After first announcing the introduction of a digital nomad visa in 2022, Government finally in February 2024 published draft amendments to the Immigration Regulations. The deadline for written submissions was 29 March 2024. While the publication of the draft amendments is a positive step towards encouraging remote working in South Africa, it does not address critical issues such as the potential PE risk.

CONCLUSION

It makes a great deal of commercial sense for South Africa, a country struggling with slow economic growth and high unemployment rates, to implement a remote working scheme for employees of foreign companies. Such a scheme should include remote working visas and, from a tax perspective, should permit the payment of employee-related taxes and levies (PAYE, UIF contributions and SDL) without requiring the employer to register as an employer with SARS. The scheme could also provide the foreign employer with clear guidelines to ensure that it does not inadvertently establish a PE in South Africa.

"Instead, an employee prefers to work in a foreign jurisdiction for personal reasons, such as employees in the Northern Hemisphere wishing to escape the cold winter season and work in sunny South Africa, or individuals who prefer to work in South Africa for personal or family reasons, even if they are employed by a non-resident employer."

Aneria Bouwer

Bowmans

Acts and Bills

- Income Tax Act 58 of 1962: Schedule 4: Paragraph 2(1);
- Tax Administration Laws Amendment Act 18 of 2023: Section 13*(a)*;
- Draft Tax Administration Laws Amendment Bill, 2023: Clause 13*(a)* (released on 31 July 2023).

Tags: employees' tax (PAYE); Unemployment Insurance Fund (UIF) contributions; Skills Development Levies (SDL); permanent establishment (PE); provisional tax system; double tax agreement (DTA); employee-related taxes and levies.

TWO-POT RETIREMENT FUND SYSTEM

The Draft Revenue Laws Second Amendment Bill, 2024 (Second Amendment Bill), confirms 1 September 2024 as the implementation date of the two-pot system. This is among other significant amendments to the Income Tax Act, 1962 (the Act), as also found in the Revenue Laws Amendment Bill (the RLAB), 2023, which are set to become effective on the same date.

On 21 February 2024, the National Treasury released the Second Amendment Bill to make technical corrections to amendments to the Act as per the RLAB. The Second Amendment Bill follows the proposal by Minister of Finance Enoch Godongwana that Parliament extend the date of implementation for the two-pot system contained in the RLAB from 1 March 2024 to 1 September 2024 for various reasons supported by industry stakeholders.

UNPACKING PROPOSED CHANGES IN THE SECOND AMENDMENT BILL

Some of the proposed changes in the Second Amendment Bill signify positive adjustments to the existing system. Firstly, the Bill acknowledges and incorporates the new implementation date of 1 September 2024, providing clarity and alignment with the extended timeline advocated by stakeholders. Additionally, the Bill eliminates the necessity for a tax directive when transferring the seeding amount from the vested to the savings components contemplated in the two-pot system.

The proposed amendments to the definitions of the three components exclude maintenance awards. This adjustment ensures consistency with existing tax provisions regarding the tax treatment of maintenance awards under section 7(11) of the Act.

Furthermore, the Bill addresses intra-fund transfers and associated tax directives by proposing that the reallocations of amounts between the three components are not treated as transfers for which tax directives are required. Consequently, the requirement to obtain a directive for reallocations between the three components has been withdrawn in the Second Amendment Bill.

While these proposed changes are a step in the right direction to give effect to the two-pot system, the lead time provided still falls short of that which industry stakeholders advocate in order to overcome the practical challenges associated with the new system, including how it will be implemented for defined benefit funds (DB funds). A major difference between defined contribution funds (DC funds) and DB funds is that in DC funds, it is possible to calculate the value of the contributions that have already been made by the member, but in DB funds, the final pension fund benefit will be based on the final salary of the member plus the number of years' service.

The RLAB has provided for the one-third and two-thirds allocations to the savings and retirement components of DB funds to be determined regarding a member's pensionable service on or after 1 September 2024, or a reasonable method of allocation as approved by the Financial Sector Conduct Authority (FSCA). The implementation of the two-pot system for DB funds must be carefully undertaken to ensure fairness to all members of each DB fund. Any necessary engagements with the FSCA by DB fund administrators will also require additional lead time from the promulgation date to the implementation date – the Second Amendment Bill does not provide for this.

"The proposed amendments to the definitions of the three components exclude maintenance awards. This adjustment ensures consistency with existing tax provisions regarding the tax treatment of maintenance awards under section 7(11) of the Act."

A media statement published by the National Treasury on 21 February 2024, states that the Second Amendment Bill is aimed at clarifying the language in the RLAB and at simplifying the directives system for both administrators and the South African Revenue Service (SARS), allowing for an efficient implementation of the two-pot system. The deadline for public comment on the Second Amendment Bill was 31 March 2024.

Joon Chong & Nicolette van Vuuren

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Acts and Bills

- Income Tax Act 58 of 1962: Section 7(11);
- Draft Revenue Laws Second Amendment Bill, 2024 (released on 21 February 2024);
- Revenue Laws Amendment Bill 39B of 2023.

Tags: two-pot system; intra-fund transfers; defined benefit funds (DB funds); defined contribution funds (DC funds).

EXTENDING PRESCRIPTION PERIODS

Most taxpayers will be familiar with section 99 of the Tax Administration Act, 2011 (the TAA), namely the provisions which deal with the period of limitations for the issuance of assessments.

This article aims to take a closer look at one of the circumstances where prescription may not apply; that is, how a taxpayer's actions may have an impact on this and what has been seen in practice.

As a quick refresher on the structure of the provisions of section 99, section 99(1) provides for the time periods in which the Commissioner for the South African Revenue Service ("the Commissioner" or "SARS") may assess a taxpayer while section 99(2) sets out the circumstances where the time periods provided for in section 99(1) will not apply. Section 99(3) and (4) provide for circumstances where the Commissioner may by prior notice extend the time periods in section 99(1). Finally, this article will also focus on instances where the Commissioner may extend a time period on the basis that the circumstances contemplated in section 99(3)*(a)* have arisen.

