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DEDUCTIONS AND ALLOWANCES
LOSSES INCURRED DURING LOCKDOWN

DIGITAL TAX
TAX ON TAX DIGITAL ECONOMY

TAX ADMINISTRATION
PROFESSIONAL CONDUCT REQUIRED OF OFFICERS OF THE COURT

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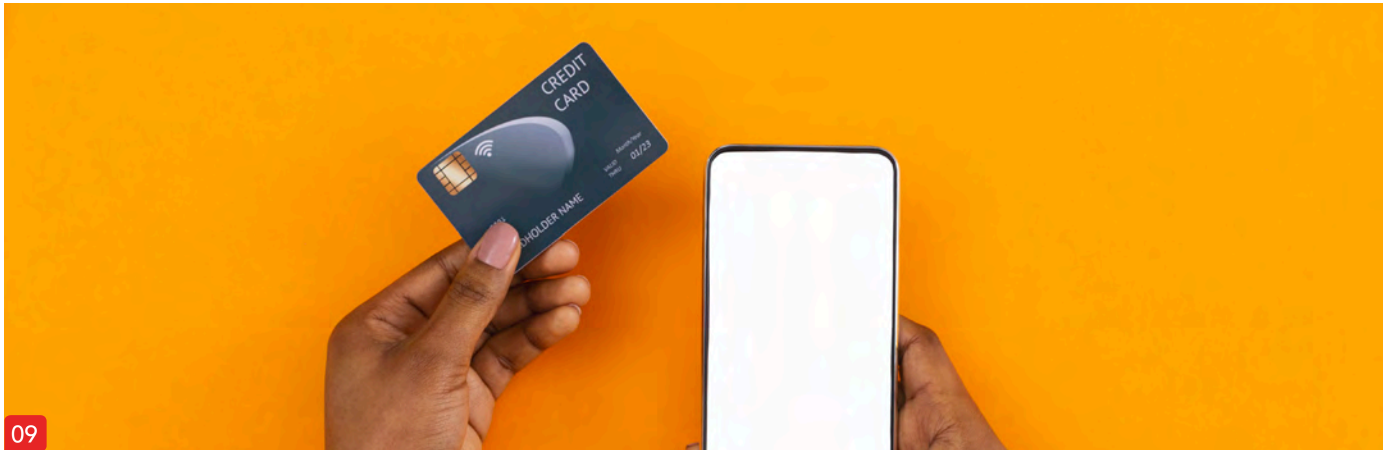

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ALLOWANCES AND RENEWABLE ENERGY PREMIUMS

On 19 June 2020, Minister of Finance, Tito Mboweni, finalised the next set of regulatory mechanisms applicable to the Carbon Tax Act, 2019 (the Act):

- Regulations under section 19*(b)* of the Act for purposes of section 10 for the Trade Exposure Allowance (the Trade Exposure Allowance Regulations);
- Regulations under section 19*(a)* for greenhouse gas emissions intensity benchmarks for purposes of section 11 for the Performance Allowance (the GHG Emission Intensity Benchmark Regulations); and
- Notice regarding Renewable Energy Premium in respect of Tax Period for purposes of Symbol "B" in the formula contained in section 6(2) (Renewable Energy Tax Premium Notice).

THE TRADE EXPOSURE ALLOWANCE REGULATIONS AND GHG EMISSION INTENSITY BENCHMARK REGULATIONS

The draft Trade Exposure Allowance Regulations and draft GHG Emission Intensity Benchmark Regulations were published for comment in December 2019. These regulations were published in final form in the *Government Gazette* on 19 June 2020.

The trade exposure allowance permitted under the Act provides some reprieve to entities exposed to international competitiveness. The Trade Exposure Allowance Regulations provide a list of such applicable sectors and/or subsectors with the corresponding trade allowance percentage of that sector in Annexure A. The carbon tax payable by these sectors will be determined by the sum of the GHG emissions for each category, less the allowances for each emissions category (combustion, fugitive or industrial process). Where a taxpayer undertakes activities in different sectors and therefore potentially faces different trade intensity risk levels simultaneously, a weighted average of the different tax-free allowance levels will be calculated. An alternative approach to calculate the trade exposure allowance is also permitted, where a taxpayer is of the opinion that the sector-based allowance does not accurately reflect the extent of the trade exposure of that taxpayer.

"Taxpayers that perform better than an approved sector or subsector emission intensity benchmark will qualify for a performance allowance."

The Act further provides for a performance allowance where a taxpayer has implemented measures to reduce its GHG emissions in respect of a tax period, which is to be calculated against an approved sector or subsector emission intensity benchmark. In other words, taxpayers that perform better than an approved sector or subsector emission intensity benchmark will qualify for a performance allowance. The GHG Emission Intensity Benchmark Regulations set out the emissions intensity benchmarks for the applicable sectors and subsectors in Annexure A, as well as the determination for measured and verified emissions intensity, for purposes of completing the formula prescribed in the Act.

The above regulations are both deemed to have come into operation on 1 June 2019, and can accordingly be applied under the current tax return period (as extended by the COVID-19 regulatory framework).

Whether these incentives will be utilised in the face of major emitters, particularly those in monopolised industries, directly passing on their carbon tax liability to customers, remains a subject of concern.

Webber Wentzel

Acts

- Carbon Tax Act 15 of 2019: sections 6(2), 10, 11 & 19*(a)* & *(b)*.

Other documents

- Trade Exposure Allowance Regulations (made under section 19*(b)* of the Carbon Tax Act for purposes of section 10; published on 19 June 2020 in *Government Gazette* 43451);
- GHG Emission Intensity Benchmark Regulations (made under section 19*(a)* of the Carbon Tax Act for purposes of section 11; published on 19 June 2020 in *Government Gazette* 43452 (performance allowance));
- Renewable Energy Tax Premium Notice (in respect of Tax Period for purposes of Symbol "B" in the formula contained in section 6(2) of the Carbon Tax Act; published on 19 June 2020 in *Government Gazette* 43453).

Tags: trade exposure allowance; performance allowance; emissions intensity.

LOSSES INCURRED DURING LOCKDOWN

There is little doubt that the national lockdown in response to the COVID-19 health crisis has had a negative financial impact on individuals and business alike.

In this article we take a look at the effect that the national lockdown may have on expenditure or losses incurred by individuals and businesses. We also look at the tax consequences that may arise as a result of employers providing their employees with personal protective equipment. To this end we will consider two scenarios.

SCENARIO 1: TAX TREATMENT OF LOSSES INCURRED DURING LOCKDOWN

In our first scenario we have a taxpayer trading in general goods or rendering services that were not classified as essential goods and services, under the regulations promulgated under the Disaster Management Act, 2002, which applied from the commencement of the lockdown on 26 March until 31 May, when the lockdown moved to level 3. This means that the taxpayer had to close their doors to customers from 26 March 2020 to 1 June 2020 when level 3 was introduced. During this period, the taxpayer may have incurred expenditure and suffered losses they may wish to claim as a deduction.

In order to calculate the taxable income of a taxpayer, one must deduct from the taxpayer's income all amounts that are allowed as tax deductions in terms of the Income Tax Act, 1962 (the Act). In terms of section 11 of the Act, in determining the taxable income derived by any person carrying on any trade, there shall be allowed as deductions from the income of such person expenditure and losses actually incurred in the production of the income, provided such expenditure and losses are not of a capital nature.

In terms of section 11, the first step of the enquiry is to establish whether the taxpayer was trading for purposes of the Act. Carrying on a trade presupposes a system or plan which discloses a degree of continuity in the operation. The test to be applied to determine whether trading is being carried on is an objective test. This means that if objective factors indicate that the taxpayer is trading, then the trade requirement is satisfied.

