Issue 65 | 2023
DECEMBER

South African Institute of Taxation

Unstructured CPD 150mins

TAX CHRONICLES MONTHLY

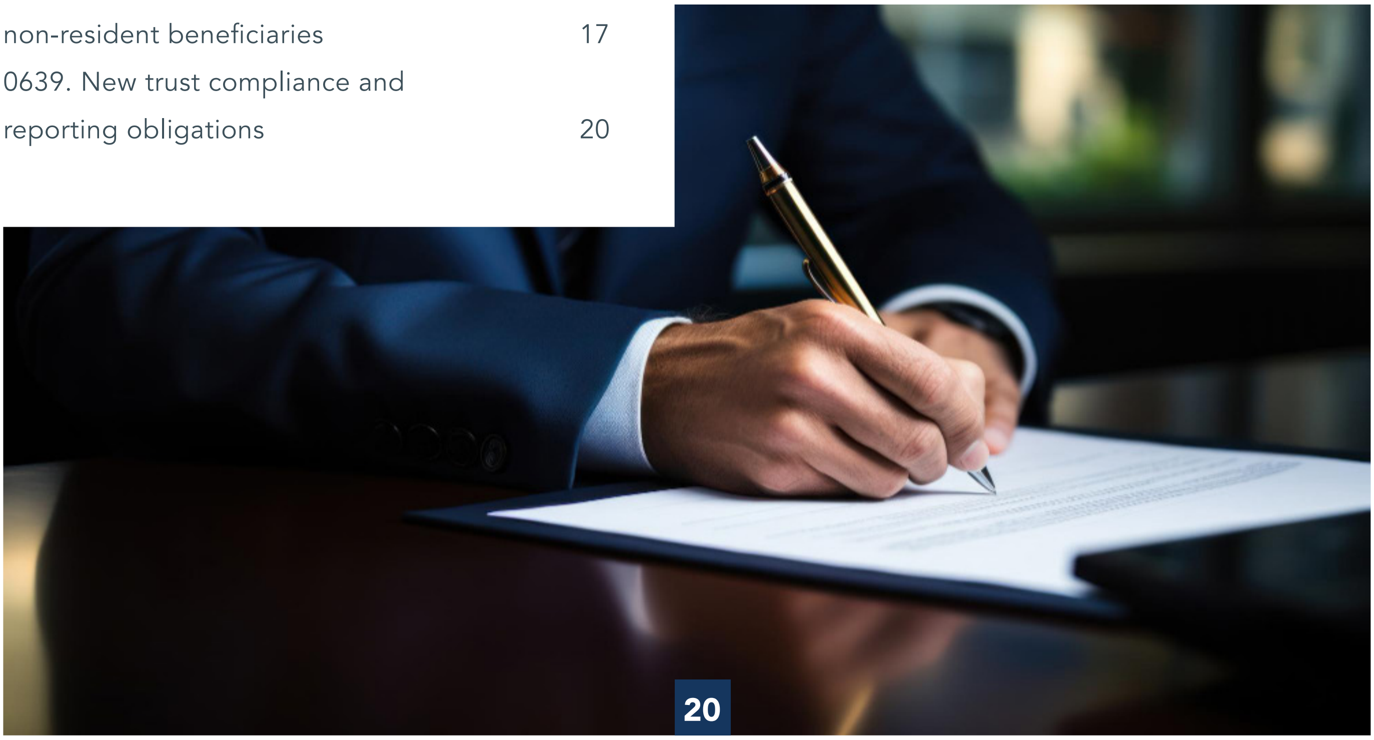
Official Journal for the South African Tax Professional

DEDUCTIONS AND ALLOWANCES
BURSARIES AND SCHOLARSHIPS

PUBLIC BENEFIT ORGANISATIONS
REQUIREMENTS FOR REPORTING DONATIONS

TRUSTS
INCOME VESTED IN NON-RESIDENT BENEFICIARIES

CONTENTS



BURSARIES AND SCHOLARSHIPS

Former President Nelson Mandela once said, "Education is the most powerful weapon which you can use to change the world."

It is sad to imagine that access to higher education is a privilege that many South Africans do not have as a result of, amongst other things, a lack of funds. Bursaries and scholarships are a mechanism through which access to higher education can be obtained. It is therefore always commendable whenever a company undertakes to offer bursaries or scholarships to those in need.

In case one forgets, or just did not have the time to give back on Mandela Day earlier this year, extending a bursary or scholarship to children in need could be the greatest gift that one can give.

Those who require some extra encouragement to give back, may perhaps be encouraged to do so by the tax consequences of advancing a bursary to someone in need.

In terms of section 10(1)*(q)* and *(q*A*)* of the Income Tax Act, 1962 (the Act), any *bona fide* scholarship or bursary granted to enable or assist any person to study at a recognised educational or research institution is exempt from normal tax, provided that the requirements of the respective provisions are met.

In this context, the bursary or scholarship must –

- be *bona fide* – ie, it must be extended to the individual in good faith;
- be made to enable or assist the person to pursue a course of study;
- be towards study at a recognised educational or research institution; and
- in the case of section 10(1)*(q*A*)*, be for a person with a disability as defined in section 6B(1) of the Act.

The applicant in Binding Private Ruling 389 (BPR 389) provides a good example of how the section can be applied. However, it is possible that the applicant in BPR 389 applied for the ruling because of the most recent legislative changes to these sections. In this context, National Treasury proposed amendments to section 10(1)*(q)* and *(q*A*)*, which came into effect on 1 March 2021 following concerns regarding abuse of these provisions.

The ruling published by the South African Revenue Service (SARS) in BPR 389 is discussed below.

BINDING PRIVATE RULING 389

The applicant in BPR 389 is a resident company that carries on business in the manufacturing sector. The applicant recognised that there are children in the community in which it operates who are unable to pursue tertiary studies due to financial constraints.

In this regard, the applicant established two bursary schemes to fund the tertiary education of the children in the surrounding community, which included relatives of people who are employed by the applicant or who were previously employed by the applicant.

The first bursary scheme that was established by the applicant had the objective of providing opportunities for tertiary education in any field of study to candidates with sufficient merit. In terms of the first bursary scheme the recipients do not have to complete a work-back period with the applicant after completing their studies. Those who are eligible to apply for the bursaries are members of the general public, which includes the relatives of employees and former employees; however, it excludes current employees of the applicant. The bursaries awarded in terms of the first bursary scheme are awarded on a first come, first served basis.

The ruling noted that in the last three years of assessment, on average, 94% of the bursaries awarded in terms of the first bursary scheme were awarded to relatives of people who were employees of the applicant, while 4% of the bursaries were awarded to relatives of former employees.

On the other hand, the second bursary scheme was established to provide funding to qualifying students who have completed their first year of study in any field of engineering. Unlike the first bursary scheme, the second bursary scheme contemplates, at the discretion of the applicant, a work-back period for a period equal to the period for which the bursary is advanced.

In terms of the second bursary scheme, all the bursaries, in the last three years of assessment, were awarded to applicants unrelated to employees and former employees of the applicant.

Notwithstanding the creation of two separate bursary schemes, the ruling noted that the bursary schemes had corresponding characteristics in relation to, *inter alia*, their allocation criteria, application procedure and applicable conditions. In this context, in terms of both bursary schemes the bursaries were allocated based on an academic and administrative testing scale. The criteria that were used to grant the respective bursaries included:

- academic performance;
- financial need;
- course requirements of the educational institution; and
- a selection process based on assessments and interviews.

One of the conditions applicable to both bursary schemes was that a bursary recipient, or their guardian, would be obliged to reimburse the monies awarded to the extent that a recipient failed to comply with the terms of the bursary agreement, which included the recipient discontinuing their studies except for reasons as set out below.

In this context, the legislative framework of section 10(1)*(q)* and *(q*A*)* is set out in more detail below before the ruling granted by SARS in BPR 389 is outlined.

LEGAL CONSIDERATIONS

Generally, any amount, in cash or otherwise, that is received by or that accrues to a resident person must be included in that person's gross income in the determination of their taxable income, except where the amount constitutes a receipt of a capital nature. Fringe benefits (or "taxable benefits" as they are referred to in the Act), must also be included in a person's gross income. However, an amount included in gross income may constitute exempt income, in which case it will be exempt from income tax. The same principles apply to an amount in respect of a bursary or scholarship.

