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Official Journal for the South African Tax Professional

CAPITAL GAINS TAX
TIME OF DISPOSAL

GROSS INCOME
ASSETS COMMENCING TO BE HELD
AS TRADING STOCK

TAX ADMINISTRATION
RESCISSION OF TAX JUDGMENTS

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GAAR AND IMPERMISSIBLE TAX AVOIDANCE ARRANGEMENTS

Despite the crippling effects of the COVID-19 pandemic, the tide has turned and the South African Revenue Service (SARS) has collected R1 884.9 billion in 2021/2022, 25.1% more than the previous year. Commissioner Kieswetter submitted that the revenue collection came through the issuing of assessments and tax disputes, and SARS' recent successes in court are indications of their investigative prowess and that they are truly warming up to continuously deal with delinquencies.

WHAT ARE THE PROSPECTS OF SARS ATTACKING TAX AVOIDANCE ARRANGEMENTS?

There is currently a dearth of reported cases on the General Anti-Avoidance Rules (current GAAR) reflected in sections 80A to 80J and 80L of the Income Tax Act, 1962 (the Act), which apply to arrangements entered into on or after 2 November 2006.

In order to limit SARS' wiggle room in attacking arrangements, taxpayers entering into arrangements should –

- seek professional legal and tax assistance to structure the transaction and prepare the underlying documentation;
- ensure that the purpose of the various parties to the transaction is not to obtain the relevant benefit;
- properly understand the contents of the agreements;
- genuinely intend to enter into the arrangements supported by the agreements and related transaction documents; and
- ensure that the agreements and all correspondence between the parties and their founders and the transaction and legal advisors support the parties' intention or purpose for concluding the transactions.

In fact, the interpretation and application of the current GAAR are yet to be adjudicated by our courts. In our experience, these matters often do not see the light of day because of the enormous amounts involved (including penalties and interests) and because of tax court appeals being settled at the footsteps of the tax court. However, given the recent pronouncements by Commissioner Kieswetter regarding tax collections, it would not come as a surprise that SARS may shut its doors for settlement and rather seek judicial clarification on the current GAAR, provided that the particular case is appropriate for that purpose.

Therefore, if parties enter into transactions where, in the view of SARS, there may be a tax avoidance motive, this will likely lead to SARS invoking its wide, but not unfettered, information-gathering powers and may eventually result in adverse assessments and a tax dispute.

SARS will often assess and challenge a purported impermissible tax avoidance arrangement on two bases, namely the "substance over form" or "simulation" doctrine and, in the alternative, the current GAAR reflected in sections 80A to 80J and 80L of the Act. A taxpayer disputing a SARS' assessment should be mindful of the extent of the two aforesaid bases, but also understand the difference between them.

SIMULATION DOCTRINE VS THE CURRENT GAAR

The aim of the doctrine of simulation, being the general power of courts in all commercial contexts, is to ascertain what the true intention is that the parties have agreed to, and the court's powers are limited thereto. The current GAAR, on the other hand, applies arguably to genuinely intended transactions which meet the various requirements of an "impermissible avoidance arrangement", and SARS has far more incisive powers in this regard.

WHAT IS THE CURRENT POSITION WITH REGARD TO SIMULATION?

Sasol Oil Proprietary Limited v Commissioner for the South African Revenue Service, [2019], is the latest in a line of authorities that has served to settle the controversy which ensued following the judgment in *Commissioner for the South African Revenue Service v NWK Ltd,* [2011]. The position with regard to the simulation doctrine is now once again clear:

Firstly, the fact that a taxpayer has followed professional advice in minimising its potential exposure to a tax liability is not sinister. The courts will not interfere, provided that the transaction has a legitimate commercial purpose and that the minimising of the anticipated tax liability is not the *raison d'être* of the transaction concluded after receiving such advice.

Secondly, courts will interfere and categorise a transaction as a sham or simulation where the parties have dishonestly purported to perform in terms of the agreement between them, when in truth the only objective of such agreement was to disguise the true purpose, which could be the avoidance of a tax that would otherwise have been payable. In other words, the parties did not genuinely intend to bind themselves to the terms of the agreement.

The same can, however, not be said of the yet to be tested current GAAR.

Since its amendment in 2006, no cases have been brought before the courts to judicially clarify and test the efficacy of the current GAAR. Section 80A of the Act has four requirements for an arrangement to be characterised as an "impermissible tax avoidance arrangement":

- An "arrangement" is entered into or carried out;
- It results in a "tax benefit";
- Any one of the "tainted elements" is present; and
- Its sole or main purpose is to obtain a tax benefit.

Essential to the current GAAR are the "tax benefit" and "purpose" requirements.

THE "TAX BENEFIT" REQUIREMENT

Trollip JA said in *Hicklin v Secretary for Inland Revenue,* [1980], that "the ordinary meaning of avoiding liability for a tax . . . is to get out of the way of, escape or prevent an anticipated liability", which "means a liability for a tax that the taxpayer anticipates will or may fall on him in the future".

This was also described (in *ITC 1625* [1996] 59 SATC 383) as the so-called "but for" test, which was recently confirmed by the High Court in *Absa Bank Limited v Commissioner for the South African Revenue Service,* [2021]. SARS has been granted leave to appeal the *Absa* case directly to the Supreme Court of Appeal and the appeal should be heard in the latter part of 2022.

THE "PURPOSE" REQUIREMENT

Once SARS has proved that the arrangement resulted in a tax benefit, the onus shifts to the taxpayer in that section 80G(1) of the Act presumes that the arrangement was entered into or carried out for the sole or main purpose of obtaining a tax benefit, unless and until the taxpayer proves otherwise.

There is a well-established principle known as the "choice principle", which was introduced into South African law by *CIR v Conhage (Pty) Ltd,* [1999], and was also referred to by the Supreme Court of Appeal in the *Sasol Oil* case . This principle is well-entrenched in South Africa's constitutional democracy. The "choice principle" essentially provides that a taxpayer is entitled to structure a transaction in a manner which results in the least tax liability. If, for example, the same commercial result can be achieved in different ways, a taxpayer may enter into a transaction which does not attract tax or attracts the least amount of tax.

There is, however, a bone of contention between literati, taxpayers and SARS as to whether the purpose requirement warrants a subjective or objective inquiry. Some argue that the probabilities of the taxpayer's *ipse dixit* should be tested against the facts and circumstances, as was the case with the now repealed section 103(1) of the Act (in other words, the subjective inquiry). Others argue that the court should not focus on what the taxpayer says his, her or its intention was, but on whether it could be said that, regard being had to the relevant facts and circumstances, tax avoidance was the sole or main purpose of the arrangement (in other words, the objective inquiry).

In our experience, SARS favours the objective inquiry. This is so, despite the fact that SARS conceded in a document, published in 2006 and entitled *Tax Avoidance and Section 103 of the Income Tax Act, 1962 – Revised Proposals,* that it was never the intention to prevent a taxpayer's explanation of the reasons for an arrangement; the intention was, however, to ensure that the taxpayer's statement of intent be rigorously tested against the facts and circumstances. In other words, according to the *Revised Proposals,* the threshold test under the purpose requirement remained unchanged and reinforced existing precedents.