The difficulty that arises here is that the taxpayer would have closed down its business for the duration of the lockdown and the question then becomes whether the taxpayer ceased to be carrying on a trade during that period.

In order to determine whether the taxpayer was trading one has to consider whether there were objective factors that indicated that, despite the closing down of the business for a considerable period, the taxpayer nevertheless continued carrying on a trade. The phrase "carrying on a trade" is not defined in the Act thus one has to look to how it has been defined in case law.

In *SA Bazaars (Pty) Ltd v Commissioner of Inland Revenue*, [1952], the court considered whether a taxpayer who carried on a retail general dealer's business continued to trade for purposes of the Act when it closed down its business. In this case, the taxpayer had closed down its business but had continued to maintain its bank account, hold general meetings and prepare its annual account which disclosed that its losses had been carried forward year-on-year since closing down.

"What emerges from the case law above is that it is not possible to lay down an exhaustive list of activities that must be present in order to determine what constitutes the carrying on of a trade."

While the taxpayer's conduct was aimed at keeping itself alive during the period that it was closed down, this did not mean that it was carrying on a trade. Specifically, the court held that:

> "the mere fact that it kept itself alive during that and subsequent periods does not mean that during those periods it was carrying on a trade. It is clear from the stated case that it closed down its business and as long as it kept its business closed it cannot be said to have been carrying on a trade, despite any intention it might have had to resume its trading activities at a future date."

In ITC 777 19 SATC 320, [1953], the taxpayer owned property which it had endeavoured to lease out without much hope of success. The question that arose there was whether the taxpayer was carrying on a trade. The argument raised by SARS was that a mere intention to let out the property was itself not sufficient to constitute carrying on a trade. According to SARS, there must have been some actual dealing and the fact that the property had not been leased meant a trade was not being carried on. The court reasoned that had the taxpayer been successful in letting out the property there would be no question that the rental would have been income derived from carrying on a trade. The court held that:

> "a mere intention to let property would not amount to the carrying on of a trade but I do not agree that to constitute carrying on trade there had to be an actual letting. It was the intention of the company if possible, to let the property and though its efforts to do so were not sustained or strenuous it did endeavour to let it to and through associated companies. It has been held that in many businesses long intervals of inactivity occur. ...As the company had endeavoured to let the property, I am of opinion that it did carry on trade".

According to the court a long period of inactivity did not negate the carrying on of a trade.

In ITC 1476 52 SATC 141, [1989], the court had occasion to consider the objective factors which, if present, would indicate the carrying on of a trade. The court stated that "the appellant incurred no expense for office rent or salaries. There were no travelling or advertising expenses. This is all an indication of no activity at all". The court concluded that the absence of these factors indicated that the taxpayer was totally inactive and thus not carrying on a trade.

In *Commissioner for South African Revenue Service v Smith*, [2002], the Supreme Court of Appeal had to consider whether a taxpayer was carrying on the trade of farming when the taxpayer had no reasonable prospects of turning a profit. The court held that to be considered to be carrying on a farming operation, the taxpayer was only required to show that he possessed a genuine intention to carry on farming operations profitably. All considerations that had a bearing on whether a trade is being carried on, including the consideration of a profit, must be taken into account to answer the question.

What emerges from the case law above is that it is not possible to lay down an exhaustive list of activities that must be present in order to determine what constitutes the carrying on of a trade. All factors that have a bearing on the enquiry will be considered. This means that each case will be determined on its own facts.

Returning to our scenario, the taxpayer would have to first prove an intention to carry on trade and secondly, demonstrate the objective factors against which the taxpayer's intention can be tested. Factors such as paying salaries, incurring rental expense and advertising costs will have a bearing on the enquiry. We submit that these factors would, if present, demonstrate that despite having closed down its business for the duration of the lockdown, the taxpayer was not completely inactive.

Although each case will be determined on its own merits, the circumstances under which businesses would have closed down during the lockdown period are quite unique and may also have a bearing on the enquiry.

"In terms of the Act, the value of fringe benefits, referred to as taxable benefits, received by an employee from their employer must be included in the gross income of an employee. "

SCENARIO 2: THE PROVISION OF PERSONAL PROTECTIVE EQUIPMENT

In our second scenario, an employer has been operating during the lockdown and has provided its employees with personal protective equipment, such as masks and hand sanitisers to use whilst at work.

Ordinarily, where an employer provides assets to its employees, it is likely that the employees will also use these assets for their own private use. In the case of masks and sanitisers, employees can also wear these masks at work and at home. The issue that arises is whether the assets that the employer has provided to its employees constitute a taxable benefit in the hands of the employees.

In terms of the Act, the value of fringe benefits, referred to as taxable benefits, received by an employee from their employer must be included in the gross income of an employee. The value is the cash equivalent of the fringe benefit, as determined under the provisions of the Seventh Schedule to the Act.

In terms of paragraph 6 of the Seventh Schedule, a taxable benefit arises whenever an employee is granted the right to use any asset by their employer for their private or domestic use. Where an employee is granted the right to use the asset over its useful life or a major portion of its useful life, the value of the private or domestic use is equal to the cost of the asset to the employer.

However, in terms of paragraph 6(4)*(a)*, where the private or domestic use of an asset by the employee is incidental to the use of the asset for the purposes of the employer's business, no value is placed on that asset. This means that a taxable benefit does not arise. The determination of whether an asset is used mainly for the business of the employer is determined on the facts of each case.

The nature of the asset and the various ways in which the employee uses the asset, amongst other things, will be relevant in determining whether the asset is used mainly for the business of the employer. There must be a close link between the grant of the right to use the asset and the employee's responsibilities. In this enquiry, what will ordinarily be important are the terms under which the use of the asset is granted.

In our scenario, an argument may be made that the use of personal protective equipment like masks is mainly to enable the employee to perform their job and consequently no value will be placed on the private or domestic use. What is important to note is that only when almost the entire use of the asset is for purposes of the employer's business will the private or domestic use of the asset by the employee be considered to be incidental.

In addition, the employer and employee could also potentially rely on paragraph 10(2)*(c)* of the Seventh Schedule. It states that no value is placed on any service rendered by an employer to its employees at their work place for the better performance of their duties or as a benefit to be enjoyed by them at their place of work. This means that were an employer has rendered a service to its employees at the workplace for the better performance of their duties there is a taxable benefit, to the value of nil. As such, no tax is payable even though there is still a taxable benefit. The argument here could be that the provision of personal protective equipment is a service rendered by the employer to the employees in order to ensure that they can perform their duties during the ongoing health crisis.

"What is important to note is that only when almost the entire use of the asset is for purposes of the employer's business will the private or domestic use of the asset by the employee be considered to be incidental."

Another consideration from the employer's perspective is whether the expenditure incurred in order to provide employees with personal protective equipment may also be deductible in terms of section 11 of the Act. As noted above, section 11 provides for the deduction of expenditure and losses incurred in the production of income, provided the expenditure or loss is not of a capital nature.

The question that will arise in this scenario is whether the expenditure incurred to acquire personal protective equipment for employees can be considered to be expenditure incurred for the purposes of earning an income by the employer.

In *Port Elizabeth Electric Tramways Company Ltd v Commissioner for Inland Revenue*, [1936], the court considered this very question and held that in order to answer this question what must be determined is how closely linked the expenditure is to the business operation of the taxpayer. The court held that:

> "all expenses attached to the performance of a business operation *bona fide* performed for the purpose of earning income are deductible whether such expenses are necessary for its performance or attached to it by chance or are *bona fide* incurred for the more efficient performance of such operation provided they are so closely connected with it that they may be regarded as part of the cost of performing it".