As noted above, section 10(1)*(q)* and *(q*A*)* exempt, from income, any *bona fide* scholarship or bursary granted to enable or assist any person to study at a recognised educational or research institution. However, where the scholarship or bursary is granted by an employer, or an associated institution, to an employee or to a relative of such employee, the exemption is subject to certain conditions. In this regard, the exemption will not apply:

- In the case of a bursary or scholarship granted to an employee, unless the employee agrees to reimburse the employer for any scholarship or bursary granted if that employee fails to complete their studies for reasons other than death, ill health or injury.
- In the case of a bursary or scholarship granted to the relative of an employee if –
  - the remuneration proxy derived by the employee in relation to a year of assessment exceeds R600,000;
  - the bursary or scholarship granted, during the year of assessment, exceeds –
    - R20,000 in respect of Grades R to 12, or a qualification to which an NQF level 1 to 4 applies;
    - R60,000 in respect of a qualification to which a NQF level 5 to 10 applies; and

- any remuneration to which the employee is entitled or might in the future become entitled is in any manner whatsoever reduced or forfeited as a result of the granting of the bursary or scholarship.

The limits are increased where the recipient of the bursary or scholarship is a disabled person (section 10(1)*(q*A*)*).

The legislative amendment alluded to above came into effect on 1 March 2021, and relates to scholarships and bursaries provided to relatives of employees. In this regard, the proviso was extended to include a further disqualifying condition for the application of the exemption in section 10(1)*(q)* and *(q*A*)* of the Act, which is captured in the bullet point above (regarding forfeiture or reduction of remuneration).

"The benefit of the exemption is that, in particular where the beneficiary of the bursary/ scholarship is an employee or a relative of an employee, where the requirements to qualify for the exemption are met, the amount paid by the employer towards the bursary or scholarship will be exempt from income tax and potentially exempt from employees' tax."

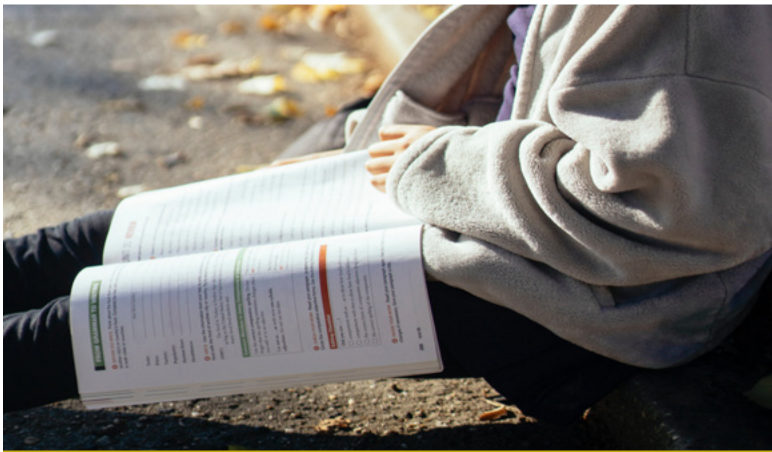
RULING

Having regard to the above legal considerations, SARS made the following ruling in BPR 389:

In relation to the first bursary scheme, the bursary granted to a relative of an employee of the applicant will constitute a taxable benefit in the hands of the employee as contemplated in the Seventh Schedule to the Act to be included in the gross income of the employee under paragraph *(i)* of the definition of "gross income" in section 1(1) of the Act. It was further held that paragraph (ii) of the proviso to section 10(1)*(q)* will apply, ie, the exemption will not apply unless the conditions noted above are met.

In respect of the second bursary scheme, the bursary award is to be included in the gross income of the recipient under paragraph *(c)* of the "gross income" definition. However, the amount included in gross income will be exempt under section 10(1)*(q)*.

The benefit of the exemption is that, in particular where the beneficiary of the bursary/scholarship is an employee or a relative of an employee, where the requirements to qualify for the exemption are met, the amount paid by the employer towards the bursary or scholarship will be exempt from income tax and potentially exempt from employees' tax. The ruling may not be particularly groundbreaking in so far as it relates to the interpretation of section 10(1)*(q)* and *(q*A*)*; however, it can hopefully serve as a gentle reminder that giving back to others, without expecting anything in return – including a tax Bill – can be the greatest gift. As former President Mandela himself said "There can be no greater gift than that of giving one's time and energy to help others without expecting anything in return". Perhaps he should have added "and money".



Puleng Mothabeng

Cliffe Dekker Hofmeyr

Acts and Bills

- Income Tax Act 58 of 1962: Sections 1(1) (definition of "gross income": paragraphs *(c)* and *(i)*), 6B(1) (definition of person with a "disability"), 10(1)*(q)* (including paragraph (ii) of the proviso to paragraph *(q)*) & 10(1)*(q*A*)*; Seventh Schedule: reference to "taxable benefit".

Other documents

- Binding Private Ruling 389 ("*Bursaries awarded by a resident company*").

Tags: *bona fide* scholarship or bursary; resident company; exempt income; taxable benefit.

CAPITAL V REVENUE

The capital versus revenue debate is as old as tax law itself. The benefits, advantages or consequences of an amount being considered capital or revenue in nature has motivated taxpayers and the South African Revenue Service (SARS) alike to characterise amounts as one or the other.

More often than not, the task of distinguishing between the two has fallen to the courts, as it did once again in the case of *A Taxpayer v Commissioner for the South African Revenue Service,* [2023], where judgment was handed down on 19 July 2023 (*IT 45638*).

BACKGROUND

In *IT 45638*, the taxpayer formed part of a group of companies that produced and exported fruit. The taxpayer undertook the marketing for the group, but also, to a very limited extent, exported fruit as well.

In 2014, the taxpayer entered into an agreement with a sustainable trade initiative and a European retail chain with which the taxpayer had an existing export relationship. This agreement had been concluded on the suggestion of the retail chain, which was cognisant that its customer base was prepared to pay a premium for produce that was sourced in an environmentally and socially sustainable manner. The purpose of the agreement was therefore to source table grapes from the taxpayer and other companies in the taxpayer's group that would produce these grapes in a sustainable manner with the assistance of the sustainable trade initiative.

In this, the taxpayer was the implementing partner and was tasked with managing the new company, NewCo, which was set up for the purpose of supplying the European retail chain. This NewCo was 40% held by a socio-economic empowerment trust, and 60% held by the taxpayer's holding company. The European retail chain and the sustainable trade initiative committed 40% of the funding necessary to capitalise NewCo, while the taxpayer committed 60% of the funding.

The funding from the taxpayer was extended to NewCo by way of a grant totalling more than R15 million. Following an opinion by its tax advisers, the taxpayer claimed the expenditure it incurred on the grant as a deduction against its income in terms of section 11*(a)* of the Income Tax Act, 1962 (the Act). SARS took exception to this, stating that the expenditure incurred by the taxpayer was capital in nature, and therefore SARS disallowed the deduction. The taxpayer objected, and after the objection was also disallowed, it appealed to the tax court.

DECISION

The taxpayer's advisers argued that, in their opinion, the taxpayer's business relied on foreign customer satisfaction. Therefore, they reasoned, the grant to NewCo would enable NewCo to supply produce to the European retail chain, thereby resulting in the taxpayer being able to satisfy its European customer base. In light of this, they concluded that the expenditure incurred by the taxpayer on the grant would be in the production of its income and for the purpose of its trade.

This line of reasoning was maintained by the taxpayer in the tax court. In support of this, the taxpayer relied on the case of *Commissioner for Inland Revenue v VRD Investments (Pty) Ltd,* [1993] *(VRD)*, concluding that the expenditure on the grant made the taxpayer's business more profitable, but did not result in the taxpayer acquiring a permanent asset or right (ie, its income-earning structure did not change).

The tax court began by admitting that the question of whether expenditure is capital or revenue in nature is never cut and dried. Rather, the character of expenditure must be determined with regard to the particular facts in question.