"There is currently a dearth of reported cases on the General Anti-Avoidance Rules (current GAAR) reflected in sections 80A to 80J and 80L of the Income Tax Act, 1962 (the Act), which apply to arrangements entered into on or after 2 November 2006."

> "Now that SARS is showing its teeth by eradicating transactions that lack commercial substance, do not attract tax, or attract the least amount of tax, taxpayers would be wise to consult with experienced tax practitioners before concluding or entering into any form of transaction."

TO REPORT OR NOT TO REPORT?

A further consideration is whether the arrangement entered into (or elements thereof) by a taxpayer constitutes a so-called "reportable arrangement", as set out in sections 34 to 39 of the Tax Administration Act, 2011 (the TAA), which statutorily oblige a "participant" to an arrangement to report the details of the arrangement to SARS.

What constitutes a "reportable arrangement" is extremely wide and includes arrangements listed by the Commissioner in a public notice as reportable, as well as arrangements in terms of which a person derives a tax/financial benefit, or if the arrangement has the same characteristics as (or substantially similar characteristics to) the "tainted elements" referred to in the current GAAR.

This, too, requires the careful consideration by taxpayers and the procurement of professional legal advice of experienced tax practitioners as to whether the arrangement is reportable or not, and if it is reportable, how one should report the arrangement. This is so especially in circumstances where "reportable arrangements" include characteristics of arrangements that may be subject to the current GAAR. The wording and contents of the reportable arrangement will undoubtedly come across the desk of the SARS official assessing the relevant taxpayer.

Now that SARS is showing its teeth by eradicating transactions that lack commercial substance, do not attract tax, or attract the least amount of tax, taxpayers would be wise to consult with experienced tax practitioners before concluding or entering into any form of transaction. This will ensure that arrangements are structured in the most tax-efficient manner and are given a stamp of approval so that the transactions have the best possible chance of surviving scrutiny by SARS.

As the saying goes, nothing is certain in this world except death and taxes. It should not, however, be death by taxes!

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Acts and Bills

- Income Tax Act 58 of 1962: Sections 80A–80J & 80L (more specifically sections 80A & 80G(1)); section 103(1) (now repealed);
- Tax Administration Act 28 of 2011: Sections 34–39.

Other documents

- *Tax Avoidance and Section 103 of the Income Tax Act, 1962 – Revised Proposals* (published by SARS in 2006).

Cases

- *Sasol Oil Proprietary Limited v Commissioner for the South African Revenue Service* [2019] 1 All SA 106 (SCA);
- *Commissioner for the South African Revenue Service v NWK Ltd* [2011] (2) SA 67 (SCA);
- *Hicklin v Secretary for Inland Revenue* [1980] (1) SA 481 (A);
- *ITC 1625* [1996] 59 SATC 383;
- *Absa Bank Limited v Commissioner for the South African Revenue Service* [2021] (3) SA 513 (GP) (11 March 2021);
- *CIR v Conhage (Pty) Ltd* [1999] (4) SA 1149 (SCA).

Tags: tax disputes; General Anti-Avoidance Rules (GAAR); doctrine of simulation; tax benefit; impermissible tax avoidance arrangement; reportable arrangement.

TIME OF DISPOSAL

COPYRIGHT CLAIM

Mr S concludes an agreement to sell fixed property (Property S) to Mr P on 20 January 2022, subject to Mr P concluding an unconditional agreement of sale to sell his own fixed property (Property P) by 20 February 2022. Mr P concludes an unconditional agreement for the sale of Property P on 2 February 2022. The Deeds Office registers the transfer of Property S on 20 May 2022.

> "Importantly, the time at which the transfer of a property is registered in the Deeds Office is of no relevance to the time of disposal and when capital gains tax should be payable."

At what point in time does Mr S trigger capital gains tax? The importance and detailed consideration of this question is at times overlooked – with potentially drastic implications for Mr S (or any other taxpayer realising a capital gain on the sale of property).

To take a step back – capital gains tax may be triggered in respect of the disposal of assets in the event that the proceeds realised by the seller exceed the base cost of the asset in the hands of the seller. The Eighth Schedule to the Income Tax Act, 1962, contains rules which stipulate the time of a disposal for capital gains tax purposes – this is therefore the time at which the disposal for capital gains tax is triggered.

In the context of the example above, the time of disposal of an asset is the date upon which an agreement for the sale of the asset is concluded. However, if the agreement is subject to a suspensive condition, the time of disposal will be delayed until such time as the suspensive condition is met. The relevant considerations in determining the time of disposal of the asset (and accordingly the time at which capital gains tax is triggered) include:

(1) At what point in time was an agreement concluded for the sale of an asset?

(2) Is such agreement subject to a suspensive condition?

(3) If (2) above is answered yes, the time of disposal will be the time when the suspensive condition is met. If (2) above is answered no, the time when the agreement is concluded will constitute the time of disposal.

Importantly, the time at which the transfer of a property is registered in the Deeds Office is of no relevance to the time of disposal and when capital gains tax should be payable. Should, for example, Mr S have incorrectly regarded the time of disposal of the sale of Property S as 20 May 2022, he would have determined his capital gains tax liability in respect of the transaction for purposes of his 2023 year of assessment.

As the correct time of disposal in relation to the above example is 2 February 2022 (ie, the date upon which the agreement for the sale of Property S became unconditional), the capital gains tax liability is triggered in Mr S's 2022 year of assessment. As a result of Mr S only disclosing his capital gains tax liability for purposes of his 2023 year of assessment, his income for the 2022 year of assessment would be understated – and therefore subject to potentially significant underestimation penalties (for the purposes of provisional tax) and understatement penalties on assessment.

On the basis of the above, it is clear that the time of disposal rules should be carefully considered when an asset giving rise to a capital gain is disposed of.

Should there be any uncertainty in this regard it is best to seek professional advice to confirm the time of disposal.