In this case, it is submitted that as the use of personal protective equipment is required in order for businesses to be open, one could argue that the expenditure in respect of the provision of personal protective equipment would be expenditure that is necessary for the performance of the employer's business operations.

COMMENT

Individuals and business who incur expenditure or losses as a result of the COVID-19 pandemic, must ensure that they meet the relevant requirements to claim such expenditure or loss incurred as a deduction for income tax purposes. If a taxpayer is uncertain whether an amount is deductible, they should obtain proper tax advice on the issue or consider applying to SARS for an advance tax ruling, in particular if the expense in question is significant.

Cliffe Dekker Hofmeyr

Acts

- Disaster Management Act 57 of 2002;
- Income Tax Act 58 of 1962: section 11; Seventh Schedule: paragraphs 6 (6(4)*(a)*) & 10(2)*(c)*.

Other documents

- Regulations promulgated under the Disaster Management Act 57 of 2002.

Cases

- *SA Bazaars (Pty) Ltd v Commissioner of Inland Revenue* 18 SATC 240; [1952] (4) SA 505 (A);
- ITC 777 [1953] 19 SATC 320;
- ITC 1476 [1989] 52 SATC 141;
- *Commissioner for South African Revenue Service v Smith* [2002] (6) SA 621 (SCA);
- *Port Elizabeth Electric Tramways Company Ltd v Commissioner for Inland Revenue* [1936] CPD 241; 8 SATC 13.

Tags: tax consequences; taxable income; expenditure and losses; carrying on a trade; taxable benefit; fringe benefit; advance tax ruling.

REFUNDED REMUNERATION

On occasions when company executives have to pay back a portion of their remuneration, the fiscus may unjustifiably benefit at the expense of employers from the tax previously paid on these amounts. This situation could be made fairer by adding a simple provision to the Income Tax Act (the Act).

Company executives may sometimes have to pay back some of their remuneration to their former employers. This could arise either from current economic volatility impacting incentive arrangements, or the various corporate financial scandals which have engulfed South Africa over the past few years. What is often forgotten in these often highly emotive events is that, in most instances, income tax would have been paid by the executive on a portion of the remuneration now being returned to their former employer.

The former executive may have only received up to 55c in the rand of this perceived excessive or ill-gotten compensation, and the fiscus would have been the beneficial recipient of the balance. So the executive may be unable to repay the full amount. The mechanism currently included in the Act to mitigate this situation is not only anomalous, but practically unworkable and inefficient from the perspective of the employer, when large sums of money are involved. In this regard, section 11*(n*A*)* of the Act currently permits an individual to claim a deduction against their income of any amount which the individual actually repays to their employer.

"The mechanism currently included in the Act to mitigate this situation is not only anomalous, but practically unworkable and inefficient from the perspective of the employer, when large sums of money are involved."

Issues which relate to this provision and its inadequacies are probably best explained by way of a simple example. Assume that in Year 1, Mr X was paid a ZAR10 million bonus by Company A, in relation to which ZAR4.5 million was paid in tax to SARS and ZAR5.5 million was actually received by Mr X. Further assume that Mr X is, for whatever reason, required to repay the full amount of his bonus (ZAR10 million) to the company in Year 2 and that Mr X did not earn any significant amount of income in Year 2.

To the extent that Mr X repays what he can, being ZAR5.5 million, to the company in Year 2, he would be entitled to a tax deduction of this amount. However, where he paid no tax to SARS during Year 2, he would not be entitled to apply his erstwhile tax deduction of ZAR5.5 million in claiming a cash refund from SARS and Mr X would simply instead derive a tax loss of ZAR5.5 million that may be carried over to subsequent tax years. While the tax loss may be carried forward to be set off against income earned by Mr X in subsequent tax years, Mr X will have to earn sufficient future income to be able to benefit from the deduction of the ZAR4.5 million tax previously paid by him.

From Company A's perspective, to the extent that Mr X does not earn any significant income again in his lifetime, no probable basis exists for the ZAR4.5 million ever to be recovered from Mr X, other than seeking to sequestrate him. (Depending on the facts, he may never have been recalcitrant in any way and may have previously been a loyal servant of the company.)

An anomalous issue exists in that had Mr X earned sufficient income in Year 1 to repay the ZAR10 million to Company A, he would have managed to recover the full amount of tax previously paid to SARS in Year 1 (as PAYE) and all the parties (including SARS) would have been satisfied with the outcome. This is because he would be entitled to claim the ZAR10 million paid back to Company A as a deduction against his taxable income of ZAR10 million, in respect of which ZAR4.5 million tax was paid to SARS. In practice, these issues unfortunately seldom manifest themselves in the same year in which the bonus was required to be repaid by the executive.

We argue that this is an untenable scenario which is easily remedied in a way that is unlikely to burden the fiscus materially.

We propose that a provision be introduced to allow an executive's employer (Company A in the above example) to lodge an application with SARS that would enable the employer to claim a refund directly from SARS of the tax that was previously paid by the executive in a tax year prior to the tax year in which the executive repays the money to their employer.

To avoid manipulation (which in any event is highly unlikely), it is submitted that an amount of the tax that was previously paid should be repaid by SARS to the employer *pro rata* to the amount of after-tax earnings that the individual actually pays back to their employer. The fact that the executive paid tax on the amount that now has to be repaid to the employer should be easily proved.

So, for example, if Mr X repays ZAR5.5 million to Company A (ie 100% of the after-tax amount paid to him), SARS should be required to repay 100% of the tax withheld directly to Company A, ie ZAR4.5 million. However, if Mr X only repays, say, ZAR2.75 million (50% of the after-tax amount he received) to the employer, then SARS should only be obliged to repay ZAR2.25 million to Company A.

We believe this would be a workable remedy which would enable the executive to meet their obligation to repay to their employer the full remuneration previously earned, while ensuring that the fiscus is not unwittingly enriched at the expense of the executive or their former employer.

Weber Wentzel

Acts

- Income Tax Act 58 of 1962: section 11*(nA)*.

Tags: tax deduction; after-tax earnings.

SECTION 23H PREPAYMENTS

Section 23H of the Income Tax Act is a provision that is designed to spread prepayments made by taxpayers over the term of the contract, where the goods or services to be supplied or the benefits to be enjoyed under the contract will extend more than six months beyond the end of the year of assessment.

The Supreme Court of Appeal was called upon to adjudicate whether commissions paid by a cellphone service provider constituted prepayments that were required to be so spread.

In the matter of *Telkom SA SOC Limited v the Commissioner for the South African Revenue Service*, [2020], there was a second dispute in addition to the foreign exchange dispute. This second dispute concerned the right of Telkom to deduct commissions paid to selling agents who signed up subscribers.

Telkom offered a special incentive bonus to agents for the introduction of new subscribers, which was paid on the connection of the subscriber to Telkom's mobile network. It paid an incentive bonus of approximately R179m in the year of assessment in question, which it claimed as a deduction. SARS asserted that the subscribers had signed up for 24-month contracts and that the expenditure should be spread over the term of each contract. It disallowed approximately R137m, which would only be allowed as a deduction in subsequent years of assessment.

The decision of the tax court is summarised in paragraph [46] of the SCA judgment:

> "The Tax Court, in upholding the appeal, made the following findings:
>
> (a) The benefit that was attached to the expenditure was the conclusion of the contract with the customer in question.
>
> (b) Velociti rendered all the services which it was obliged to do in terms of the incentive letters and for which the payment of R178 788 421 was made.
>
> (c) As a result, there was no basis to add back and disallow R136 531 542 of the cash incentive bonus expenditure by the application of s 23H in the 2012 year of assessment."