Turning to *IT 45638*, the tax court found that there were two pivotal facts. Firstly, the European retail chain sourced its table grapes from South Africa through the taxpayer. Secondly, the taxpayer's expenditure on the grant amounted to more than double the taxpayer's net profits before tax.

Looking at *Commissioner for Inland Revenue v George Forrest Timber Co Ltd*, [1924], the tax court concluded that capital amounts are invested to earn future profits, the outlay not recurring, but the income recurring. Although admitting that it is not an essential feature of capital expenditure to be non-recurring, the tax court then referenced the English case of *British Insulated and Helsby Cables Ltd v Atherton,* [1926] (*Atherton*), where the point was made that expenditure incurred for the purpose of bringing an asset or advantage into existence for the enduring benefit of a trade is capital in nature.

In light of this, the tax court concluded that the agreement entered into by the taxpayer was not intended to create only a hope of NewCo exporting grapes to the European retail chain via the taxpayer. Rather, it was the intention of the parties that this agreement would establish a trading relationship between the parties from which the taxpayer would benefit as an exporter.

In reaching this conclusion, the tax court placed reliance on the fact that it would not have been commercially viable for the taxpayer to outlay the grant expenditure if it did not foresee an enduring benefit of this. Further, this enduring benefit was made more certain by the fact that the European retail chain had an existing trade relationship with the taxpayer.

Therefore, the tax court concluded that the expenditure incurred by the taxpayer in extending the grant to NewCo was capital in nature as it secured an enduring advantage for the taxpayer.

EFFICIENCY OR INCOME

In coming to its conclusion, the tax court distinguished the *VRD* case relied on by the taxpayer from the cases relied on by the tax court. In *VRD*, the expenditure was found to be revenue in nature as it merely improved the income-earning efficiency of a business, but did not establish an additional source of income. Here, however, the tax court found that NewCo exporting grapes to the European retail chain through the taxpayer was not a mere enhancement of the taxpayer's existing business, but was an entirely new income stream. In distinguishing *VRD* from the present matter, the tax court also referred to the well-known judgment in *Palabora Mining Co Ltd v Secretary for Inland Revenue,* [1973], which it held was equally distinguishable from the present case.

In effect, the tax court managed to potentially bring some clarity to a particularly muddy area of an already murky subject – it attempted to clarify when a lump sum (ie, non-recurring expenditure) should be considered revenue or capital in nature. According to the tax court, the key is to examine the effect of the expenditure, and distinguish between new income streams and the enhancement of existing income streams. On the tax court's own admission, this distinction is drawn from the enduring benefit test as set out in *Atherton*, but the tax court highlighted its application in the present instance. The enduring benefit test has also formed part of our law for some time, having been stated by the Appellate Division (as it then was) in *New State Areas Ltd v Commissioner for Inland Revenue,* [1946].

As a result, taxpayers must be mindful of the effect of their expenditure before deciding whether it qualifies as an income tax deduction, or whether it is capital in nature. While the capital or revenue nature of a deduction will always depend on the facts, the judgment in *IT 46538* reflects that in order to claim a deduction on revenue account, even if the expenditure is non-recurring, it must serve to enhance an already existing business structure, and not add to that structure.

"Looking at *Commissioner for Inland Revenue v George Forrest Timber Co Ltd,* [1924], the tax court concluded that capital amounts are invested to earn future profits, the outlay not recurring, but the income recurring."

Nicholas Carroll

Cliffe Dekker Hofmeyr

Acts and Bills

- Income Tax Act 58 of 1962: Section 11(*a*).

Cases

- *A Taxpayer v Commissioner for the South African Revenue Service* [2023] ZATC 13 (19 July 2023) (IT 45638);
- *Commissioner for Inland Revenue v VRD Investments (Pty) Ltd* [1993] (4) SA 330 (C);
- *Commissioner for Inland Revenue v George Forrest Timber Co Ltd* [1924] AD 516;
- *British Insulated and Helsby Cables Ltd v Atherton* [1926] AC 205;
- *Palabora Mining Co Ltd v Secretary for Inland Revenue* [1973] (3) SA 819 (A);
- *New State Areas Ltd v Commissioner for Inland Revenue* [1946] AD 610.

Tags: holding company; capital in nature; revenue in nature; non-recurring expenditure.

PLACE OF EFFECTIVE MANAGEMENT

*On 30 June 2023 the South African Revenue Service (SARS) released a third version, Issue 3, of Interpretation Note 6 (*Resident: Place of effective management (companies)*) (IN 6), addressing the interpretation and application of the term "place of effective management" (POEM) as it applies to companies.*

This update mainly addresses changes resulting from substantial amendments to Article 4 of the OECD Model Tax Convention (the MTC). Although South Africa is not a member of the OECD, the wording of the Convention that pertained at the time the relevant Double Taxation Agreement (DTA) was entered into has been utilised in the vast majority of the DTAs to which South Africa is a party.

BACKGROUND

The second version of IN 6, issued on 3 November 2015, stated that its purpose was to provide guidance on the interpretation of the term POEM when determining the residence of a company in terms of section 1(1) of the Income Tax Act, 1962 (the Act). The principles in that version of IN 6 aligned with the POEM determination when used as a tie-breaker rule in a tax treaty that was based on paragraph 3 of Article 4 of the condensed version of the MTC as at 15 July 2014 and its accompanying Commentary. It is worth noting that POEM was the sole tie-breaker rule in that previous version of the MTC, while the Commentary mentioned an alternative position that was adopted by certain states. The alternative position is similar to the tie-breaker rule now contained in the 2017 version of the MTC.

While the principles and guidelines in Issue 3 of IN 6 remain consistent with determining POEM according to section 1(1) of the Act, as stated above, the 2017 version of the MTC introduced substantial amendments to Article 4. In particular, the residency of a person other than an individual in cases involving dual residency is, in terms of the revised wording of Article 4, now determined on a case-by-case basis and through mutual agreement by the contracting states and not only on the basis of the entity's POEM. [*Author's note*: Mutual agreement refers to the Mutual Agreement Procedure (MAP) as referred to in Article 25 of the OECD Model Tax Convention.] This competent authority determination considers various factors, including the POEM, the place of incorporation or where the entity was otherwise constituted, and other relevant elements. [*Author's note*: The term "Competent Authority" is used in treaties to identify a position, a person or a body within a contracting state or jurisdiction to whom issues can be addressed.

"Regarding the impact of the COVID-19 pandemic on the POEM for companies, IN 6 confirms that temporary changes in the location of senior executives due to the pandemic are unlikely to alter a company's residence status under a tax treaty."

The Competent Authority in South Africa is the Commissioner for SARS.] Additionally, in the absence of a mutual agreement by the competent authorities, the company will not be entitled to any tax relief or exemption solely based on the place of effective management, but only to such reliefs as agreed by the competent authorities of the states involved.

Unfortunately, the third version of IN 6 creates the misleading impression that the amendments contained in the 2017 version of the MTC and its commentary apply in cases of dual residency to each double tax treaty entered into by South Africa, whether or not the treaty, when concluded, contained the 2017 wording. The correct position with regard to such treaties is that, in most cases, POEM remains the sole tie-breaker to determine residency. However, in cases where the multilateral instrument applies to Article 4 of the treaty, depending on the options elected by South Africa and the other jurisdiction with regard to Article 4, the revised tie-breaker tests may in effect have to be applied as a kind of overlay in cases of dual residency. However, the revised tie-breaker tests will not be applicable to all of South Africa's double tax treaties and, in most cases, will in effect apply only in situations of dual residency.

THE MEANING OF POEM

The third version of IN 6 is in alignment with the second one in so far as the meaning of POEM is concerned and, in that regard, the main points have been listed below. A new feature is that considerations are provided dealing with the impact of COVID-19 on the POEM of a company.

- The POEM for a company refers to the location where the key management and commercial decisions necessary for the conduct of its business as a whole are in substance made.

- A company may have more than one place of management but can only have a single POEM at any given time. In cases where a company's key management and commercial decisions are made in multiple locations, its POEM will be where those decisions are predominantly or primarily made.