Section 99(3)*(a)* (with our emphasis) provides as follows:

> "(3) The Commissioner may, by prior notice of at least 30 days to the taxpayer, **extend a period under subsection (1) or an extended period under this section, before the expiry thereof, by a period approximate to a delay arising from:**
>
> *(a)* **failure by a taxpayer to provide all the relevant material** requested within the period under section 46(1) or the extended period under section 46(5);"

As can be seen from the above extract, section 99(3) makes reference to a taxpayer's behaviour relating to the provision of relevant material in accordance with section 46 of the TAA. Section 46 in turn provides that SARS may request a taxpayer to provide relevant material within a reasonable time period (section 46(1)), but that SARS may extend the period based on reasonable grounds submitted by a taxpayer (section 46(5)).

From the wording of section 99(3), it, therefore, appears that if a taxpayer does not comply with either the time period granted by SARS to provide relevant material in accordance with section 46(1), or with an extended time period granted by SARS to provide relevant material in accordance with section 46(5), the Commissioner may extend the prescription time periods. This is an important consideration for taxpayers during the information-gathering phase of an audit as the Commissioner's powers to extend prescription in these circumstances are unilateral despite the Commissioner having to provide advance notice.

However, in practice SARS appears to be relying on section 99(3)*(a)*, not only where a taxpayer merely did not comply with the deadlines imposed in section 46(1) or 46(5), as the case may be, but also in circumstances where a taxpayer motivated, obtained and adhered to an extension from SARS based upon reasonable grounds in accordance with section 46(5). What has been observed in this regard is that SARS unilaterally added the number of days to the prescription time periods which passed between the date of the original due date by which the relevant material had to be provided (in accordance with section 46(1)) and the new due date by which the relevant material had to be provided as agreed to by SARS (in accordance with section 46(5)). In other words, SARS places reliance upon the provisions of section 99(3)*(a)* to extend the prescription time periods when there was no failure to provide relevant material by the agreed extended date in accordance with section 46(5). This appears to be the SARS interpretation of these provisions.

As referred to above, this is a very important consideration for taxpayers to take into account during the information-gathering stage of an audit and taxpayers should therefore carefully weigh up how a request for more time to provide relevant material (even if such request is acceptable to SARS) can factor into prescription, which can become a very important defence in tax dispute matters.

"As a quick refresher on the structure of the provisions of section 99, section 99(1) provides for the time periods in which the Commissioner for the South African Revenue Service ('the Commissioner' or 'SARS') may assess a taxpayer while section 99(2) sets out the circumstances where the time periods provided for in section 99(1) will not apply."

Taryn Solomon

ENSafrica

Acts and Bills

- Tax Administration Act 28 of 2011: Sections 46(1) & (5) & 99 (with specific reference to subsections (1), (3)*(a)* and (4)).

Tags: issuance of assessments; prescription time periods.

TAX-RELATED SCAMS

Over the past few years, the Southern African Fraud Prevention Service (SAFPS) has seen a steady increase in the number of tax-related scams.

IMPROVED EFFICIENCY

To improve efficiency when it comes to processing tax returns, and to encourage individuals and businesses to file their tax returns timeously, SARS launched its eFiling service in 2000. This allows taxpayers to file their returns electronically.

Unfortunately, this has provided scammers with increased opportunities to turn taxpayers into fraud victims.

Fraudsters use a very focused *modus operandi* when running this scam. In the weeks following the tax deadlines, taxpayers will typically receive an SMS or email informing them that they have yet to file their tax returns, and may face significant penalties.

This message typically includes a link for the taxpayer to follow to check if they have filed their tax, or a phone number to call and follow up on the issue. Needless to say, taxpayers must not click any link in an SMS or email.

If there is an issue, SARS typically puts all of its correspondence on its eFiling system and will send correspondence to the taxpayer informing them to log onto eFiling to view this correspondence. SARS will not provide a link in an SMS or email.

Should taxpayers want to follow up on any specific issue of which they are aware, they should either call the SARS call centre or visit their nearest branch.

AUTO-ASSESSMENTS

To improve efficiency when processing returns, SARS has been known to pre-assess some individuals before they file their returns. This is typically done on individuals who use the same metrics when filing their returns annually. Following this assessment, SARS determines whether an individual owes SARS money, or is entitled to a rebate from SARS.

"By dialling 083 123 SCAM (7226), victims of fraud will be able to connect to relevant authorities such as the South African Police Service as well as their bank or other registered credit providers to report their case."

Individuals who have been pre-assessed will typically receive an SMS from scammers claiming to be SARS informing them of the result of their auto-assessment. This message typically includes a link for the taxpayer to follow up on this correspondence.

Again, taxpayers must not click any link in an SMS as it may be a scam. SARS communicates the outcome of these assessments on its eFiling system. Instead, one should log onto one’s eFiling profile, call the SARS call centre or visit a SARS branch to follow up on this.

A MAJOR SCAM PREVENTION TOOL

In response to the increased level of scams in South Africa, SAFPS launched Yima, a platform offering online tools to combat these scams. The Yima platform has proven to be very effective in the proactive fight against fraud.

Yima is a one-stop-shop website for South Africans to report scams, secure their identity, and scan any website for vulnerabilities related to scams. They can also educate themselves on identifying a scam.

These tools will enable consumers to surf the internet, access key products such as online banking and money transfers more confidently, and make their daily lives aware and informed.

The main element of the website will be the ability to report a scam incident or any suspicious activity to the SAFPS. This suspicious activity includes a fake or suspicious-looking online shopping website/portal, and instances where the user has received phoney banking information. These reports will be collated and shared with law enforcement for investigation.