SARS had been dissatisfied with this decision and had noted an appeal to the SCA.

THE JUDGMENT

In his judgment, Swain JA paraphrased section 23H(1) by referring only to the parts that he considered pertinent:

> "(1) Where any person has during any year of assessment actually incurred any expenditure (other than expenditure incurred in respect of the acquisition of any trading stock) –
>
> *(a)* which is allowable as a deduction in terms of the provisions of section 11*(a)* . . .; and
>
> *(b)* . . . in respect of –
>
> . . .
>
> (ii) any other benefit, the period to which the expenditure relates extends beyond such year of assessment,
>
> the amount of the expenditure which shall be allowable as a deduction in terms of such section in the said year and any subsequent year of assessment, shall be limited to, in the case of expenditure incurred in respect of –
>
> . . .
>
> (iii) any other benefit to which such expenditure relates, an amount which bears to the total amount of such expenditure the same ratio as the number of months in such year during which such person will enjoy such benefit bears to the total number of months during which such person will enjoy such benefit or where the period of such benefit is not determinable, such period over which the benefit is likely to be enjoyed:
>
> Provided that the provisions of this section shall not apply –
>
> *(aa)* where all the goods or services are to be supplied or rendered within six months after the end of the year of assessment during which the expenditure was incurred, or such person will have the full enjoyment of such benefit in respect of which the expenditure was incurred within such period, unless the expenditure is allowable as a deduction in terms of section 11D(2); ..."

Telkom argued that the agent had provided a customer, which Telkom had accepted and connected to its network, and that no further benefit was expected to accrue to Telkom from the agent, whose services had been fully rendered and paid for. Telkom was thereafter under an obligation to supply the services to the subscriber in terms of the subscription agreement, for which a fee was payable by the subscriber. The agent, in addition to the introductory commission, would be entitled to receive a commission monthly in respect of subscription revenues.

The argument of SARS was set out in paragraph [50] of the judgment:

> "The Commissioner, however, submitted that the key question was when and how the benefit, in respect of which the expenditure was incurred, was enjoyed. This was because the pleaded dispute turned on when and how Telkom enjoyed the benefit, received from the cash incentive bonus payment. The Commissioner pleaded that it was the subscription agreement with the client that was the source of the direct benefit to Telkom. The Commissioner also pleaded that the benefit to Telkom flowed primarily and directly from the service contract, in terms of which the individual customer paid monthly subscription fees. The dealer was a mere facilitator, who brought about the source of the benefits, and the benefits ie the fees, were direct and central to Telkom's business. It was the agreement concluded between Telkom and the respective dealers which was the indirect source of the benefit."

These arguments prevailed and the judgment concluded at paragraph [53]:

> "The Commissioner therefore correctly submitted that the period to which the expenditure 'relates', must be the period during which the benefit is enjoyed. Telkom does not incur the incentive bonus expenditure solely to establish a new connection with a customer. The benefit lies in having a customer who pays subscription fees over the fixed term of the contract. Telkom does not enjoy any benefit immediately upon the conclusion of a new contract. It has nothing to show for it until such time as the connection turns into fee income. That is when Telkom begins to enjoy the true benefits of the cash incentive payments."

Judgment was given in favour of SARS and it was held that the commissions could only be deducted evenly over the period of the contract.

COMMENTARY

From the discussion in the judgment of the respective arguments, it appears that the arguments on both sides addressed only the "benefit" derived from a contract of agency and that the court concerned itself only with the benefit of the arrangement. That said, it is submitted that a thorough analysis of section 23H(1) should have been made. The second finding in the tax court (that the services in respect of which the commission was paid had been fully rendered by the agent in the year of assessment) was not addressed in the judgment. It is submitted that the finding that the services had been rendered by the agent in the year of assessment was the *ratio decidendi* of the tax court decision.

In paragraphs 8 to 21 of the judgment, Swain JA had gone to lengths to specify the approach to interpretation of words used in a statute and the importance of the correct application of context in so doing. He had also confirmed that the *contra fiscum* rule, which entails an interpretation more favourable to the taxpayer, should be applied in cases of irresoluble ambiguity.

Based on the discussion on interpretation in the judgment, it is pertinent to identify whether the principles were put into practice in interpreting section 23H(1)*(b)*.

Words used in a statute should be interpreted by considering "… the language used in the light of the ordinary rules of grammar and syntax …" (As quoted by Swain JA from the judgment of Wallace JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*, [2012]).

Swain JA considered only a part of section 23H(1)*(b)* (which was referred to in the judgment as "the relevant portions of section 23H(1)").

Section 23H(1)*(b)* applies to expenditure actually incurred by a taxpayer:

> "*(b)* in respect of—
>
> (i) goods or services, all of which will not be supplied or rendered to such person, during such year of assessment; or
>
> (ii) any other benefit, the period to which the expenditure relates extends beyond such year of assessment".

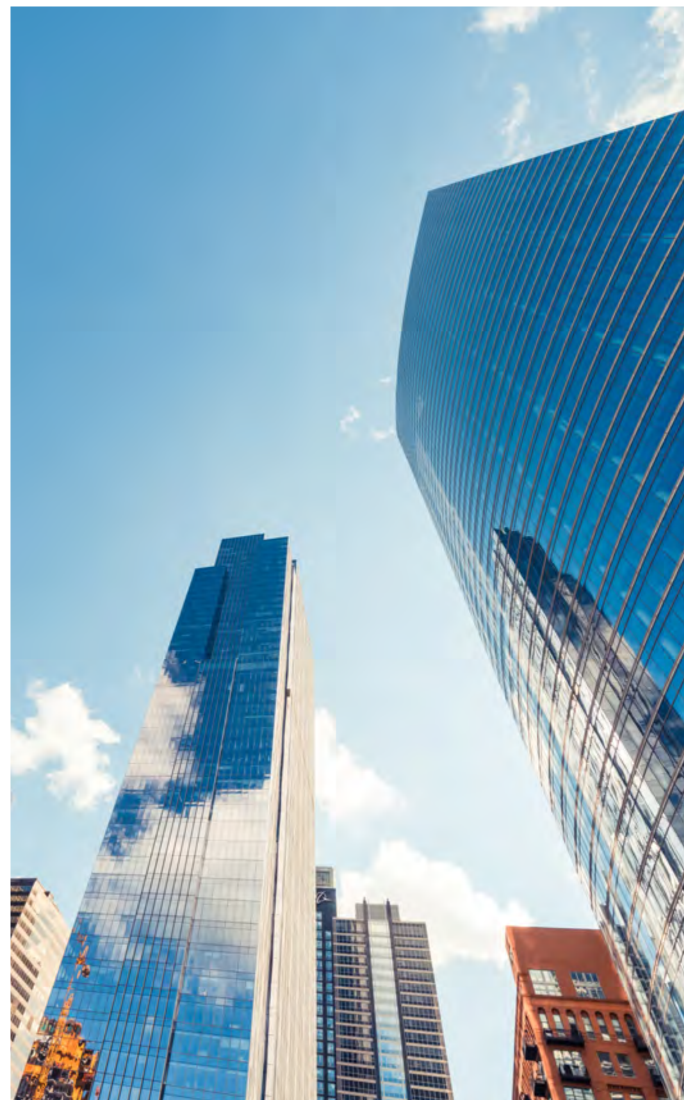
It is submitted that, based on the ordinary rules of grammar and syntax, the relevant inquiry was to establish first whether the payment had been made for goods or for services or for another benefit and not whether the taxpayer enjoyed a commercial benefit flowing from a person other than the person to whom the expenditure was paid. This was the basis for the finding in the tax court, to which no reference is made in the judgment, other than to state the tax court's findings.