- While definitive rules for determining the POEM cannot be prescribed, IN 6 provides certain factors to consider when assessing a company's POEM and states that the determination of a company's POEM requires a substance over form approach. The following factors are provided in IN 6 and serve as a guide – IN 6 states that a thorough examination of all relevant facts and circumstances is necessary on a case-by-case basis:
    - **Head office:** The location of a company's head office, where senior management and their support staff are primarily situated, is often where key management decisions are made. However, in cases of decentralised management, determining the head office's location may be less relevant for POEM determination.
    - **Delegation of authority:** If a company's board delegates its authority to one or more committees, the location where the members of the committee are based and where the committee develops and formulates the key strategies and policies for mere formal approval by the full board will often be considered the company's POEM.
    - **Board:** The location where a company's board regularly convenes and makes decisions may often be its POEM, provided the board retains and exercises its authority to govern the company and substantially makes the essential management and commercial decisions.
    - **Modernisation and global travel:** Given the use of technology, the physical location of decision-making may not accurately represent where key management and commercial decisions are substantially made. Consequently, what initially appears to be the location where the decisions are made, that is, the physical location of the board meeting, may not be where the key management and commercial decisions are in substance made.
    - **Shareholders:** Shareholder involvement can cross the line into that of effective management. For example, a shareholder may effectively usurp the powers of the directors of the company. While the influence of shareholders does not constitute effective management, undue influence may do so. IN 6 further states that situations in which a shareholder or another party usurps effective management will probably be the exception rather than the norm.
    - **Operational management versus broader top-level management:** Operational decisions are generally of limited relevance in determining a company's POEM compared to key management and commercial decisions, with the latter being the key consideration in establishing the POEM.
    - **Legal factors, economic nexus and support functions:** These factors are generally of limited relevance to determining the location of a company's POEM.

THE IMPACT OF COVID-19

Regarding the impact of the COVID-19 pandemic on the POEM for companies, IN 6 confirms that temporary changes in the location of senior executives due to the pandemic are unlikely to alter a company's residence status under a tax treaty. These changes should generally be considered as extraordinary and temporary situations, and the tie-breaker rule contained in tax treaties would continue to apply. However, SARS will carefully consider the merits of each case.

CONCLUSION

Issue 3 of Interpretation Note 6 maintains its stance on the interpretation and application of the term POEM. IN 6 emphasises that POEM is determined based on the place where the key management and commercial decisions required for the conduct of the overall business of the company are in substance made. IN 6 does not lay down definitive practical tests for determination of the POEM in every case but it offers guiding factors, necessitating a case-by-case examination of relevant facts and circumstances.

Martin Groenewald & Associate Professor David Warneke

BDO

Acts and Bills

- Income Tax Act 58 of 1962: Section 1(1) (definition of "company").

Other documents

- Interpretation Note 6 (Issue 3) (*Resident: Place of effective management (companies)*) (30 June 2023);
- Interpretation Note 6 (Issue 2) (*Resident: Place of effective management (companies)*) (3 November 2015);
- Mutual Agreement Procedure (MAP), as referred to in Article 25 of the OECD Model Tax Convention;
- OECD Model Tax Convention (2017 version): Article 25;
- Condensed version of the OECD Model Tax Convention (as at 15 July 2014) and its accompanying Commentary: Article 4 (Paragraph 3).

Tags: place of effective management (POEM); mutual agreement; management decisions.

REQUIREMENTS FOR REPORTING DONATIONS

Public benefit organisations (PBOs) play a vital role in South Africa, a country with significant social and economic challenges. These organisations aim to address various social issues and improve the well-being of individuals and communities in need.

For example, many PBOs actively work towards reducing poverty and addressing its associated challenges. They provide support to vulnerable groups, such as unemployed individuals, children living in poverty, and families facing financial difficulties.

They may offer food aid, access to healthcare, skills training, and income-generation programmes to uplift communities and alleviate poverty.

Some PBOs provide essential social services to marginalised populations, offering assistance in areas such as healthcare, education, housing, and social welfare. This includes providing access to medical care, counselling, education support, and social grants for individuals who meet specific criteria.

Many people in South Africa are struggling financially. This may be due to their being unemployed or suffering from the high cost of living due to inflation, rising interest rates, etc. South Africa's unemployment rate in the second quarter of 2023 was recorded at 32,6% and is among the highest in the world.

The challenge of unemployment in South Africa is compounded by the uneven distribution of joblessness across the population. The youth are disproportionately affected, with a staggering 61% of those aged 15–24 being unemployed during the last quarter of 2022.

In summary, PBOs play an important role to address the social, economic and financial challenges in the South African society.

In order to do so, they rely more and more on funding from the private sector, in the form of donations.

There are several reasons why it is important for companies to donate funds to PBOs.

Donating funds to PBOs is a way for companies to fulfil their corporate social responsibility commitments. It demonstrates their commitment to giving back to society and investing in the well-being of communities. Furthermore, such initiatives can enhance a company's reputation and brand image, improving public perception and customer loyalty.

Companies have the ability to make a significant positive impact on social issues by supporting PBOs. Through their donations, companies can contribute to poverty alleviation, education, healthcare, and other essential services. This support can help uplift marginalised communities, improve quality of life, and create a more equitable society.

Companies operate within communities and supporting PBOs allows them to address the specific needs and challenges faced by those communities. By supporting PBOs, companies can have a direct and meaningful impact on the well-being of their customers and neighbours.

Similar considerations apply to individuals. Many high net-worth individuals annually donate large amounts to PBOs. Recognising the socioeconomic disparities in the country, individuals who have the means often donate to charity as a way to alleviate suffering, address social inequality, and uplift disadvantaged communities.

However, donations are also made on a regular basis by ordinary South Africans. Many people donate to charitable causes as a way to contribute to the country's healing and transformation. It is seen as a means to rectify past injustices and build a more inclusive and equitable society.

Section 18A of the Income Tax Act, 1962 (the Act), provides for a tax deduction of up to 10% of a taxpayer's taxable income in respect of donations made to qualifying PBOs. This includes companies as well as individuals.

The tax benefit provides an additional motivation for people to contribute to charitable causes, as they can receive tax deductions or other financial benefits while supporting organisations and initiatives aligned with their values.

Up to now, PBOs were merely required to issue receipts containing prescribed information (commonly referred to as section 18A certificates) in respect of all donations received by them. This has now changed. All PBOs will now also have to submit to SARS biannual reports of all donations received by them.

This requirement is similar to the biannual PAYE returns that all employers have to submit to SARS.

According to the new requirements announced by SARS on 30 June 2023, PBOs or any person that issues a receipt in terms of section 18A(2) are now required to submit third-party returns for any amount received as a donation, in the form of an IT3(d) or data compiled in accordance with SARS Business Requirement Specification, IT3 Data Submission. The return must be submitted electronically on the SARS eFiling platform. These requirements are contained in Public Notice 3631, issued on 30 June 2023, requiring information in respect of returns to be submitted by third parties in terms of section 26 of the Tax Administration Act, 2011.

Annually, the first submission will be for the period from 1 March to 31 August and will be due by 31 October. The second submission will be for the period from 1 September to the last day of February and will be due by 31 May.

In order to allow affected PBOs the opportunity to upgrade their systems and processes to implement the new filing requirements, they will not have to submit a return for the period from 1 March 2023 to 31 August 2023.

The compulsory disclosure and submission of section 18A certificate information by PBOs will help to avoid errors when capturing the section 18A certificate information on the donor's return, which has sometimes led to disallowance of the donation deduction. The electronic data submission to SARS will also be beneficial, especially to donors as it will be automatically pre-populated on the income tax return of the taxpayer making the donation, similar to the IRP5 certificates issued by employers to their employees.

In terms of a *Government Gazette* notice published on 24 February 2023, SARS also requires more detailed information to be included on all section 18A certificates issued on or after 1 March 2023. .

Until the end of February 2023, all that was required for a valid section 18A certificate was:

- The name, reference number, address and contact details of the PBO;
- Details of the donation (date of receipt, amount and nature of donation if not made in cash);
- The name and address of the donor; and
- Confirmation that the donation would be used exclusively for the object of the PBO.

From 1 March 2023, the certificate must also include:

- Donor nature of person (natural person, company, trust, etc);
- Donor identification type and country of issue (in the case of a natural person);
- Identification or registration number of the donor;
- Income tax reference number of the donor (if available);
- Contact number of the donor;
- Email address of the donor;
- A unique receipt number; and
- Trading name of the donor (if different from the registered name).