Users will also be provided with a scam hotline to report a fraud incident directly to their banks, retailers, or insurance companies via a single number. Users only need to remember one number rather than search for each institution's contact numbers online. The Yima Hotline number is 083 123 7226 (SCAM).

Additionally, Yima users will have access to the consumer products and services offered by the SAFPS.

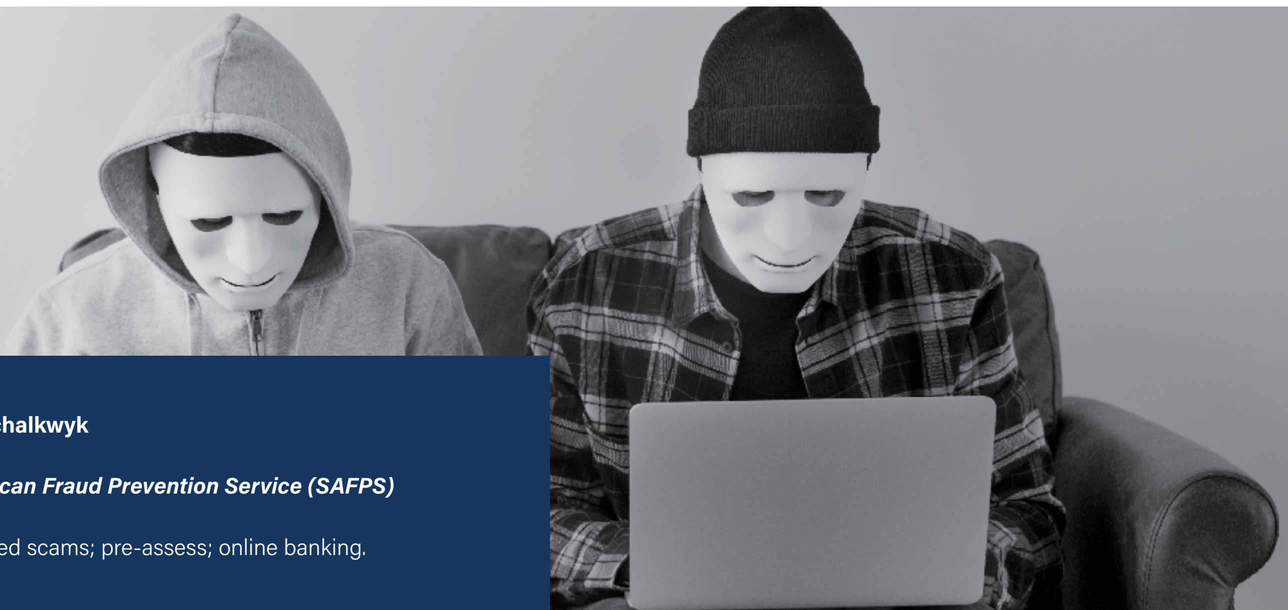
ONE LINE TO RULE THEM ALL

The main element of Yima is the ability to report fraud and scams that lead to fraud.

One of the challenges a victim of fraud had in the past was that they had to approach several different authorities to report the case and begin trying to address the situation. This was very stressful.

This is no longer the case, as fraud victims now have access to one hotline number to address this challenge. The SAFPS has partnered with MTN and several key stakeholders to launch a hotline to report fraud.

By dialling 083 123 SCAM (7226), victims of fraud will be able to connect to relevant authorities such as the South African Police Service as well as their bank or other registered credit providers to report their case. This will simplify the process of reporting fraud cases and will hopefully alleviate some of the stress that victims of fraud experience.



Manie van Schalkwyk

Southern African Fraud Prevention Service (SAFPS)

Tags: tax-related scams; pre-assess; online banking.

ADVANCE PRICING AGREEMENTS

The President assented to the Tax Administration Laws Amendment Act, 2023, on 22 December 2023. This amendment Act saw a number of business critical changes and insertions into various pieces of tax legislation that one should be aware of. The practical implementation of these may require some ironing out. From a global business expansion perspective, one key insertion is that of a new Part IA ("Advance Pricing Agreements" (APAs)) in Chapter III of the Income Tax Act, 1962 (the Act).

The purpose of this Part IA (sections 76A to 76P) is the regulation and provision of clarity on "affected transactions", as defined in section 76A. Per National Treasury's initial explanation, the aim of implementing APAs is not only to keep up with international trends, but also to comply with recommendations of the Davis Tax Committee and to prevent or minimise double taxation.

The insertion of APAs into South African domestic law is likely to see multi-national enterprises being the most affected, as South Africa's current transfer pricing framework is informed by the "arm's length principle", which serves as the accepted standard for any related-party transaction. This principle outlines South Africa's position for transfer pricing in general and plays a crucial role in determining a taxpayer's position within the context of the transfer pricing provisions under section 31 of the Act.

SAFETY WITHOUT SAFE HARBOURS

At a high level, the arm's length principle is the international standard by which all commercial or financial dealings between two connected enterprises must be conducted. This principle notes that the terms of such transactions should closely resemble those that would have been agreed upon had the contracting parties been independent enterprises. Tax implications must also follow the same principle and tax must accrue as though the enterprises were not connected. This standard is adopted by all member states of the Organisation for Economic Co-operation and Development, as well as other non-member states.

In practice, the responsibility lies with the taxpayer to demonstrate that the relevant cross-border related-party transaction adheres to the arm's length principle and to provide supporting documentation as evidence. Simply relying on a safe harbour provision does not automatically relieve the taxpayer of this obligation.

"The insertion of APAs into South African domestic law is likely to see multi-national enterprises being the most affected, as South Africa's current transfer pricing framework is informed by the 'arm's length principle', which serves as the accepted standard for any related-party transaction."