Alexa Muller

PKF Cape Town

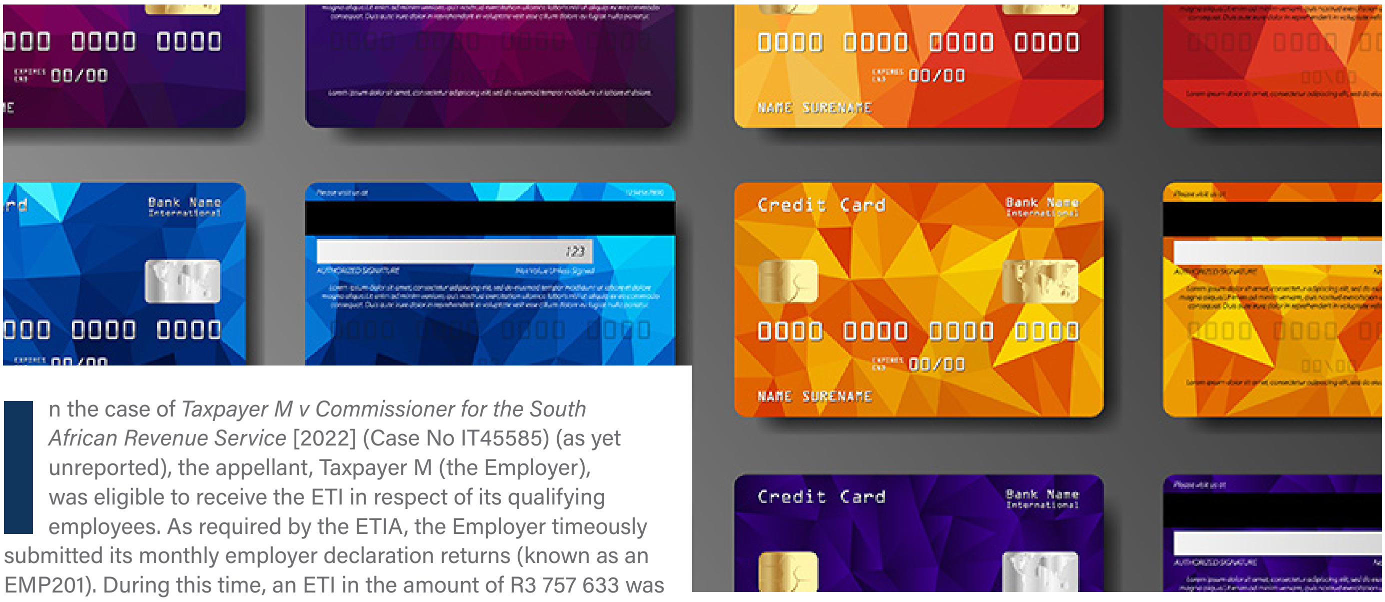
Acts and Bills

- Income Tax Act 58 of 1962: Eighth Schedule.

Tags: fixed property; time of disposal.

RECOVERY OF UNUSED CREDITS

The Employment Tax Incentive Act, 2013 (the ETIA), creates a motivation, known as the employment tax incentive (the ETI), whereby employees' tax may be reduced in terms of the formulae provided in the ETIA for the benefit of the employer. In its preamble, the ETIA explains that this measure aims to support employment growth in the face of South Africa's concerning rate of unemployment and for Government to share the costs of expanding job opportunities with the private sector.



In the case of *Taxpayer M v Commissioner for the South African Revenue Service* [2022] (Case No IT45585) (as yet unreported), the appellant, Taxpayer M (the Employer), was eligible to receive the ETI in respect of its qualifying employees. As required by the ETIA, the Employer timeously submitted its monthly employer declaration returns (known as an EMP201). During this time, an ETI in the amount of R3 757 633 was available to the Employer. However, in the employer reconciliation declaration (known as an EMP501), the Employer only claimed R2 344 503 of its available ETI. This was claimed as a reduction of its Pay-As-You-Earn (PAYE) debt to the South African Revenue Service (SARS).

In terms of paragraph 14(3)*(a)* of the Fourth Schedule to the Income Tax Act, 1962 (the Act), the EMP501 constitutes a "self-assessment". Approximately seven weeks after submitting the EMP501, the Employer objected to its self-assessment and submitted a revised EMP501 in order to correct the determination of its tax liability (or refund). In this revised EMP501, the Employer then included the amount of R1 413 130 (the understated amount) which it had underclaimed in its initial EMP501. It asked SARS to refund this amount.

"In the memo, National Treasury explains that it proposes certain refinements to the application of the ETI programme, including a limit on back-dated claims."

SECTIONS 9(4) AND 10(3)

SARS disallowed the objection, arguing that on a proper interpretation of sections 9(4) and 10(3) of ETIA, the Employer is not entitled to recover the understated amount.

Essentially, section 9(4) states that any amount of an ETI available to an employer that has not been used, will be deemed to be nil from the first day of the month following the end of the period for which the employer was required to submit a return, and cannot be rolled over to the next month. Employers are required to submit PAYE returns (EMP201s) on a monthly basis as PAYE is payable on a monthly basis. The monthly PAYE periods for employers are grouped into six-month periods; any unclaimed amounts within that monthly period can be rolled over to be claimed in the next month. However, this provision means that on the first day after the relevant six-month period has ended, the amount of an ETI available for rollover is deemed to be nil.

Section 10(3) similarly states than any excess amount claimed by an employer at the end of the relevant six-month period is nil in the month immediately following that period.

SARS contended that sections 9(4) and 10(3) create a time bar: no amounts may be claimed once the prescribed periods have expired. As the court noted, this argument amounts to a "use it or lose it policy". SARS was of the view that any unclaimed amounts would be forfeited in this case, which is consistent with the *SARS Guide for Employers in respect of Employment Tax Incentive.*

The Employer countered this argument by relying on fundamental statutory interpretation principles – emphasising that when reading these provisions in context and holistically as a whole act, it does not result in a forfeiture of its right to claim the understated amount.

IMPORTANT RIDERS

As a point of departure, the learned judge relied on the seminal Constitutional Court case of *Cool Ideas 1186 CC v Hubbard and Another,* [2014]. In this case the Constitutional Court elucidated three "important riders" to the general principle that legislation should be given its ordinary grammatical meaning (unless doing so results in an absurdity):

1. statutory provisions should always be interpreted purposively;
2. the relevant statutory provision must be properly contextualised; and
3. all statutes must be construed consistently with the Constitution (ie, to preserve their constitutional validity).

The court then considered National Treasury's Explanatory Memorandum on the Taxation Laws Amendment Bill 17B of 2016 (the memo), which allows the ETI programme to be extended beyond its initial sunset date of 31 December 2016 (it has subsequently been extended to 28 February 2029).

In the memo, National Treasury explains that it proposes certain refinements to the application of the ETI programme, including a limit on back-dated claims. Essentially, the memo indicates that after the date for each six-monthly reconciliation, no further claims for that period are allowed. Rather, at that time any excess becomes available as a refund. The court noted that the memo does not contemplate the forfeiture of the benefit. In fact, the court found that except for section 8 of the ETIA (which does not apply in the current circumstances) there is no express forfeiture provision in the ETIA.

WHEN THE DEEMING PROVISIONS COME INTO PLAY

After considering a slew of case law, the learned judge agreed with SARS that the deeming provisions in both sections 9(4) and 10(3) are exhaustive. The court held that on a purposive and contextual reading, section 9(4) aims to prevent the rolling over of any excess amount at the end of the relevant six-month period. But, this does not mean that the excess amount cannot be claimed as of that date. While the new period starts with a clean slate, the intention is not for an employer to lose the benefit of the entire unclaimed amount. Yes, an employer is prevented from rolling the excess forward, but it is not barred from claiming it as a payment from SARS. By reading this in context, the court held that the deeming provisions do not intend for the benefit to be lost to an employer; only from rolling the benefit forward and receiving that benefit twice.