It is recommended that organisations that are unsure of their reporting obligations or require assistance with implementing the necessary changes to their systems and processes, contact experts in the field.

Limakatso Mtau & Johann Benadé

BDO

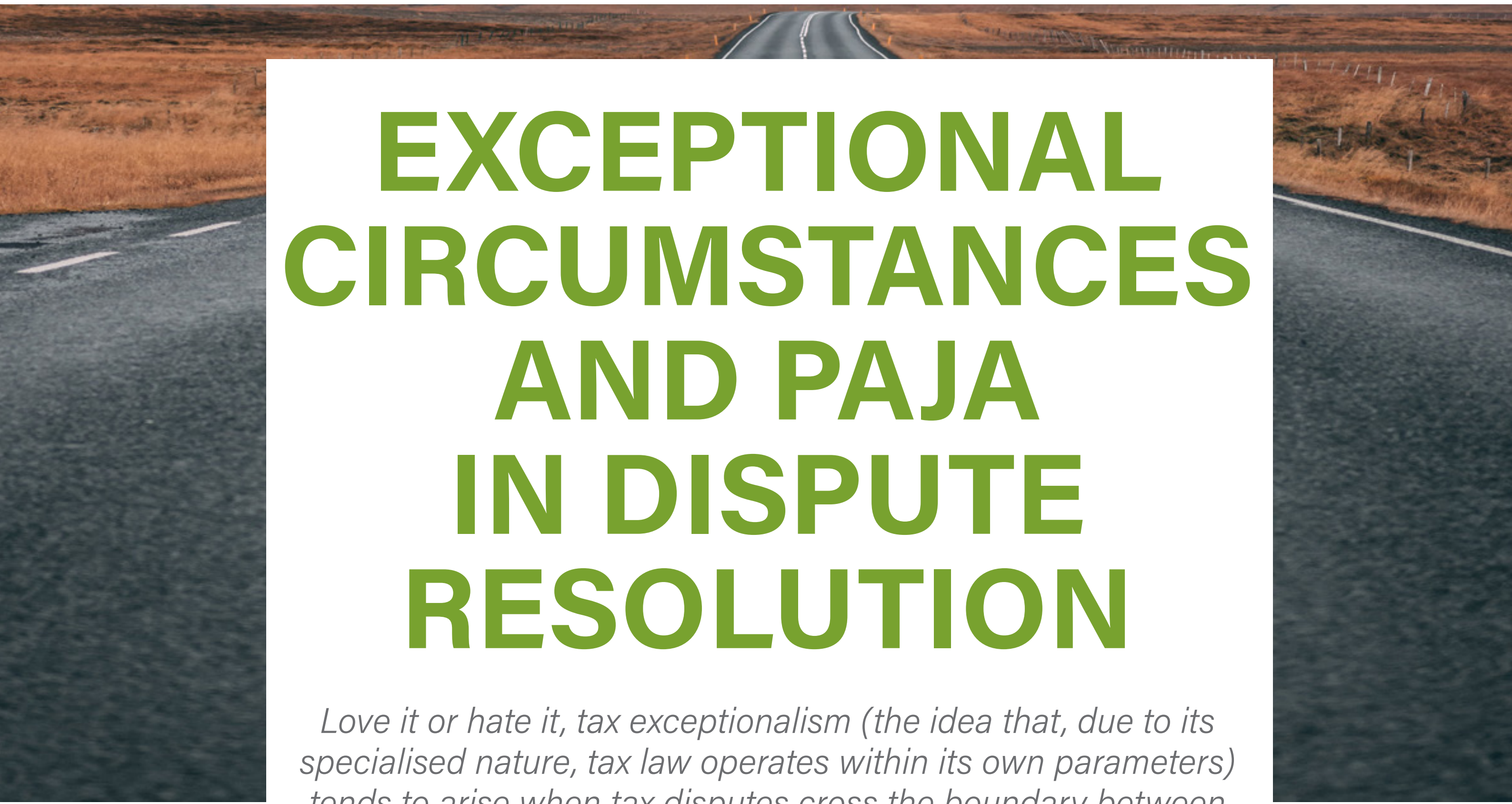
Acts and Bills

- Income Tax Act 58 of 1962: Section 18A;
- Tax Administration Act 28 of 2011: Section 26.

Other documents

- Section 18A certificates;
- IT3(d) form;
- SARS Business Requirement Specification, IT3 Data Submission;
- Public Notice 3631 – issued on 30 June 2023 (detailing information to be submitted by third parties in terms of section 26 of the Tax Administration Act, 2011).

Tags: third-party returns; section 18A certificate.



EXCEPTIONAL CIRCUMSTANCES AND PAJA IN DISPUTE RESOLUTION

Love it or hate it, tax exceptionalism (the idea that, due to its specialised nature, tax law operates within its own parameters) tends to arise when tax disputes cross the boundary between tax law and other areas of the legal landscape.

The 2015 amendment to section 105 of the Tax Administration Act, 2011 (the TAA), is an example of this as it tries to restrict tax disputes to specialised forums such as the tax court. In particular, the crossover between this section and administrative law is a circumstance where tax exceptionalism can become contentious, as it did again in the case of *Trustees of the CC Share Trust and Others v Commissioner for the South African Revenue Service,* [2023], (*CC Share Trust*).

BACKGROUND

In the *CC Share Trust case*, the taxpayers had entered into a transaction for the sale of assets which was challenged by the South African Revenue Service (SARS) under the general anti-avoidance rules (GAAR). This entailed SARS issuing the taxpayers a notice in terms of section 80J(1) of the Income Tax Act, 1962 (the Act), inviting the taxpayers to give reasons why the GAAR should not be applied to the impugned transaction.

However, this section 80J notice was not issued before SARS had already indicated its intention to audit the taxpayers under section 42(1) of the TAA. In terms thereof, SARS requested information from the taxpayers in order to conduct its audit – the taxpayers supplied this information.

At no time did SARS explicitly indicate that it had completed its audit of the taxpayers, but following the later section 80J notice, SARS issued the taxpayers a letter indicating that it intended to apply the GAAR to the impugned transaction and reassess the taxpayers accordingly. An exchange between SARS and the taxpayers ensued, during which SARS requested, and was provided with, various further pieces of information pertaining to the transaction in question.

Finally, this was followed by a further letter in which SARS set out why it rejected the taxpayers' argument against the application of the GAAR. In this letter, SARS set out the adjustments it had made to the taxpayers' incomes and levied understatement penalties on the taxpayers.

The taxpayers took exception to the process SARS had followed and made a request to SARS under section 9 of the TAA to withdraw its assessment, as neither the first letter nor the second letter received from SARS was the finalisation of audit letter required by section 42(2). Therefore, the taxpayers argued, SARS had followed a procedurally flawed process in reassessing them for tax.

SARS rejected this request, and this led the taxpayers to approach the High Court under the provisions of the Promotion of Administrative Justice Act, 2000 (PAJA). Arguing that section 42(2) was not followed, the taxpayers argued that this was reviewable under PAJA as they had been denied the opportunity to receive, consider and respond to an audit outcome letter.

THE LEGAL FRAMEWORK AND ARGUMENTs

Section 42(1) provides that:

> "A SARS official involved in or responsible for an audit under this Chapter must, in the form and manner as may be prescribed by the Commissioner by public notice, provide the taxpayer with a notice of commencement of an audit and, thereafter, a report indicating the stage of completion of the audit."

The first notice sent to the taxpayers was in terms of this section and notified them of the audit SARS intended to conduct.

Section 42(2)*(b)* then provides that:

> "Upon conclusion of the audit … and where … the audit identified potential adjustments of a material nature, SARS must within 21 business days … provide the taxpayer with a document containing the outcome of the audit, including the grounds for the proposed assessment …"

The taxpayers argued that this section meant that once SARS had initiated an audit with the section 42(1) notice, it was obligated to then issue a section 42(2) notice setting out the audit findings. Following the section 42(1) notice, however, SARS then sent a notice in terms of section 80J of the Act in order to challenge the impugned transaction in terms of the GAAR.