NATIONAL TREASURY'S POSITION

As there are no "safe harbours" that apply under South African domestic law to exempt a taxpayer from adhering to the compliance obligations under section 31 of the Act, each related-party cross-border transaction must be assessed independently. This primarily focuses on taking into account all relevant factors, to determine if it is conducted on an arm's length basis. This usually includes independent benchmarked evidence to support the transaction. In this regard, Treasury confirmed in their initial response documents that, where consensus is not reached on an APA, affected parties are free to continue on the basis initially proposed.

The insertion of APAs into our law, although in the testing phase only, is aimed at providing certainty for large-scale international transactions. This will allow taxpayers to ensure adherence to their transfer pricing obligations from the get-go and aligns well with SARS' strategic intent of "providing clarity and certainty to taxpayers to promote voluntary compliance".

A HIGH-LEVEL OVERVIEW OF THE APA PROCESS

The APA process commences with a prescribed person, per the Commissioner by public notice, requesting a "pre-application consultation" with SARS / the Commissioner. After consulting with the other country's "competent authority", SARS will then notify the prospective applicant within 90 days if they can submit an "advance pricing agreement application".

Subsequent to the consultation, SARS will then engage with the "competent authority" of the jurisdiction in which the other party to the "affected transaction" is resident. If the two authorities reach an agreement on the most acceptable pricing methodology for the transaction, ensuring that it meets the arm's length standard for pricing, the APA may be submitted, and becomes valid once signed by all required parties.

The APA will then remain in effect in principle for a period not exceeding five consecutive years.

CONSIDERATIONS IN RELATION TO THE/ANY APA PROGRAMME

The implementation of the APA programme serves well to align with other OECD member states, as well as non-OECD countries such as Singapore, which is a favourite for tech-hub-related companies. Amongst the BRICS nations, Russia, China, and India have all successfully implemented APA legislation; South Africa is finally following international trends across the board.

Practically, this means that SARS must build its transfer pricing capacity as a starting point. In their responses to public comment, SARS and Treasury have confirmed that this will be done by SARS drawing on experience from both the advanced tax ruling system and voluntary disclosure programme. For now, the authorities have noted that due to the skills shortage on transfer pricing, they may need to draw on expertise across the organisation.

With the certainty that the APA programme is intended to provide, to both contracting parties and their respective states, it may serve to boost foreign direct investment into an economy in need, furthering development of infrastructure.

Jashwin Baijoo

Tax Consulting SA

- Income Tax Act 58 of 1962: Section 31; Chapter III: Part IA (sections 76A to 76P);
- Tax Administration Laws Amendment Act 18 of 2023: Section 10.

Tags: advance pricing agreements (APAs); affected transactions; double taxation; arm's length principle; pre-application consultation; APA programme.

APPORTIONMENT OF INPUT TAX

The shortcomings of the VAT apportionment formula set out in 2011 have been addressed in a new formula which applies with effect from all financial years commencing on or after 1 January 2024. Important adjustments to the formula, which are laid out in the new Binding General ruling, BGR 16 (Issue 3), are highlighted in this article.

Section 17(1) of the Value-Added Tax Act, 1991 (the VAT Act), sets out the way in which a VAT vendor may deduct VAT payable in respect of goods or services acquired *partly* to make taxable supplies, and *partly* for another non-taxable purpose – for example, exempt supplies, private use or other non-taxable purposes. The section provides that such an apportionment must be made according to an apportionment ratio determined by the South African Revenue Service (SARS) in terms of a ruling contemplated under the Tax Administration Act, 2011 (a binding general ruling or BGR), or a ruling under section 41B of the VAT Act (a VAT class ruling or a VAT ruling).

THE ORIGINAL FORMULA

Binding General Ruling 16 (Issue 2) effective from 1 April 2015 was a straightforward, two-page document setting out the so-called standard turnover-based method of apportionment. The apportionment percentage that needed to be applied to VAT incurred on goods and services acquired only partly to make taxable supplies was required to be determined by applying the following formula:

$$y = \frac{a}{a+b+c} \text{ x } \frac{100}{1}$$

Where:

"y" = the apportionment ratio/percentage;

"a" = the value of all taxable supplies (including deemed taxable supplies) made during the period;

"b" = the value of all exempt supplies made during the period; and

"c" = the sum of **any other amounts** not included in "a" or "b" in the formula, which were **received, or which accrued during the period (whether in respect of a supply or not)**. (*own emphasis*)

Due to many imperfections, the application of the formula as set out in Issue 2 gave rise to unfair or unreasonable outcomes in certain circumstances. Therefore, numerous deviations from the prescribed apportionment determination were often sought from SARS. Cognisant of the shortcomings of the formula as provided for in BGR 16 (Issue 2), SARS embarked on a thorough review thereof, which included numerous discussions with stakeholders.

The result is BGR 16 (Issue 3), which was published on 27 November 2023 and applies with effect from all **financial years commencing on or after 1 January 2024**. While BGR 16 (Issue 3) does not change the actual formula, it specifies, in detail, which types of amounts and income should be excluded or specifically included within it. The elements of the new formula as dealt with in BGR 16 (Issue 3) are to be welcomed as they deal with the numerous unresolved issues that arose under the formulation of the formula in BGR 16 (Issue 2).

> "Due to many imperfections, the application of the formula as set out in Issue 2 gave rise to unfair or unreasonable outcomes in certain circumstances."

Why is the new apportionment formula as provided for in BGR 16 (Issue 3) so important for business?

In the first instance, "c" in the formula – that is included in the denominator of the formula – includes "the sum of **any other amounts** of income not included in 'a' or 'b' which was received or accrued during the period, whether in respect of a supply or not". On a strict application of the law, it was necessary to include, for example, gross interest, gross dividends, share capital receipts and foreign exchange gains and losses in "c", with the resultant reduction in apportionment ratio for the vendor. The treatment of substantial once-off receipts of exempt income is also always problematic.