By simply assigning no relevance to paragraph *(b)*(i), Swain JA appeared to ignore a part of the subsection that was critical to the dispute.

Even in the modern age of purposive interpretation, consideration still needs to be given to the words used in the statutory provision, as suggested in *Rex v Standard Tea & Coffee Co (Pty) Ltd and Another*, [1951], at 416:

> "It is a cardinal rule of interpretation of legislative enactments that they 'should be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant'."

It is submitted that Swain JA failed to take account of the necessity to identify the cause for the payment, as opposed to the indirect outcome. It is submitted that the words used in section 23H(1),



"Telkom had urged a narrow interpretation that the commission was paid for the introduction of a qualifying subscriber and that the fees flowed from a separate agreement – the subscription agreement – between Telkom and the subscriber."

applying the ordinary rules of grammar and syntax, indicate that the expenditure must have been incurred either for goods or for services or for some other benefit.

The determination appears to hinge on the interpretation of the words "in respect of". In this regard, Rumpff ACJ stated in *Buglers Post (Pty) Ltd v Secretary for Inland Revenue*, [1974], at 33:

> "I have quoted the whole of this sub-paragraph because it illustrates the possibility of the words 'in respect of' having a narrow or a wide meaning depending on the context in which the words are used. See, for instance, *Sekretaris van Binnelandse Inkomste v Raubenheimer*, 1969 (4) SA 314 (AD), where, in considering the meaning of these words in relation to s 11(1) of the then Act, this Court referred to the case *Commissioner for Inland Revenue v Crown Mines Ltd*, 1923 AD 121, and more specifically to what Solomon, JA, said at p 128, namely:
>
> > 'Now the words in respect of may be used in various senses, and in each case it is essential to examine the context in order to ascertain the sense in which it is used.' "

Words used in a statute should be interpreted after considering "… the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production."

The provisions of section 23H were enacted in 2000. The Explanatory Memorandum to the Taxation Laws Amendment Bill, 2000, stated that the provision is an anti-avoidance provision to address certain tax-avoidance schemes.

It stated, at page 35:

> "In this regard, a new section 23H is proposed, which provides that where any person has incurred any expenditure, which is or was allowable as a deduction in terms of the provisions of section 11*(a)*, *(b)*, *(c)* or *(d)* of the Income Tax Act, 1962, the amount allowed to be deducted in any year of assessment shall be limited to the expenditure relating to goods supplied, services rendered or benefits the person will become entitled to during the relevant year of assessment."

Paragraph *(b)* read as follows when originally enacted:

> "*(b)* in respect of goods, services or any other benefit, all of which will not be supplied or rendered to such person, or the full benefit of which such person will not become entitled to during such year of assessment,".

In 2001, the wording of section 23H(1)*(b)* was amended; the paragraph was split into two subparagraphs, as recorded earlier. Subparagraph (i) dealt with goods or services that had not been fully supplied or rendered and subparagraph (ii) with other benefits yet to be fully "enjoyed".

At the same time, paragraph (iii) of subsection (1) was amended as follows (Note: bold text indicates deletions and underlined text indicates insertions):

> "(iii) any other benefit to which such **[person will become entitled]** <u>expenditure relates</u>, an amount which bears to the total amount of such expenditure the same ratio as the number of months in such year during which such person will **[be entitled to]** <u>enjoy</u> such benefit bears to the total number of months during which such person will **[be entitled to]** <u>enjoy</u> such benefit <u>or where the period of such benefit is not determinable, such period over which the benefit is likely to be enjoyed</u>:"

The Explanatory Memorandum to the Second Revenue Laws Amendment Bill, 2001, explained the amendment thus:

> "Certain commentators have suggested that this provision is not effective in spreading the amount incurred in respect of a benefit over the period over which that benefit will be enjoyed. It is, therefore, proposed that this section be amended to make it clear that this is the intention."

The purpose of the amendment was therefore to give effect to the spread of the expenditure and not to extend the original purpose that the taxpayer must be entitled to a benefit in respect of the payment.

The mischief at which the provision was directed was the deduction of prepayments for services yet to be rendered or prepayment of contractual consideration or statutory charges for benefits which would only commence or be finally received after the end of the year of assessment and claiming deduction of the expenditure as actually incurred. At the same time, recipients of the payments could potentially invoke section 24C and claim a deduction for expenditure yet to be incurred by them under the contracts. The purpose was to match the deduction of expenditure incurred with the goods or services or benefits that were supplied or to be provided or to which the taxpayer might be entitled.

The reference to "other benefits" was included to bring within the ambit of the provision expenditure such as:

- premiums for short-term policies of insurance paid annually in advance;

- statutory charges, which may be imposed or paid annually, such as municipal rates, vehicle licensing charges, television licences and business licences; and
- prepaid rental.

Payment of these amounts does not result in the supply of goods or services, but provides the security of insurance cover in respect of insurable risks, the ongoing enjoyment of maintained municipal or national infrastructure, such as roads, parks, public beaches, public television broadcasts, and the like, and undisturbed possession of leased premises. This is the context in which the term "other benefit" was used. The payment resulted in entitlement and demanded no obligation of the taxpayer other than to make payment.

It was clear from the words "goods or services supplied or rendered" that the expenditure in question related to consumption. Similar principles apply to a benefit which is enjoyed for the period referred to in the contract or statute giving rise to the payment. That is, the goods or services would be consumed or the entitlement to the benefit of insurance cover, enjoyment of public amenities or undisturbed possession of leased premises would be extended to the taxpayer in the future period. In all instances the payment must have secured a future entitlement.

In the circumstances, the context suggests that the words "in respect of" should be interpreted narrowly. In this respect, the words should be interpreted in the manner suggested by Innes CJ in *Commissioner for Inland Revenue v Crown Mines Ltd*, [1923], at 125:

> "A tax cannot be said to be imposed in respect of a particular subject matter unless it has a direct relationship to that matter."

Telkom had urged a narrow interpretation that the commission was paid for the introduction of a qualifying subscriber and that the fees flowed from a separate agreement – the subscription agreement – between Telkom and the subscriber. The commission agent was not bound to perform any service other than to introduce a qualifying subscriber. This argument, which formed the cornerstone of the tax court's decision, was apparently rejected without further consideration.

Swain JA, however, seemingly applied a wide interpretation and accepted the view of the Commissioner, which was stated as follows at paragraph [50]:

> "The dealer was a mere facilitator, who brought about the source of the benefits, and the benefits ie the fees, were direct and central to Telkom's business. It was the agreement concluded between Telkom and the respective dealers which was the indirect source of the benefit."

From the aforegoing, it is submitted that there was at least an ambiguity in the interpretation of the words "in respect of".

The argument of Telkom, as accepted by the tax court, was that the direct cause of the commission payment should be decisive, whereas that of SARS was that the indirect result of the commission payment should be decisive. At the very least, had Swain JA applied his own counsel, these interpretations should have been identified as being equally plausible on the wording of section 23H when read in context. However, by ignoring that the tax court's decision was based on the words in section 23H(1)*(b)* (i) and (ii) and by selecting only the words in subparagraph (ii) as being relevant to the SCA decision, Swain JA did not raise this possibility.

The statute must apply to all subjects equally, regardless of the facts.