The court agreed with the Employer that there is no link between these deeming provisions (ie, sections 9(4) and 10(3)) and the date on which the Employer was obliged to render the EMP501. The deeming provisions only come into play on the date after the relevant six-month period ended.

The court concluded that this interpretation is consistent with the stated purpose of the ETIA: to provide employers with a benefit to encourage job creation. Furthermore, the court confirmed that forfeiture of a benefit is an important consideration with serious consequences which the Legislature would have expressly addressed if that was the intention.

The court further held that if SARS' interpretation were to be followed, it would create uncertainty and taxpayers would be in a position where they would be unsure of whether they could rely on the ETI.

The court rejected SARS' contention that the Employer had forfeited the unclaimed amounts. Rather, the court ordered that the Employer is entitled to claim and receive payment of the understated amount.

The decision reached by the court is commendable. Post the COVID-19 pandemic, the ETI has been embraced more enthusiastically than before and it is a comfort to employers that unclaimed ETI amounts may be claimed as a refund. It is also a useful reminder that tax legislation is subject to the same principles of interpretation as any other legislation.

Taigrine Jones & Howmera Parak

Cliffe Dekker Hofmeyr

Acts and Bills

- Income Tax Act 58 of 1962: Fourth Schedule: Paragraph 14(3)*(a)*;
- Employment Tax Incentive Act 26 of 2013: Sections 8, 9(4) & 10(3);
- Taxation Laws Amendment Bill 17B of 2016.

Other documents

- Explanatory Memorandum on the Taxation Laws Amendment Bill 17B of 2016;
- EMP201s: Monthly employer declaration returns;
- *SARS Guide for Employers in respect of Employment Tax Incentive.*

Cases

- *Taxpayer M v Commissioner for the South African Revenue Service* [2022] (Case No IT45585) (as yet unreported);
- *Cool Ideas 1186 CC v Hubbard and Another* [2014] (4) SA 474 (CC).

Tags: employment tax incentive (ETI); employer declaration returns (EMP201); back-dated claims.

ASSETS COMMENCING TO BE HELD AS TRADING STOCK

On 22 February 2022, the South African Revenue Service (SARS) issued a draft Interpretation Note (the Draft IN – "*Recoupment of amounts deducted or set off when an asset commences to be held as trading stock which was previously not so held*") for public comment; the Draft IN appears to have been published to provide clarity on the interplay between the recoupment provisions under section 8(4)*(a)* of the Income Tax Act, 1962 (the Act), and the newly introduced deemed-disposal rule under section 8(4)*(k)*(iv) of the Act.

BACKGROUND

Section 8(4)*(a)* contains recoupment provisions that aim to include in a taxpayer's income all amounts claimed as a deduction or allowance under certain sections of the Act – whether in the previous or current years of assessment – which have been recovered or recouped in the current year of assessment. Therefore, the effect of section 8(4)*(a)* is, subject to certain exemptions and exclusions under the Act, to include in income, amounts which have either been recovered or recouped by the taxpayer on the disposal of an asset or where an expense is recovered. However, section 8(4)*(a)* does not create a deemed disposal in circumstances where a taxpayer commences holding an asset as trading stock.

Prior to 2020, deductions and allowances previously granted on an allowance asset which commenced to be held as trading stock would only be required to be recouped upon the disposal of an asset. Based on this, in terms of the Draft IN, the recoupment of the allowances or deductions claimed were either deferred to the time of the disposal of the asset or never triggered.

With effect from 15 January 2020, section 8(4)*(k)*(iv) was introduced to create a deemed disposal where an allowance asset commences to be held as trading stock. Since this provision does not regulate the recoupment of amounts claimed as allowances or deductions, SARS has, from a reading of the Draft IN, contended that section 8(4)*(a)* must be considered to determine whether any amounts can be recouped and included in the taxpayer's income. Given that there is no clarity on the interplay between these provisions, the Draft IN appears to provide guidance on the interpretation and application of these provisions.

"Although the Draft IN is merely SARS' guidance on the interpretation and application of these provisions and given that taxpayers often change their intention in use and purpose of assets, it is helpful to understand how SARS will likely interpret and apply the provisions in a relevant scenario."

SARS states that when an allowance asset commences being held as trading stock, both capital gains tax (CGT) and normal tax implications arise:

- From a CGT perspective, the disposal will be deemed to occur for an amount equal to the market value of the asset, immediately before the day the deemed disposal is triggered under the Eighth Schedule to the Act;

- the taxpayer will be deemed to have disposed of the asset for an amount equal to the market value of the asset at the time that the asset commences being held as trading stock, and on the same day thereafter the taxpayer will be deemed to have immediately reacquired the asset at an expenditure equal to its market value; and

- a recoupment of the amounts previously granted as a deduction will be triggered under the provisions of section 8(4)*(a)* and *(k)*(iv).

Although it appears as though there is a double tax because of the deemed disposal and recoupment under the income tax provisions, as well as the deemed disposal under the Eighth Schedule, SARS appears to demonstrate by way of an example that where a person purchases an allowance asset and later holds that asset as trading stock (assuming that the asset has appreciated in value), then –

- the in-principle taxable amounts on the disposal of the asset will comprise a recoupment amount and a capital gain; and

- the amount recouped would be applied to reduce the capital gain.

In this way, the tax implications arising for the taxpayer are less harsh considering that the provisions work to eliminate the incidence of double taxation.

Although the Draft IN is merely SARS' guidance on the interpretation and application of these provisions and given that taxpayers often change their intention in use and purpose of assets, it is helpful to understand how SARS will likely interpret and apply the provisions in a relevant scenario. Comments on the content of the Draft IN were due on 3 June 2022.

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Acts and Bills

- Income Tax Act 58 of 1962: Section 8(4)*(a)* and *(k)*(iv); Eighth Schedule.

Other documents

- Draft interpretation note (*"Recoupment of amounts deducted or set off when an asset commences to be held as trading stock which was previously not so held"* – published on 22 February 2022).

Tags: exemptions and exclusions; trading stock.

EXCHANGE OF INFORMATION AND AIRBNB

It came to light in March 2022 that the Irish Tax Authority (the ITA) had reached out to Airbnb Ireland UC (Airbnb), for the disclosure of specific information, as pertains to income generated from the online accommodation booking platform, across both current and historical transactions.

This arose after the South African Revenue Service (SARS) issued an exchange of information request to the ITA pertaining to South African resident hosts not having their Airbnb financial disclosures in order. The ITA immediately took action, engaging Airbnb for the transactional lists canvassing the 2018/19 and 2019/20 tax years.

NO PANIC ROOM FOR NON-COMPLIANT SOUTH AFRICAN TAXPAYERS

Airbnb has proactively laid the foundation for their co-operation with the issuance of a notice to its South African host base stating that "your earnings on Airbnb are subject to South African tax regulations". This may come across as a proactive risk mitigation measure for the company; however, this is yet to be ascertained.

Airbnb serves as the data controller for the personal data of all hosts in South Africa and has been formally requested by the ITA to hand over this information by virtue of their legal obligation to comply. It is further noted that prior to this information sharing, the ITA will communicate same to the affected South African hosts.