Section 80J of the Act provides, *inter alia*, that:

> "(1) The Commissioner must … give [a] party notice that he or she believes that the provisions of this Part may apply in respect of an arrangement and must set out in the notice his or her reasons therefor.
>
> (2) A party who receives notice in terms of subsection (1) may, within 60 days … submit reasons to the Commissioner why the provisions of this Part should not be applied.
>
> (3) The Commissioner must within 180 days of the receipt of the reasons or the expiry of the period contemplated in subsection (2) –
>
> *(a)* request additional information in order to determine whether or not this Part applies in respect of an arrangement;
>
> *(b)* give notice to the party that the notice in terms of subsection (1) has been withdrawn; or
>
> *(c)* determine the liability of that party for tax in terms of this Part."

SARS then argued that its first letter to the taxpayers (which was in reply to the taxpayers' reasons provided under section 80J(2)), although not explicitly stating it, was also a finalisation of audit letter as contemplated in section 42(2) of the TAA.

Although complying with the provisions of section 42(2), the taxpayers argued that it was impossible for the first letter from SARS to have been the finalisation of audit letter as it had still submitted documents to SARS following the receipt of this letter. Therefore, SARS had not been in a position to finalise the audit. As the second letter did not comply with the provisions of section 42(2), the taxpayers brought the review application in terms of PAJA.

However, section 7(2) of PAJA provides that, unless there are "exceptional circumstances" present, a court cannot hear a review in terms of PAJA until all internal remedies have been exhausted.

This is bolstered by section 105 of the TAA, which now provides that:

> "A taxpayer may only dispute an assessment or 'decision' as described in section 104 in proceedings under this Chapter, unless a High Court otherwise directs."

This meant that in order to circumvent the processes prescribed in section 104 (objection and appeal to the tax court) and rely on PAJA, the taxpayers would require permission from the High Court.

DECISION

Reading section 105 of the TAA together with section 7(2) of PAJA, the court in *CC Share Trust* found that the nub of the enquiry for both was whether exceptional circumstances existed. In coming to this conclusion, the court relied on the case of *Commissioner for the South African Revenue Service v Rappa Resources (Pty) Ltd,* [2023] (*Rappa*), where the Supreme Court of Appeal held that a taxpayer must dispute an assessment using the objection and appeal processes unless the High Court indicates otherwise, the High Court only being permitted to do this where exceptional circumstances exist.

Therefore, the court in *CC Share Trust* concluded that the taxpayers would only be able to approach it directly on review in terms of PAJA where exceptional circumstances existed for this. Turning to what constitutes exceptional circumstances, the court examined the legal development of this concept, particularly as it has been set out in previous tax cases.

In short, prior to *Rappa* the tax court had held in C*ommissioner for the South African Revenue Service v FP (Pty) Ltd,* [2021], that an error by SARS relating to section 42 of the TAA would constitute exceptional circumstances as it directly related to a taxpayer's rights under the South African Constitution. Further, the High Court in *ABSA Bank Ltd v Commissioner for the South African Revenue Service,* [2021], had stated that a dispute that turns wholly on a point of law constitutes an exceptional circumstance.

Following *Rappa*, however, the position has been clarified that the tax court wields broad powers which include the power to determine the legality of an assessment on review. On this basis, the court in *CC Share Trust* found that a point of law is no longer adequate to constitute exceptional circumstances. Rather, and as pointed out in *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas and Another,* [2002], the court found that exceptional circumstances must be something which is out of the ordinary, uncommon, rare or different.

As the taxpayers in *CC Share Trust* had argued the applicability of review under PAJA on a purely legal point, the court decided not to permit this review. Rather, the taxpayers were directed to challenge SARS' decisions in terms of the objection and appeal processes set out in the TAA.

TO REVIEW OR NOT TO REVIEW

To turn a phrase on its head, the court in *CC Share Trust* took with one hand while giving with the other. In a clear and well-structured decision, the court summarised the history of using administrative review in terms of PAJA in tax disputes, and then set out the parameters in which a taxpayer can review a decision by SARS.

> "However, section 7(2) of PAJA provides that, unless there are 'exceptional circumstances' present, a court cannot hear a review in terms of PAJA until all internal remedies have been exhausted."

The court clarified that objection and appeal in terms of the TAA are the first port of call for a taxpayer. But in this, the tax court's powers extend to conducting a legality review of the decision brought before it in a preliminary hearing.

Further, in the event that a taxpayer is not successful following these preliminary proceedings, administrative review in terms of PAJA would potentially be a possibility. However, how the requirement to bring a review application within 180 days will be interpreted remains slightly unclear. In *Forge Packaging (Pty) Ltd v Commissioner for the South African Revenue Service*, [2022], for example, the review application was declined as it was not brought within 180 days of the assessments being issued. What would also remain questionable, is the application of section 105 of the TAA to such subsequent proceedings. Unlike PAJA, this section does not impose a threshold of exhausting internal remedies, but rather, as set out in *Rappa*, imposes the higher threshold of exceptional circumstances.

Nicholas Carroll

Cliffe Dekker Hofmeyr

Acts and Bills

- Income Tax Act 58 of 1962: Section 80J;
- Tax Administration Act 28 of 2011: Sections 9, 42(1) & (2) & 105;
- Promotion of Administrative Justice Act 3 of 2000: Section 7(2);
- Constitution of the Republic of South Africa, 1996.

Other documents

- Section 80J notice;
- Section 42(1) notice;
- Section 42(2) notice.

Cases

- *Trustees of the CC Share Trust and Others v Commissioner for the South African Revenue Service* [2023] (38211/21) ZAGPPHC 597 (24 July 2023);
- *Commissioner for the South African Revenue Service v Rappa Resources (Pty) Ltd* [2023] JDR 0861 (SCA);
- *Commissioner for the South African Revenue Service v FP (Pty) Ltd* [2021] ZATC 8; 84 SATC 321;
- *ABSA Bank Ltd v Commissioner for the South African Revenue Service* [2021] (2019/21825) [2021] ZAGPPHC 127; 2021 (3) SA 513 (GP);
- *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, and Another* [2002] (6) SA 150 (C);
- *Forge Packaging (Pty) Ltd v Commissioner for the South African Revenue Service* (21634/2021) [2022] ZAWCHC 119; 85 SATC 357 (13 June 2022).

Tags: general anti-avoidance rules (GAAR); finalisation of audit letter; administrative review.

INCOME VESTED IN NON-RESIDENT BENEFICIARIES

Currently, income arising in a South African trust that is distributed to a beneficiary within the same tax year is treated as the income of the beneficiary, irrespective of their tax residence. Effectively, the trust is disregarded.

The proposal in clause 29 of the Taxation Laws Amendment Bill, 2023 (the 2023 TLAB), which was tabled on 1 November 2023, and which provides for the amendment of section 25B of the Income Tax Act, 1962 (the Act), seeks to terminate this regime in the event that the income is awarded to a foreign beneficiary. The rationale for this is to strike a balance between South African tax resident and non resident beneficiaries of South African trusts.

CURRENT LEGAL POSITION

As a general principle, any amount of an income nature (ie, dividends, interest, rentals, trading income, etc) that is received by a South African trust and onward distributed to beneficiaries in the same tax year, regardless of the beneficiaries' country of residence, will be taxed in the beneficiaries' hands. If it is not distributed in the same year, the trust is taxed. The trust is treated as merely a vehicle through which the amount "flows" and such amount retains its nature. As to amounts representing capital gains, the difference is that SARS treats such capital awards to a beneficiary during the same tax year as taxable in the beneficiary's hands if they are South African tax resident, alternatively taxable in the trust if they are non resident. This is the "disparity" that the proposal seeks to correct.

Potentially, these proposed amendments have far-reaching implications, especially for foreign beneficiaries of South African trusts. This article focuses on the potential impact on the liability for dividends tax, withholding taxes and the available relief to the foreign recipient.