At paragraph [15] of the judgment, Swain JA had stated:

> "As correctly submitted by counsel for the Commissioner, it is axiomatic that a statute must apply to all subjects equally and that its interpretation cannot vary from one factual matrix to the next. It is impermissible to apply a particular meaning to legislation, depending upon the factual situation, in which it is sought to be applied."

This invites a hypothetical comparison:

- *In scenario one*, a taxpayer's business is the letting of office properties in buildings that it owns. It employs full-time staff whose sole function is to negotiate and conclude rental agreements with lessees. The majority of the contracts concluded by the employees are for terms of three years or more. The staff receive monthly salaries and performance bonuses. At the end of the year of assessment there are a number of long-term contracts which will continue to run in subsequent years of assessment.

  Based on the decision in the SCA, the deduction of the remuneration paid to the employees should be deferred based on the benefit derived from the sales that were concluded by the taxpayer. It is trite that remuneration is a payment for services, and that the services of the employees have been fully rendered in the year of assessment. The expenditure would not be deferred because the payment is in respect of services rendered and not in respect of the outcome of the services.

- *In scenario two*, a taxpayer conducting the same business determines that it is less costly to use third-party agents than to employ personnel to perform its sales function in-house. It appoints agents whose sole mandate is to negotiate and conclude rental agreements. The majority of the agreements concluded by the agents are for terms of three years or more. The agents are paid a commission in respect of contracts concluded in the year of assessment. At the end of the year of assessment there are a number of long-term contracts which will continue to run in subsequent years of assessment.

> There is no justification in finding that the agents' activities are not services whereas the employees' activities are. To do so would be to apply the provisions of section 23H(1) differently based on the factual situation – which is "impermissible".

The clear indication is that a wide interpretation would not apply equally in all circumstances and that the words "in respect of" should have been interpreted narrowly.

In cases of competing equally plausible interpretations, the interpretation favourable to the taxpayer must apply.

Faced with competing arguments, in which one party contended that the words "in respect of" should have a narrow interpretation and one that suggested they should be widely interpreted to incorporate indirect benefits, both of which were arguably equally plausible interpretations in the circumstances, it is submitted that Swain JA should have considered the application of the *contra fiscum* rule.

Paragraph [19] of the judgment states:

> "C I Miller *The Application of a New Approach to Interpreting Fiscal Statutes in South Africa* (2016) para 6.4, in a limited-scope dissertation submitted in January 2016 as part fulfilment of the requirements for the degree of Master of Commerce, at the University of Johannesburg, states the following, with which I agree:
>
>> 'It is submitted that the *contra fiscum* rule still applies in South African law and that it would be incorrect to conclude that the *contra fiscum* rule has no application in the context of an interpretation of a fiscal provision, anti-avoidance or otherwise. The rule is clearly consistent with the values underlying the Constitution. It is conceded that in the modern era of a purposive approach to interpretation, this rule may have a reduced application when compared to the previous era which favoured a strict literal approach to interpretation which more easily appeared to lead to ambiguity. However, to the extent that following analysis, a purposive approach ultimately yields two constructions which are both equally plausible, it is submitted that the *contra fiscum* rule should apply and the court should ultimately conclude in favour of the taxpayer.' ".

Again, if Swain JA had pursued the approach to interpretation suggested earlier in the judgment and concluded that both interpretations of "in respect of" were equally plausible, the one favourable to Telkom should have prevailed.

CONCLUSION

The cumulative effect is that the principles of interpretation espoused in the judgment were not applied to this issue. The broad interpretation of the words "in respect of" was based on an edited version of section 23H(1)*(b)*. The editing excluded consideration of the direct causal connection suggested by the omitted word "or" ("goods or services … or other benefit") and reflected a distorted view of the words used in that section.

COMMENT

The decision is arguably contrary to the purpose of the section and has the result that the recipient is fully taxed in the year of assessment, with no deduction of future expenditure (there being none to incur), whereas the taxpayer that incurred the expenditure is required to defer the deduction.

The judgment on this issue is binding on all courts. It opens the path for SARS to investigate and defer the deduction of expenditure incurred by business operations which pay commissions to agents for the introduction of customers. If this should occur, it is to be expected that the issue may well come before the SCA again.

PWC

Acts

- Income Tax Act 58 of 1962: Sections 11, 11D, 23H(1) & 24C.

Other documents

- Explanatory Memorandum to the Second Revenue Laws Amendment Bill, 2001;
- Explanatory Memorandum to the Taxation Laws Amendment Bill, 2000.

Cases

- *Telkom SA SOC Limited v The Commissioner for the South African Revenue Service* [2020] ZASCA 19 (25 March 2020); [2020] (4) SA 480 (SCA);
- *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA);
- *Rex v Standard Tea & Coffee Co (Pty) Ltd and Another* [1951] (4) SA 412 (AD);
- *Buglers Post (Pty) Ltd v Secretary for Inland Revenue* [1974] (3) SA 28 (A);
- *Sekretaris van Binnelandse Inkomste v Raubenheimer* [1969] (4) SA 314 (AD);
- *Commissioner for Inland Revenue v Crown Mines Ltd* [1923] AD 121.

Tags: incentive bonus; purposive interpretation; ordinary rules of grammar and syntax; anti-avoidance provision; year of assessment.

TAX ON TAX DIGITAL ECONOMY

The Parliamentary Budget Office released a report (the Report) on 26 June 2020 on the potential introduction of a digital tax in respect of the supplies of goods and services by non-residents to South African customers, which are delivered by digital means.

The Report acknowledges the current efforts of the OECD in conjunction with the G20countries (the Inclusive Framework) to design changes to the existing international tax system to allow countries to impose such digital taxes.

A main objective of the new approach is to grant a right to jurisdictions to tax part of the profits of multinational enterprises (MNEs) with reference to the income generated in that jurisdiction, irrespective of whether the MNE has physical presence in that country.

The Report observes that many countries have opted for unilateral rules to tax the digital economy in view of the relatively slow progress made by the Inclusive Framework to agree on a new approach, which has become critical in view of the budgetary constraints following the COVID-19 crisis.

The Report points out that South Africa was one of the first countries which introduced a consumption tax (VAT) on the supply of electronic services, which has since been adopted by many countries. However, there is a further need to also collect income taxes from the digital economy.

The Report notes that there is no scope to impose customs duties on such supplies since the members of the WTO agreed on a moratorium on the imposition of customs duties on the cross-border supply of goods and services via digital means in 1998. South Africa and India submitted a proposal to end this moratorium in March 2020, but it is unlikely that the ban will be lifted in the near future.

Therefore, the Report concludes that South Africa can learn from those countries, notably France, the United Kingdom, Spain and Italy, that have introduced unilateral measures to tax digital supplies by imposing a flat tax on the supplies by MNEs to customers in their jurisdictions.

The main obstacle to such a unilateral digital tax is the basic, existing rule of double taxation agreements (DTAs) which only allows the source jurisdiction to impose tax on a resident of the other contracting state if that resident carried on business via a permanent establishment in the source state.

Several of the countries that have threatened to impose the new digital tax have decided to suspend the effective date of the new tax in view of the uncertainty as to whether the tax may be declared invalid by the relevant courts. This is most likely the result of the approach of the USA, which has indicated that it would encourage its residents to oppose the imposition of the tax in court.

The Inclusive Framework aims to issue a final report and recommend guidelines for the new approach towards the end of 2020. Therefore, it is advisable for the Government to await this international action to ensure cooperation of other states, notably the USA, since most of the targeted MNEs are USA-based.

A more immediate avenue to collect more revenue from such digital supplies is to increase the scope and the rate of VAT which is imposed on such supplies to residents.