AUTOMATIC EXCHANGE OF INFORMATION AIMED TO ERADICATE NON-COMPLIANCE

SARS' approach should not come as a surprise; a review of South Africa's domestic legal framework was proposed in the 2022 Budget Speech with the objective of facilitating joint audits. This proposal pertained particularly to the Tax Administration Act, 2011 (the TAA), with the amendment sought being that provision be made for the comprehensive utilisation of joint audits with foreign tax authorities.

The knock-on effect of this, as can now be clearly seen in the instance of Airbnb, is the promotion of the automatic exchange of information and imputing a legal obligation on the respective revenue authorities by virtue of the provisions contained in the *Convention between the Member States of the Council of Europe and the Member Countries of the OECD on Mutual Administrative Assistance in Tax Matters* (1988).

What is noteworthy, simply based on Airbnb being the first of many targeted entities for the automatic exchange of information requests, is that multi-national enterprises have historically opted for a jurisdiction such as Ireland, Mauritius, or even the Virgin Islands to be head-quartered in light of favourable tax treatment. This jurisdiction choice included a number of South African entities, thinking they were safe. This was before Commissioner Kieswetter began pushing the agenda of joint audits to the point where they are now a reality, leaving nowhere to hide.

THE LUCK OF THE IRISH HAS RUN OUT

As evidenced in recent months, and in light of the on-going COVID-19 pandemic, our firm has seen SARS upping its collection power to eradicate any semblance of non-compliance, be it domestic, or offshore. This is even true for historic non-compliance, where taxpayers have hoped the pandemic would be their saving grace, and an Airbnb, being some helpful "other income".

How this has played out, practically, is that the revenue authority has risen to the occasion with aggressive collection steps being implemented against historically non-compliant taxpayers, including salary garnishees, sheriff callouts and even taking money directly from business and/or personal bank accounts.

This has now extended into the realm of international tax agreements and frameworks, empowering SARS further to reach beyond the shores of South Africa, and into international accommodation booking platforms, as an example to non-compliant South African taxpayers worldwide.

Now is not the time to take risks. SARS' approach clearly shows we are dealing with a competent revenue authority. Why risk it when compliance is evidently the preferred way forward? SARS is willing and ready to assist all taxpayers, as advised by Commissioner Kieswetter, stating that SARS will do its best to "make it easy and seamless for taxpayers when they transact with the organisation".

A LEVEL OF SOLUTION-BASED THINKING

For South African taxpayers wishing to rectify historical non-compliance by means of a voluntary disclosure of information, as may be the case for South African Airbnb hosts, or ensure that their current compliance record remains unblemished, there are various solutions available from a legal standpoint.

"How this has played out, practically, is that the revenue authority has risen to the occasion with aggressive collection steps being implemented against historically non-compliant taxpayers, including salary garnishees, sheriff callouts and even taking money directly from business and/or personal bank accounts."

The most proactive way to effect this disclosure is by means of a voluntary disclosure programme (VDP) application. The VDP application allows you to legally declare any undeclared income, but not be subject to the penalties which would generally stem from such a non-disclosure.

This is the first prize from a compliance perspective and should be considered as a priority for all taxpayers who have not yet received any formal correspondence from SARS, pin-pointing a specific liability owed.

There also remains the option of a Section 92 (additional assessment) or, alternatively Section 93 (reduced assessment), request, as per the TAA.

Should the revenue authority discover past non-disclosure prior to the VDP application being submitted, there is still one possible route, by means of a Compromise of Tax Debt application (the Compromise).

The Compromise is aimed at aiding taxpayers, both individual and corporate, to reduce their tax liability by means of a Compromise Agreement (the Agreement), which is entered into with SARS, on the basis of affordability, and benefit to the fiscus.

The result of entering into such an Agreement is having the tax liability greatly reduced, to an amount which is affordable to the taxpayer, granting a much-needed reprieve and aiding the taxpayer on the road to recovery.

Once the agreement is duly executed, and payment is made, as proposed by the taxpayer and accepted by SARS' Compromise Committee, the balance of the liability due to SARS is written off by the revenue authority.

THE BEST STRATEGY TO REMEDYING NON-COMPLIANCE

In order to protect yourself from a wall of penalties and interest, even possible jail-time, it remains the best strategy that you always ensure compliance.

Where you find yourself on the wrong side of SARS, there is a first mover advantage in seeking the appropriate tax advice, ensuring that the necessary steps are taken to protect both yourself and your family from paying for your crimes of non-compliance. However, where things do go wrong, SARS must be engaged legally, and we generally find them most agreeable where a correct tax strategy is followed.

As a rule of thumb, any and all correspondence received from SARS should be immediately addressed by a qualified tax specialist or tax attorney. This will not only serve to safeguard the taxpayer against SARS implementing collection measures, but also ensure that the taxpayer is correctly advised on the most appropriate solution to ensure that their Airbnb financial disclosures are in order.

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Acts and Bills

- Tax Administration Act 28 of 2011: Sections 92 & 93.

Other documents

- *Convention between the Member States of the Council of Europe and the Member Countries of the OECD on Mutual Administrative Assistance in Tax Matters* (25 January 1988, as amended);
- Section 92 (additional assessment) request;
- Section 93 (reduced assessment) request;
- Compromise of Tax Debt application.

Tags: international tax agreements; voluntary disclosure programme (VDP); additional assessment; reduced assessment.

RETROSPECTIVE APPROVAL

In April 2022, many South Africans were affected by the extreme weather and flooding around the country, particularly in KwaZulu-Natal. While government intervention is required to alleviate the harm and impact on affected South Africans, effective alleviation of their plight will require collaboration between Government and civil society, such as charitable organisations. For civil society organisations, including charities, to assist most efficiently, it is crucial that our tax laws relieve them of the tax burden that they would otherwise incur, which in South Africa is done by way of the tax dispensation applicable to public benefit organisations (PBOs).

In *XY Mining v The Commissioner for the South African Revenue Service,* [2021] (Case No IT25390) (as yet unreported), the tax court summarised this as follows:

> “a PBO by designation exists to relieve the state of certain burdens. Accordingly, only those organisations that qualify as PBOs should be released from [the] tax burden. In this regard the income tax legislation is deliberate to grant PBOs retrospective and or proactive PBO status; thus resulting to [sic] tax exemption.”

In this article, we focus on the issue of retrospective approval that the court had to consider. We refer to the respondent as either “Commissioner” or “SARS”.

FACTS

In the *XY Mining* case the taxpayer (XY) applied in September 2018 for approval as a PBO retrospectively from 1 February 2016, as provided for under section 30(3B) of the Income Tax Act, 1962 (the Act). The South African Revenue Service (SARS) declined to grant retrospective approval to XY from 1 February 2016 for the following reasons:

- XY did not conduct any public benefit activities (PBAs – defined in section 30(1)) since its establishment and accordingly did not qualify for tax exemption status prior to 26 June 2018.
- XY’s trust deed did not comply with all the requirements set out in section 30 of the Act.
- XY was not compliant as its compliance history showed the 2017 to 2019 income tax returns were outstanding as at 1 March 2020.