DIVIDENDS

A "beneficial owner" of a cash dividend is liable for dividends tax, currently at a rate of 20%, that is withheld and paid by the declaring company. A "beneficial owner" is defined in section 64D (for the purposes of Part VIII of the Act) as the person entitled to the benefit of a dividend. It is trite that the registered owner of shares is not necessarily the beneficial owner of a dividend paid in respect of such shares. Currently, it is accepted by SARS that the beneficial owner of a dividend is the person who receives the dividend for their own use and enjoyment and assumes the risk and control of the dividend received. Thus, a beneficiary of a discretionary trust who has a vested right in a dividend, arising out of a distribution by the trustees, is regarded as the beneficial owner of the dividend. In terms of the current "flow through" rules, upon distribution the tax treatment of the income is that it accrues for the benefit of the beneficiary and this coincides with the principle that the recipient beneficiary is considered the "beneficial owner" of the cash dividend and therefore is liable for the tax.

The proposed amendment would cause the dividend to accrue to the trust for its own benefit. Essentially, the accrual of the dividend no longer "flows through" to the foreign beneficiary but is trapped and treated as subject to dividends tax in the hands of the trust at 20%. Potentially, the trust itself could be considered the "beneficial owner" of the dividends. This creates disparity between the person whom SARS accepts as the beneficial owner of a dividend and the person for whose benefit the dividend accrues. A number of issues arise in this regard:

- in the case of a foreign beneficiary the same amount of dividends taxed in the trust's hands will potentially be taxed in the beneficiary's hands in their country of residence under the domestic tax laws without a credit for the South African tax being given, on the basis that the beneficiary did not bear the dividends tax here;

- the foreign beneficiary could potentially, on that interpretation, not be able to claim a reduced rate of dividends tax under an applicable treaty (for example in terms of the South Africa / United Kingdom double tax treaty reducing the dividends tax rate from 20% to 10%); and

- trapping the income in the trust could create uncertainty as to the nature of the receipt from the trust by the foreign beneficiary.

INTEREST

The Draft Taxation Laws Amendment Bill, 2023 (the Draft TLAB), which was published in July 2023, set out the original position regarding the treatment of various streams of income received by a trust and onward distributed to the foreign beneficiaries in the same tax year. In terms of the Draft TLAB, with reference to interest income, South African tax resident beneficiaries would be subject to tax on the interest at their marginal rate of tax up to a maximum of 45%. With respect to payment of interest to non residents ("a foreign person"), there would be a levy of withholding tax on interest at a rate of 15%. The payor of the interest would have been required to withhold the tax but the non resident would still bear the liability for the tax. On the amendments proposed in the Draft TLAB:

- the interest income will accrue to the trust and no longer to the foreign beneficiary making the trust liable for the tax on the interest income at the flat rate of 45%; and

- the same issues as relate to dividends will apply here as well, ie, potentially no foreign tax credit for the beneficiary, the inability to rely on the reduced rate of withholding tax (or even the 15% imposed under the Act) and uncertainty as to the nature of the receipt.

Effectively, the proposed amendments could have the effect of subjecting the same income to double tax, ie, in the hands of the trust and in the hands of the foreign beneficiary, potentially without any relief in the domestic jurisdiction of the foreign beneficiary.

Unlike the Draft TLAB, the 2023 TLAB, tabled on 1 November 2023, in clause 39 includes proposed amendments to section 50D(1) of the Act. Relevant in this regard is the proposed addition of a new paragraph *(f)* in subsection (1). It refers to the exemption from withholding tax on interest of any amount of interest –

> "*(f)* that is received by or accrued to a resident trust and is then paid to a beneficiary of that trust as a distribution by that trust."

The intended reason for this exemption is to prevent possible double taxation, ie, the debtor withholding the 15% tax and the trust still being taxable on the interest at 45%.

A similar exemption is proposed for the withholding tax on royalties.

IMPLICATION ON THE APPLICATION OF TAX TREATIES

Tax treaties apply mainly to prevent double taxation (ie, juridical double taxation where one taxpayer is being taxed on the same amount in two different jurisdictions). In this regard, treaty relief may be claimed by the taxpayer who is the beneficial owner of a particular income stream. This comes into consideration as both jurisdictions may want to tax the amount with respect to that taxpayer, the one on a source basis and the other on a residence basis. The treaty would apply to either allocate or limit taxing rights.

With regard to dividends, if the trust is considered the beneficial owner and therefore liable for the dividends tax, the foreign beneficiary may not be able to rely on treaty relief in terms of the article dealing with taxation of dividends because they are seen as not bearing the liability for the dividends tax. Alternatively, the foreign beneficiary could rely on the general elimination of double taxation article available in treaties. But this would require that they prove that the income (specifically dividends) upon which the trust paid the tax is the same income that is now being subject to dividends tax, in their country of residence. Relief on this basis is uncommon and much less certain compared to relying on the specific article dealing with the relevant stream of income.

FOREIGN TRUSTS

The proposed new rules make no distinction between South African and foreign trusts, and there might be problems if the proposed legislation applies to foreign trusts in the same way.

CONCLUSION

The extent of the potential impact of the proposed amendments on the liability for withholding taxes and the available relief to the foreign recipient are yet to be observed in practice. While the proposed changes are geared towards protecting South Africa's tax base and the ease of revenue collection for the fiscus, it will result in non residents having less certainty as to the taxation of dividends and interest received from a trust.

Adelle du Plessis & Benedict Ngobeni (reviewed by **Ernest Mazansky)**

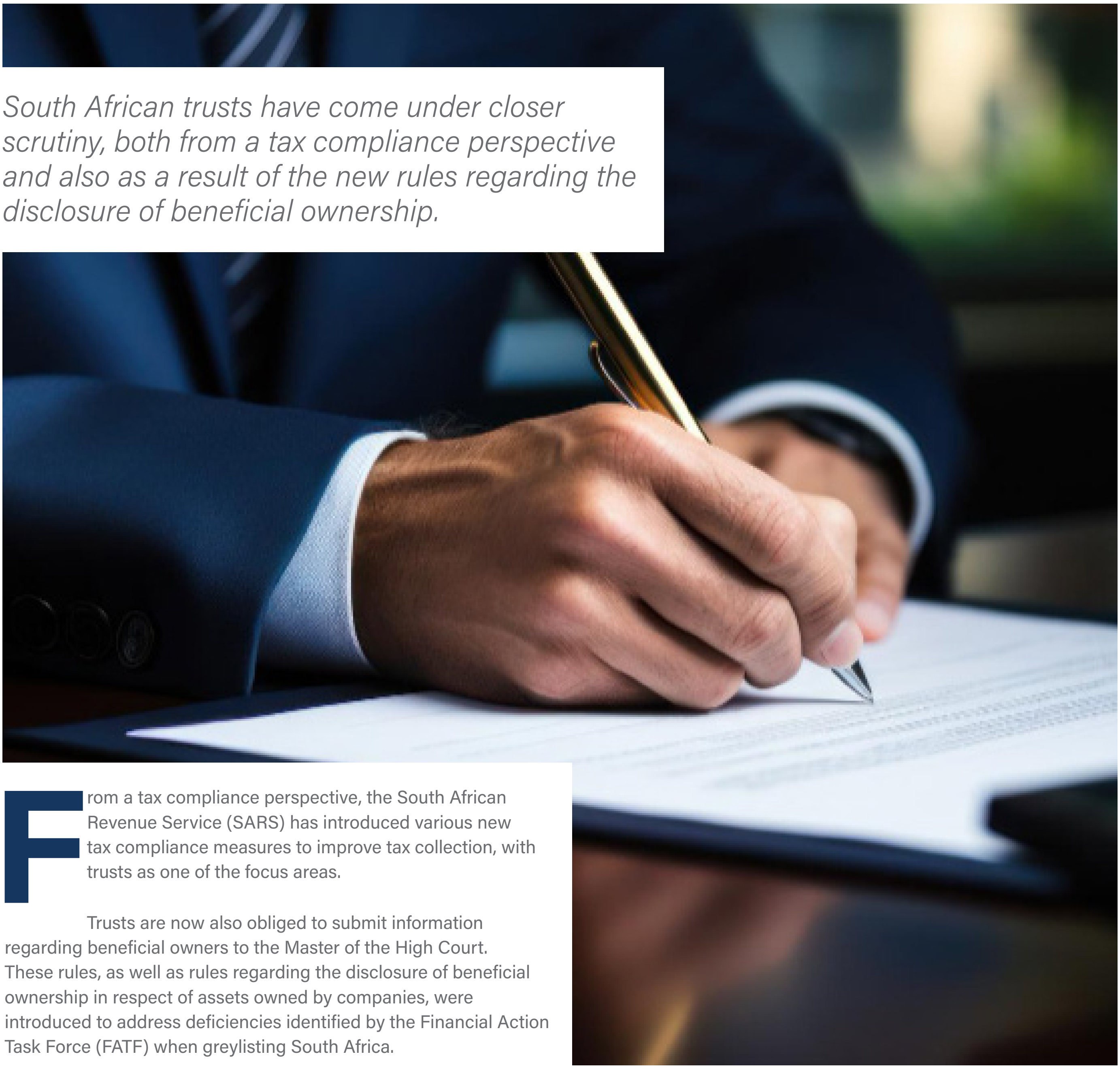
Werksmans Attorneys

Acts and Bills

- Income Tax Act 58 of 1962: Sections 25B, 50D & 64D (definition of "beneficial owner");
- Taxation Laws Amendment Bill 36 of 2023;
- Draft Taxation Laws Amendment Bill, 2023.