"Several of the countries that have threatened to impose the new digital tax have decided to suspend the effective date of the new tax in view of the uncertainty as to whether the tax may be declared invalid by the relevant courts."

Bowmans

Acts

- Money Bills and Related Matters Act 9 of 2009: section 15(1).

Other documents

- Double taxation agreements (DTAs);
- Report released by the Parliamentary Budget Office (on 26 June 2020).

Tags: digital tax; consumption tax; supply of goods and services.

SARS INTEREST RATES

TAX AND VAT – FURTHER INTEREST RATE DECREASES

The SARS interest rates have been further decreased as detailed below.

It is important to remember that interest and penalties paid to SARS are not deductible expenses for income tax purposes. On the other hand, interest received from SARS is fully taxable (after deducting the current initial exemption of R23 800 per annum (R34 500 if you are 65 or older) for all local interest income earned by natural persons).

- **Income tax, provisional tax, dividends tax, etc**

  Payable to SARS on short payments of all such taxes (other than VAT): 7% per annum from 1 November 2020 (was 7.25% per annum with effect from 1 September 2020).

  Payable by SARS on refunds of tax (where interest is applicable): 3% per annum from 1 November 2020 (was 3.25% per annum with effect from 1 September 2020).

  If the refund is made after a successful tax appeal or where the appeal is conceded by SARS, the interest rate is 7% per annum from 1 November 2020 (was 7.25% per annum from 1 September 2020).

- **VAT**

  Payable to SARS on late payments: 7% per annum from 1 November 2020 (was 7.25% per annum from 1 September 2020).

  Payable by SARS on VAT refunds after prescribed period: 7% per annum from 1 November 2020 (was 7.25% per annum from 1 September 2020).

- **Fringe benefits**

  Official interest rate for loans to employees below which a deemed fringe benefit arises: 4.50% per annum from 1 August 2020. See below for details of historical changes.

- **Dividends tax**

  Official interest rate for loans (designated in rands) to shareholders below which the interest on such loans can be deemed to be dividends on which dividends tax is payable: 4.50% per annum from 1 August 2020. See below for details of historical changes.

- **Donations tax**

  Loans to trusts by natural connected persons with interest charged at rates below the official rate create a donation subject to donations tax at 20% on the interest forgone each year.

- **Penalties**

  The amount of penalties for late payments (where applicable) are substantial (at least 10%) and are in addition to interest charged.

"With effect from 1 March 2011, the official rate has been defined as the rate of interest equal to the South African 'repo rate' plus 1%."

FRINGE BENEFITS, LOANS, DONATIONS TAX AND DIVIDENDS TAX – INTEREST RATES

- If inadequate interest is charged to an employee (including working directors) on loans (other than for the purpose of furthering their own studies) in excess of R3 000 from their employer (or associated institution), tax on the fringe benefit may be payable.

  Unless interest is charged at the "official" rate or greater, the employee is deemed to have received a taxable fringe benefit calculated as being the difference between the interest actually charged and interest calculated at the "official" rate.

  For employees' tax purposes, the tax deduction must be made whenever interest is payable; if not regularly, then on a monthly basis for monthly paid employees, weekly for weekly paid employees, etc.

- Subject to a number of exceptions, distributions of income and capital gains from a company / close corporation are normally subject to dividends tax at the flat rate of 20%. Loans or advances to or for the benefit of a shareholder / member will be deemed to be dividends but only to the extent that interest at less than the "official" rate (or market-related rate in the case of foreign-currency loans) is payable on the loan, or fringe benefits tax is payable on an interest-free (or subsidised-interest) loan to an employee.

  It is not the amount of the loan but the interest reduction which is deemed to be a dividend. Low-interest loans are accordingly subject to dividends tax payable by the company and only in respect of the interest benefit.

- Loans to trusts by natural connected persons with interest charged below the official rate create a donation subject to donations tax at 20% on the interest forgone each year.

- With effect from 1 March 2011, the official rate has been defined as the rate of interest equal to the South African "repo rate" plus 1%. For foreign-currency loans, the rate is the equivalent of the foreign "repo rate" plus 1%. The South African repo rate is currently 3.50% per annum.

The "official" rate of interest over the past five years

With effect from		***Rate per annum***
1 February 2016	–	7.75%
1 April 2016	–	8.00%
1 August 2017	–	7.75%
1 April 2018	–	7.50%
1 December 2018	–	7.75%
1 August 2019	–	7.50%
1 February 2020	–	7.25%
1 April 2020	–	6.25%
1 May 2020	–	5.25%
1 June 2020	–	4.75%
1 August 2020	–	4.50%

Kent Karro

Tags: deductible expenses; natural connected persons; donations tax; taxable fringe benefit; low-interest loans; repo rate.

THE TAX EFFECTS OF THE SALE OF A BUSINESS IN THE HANDS OF A SELLER

Tax practitioners are often asked to calculate the indicative effects of the prospective sale of a business (assuming no roll-over relief applies) for the seller.

Invariably, the tax practitioner will be informed by the private equity or corporate finance practitioner that enterprise value (EV) is the estimated fair value of the operations of the business. However, this may give rise to a misunderstanding. A tax practitioner is likely to be confused by reference to the "business" and will not always understand how this value is calculated.

There may also be an "equity value" calculation, where interest-bearing debt is deducted from the "enterprise value". At a basic level, the formula to arrive at equity value is shown below:

EV minus Debt (interest-bearing) plus Cash = Equity Value

Upon seeing the reference to "equity value", a tax practitioner may be quick to conclude that EV relates to the value of the gross assets which are the subject of the impending transfer. This is because a "business" is, strictly speaking, not an asset for income tax and capital gains tax purposes. Rather, for purposes of determining the tax consequences, each asset which is subject to the sale needs to be identified and then a portion of the purchase price which is payable by the purchaser to the seller must be allocated to that asset.

However, even if the parties allocate a purchase price between different assets, SARS may still apply a different application, if the allocation does not represent the actual facts and true intention of the parties. The allocation needs to be reasonable, within the context of the commercial considerations.

If the "business" is defined in the sale of business agreement as the transfer of "sale assets" and "sale liabilities" in exchange for a cash consideration of, say, ZAR80, it is incorrect simply to use ZAR80 as the basis for determining the seller's tax liability arising from the transaction. The purchaser has both assumed the liabilities of the business and paid ZAR80 in cash.

Instead, the seller needs to determine the fair value of the liabilities assumed by the purchaser and the cash consideration (both of which will constitute an "amount" for income tax purposes) in determining the gross value of consideration received, and then refer to the sale agreement to determine how this value should be allocated between the different assets. If the seller has not taken "sale liabilities" into account for this purpose, the potential tax liability may have been materially underestimated.

"EV is a popular basis for valuation as it reduces any potential distortion arising from different capital structures and different firms' accounting policies."

EV is often derived from the popular discounted cash flow (DCF) basis of valuation. A DCF valuation begins by calculating future cash flows, taking into account forecast capital expenditures and movements in the working capital of the firm in future years, which amounts are discounted back by the weighted average cost of capital or any other risk-adjusted discount rate in ultimately calculating a net present value of these amounts.

EV is a popular basis for valuation as it reduces any potential distortion arising from different capital structures and different firms' accounting policies. However, it is important to note that "payables" (which may comprise various current liabilities forming part of the working capital cycle) have already been taken into account in determining EV. To determine only the indicative gross asset value to the seller of the assets, the current market value of these "payables" should be added to EV.