"The court’s judgment is encouraging as it upholds the presumption that legislation can generally not be applied retrospectively, especially where it would have adversely affected a PBO carrying on important public benefit activities."

The matter was considered pursuant to the court granting an order for separation of issues in terms of rule 33(4) of the Uniform Rules of Court. In deciding the matter, the court thus dealt with the question of law and the interpretation of section 30(3B) separately from the factual considerations.

JUDGMENT

The relevant provisions

Firstly, the court considered the wording of section 30(3B) as it stood at the time that XY's application was brought, which stated the following:

> "Where an organisation applies for approval, the Commissioner may approve that organisation for the purposes of this section with retrospective effect, to the extent that the Commissioner is satisfied that that organisation during the period prior to its application complied with the requirements of a 'public benefit organisation' as defined in subsection (1)."

The court also referred to section 30(1), where a PBO is defined, amongst other things, as

"any organisation –

(a) which is a non-profit company … or a trust … that has been incorporated, formed or established in the Republic. . .

(b) of which the sole or principal object is carrying on one or more public benefit activities, where –

(i) all such activities are carried on in a non-profit manner and with an altruistic or philanthropic intent; [and]

(ii) no such activity is intended to directly or indirectly promote the economic self-interest of any fiduciary or employee of the organisation, otherwise than by way of reasonable remuneration payable to that fiduciary or employee ..."

The definition also requires that the PBAs are carried on by the PBO for the benefit of, or are widely accessible to, the general public at large, including any sector thereof (other than small and exclusive groups).

The court's interpretation of the relevant provisions

With reference to case law affirming that legislative interpretation requires one to consider the text of the legislation as a whole, the court held that the wording of section 30(3B) is unambiguous and plain. According to the court, the key issue that SARS had to consider in granting the request for retrospective approval was whether XY complied with the PBO requirements in section 30(1), and "nothing less and nothing more".

The court considered the wording of the Explanatory Memorandum on the Taxation Laws Amendment Bill, 2009 (the memo), outlining the rationale for the inclusion of section 30(3B) in the Act, which states, amongst other things, that organisations that do not apply promptly for PBO approval should not be kept from "subsequently seeking relief on a going forward basis, because of concerns about the potential tax liability from pre-existing activities". The memo also notes that in exercising the discretion provided for in section 30(3B), the intention is that SARS consider "whether the . . . PBO . . . was substantially within its given status in terms of existing law".

Considering section 30(3B) and the memo, the court rejected SARS' argument that XY's compliance history and its trust deed's compliance with section 30(1) could be taken into account when considering the application for retrospective approval. Notably, it stated that:

> "[I]t is not open for the Commissioner to write its own desired sections within the setting of section 30(3B). The Commissioner's wide discretion cannot be translated to the Commissioner reading in sections or the law or what it thinks the law could have said."

The court held that the subsequent amendment to section 30(3B) (after XY applied for retrospective approval), which introduced a compliance history requirement for retrospective approval to be granted, only came into effect on 15 January 2020, long after XY's application for PBO approval had been brought. As XY's application was brought before this date, SARS could not apply the amended section 30(3B) retrospectively.

The court concluded that XY's application on the point of law succeeded and made no order as to costs.

COMMENT

The court's judgment is encouraging as it upholds the presumption that legislation can generally not be applied retrospectively, especially where it would have adversely affected a PBO carrying on important public benefit activities. However, in light of the amendment to section 30(3B) in 2020, organisations applying for retrospective approval should note that the compliance history of the organisation will likely and can be considered by SARS for applications submitted after the amendment came into effect. The compliance history of the organisation is only relevant where an organisation seeks retrospective approval as a PBO. In other words, it is possible that an organisation applying for prospective and retrospective approval as a PBO, is approved prospectively (from a certain date going forward), but not retrospectively.

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Acts and Bills

- Income Tax Act 58 of 1962: Section 30 (more specifically subsections (1) (definitions of "public benefit organisation" and "public benefit activities") & (3B) (wording as at September 2018)).

Other documents

- Uniform Rules of Court: Rule 33(4).

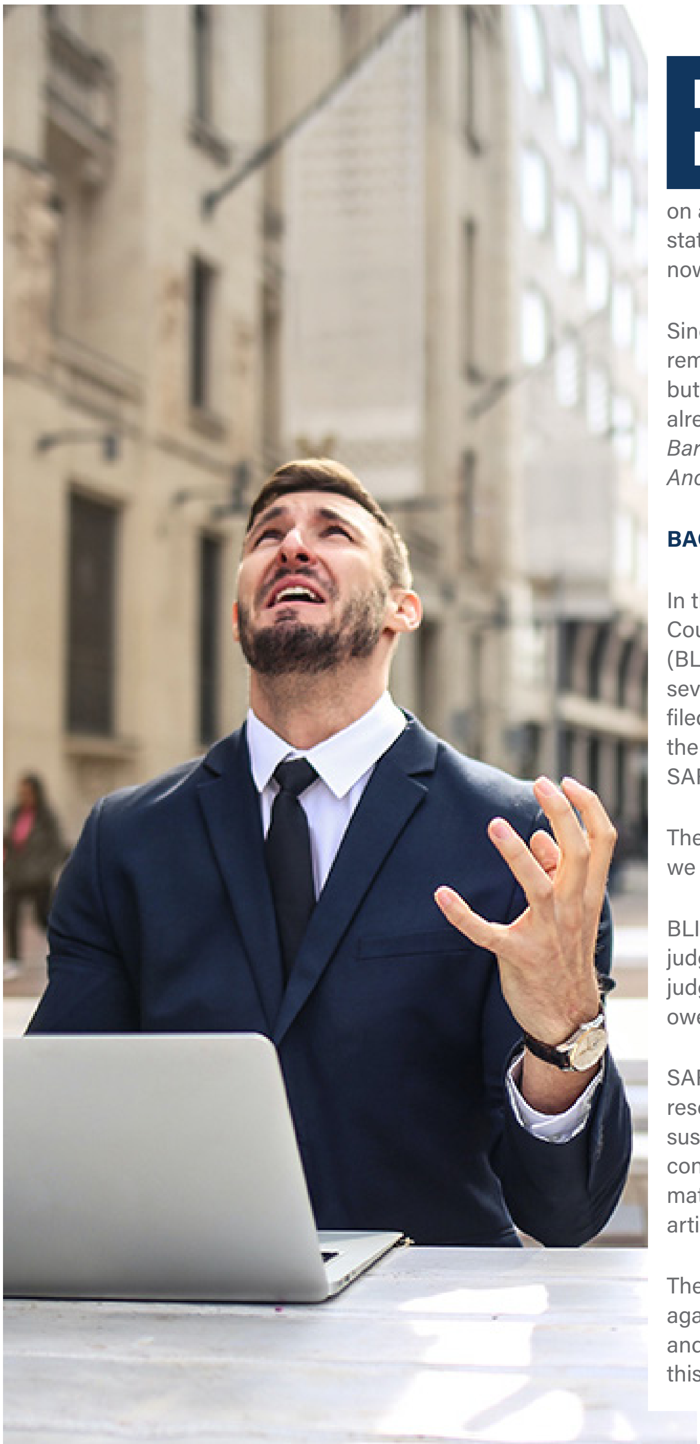
Cases

- *XY Mining v The Commissioner for the South African Revenue Service* [2021] (Case No IT25390) (as yet unreported).