These issues have all been dealt with in detail in BGR 16 (Issue 3).

So, what changes have been made? In a nutshell, the following adjustments or exclusions apply from 1 January 2024:

- Foreign exchange differences that do not form part of any hedging activities.
- Accounting entries that do not reflect income received, but rather a revaluation.
- Profit share from joint ventures or partnerships.
- Proceeds from the supply of a capital asset (the previous exclusion referred to goods or services of a capital nature).
- Extraordinary income as defined.
- Value of goods/services where input tax was denied under section 17(2), such as motor cars, entertainment, etc.
- Trading in financial assets.
- Capital value of loans.
- The cash value of goods supplied by a financier under an instalment credit agreement (ICA).
- The portion of a rental payment relating to the capital value of goods supplied under a rental agreement which is entered into as a mechanism of finance.
- Change-in-use adjustments under sections 18, 18A, 18C and 18D.
- Indemnity payments received.
- Manufactured interest and dividends received by the borrower of a securities lending arrangement.
- Debt securitisation transactions.
- The value of equities, debentures or bonds issued as a manner of raising funds.
- Net interest and the use of proxies where no interest is charged.
- Smoothing of dividend receipts and inclusion of proxy dividends.

Whilst SARS provides detail on each of the above in BGR 16 (Issue 3), and there are numerous important developments, it is important to highlight the following:

EXTRAORDINARY INCOME

- In Annexure E4 SARS defines "extraordinary income" as "non-recurring income received due to exceptional circumstances that are unlikely to be repeated". SARS gives an example of extraordinary income dividends received as a result of a reorganisation or liquidation of a company under sections 44, 46 or 47 of the Income Tax Act (the Act).
- Sections 42 (asset-for-share transactions) and 45 (intra-group transactions) of the Act could also be viewed as instances where there would be extraordinary income received due to exceptional circumstances that are unlikely to be repeated, such as a corporate restructure.

INTEREST

- Interest earned from the vendor's **current account(s)**, meaning, the account used for day-to-day business operations, may be excluded from the formula. However, interest earned from a **call or other investment account** must be included in the apportionment formula.
- BGR 16 (Issue 3) now specifically provides for **interest-free loans** and requires the inclusion of a proxy in the apportionment formula. The proxy for interest income relating to interest-free loans must be determined using the following formula, with the result being included in "c" in the formula:

  Loan value multiplied by prime rate
- BGR 16 (Issue 3) gives recognition to the fact that including **gross interest** in "c" in the formula gives rise to an unfair anomaly in circumstances where the vendor has incurred interest in providing the loan or credit. It therefore provides that a **net interest** approach may be adopted in certain circumstances. BGR 16 (Issue 3) notes that "net interest" refers to interest received from lending less interest paid on funds borrowed **to on-lend** and the interest portion of bad debts written off. It further holds that no other expenses may be deducted from the net interest received in arriving at the amount that must be included in the formula.

- SARS notes that where a vendor provides finance from its cash reserves or borrows on an interest-free basis, it will not have any interest paid to reduce the interest income in the formula. BGR 16 (Issue 3) accordingly provides for a proxy that must then be used to ensure that these vendors are not disadvantaged in the calculation of an appropriate apportionment ratio:

  Loan value multiplied by JIBAR

- As a vendor that lends monies or provides credit on an interest-free basis is required to include proxy interest (see above), where a vendor lends funds to a borrower interest-free from its cash reserves, BGR 16 (Issue 3) provides for a proxy interest deduction calculated as follows:

  Loan value multiplied by (prime rate – JIBAR)

- Interest derived from the provision of loans or credit to a non-resident is not exempt, but taxable at the zero rate (a taxable supply). BGR 16 (Issue 3) provides that where a vendor is unable to directly identify and allocate interest paid to the respective interest income streams – that is, either taxable or exempt – a formula must be applied to determine the value of the interest paid relating to zero-rated interest income. This formula can either be based on the interest income values earned by the vendor during the year, or the value of the respective loans from which the interest is earned, granted by the vendor during the year.

DIVIDENDS

- SARS argues that dividends received must be included in the "c" in the formula (ie, the denominator) to reflect the investment activity by the vendor in respect of the relevant investment, notwithstanding that dividends are not a consideration for any supply made by a vendor.

- There is, thankfully, recognition that the flow of dividends in any one year may totally distort the apportionment formula. SARS has therefore provided, in the first instance, for a three-year moving average of dividends received multiplied by (prime rate – JIBAR) that must be included in "c" in the formula.

- The three-year moving average is determined by calculating the average of dividends received during the current financial year and two immediately preceding financial years.

- If a vendor does not receive dividends during the current financial year, a three-year moving average of the three preceding years may be used as proxy.

- If a vendor receives no dividends for at least two out of the three years, a five-year moving average must be used instead of the three-year moving average where dividends were received for at least two of the five years.

- If a vendor has not received dividends for two out of the five years as required above, and the vendor is a holding company charging management fees to its subsidiaries, the vendor must include a value equal to the management fees charged for that financial year in the formula as proxy for dividend income. No three-year moving average will be applied in this instance.

- If a vendor has not received dividends for two out of the five years as required above, and the vendor is not a holding company charging management fees to its subsidiaries, the vendor must approach SARS for an alternative manner of determining a value to be included in the formula that appropriately reflects its investment activities.

GENERAL

If an alternative apportionment method has been approved for use by a vendor in a VAT ruling or VAT class ruling and the vendor regards the apportionment formula set out in BGR 16 (Issue 3) to be a fairer and more reasonable basis of apportionment, the vendor or class of vendors may approach SARS to have the VAT ruling or VAT class ruling withdrawn from the financial year commencing on or after 1 January 2024. The withdrawal request must be submitted to vatrulings@sars.gov.za before the end of the financial year commencing on or after 1 January 2024.