Tags: tax residence; beneficial owner; dividends tax; beneficiary of a discretionary trust; marginal rate of tax; foreign beneficiary; withholding tax on royalties.

NEW TRUST COMPLIANCE AND REPORTING OBLIGATIONS



South African trusts have come under closer scrutiny, both from a tax compliance perspective and also as a result of the new rules regarding the disclosure of beneficial ownership.

From a tax compliance perspective, the South African Revenue Service (SARS) has introduced various new tax compliance measures to improve tax collection, with trusts as one of the focus areas.

Trusts are now also obliged to submit information regarding beneficial owners to the Master of the High Court. These rules, as well as rules regarding the disclosure of beneficial ownership in respect of assets owned by companies, were introduced to address deficiencies identified by the Financial Action Task Force (FATF) when greylisting South Africa.

"In this context, 'trusts' refers to both resident trusts and non-resident trusts that are required to submit income tax returns, but excludes collective investment schemes and employment share incentive scheme trusts."

TAX RETURNS

Resident trusts have for many years been obliged to submit income tax returns, irrespective of whether or not they derive any income. Non-resident trusts are only obliged to submit income tax returns if they:

- carry on a trade through a South African permanent establishment;
- derive income from a South African source; or
- derive any capital gain or capital loss from the disposal of an asset to which the Eighth Schedule to the Income Tax Act applies, including if the asset disposed of is (an interest in) South African immovable property.

It is important not to interpret these requirements in isolation. For example, it is important to keep in mind that "income" excludes exempt income. Accordingly, if a non-resident trust derives only exempt income (such as exempt interest) from a South African source, the trust would not be obliged to submit tax returns.

Many resident trusts have not submitted income tax returns, arguing that they are dormant or do not carry on income-producing activities. SARS is now running an awareness campaign to ensure that all resident trusts submit returns. SARS can (and in fact from time to time does) criminally charge representative taxpayers for the failure to submit income tax returns.

THIRD PARTY RETURNS

In terms of General Notice 3631, issued on 30 June 2023, trusts are now obliged to submit third-party returns to SARS. These returns (IT3(t)) must be submitted electronically via eFiling and must include information regarding all amounts vested in beneficiaries, including net income, capital gains and capital amounts.

In this context, "trusts" refers to both resident trusts and non-resident trusts that are required to submit income tax returns, but excludes collective investment schemes and employment share incentive scheme trusts.

Notice 3631 required trusts to submit returns once a year, by 31 May, in respect of the period 1 March to the end of February. Although the Notice applies to periods commencing on or after 1 March 2023, it was published after the 31 May 2023 trust submission deadline. This implied that the first third-party returns for trusts would have been due by 31 May 2024. For trusts with a February year-end, this left a relatively short period between year-end and the due date for submission.

On 10 November 2023, SARS issued Notice 4051 to change the due date for submission of third-party returns in respect of trusts, to 30 September of each year.

BENEFICIAL OWNER REGISTER

In terms of the Trust Property Control Act, 1988 (the TPCA), read with the Regulations issued in terms thereof (Regulations), trustees are subject to new obligations, including the obligation –

- to keep records of the beneficial owners of the trust and to submit a register with the prescribed information on the beneficial owners (Register) to the Master's Office; and
- to record the details of accountable institutions used by the trustees to perform any of the trustees' functions relating to trust property.

While the rules came into effect on 1 April 2023, they do not prescribe a period within which the Register must be submitted to the Master. The TPCA does, however, stipulate that the failure by a trustee to submit the Register to the Master is an offence which on conviction could result in a fine of up to R10 million and/or imprisonment for a period of up to five years. Trustees should thus ensure that they comply with their obligations in respect of the submission of the Register, as well as in respect of associated institutions.

The definition of "beneficial owner" (in section 1 of the TPCA), includes:

- the founder of the trust; or if the founder is a legal person, the natural person who directly or indirectly ultimately owns or exercises effective control of that legal person; and
- each trustee of the trust.

Notably, the concept of beneficial ownership for the purpose of TPCA reporting must be interpreted based on the context and on the specific set of facts. For example, in the context of a share scheme, a beneficiary who is not specifically named and who does not have a vested right to trust assets but who receives income derived from trust assets, would arguably not qualify as a beneficial owner as defined, although each case would have to be assessed based on the specific facts.

Once the trustees have compiled the prescribed information of the beneficial owners, they must include the information in a Register (the BO Register) and submit it to the Master:

- The BO Register can be accessed from the website of the Master, by selecting the link to the "Trust Beneficial Ownership Register form and register" in the "Administration of Trusts" section.
- Initially, the BO Register had to be submitted via a Google documents platform, as a temporary solution.
- In Chief Master's Directive 8 of 2023, dated 16 October 2023, the Master announced that a new BO Register had been developed. It is a web-based system enabling trustees and other authorised parties to submit the BO data in a safe and secure environment.
- BO Registers previously submitted via the Google platform will be migrated to the new system and would not have to be resubmitted, unless the trustees are notified by email that updates are required; and
- any changes to the Register must be submitted via the new web-based system.

ACCOUNTABLE INSTITUTIONS

The trustees must also record the prescribed details relating to the accountable institutions used by the trustees to perform any of the trustees' functions relating to trust property. There is no obligation to submit such information to the Master, but the trustees must record the details of these organisations.

This seems to be aimed at ensuring that the outsourcing of functions relating to trust property to accountable institutions is duly recorded. The TPCA defines an "accountable institution" to have the meaning as defined in the Financial Intelligence Centre Act, 2001 (FICA) – this definition includes a person who "carries on *the business* of preparing for or carrying out transactions (including as a trustee) *related to the investment, safe keeping, control or administering of trust property*" within the meaning of the TPCA.

Persons or organisations who qualify as accountable institutions have to register as such with the Financial Intelligence Centre (the FIC).

Trustees who act as trustees only on an occasional basis or who perform this function in their personal capacities (as opposed to doing so on a commercial basis as a regular feature of their business) would not be carrying on such functions as their business and should thus not be obliged to register with the FIC as an accountable institution. However, this would depend on the specific circumstances of each case and trustees are urged to consider whether they could be said to carry on the transactions relating to the investment or administering of trust property as a business, in which case they may be obliged to register in terms of FICA.

Aneria Bouwer & Reuben Pretorius

Bowmans

Acts and Bills

- Income Tax Act 58 of 1962: Eighth Schedule;
- Trust Property Control Act 57 of 1988: Section 1 (definitions of "accountable institution" & "beneficial owner");
- Financial Intelligence Centre Act 38 of 2001.

Other documents

- Regulations issued in terms of the Trust Property Control Act, 1988.
- General Notice 3631, issued on 30 June 2023 (trusts now obliged to submit third-party returns to SARS);
- General Notice 4051, issued on 10 November 2023 (amendment to third-party notice);
- The BO Register (Beneficial Owners Register);
- Chief Master's Directive 8 of 2023, dated 16 October 2023 (announcement of a new BO Register).

Tags: tax compliance; non-resident trusts; exempt income; beneficial owner; accountable institutions.

South African
Institute of
Taxation