Tags: public benefit organisations (PBOs); public benefit activities (PBAs); non-profit company.

RESCISSION OF TAX JUDGMENTS

A revenue authority must be given "teeth" to execute its mandate. One of these "teeth" is found in sections 172 to 174 of the Tax Administration Act, 2011 (the TAA).



Essentially, in terms of these provisions, if a taxpayer owes SARS a tax debt, SARS may file a certified statement with a competent court. Once endorsed, this statement is then treated as a civil judgment against the taxpayer. Notably, even if the taxpayer has objected to the debt or has taken it on appeal, SARS may still, in certain circumstances, proceed to file the statement. This is supported by section 164(1), better known as the "pay now, argue later" rule (another "tooth" of the taxman).

Since this certified statement is effectively a civil judgment, what remedy would a taxpayer have if, for example, SARS files a statement but the debt reflected in the statement did not consider amounts already paid to SARS to reduce the debt? This happened in the case of *Barnard Labuschagne Incorporated v South African Revenue Service and Another,* [2022], which is discussed in this article.

BACKGROUND

In this judgment, delivered by a unanimous bench of the Constitutional Court (the ConCourt), the applicant, Barnard Labuschagne Incorporated (BLI), owed SARS outstanding tax money. Accordingly, BLI made several payments to SARS. Nevertheless, on 15 December 2017 SARS filed a certified statement in terms of section 172(1) of the TAA with the Registrar of the High Court in Cape Town, recording that BLI owed SARS R804 747.

The ConCourt refers to the certified statement as a "tax judgment" and we accordingly follow this nomenclature throughout this article.

BLI then brought an application in the High Court to rescind the tax judgment (ie, to revoke it). BLI based its application on the fact that the judgment was wrong since SARS failed to reduce the initial amount owed considering BLI's payments.

SARS' main opposition was that a tax judgment is not capable of rescission. BLI responded by contending that if a tax judgment is not susceptible of rescission, then sections 172 and 174 of the TAA are constitutionally invalid. To avoid prolixity and to retain focus on the matter of rescission, the constitutional challenge is not discussed in this article.

The High Court agreed with SARS and held that the tax judgment against BLI was not susceptible of rescission. Thereafter, the High Court and the Supreme Court of Appeal refused to grant BLI leave to appeal; this resulted in BLI turning to the ConCourt.

CONSTITUTIONAL COURT'S FINDINGS

As a point of departure, the ConCourt considered the historical development of certain tax statutes as precursors to the current form of the TAA. Once the ConCourt was satisfied that the TAA was contextualised, it turned to notable cases that dealt with rescission of tax judgments.

The ConCourt considered, amongst others, the following cases:

1. *Kruger v Commissioner for Inland Revenue,* [1966] *(Kruger I).* In this case the High Court in Cape Town heard an appeal against a decision of a magistrates' court which refused to rescind a tax judgment. The High Court held that a tax judgment was susceptible of rescission in terms of section 36*(a)* of the Magistrates' Courts Act, 1944.

2. The same parties in *Kruger I* later litigated in the Appellate Division (as it was then) in *Kruger v Sekretaris van Binnelandse Inkomste,* [1973] *(Kruger II).* In this case, the taxpayer sued the revenue authorities for recovery of money he paid "under duress" pursuant to the tax judgment in *Kruger I*. In its judgment, the Appellate Division emphasised its view that tax judgments were rescindable. The court cited, as examples, certain grounds which may give rise to a rescission application (including incorrect computation of tax, the date from which interest runs, and the lawfulness of the levying of tax).

3. In 2000, the Constitutional Court in *Metcash Trading Ltd v Commissioner, South African Revenue Service, and Another,* [2000] *(Metcash),* unanimously confirmed, in line with the decisions in the *Kruger* judgments, that –

   3.1 A tax judgment was, in principle, capable of rescission; and

   3.2 despite the "conclusive evidence" provisions of the Income Tax Act, 1962 (now contained in the TAA), that the correctness of any assessment on which such certified statement is based, cannot be questioned, there are numerous defences available in rescission proceedings against tax judgments.

The ConCourt also considered the cases relied upon by SARS in its defence. Whilst the ConCourt found that generally these cases did not deal with the rescindibility of tax judgments, SARS relied upon an unreported 2015 case, *SARS v Van Wyk* (Case No A145/2014), where the High Court held that a magistrate's court was not entitled to hear a rescission application in respect of a tax judgment. The High Court reached a similar decision again in the 2021 judgment of *Hamid v SARS* (Case No 3280/2017) (in terms of the Customs and Excise Act 91 of 1964).

The ConCourt criticised the fact that these recent High Court decisions did not apply the decisions in *Kruger II* and *Metcash,* which bound it in terms of the rules of precedent. Essentially, a court is required, by the rules of precedent, to follow a binding statement in an earlier judgment of the (higher) court unless satisfied that the earlier statement was clearly wrong.

Turning to the High Court bench that heard BLI's initial application, the ConCourt found that the High Court was bound by, amongst others, *Kruger II* and *Metcash*. Furthermore, the High Court's view that a tax judgment was not final is irrelevant – this was apparent from the various cases. The ConCourt held that even though the TAA empowers SARS to amend or withdraw a tax judgment, this does not materially change its legal character. The ConCourt noted that the court with which the tax judgment is filed, on the other hand, has no power to treat it as an interim order, and thus availability of rescission is befitting.

The ConCourt found it unacceptable that the High Court did not discuss the relevant cases, despite the parties bringing them to the court's attention. The ConCourt further declared that, "observance of the rules of precedent is not a display of politeness to courts of higher authority; it is a component of the rule of law, which is a founding value of the Constitution ".

The appeal was upheld with BLI's application for rescission referred back to the High Court to be heard before a different judge to determine the merits of the application.

CONCLUSION

This case is important for two principal reasons:

- The Constitutional Court has again confirmed – this time in light of the TAA – that a tax judgment (ie, a section 172 certified statement) can be rescinded by a competent court of law; and
- Our courts must give effect to precedent. They are not entitled to disregard superior court judgments unless the previous statement was clearly wrong.

It is ironic that SARS has chosen to oppose this case, since on its own version in the *SARS Dispute Resolution Guide* (paragraph 11.5.7) published at the time that the TAA was created, SARS states:

> "If the rules do not provide for a procedure in the tax court, then the most appropriate rule under the Rules of the High Court made in accordance with the Rules Board for Courts of Law Act and to the extent consistent with the [TAA] and the rules, may be utilised by a party or the tax court."

This would allow a taxpayer to apply for rescission of a tax judgment in any event.