Chetan Vanmali, Des Kruger & Raeesah Shaik

Webber Wentzel

Acts and Bills

- Income Tax Act 58 of 1962: Sections 42, 44, 45 & 46;
- Value-Added Tax Act 89 of 1991: Sections 17(1) & (2), 18, 18A, 18C, 18D & 41B.

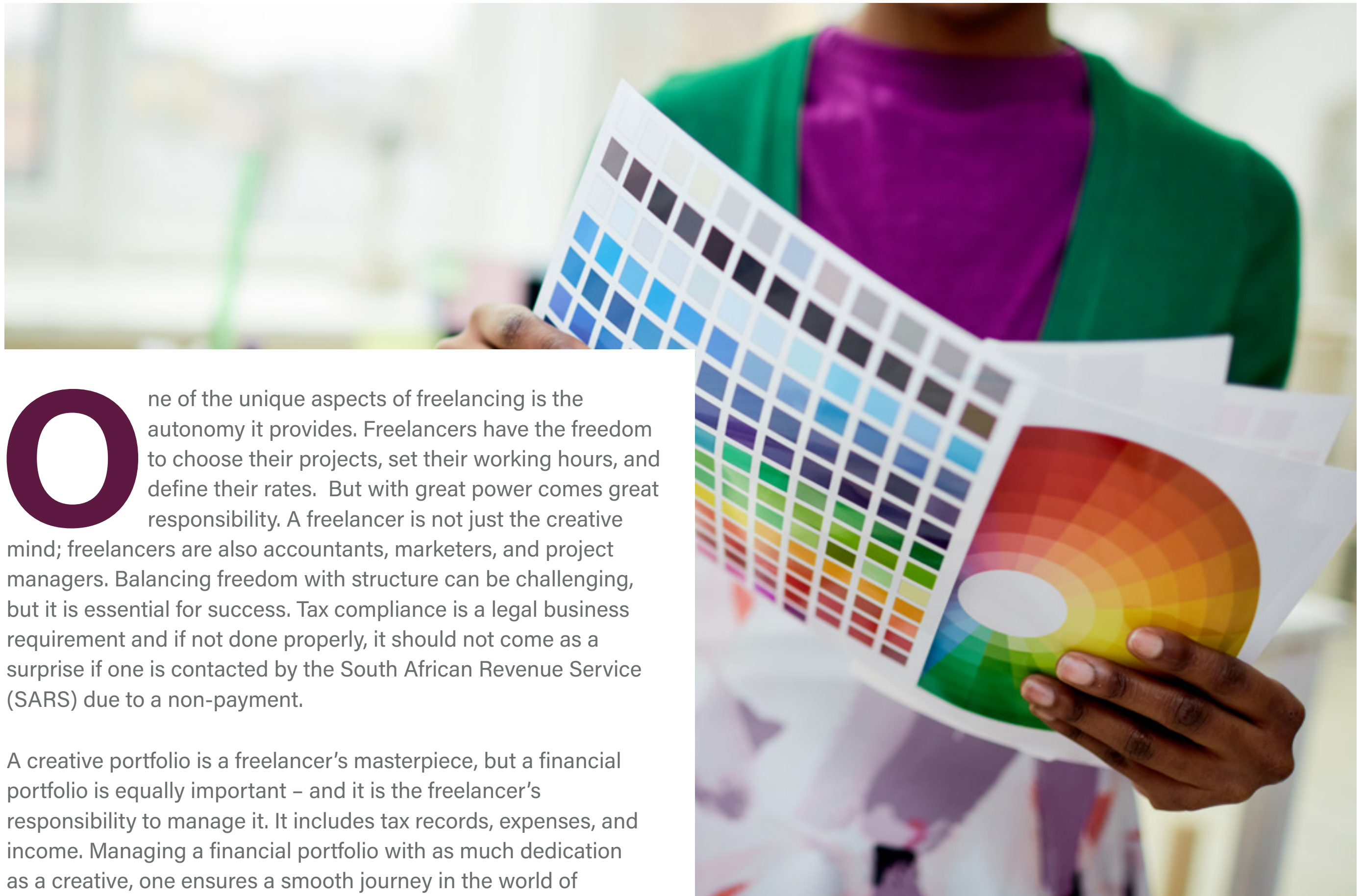
Other documents

- Binding General Ruling 16 (Issue 3) ("Standard turnover-based method of apportionment") (27 November 2023) (specific reference to definition of "extraordinary income" in Annexure E4);
- Binding General Ruling 16 (Issue 2) ("Standard apportionment method") (30 March 2015).

Tags: VAT apportionment formula; VAT class ruling; standard turnover-based method of apportionment; capital asset; instalment credit agreement (ICA); proxy dividends; extraordinary income; asset-for-share transactions; interest-free loans.

FREELANCE SERVICES

Many creative freelancers, being influencers, designers, writers or content creators, do not consider taxes in their creative pursuits. It is not a topic that readily comes to mind when one is brainstorming ideas or putting the finishing touches on a creative project. But the truth is, taxes cannot be overlooked.



One of the unique aspects of freelancing is the autonomy it provides. Freelancers have the freedom to choose their projects, set their working hours, and define their rates. But with great power comes great responsibility. A freelancer is not just the creative mind; freelancers are also accountants, marketers, and project managers. Balancing freedom with structure can be challenging, but it is essential for success. Tax compliance is a legal business requirement and if not done properly, it should not come as a surprise if one is contacted by the South African Revenue Service (SARS) due to a non-payment.

A creative portfolio is a freelancer's masterpiece, but a financial portfolio is equally important – and it is the freelancer's responsibility to manage it. It includes tax records, expenses, and income. Managing a financial portfolio with as much dedication as a creative, one ensures a smooth journey in the world of freelancing.