We welcome the ConCourt's considered and detailed judgment. It provides certainty to taxpayers; knowing that in cases where the judgment can be defended outside the "conclusive evidence" provisions, a taxpayer may bring an application for rescission of a tax judgment.

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Acts and Bills

- Tax Administration Act 28 of 2011: Sections 164(1) & 172–174 (specifically section 172(1));
- Customs and Excise Act 91 of 1964;
- Magistrates' Courts Act 32 of 1944: Section 36*(a)*;
- Rules Board for Courts of Law Act 107 of 1985.

Other documents

- *SARS Dispute Resolution Guide* (paragraph 11.5.7) (published at the time that the TAA was created).

Cases

- *Barnard Labuschagne Incorporated v South African Revenue Service and Another* [2022] ZACC 8; 2022 JDR 0412 (CC);
- *Kruger v Commissioner for Inland Revenue* [1966] (1) SA 457 (C);
- *Kruger v Sekretaris van Binnelandse Inkomste* [1973] (1) SA 394 (A);
- *Metcash Trading Ltd v Commissioner, South African Revenue Service, and Another* [2001] (1) SA 1109 (CC); [2000] ZACC 21;
- *SARS v Van Wyk* [2015] (Case No A145/2014) (unreported);
- *Hamid v SARS* (Case No 3280/2017).

Tags: susceptible of rescission; rescindibility of tax judgments.

CUSTOMS DUTY AND VAT IMPLICATIONS AFTER A DISASTER

The April 2022 floods wreaked havoc in KwaZulu-Natal causing serious damage to infrastructure, water, electricity supply and the knock-on effect of business interruption. From a Customs perspective, there has been damage to container terminals, depots, and other storage facilities which are custom control areas. The damage caused within these facilities, including the containers and goods stored therein, will have serious financial consequences, not only for the owners of the goods, but also for the management of these facilities, shipping lines and other parties liable in terms of section 44 of the Customs and Excise Act, 1964 (the C&E Act).

It is important to remember that where there has been a loss or damage to goods stored in a Customs licensed facility, there is a reporting obligation to SARS to advise them of the loss or damage to goods held in bond, ie, before payment of import duty or excise duty and VAT.

"Remember that a rebate is a special concession and it requires *strict compliance* with the terms of the rebate, lest a claimant otherwise be disappointed."

Section 7(1)*(b)* of the Value-Added Tax Act, 1991 (the VAT Act), imposes a VAT liability on the importation of any goods into the Republic by any person. This section must, however, be read with section 13 of the VAT Act, which governs the collection of tax on importation of goods, the determination of the value thereof and exemptions from tax. The general rule is therefore that importers (whether the owners of the goods or their agents) are liable for import VAT. There is, however, a silver lining for those that have suffered loss during the floods. Section 13(3) confirms that the importation of the goods set forth in Schedule 1 to the VAT Act is exempt from the tax imposed in terms of section 7(1)*(b)*. The wording of Rebate Item 412.09 of Schedule 1 to the VAT Act and that of Rebate Item 412.09 of Schedule 4 to the C&E Act is similar. Rebate Item 412.09 in Schedule 1 to the VAT Act reads as follows:

> "Goods in respect of which the customs duty, together with the fuel levy (where applicable), amounts to not less than R2 500, **proved to have been lost, destroyed or damaged on any single occasion in circumstances of *vis major*** or in such other circumstances as the Commissioner deems exceptional while such goods are –
>
> *(a)* in any customs and excise warehouse or in any appointed transit shed or under the control of the Commissioner;
>
> *(b)* being removed with deferment of payment of duty or under rebate of duty from a place in the Republic to any other place in terms of the provisions of this Act; or
>
> *(c)* being stored in any rebate storeroom:
>
> Provided that –
>
> (i) no compensation in respect of the customs duty, fuel levy or VAT on such goods has been paid or is due to the owner by any other person;
>
> (ii) such loss, destruction or damage was not due to any negligence or fraud on the part of the person liable for the duty or VAT; and
>
> (iii) such goods did not enter into consumption and the importer of those goods was not liable for tax imposed in terms of section 7(1)*(b)* when those goods were initially imported; and
>
> ***provided further that circumstances contemplated in this item exclude a hostile act by a third party constituted by robbery or theft".***

INFLATION
STOCK MARKET CRASH
ECONOMIC BUBBLE
HEALTH CRISIS
UNEMPLOYMENT
CURRENCY CRISIS

These rebates provide full relief for duty and VAT applicable to all goods lost, destroyed or damaged as a result of the flooding, which qualifies as an incident of vis major. In other words, no VAT liability arises for the importer. In *Wille's Principles of South African Law,* 9th edition at p 849, a *vis major* is described as:

> **"Some force, power or agency which cannot be resisted or controlled by the ordinary individual,** and includes not only the acts of nature, *vis divina,* or 'act of God,' but also *the acts of man*."

It is important that all parties liable for duty in terms of section 44 of the C&E Act take note of the rebate and immediately take the necessary steps to make a full disclosure to the South African Revenue Service (SARS) of all goods lost, destroyed or damaged as a result of the floods. This includes:

- Making a full inventory of the goods which were at the depot before the floods occurred;
- From the above list, assess which of the goods cannot be accounted for and which of the goods have been damaged;
- Whilst conducting this exercise, one must be careful not to break any of the SARS seals, as this will lead to duty and VAT being payable and penalties and forfeiture possibly being imposed; and
- One needs to ensure that this process is conducted thoroughly and diligently as any information not contained in the disclosure to SARS, will be excluded from the benefit of the above-mentioned rebates.

"The circumstances surrounding the potential rebate are not always simple. As demonstrated, issues such as the causal link highlighted above can be complicated and give rise to legal interpretation and debate."

Remember that a rebate is a special concession and it requires *strict compliance* with the terms of the rebate, lest a claimant otherwise be disappointed.

For example, the loss or damage must be due to the floods. We have seen from footage that containers were displaced by the floods but were not destroyed or damaged. Thereafter, those same containers were looted by the public, who broke the SARS seals. Can the duties and VAT be avoided by making use of the above-mentioned rebate items in this situation?

The circumstances surrounding the potential rebate are not always simple. As demonstrated, issues such as the causal link highlighted above can be complicated and give rise to legal interpretation and debate.

When a lot is at stake it is penny wise and pound foolish not to get expert assistance. Too many people wait until things go wrong, or their claim is rejected, before seeking assistance. It is often far more cost-effective and quicker to ensure that you meet the requirements, or that the claim is fully and correctly motivated, at the outset.

Therefore, when in doubt, or should you require assistance, please call experts in the field!

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Acts and Bills

- Customs and Excise Act 91 of 1964: Section 44; Schedule 4 (rebate items 412.09 & 497.02);
- Value-Added Tax Act 89 of 1991: Schedule 1 (rebate item 412.09).

Other documents

- *Wille's Principles of South African Law,* 9th edition (at p 849 (definition of a "*vis major*")).

Tags: import duty; excise duty; customs and excise warehouse; fuel levy.

sait South African Institute of Taxation