As a creative freelancer, one is not only juggling creative projects, but also the complexities of the tax landscape. Terms like "employer," "employee," and "remuneration", as defined in paragraph 1 of the Fourth Schedule to the Income Tax Act, 1962 (the Act), need to be understood. Some research upfront can save freelancers from financial stress down the road.

For tax purposes, employers withhold employees' tax (PAYE) on "remuneration" as defined in the Act. If the "employee" and "remuneration" definitions do not fit, it is time to consider the value-added tax (VAT) provisions.

VAT is a 15% tax levied on the supply of goods or services by a vendor in the course of carrying on an enterprise. One should not be intimidated by the jargon. In simple terms, if providing services or selling products, and when a certain income threshold (usually R1 million in a 12-month period) is crossed, it is necessary to register for VAT.

For creative freelancers, especially those earning over R84,000 monthly, VAT registration becomes a necessity as the compulsory registration threshold of R1 million will be met over a 12-month period. It is not just a legal obligation; it is a financial best practice. By registering for VAT, you ensure that you are charging and accounting for taxes correctly. This way, the risk of penalties, interest, or even criminal charges for non-compliance is avoided. Registration requires issuing tax invoices and reporting VAT to SARS correctly.

VOLUNTARY DISCLOSURE PROGRAMME (VDP): A TAXPAYER'S SAFETY NET

But what if the VAT registration deadline has been missed or if one has not been charging VAT when it should have been done? There's a lifeline called the Voluntary Disclosure Programme (VDP). This programme allows one to rectify one's tax situation without facing criminal prosecution.

Through the VDP, one can –

- avoid criminal charges for non-compliance; and
- receive a waiver for administrative penalties and understatement penalties.

So, even if mistakes have been made, there is a path to redemption.

In a creative journey, one should not forget to paint a clear picture of any financial obligations. Understanding the tax landscape, maintaining diverse portfolios (both creative and financial), and knowing when VAT applies are vital to success.

In the end, it is all about understanding one's tax responsibilities and the intricacies of relationships with clients. Before diving headfirst into any creative projects, one should take a moment to ensure that all tax ducks are in a row. It is an investment in one's financial well-being and the freedom to keep focusing on what one does best – creating.

"Freelancers have the freedom to choose their projects, set their working hours, and define their rates. But with great power comes great responsibility."

Ayanda Masina & Kagiso Nonyane

BDO

Acts and Bills

- Income Tax Act 58 of 1962: Fourth Schedule: Paragraph 1 (definitions of "employee", "employer" & "remuneration").

Tags: creative freelancers; employees' tax (PAYE); remuneration; Voluntary Disclosure Programme (VDP).

ONLINE SHOPPING FOR IMPORTS

Whilst some consumers are tactile and prefer to see and touch a product prior to purchase, many others prefer to make their purchases from the convenience of their office or home. The fact is that the world has become so small that one can buy something from a local site or an overseas site while sitting on a couch wearing one's pyjamas.

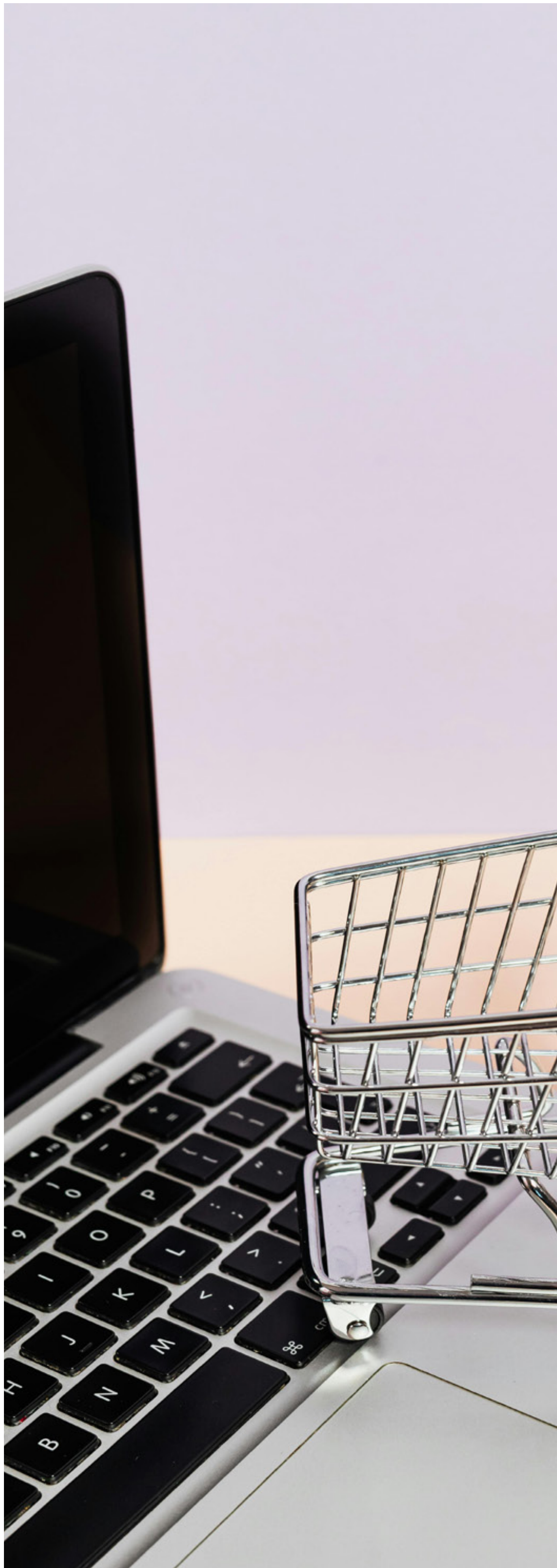
With a few clicks on an e-commerce site, various items can be placed in a dedicated virtual shopping cart. For many, this beats having to traipse up and down the aisles of a brick and mortar store searching for the desired item. However, the convenience of online shopping is balanced out by the hidden costs.

If goods are purchased from a South African supplier, the purchaser may be charged courier or transport charges, but for the most part that extra charge is relatively small in the grand scheme of things and, if local, often waived if the purchase exceeds a given sum. Some people prefer to purchase their items from an overseas seller because the price of the item itself is cheaper. In this case, though, the purchaser will be in for transport costs and, potentially, customs duty and VAT.

There is nothing worse than receiving a notification from the courier company that one's eagerly awaited parcel has arrived only to be told that a payment must be made to SARS of duty and VAT (the amount of which may very well be higher than the cost of the item purchased).

As has been said by many wise people, "being forewarned is being forearmed". To avoid the dreaded "duty" call from the courier, it is suggested that, before making an overseas purchase, one should do a bit of research to try to establish what the applicable tariff code is. SARS' website includes a link to the tariff book which contains all the relevant tariff codes, and most importantly, the applicable rate of duty. Armed with this information, it will be possible to calculate how much duty will be payable when the parcel finally arrives.

"Something many people are not aware of is that VAT payable on import is not calculated in the same way as normal VAT, ie, VAT payable on import is not a straight 15 per cent of the purchase price."



Something many people are not aware of is that VAT payable on import is not calculated in the same way as normal VAT, ie, VAT payable on import is not a straight 15 per cent of the purchase price. When calculating the amount of VAT payable on imported goods, one uses the declared value of the parcel, adds 10 per cent to the value, and then adds the amount of duty payable. This gives one what is known as the added tax value or ATV. It is on this ATV that the VAT amount is calculated. For example, if a dress is imported and one pays R200.00 for it, and if the rate of duty on the dress is 45%, the ATV would be R200 + R20 + R90 = R310.00. The VAT amount payable to SARS would equate to R46.50, bringing the total amount payable to SARS to R136.50, and the actual cost of the dress to R336.50, excluding the courier charges. As can be seen, it is relatively easy for the cost of a parcel to escalate with these, often overlooked, taxes.

Another thing that people who buy items from overseas (known to SARS as "importers") should be wary of, is the fact that, in terms of the Customs and Excise Act, 1964, if one imports goods to the value of more than R150,000 per calendar year, whether imported in one or more consignments, one has to register with SARS as an importer. Failure to register with SARS as required could lead to hefty penalties, storage charges, and possibly even having one's goods seized.

SARS has an easy way of keeping track of the value of each individual's imports. When importing, one is required, by law, to reflect either one's identity number, tax number or passport number on the import bill of entry. This is why most foreign sites ask for one's identity number before one makes the first purchase.

Suddenly those online purchases from the overseas sites seem a little less appealing. As is often said, nothing in life is certain except for death and taxes, so be sure to do thorough research before purchasing anything online from an overseas store. That overseas purchase may not be so much cheaper than the local alternative after all.

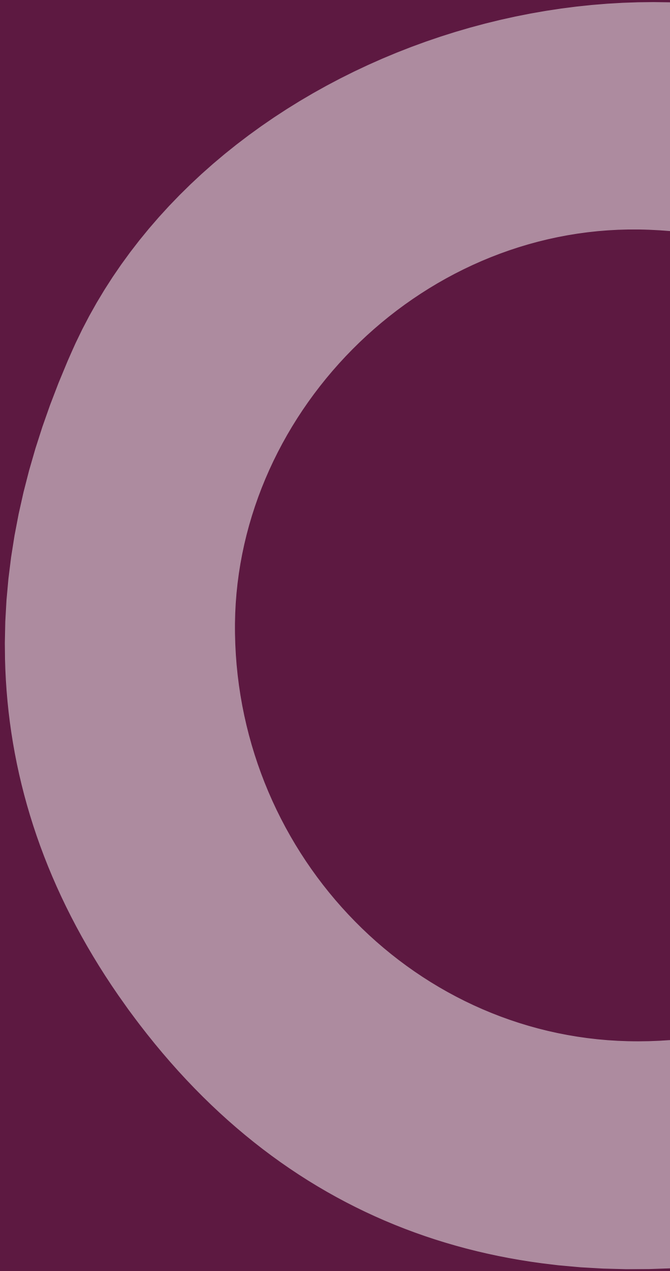
Taryn Hunkin

Shepstone and Wylie

Acts and Bills

- Customs and Excise Act 61 of 1964.

Tags: customs duty; tariff codes; courier charges; import bill of entry.



sait South African Institute of Taxation