To elaborate further, in theory a purchaser would be prepared to pay cash to the seller equal to the EV to acquire the seller's business where the "business" comprises all the assets and the "payables". When the "business" includes other liabilities, the purchaser should pay less in cash to the seller, given that the purchaser is assuming a greater value of liabilities, although the gross value of the assets remains the same. This total value should then be split between the different asset categories in calculating the indicative tax liability, after deducting the estimated tax values or base costs of assets. Other events may occur between the time that the tax practitioner calculated the indicative tax liability for the seller and when the actual liability is calculated following the successful transfer of the business. However, if the "payables" were not added to EV in determining the gross consideration to be received by the seller for the impending sale of assets, the indicative calculation will be incorrect. The seller may be left scratching his head, trying to understand why the estimated tax liability was materially lower than the actual liability.

A basic formula, shown below, would help a tax practitioner to determine the gross asset value of assets subject to a typical sale of business:

Gross asset value = Equity Value plus Debt (interest-bearing) plus Payables (plus any other liability assumed by the purchaser as part of the purchase consideration)

Webber Wentzel

Acts

- Income Tax Act 58 of 1962.

Tags: estimated fair value; equity value; discounted cash flow (DCF); tax liability.

PROFESSIONAL CONDUCT REQUIRED OF OFFICERS OF THE COURT

There are prescribed rules of conduct that attorneys and advocates must adhere to both when appearing in court and when dealing with litigious processes in general. Where these rules are disregarded or broken, the transgressors may face serious consequences.

In the recent judgment of *ABC (Pty) Ltd v The Commissioner for the South Africa Revenue Service*, [2020], the tax court conveyed its displeasure at the conduct of the taxpayer appellant and its legal representatives during the proceedings. The court then went on to examine the consequences of such conduct on the appeal brought by the appellant.

THE FACTS

The appellant's appeal against an assessment issued by SARS was set down to be heard in the Johannesburg tax court for a period of two weeks commencing on 18 November 2019. On the morning of the first day of the hearing, newly appointed counsel for the appellant applied for a postponement of the proceedings on the basis that the appellant's original attorneys had withdrawn from the matter, leaving the appellant without adequately prepared legal representation.

"The tax court reiterated that officers of the court have a duty of respect to the court and an obligation to ensure that all legal proceedings are conducted in a manner befitting the court's dignity."

In deciding whether to allow the postponement, the court critically examined the following series of (what the court described as) "unfortunate" events:

1. The appellant's newly appointed attorneys had not placed themselves on record as being the legal representatives of the appellant and the advocate who had been briefed by these attorneys could therefore not act on behalf of the appellant in the hearing.

2. Neither the appellant, nor its attorneys, had informed anyone of their intention to bring a postponement application prior to the date of the hearing.

3. The appellant had failed to participate in, and attend to, the finalisation of the necessary pre-hearing preparations.

4. At the date of the hearing, the appellant's instructing attorney was not present at court. However, a candidate attorney of the same law firm was present, although this person was not fully apprised of the facts and issues of the matter.

5. After the matter had been stood down pursuant to a request by the appellant's counsel to take instruction from the instructing attorney, a faulty notice of appointment as attorneys of record was submitted to the court, which notice contained inaccurate information and was submitted without a notice of motion.

6. The instructing attorney had only been instructed the weekend prior to the commencement of the hearing and had been unable to prepare and present a proper postponement application in court as he had participated in a skydiving event that weekend.

7. The founding affidavit submitted by the appellant in support of the postponement application consisted of 15 single sentence paragraphs. It was stated in the affidavit that the appellant's original attorney had withdrawn from the matter only 10 days prior to the hearing and that the appellant was unable to obtain new legal counsel due to time constraints.

8. When compared to the affidavit submitted by SARS, the contents of which counsel for the appellant agreed to accept as true and correct, it became apparent that the appellant's affidavit contained factually incorrect information, in particular that the appellant's original attorneys had withdrawn one month before the hearing and not only 10 days before.

9. The contents of the appellant's affidavit also conflicted with the contents of a letter sent by the appellant's original attorney to the court after the postponement application was dismissed and the court adjourned to consider the matter as a whole.

Once the postponement application had been dismissed, counsel for the appellant advised the court that his brief only pertained to the said application, that he had no knowledge of the actual appeal, and that he therefore would not be acting on behalf of the appellant any further. Despite the lack of a legal representative present at the hearing on behalf of the appellant, SARS requested that the court allow it to lead its evidence as it sought an order replacing its original assessment with one setting out the amount of tax that the appellant had to pay, which amount was higher than that contained in the original assessment.

The question that arose was whether the court was obliged to dismiss the appeal together with a costs order and leave it at that, as the appellant (by failing to appear) was not pursuing its appeal, or whether the court was obliged to determine SARS' claim regarding the alteration of the assessment issued by it.

THE JUDGMENT

The postponement application

The tax court reiterated that officers of the court have a duty of respect to the court and an obligation to ensure that all legal proceedings are conducted in a manner befitting the court's dignity. In addition, the court highlighted the following duties that must be complied with by all officers of the court:

- the duty to provide a client with the best legal service to which it is entitled;
- the duty to always be candid with the court; and
- the duty to assist the court with the proper ventilation of the issues that are before the court.

In contemplating each of the duties, the court expressed its displeasure at the conduct of the appellant's legal representatives during the proceedings and found that the relevant individuals had failed in their duties in the following ways:

1. The appellant's newly appointed attorney, despite accepting the brief, did not prioritise it over his skydiving event and therefore did not apprise himself fully of the matter. The attorney also did not place himself on record as the attorney for the appellant. In addition, the attorney was not present at the hearing, nor was any other attorney who was knowledgeable of the facts of the matter, present on his behalf. As a consequence of the aforementioned conduct, the attorney failed in his duty to ensure that the appellant received the best legal service to which it was entitled.

2. The affidavit submitted by the appellant in support of the postponement application was sworn to by an attorney employed by the appellant as an assistant to the appellant's company secretary. The contents of this sworn affidavit conflicted with that of the affidavit submitted by SARS, the facts of which were accepted by the appellant's counsel to be true and correct. Furthermore, the letter received by the court from the appellant's original attorney contained facts that were contrary to those set out in the aforementioned affidavit supporting the postponement application. On this point, the court stated that:

   > "A court should be able to accept affidavits and letters from attorneys in the confidence that the averments contained therein are beyond reproach. It is a recognised principle that attorneys should never place themselves in a situation where they are forced to be less than candid with the court."

   As both the deponent to the affidavit and the author of the letter were officers of the court, the court found that there had been a failure by at least one of them to comply with their duty to be candid with the court.

3. The appellant's newly appointed attorney was not present on the day of the hearing and the candidate attorney who was indeed present was not fully apprised of the facts or background to the dispute. As such, the candidate attorney was unable to advise counsel, or enlighten the court, about the history, details or substance of the appellant's case. In this regard, the court noted that this conduct of the appellant's legal representatives was not amenable to the proper ventilation of the issues before the court. In addition, the letter sent by the appellant's original attorney was received by the court only after the hearing was finalised. Upon receiving this letter, the court ascertained that the version put forward by the deponent in the appellant's affidavit in support of the postponement application and the version contained in the letter received by the court were irreconcilable. The court therefore noted that it was regrettable that the original attorney did not alert the court to his version before the finalisation of the hearing. If this had been done, the court could have ordered that the issues be ventilated more fully. However, in the present circumstances, the court was precluded from reaching finality on which of the versions forwarded by the parties was correct. In this way, the legal representatives of the appellant had failed in their duty to assist the court with fully ventilating all of the issues of the matter.

Ultimately, the court noted its displeasure with the conduct of the appellant, its present attorney, and the two officers of court responsible for the affidavit in support of the postponement application and the letter sent to the court. The court remarked that the manner in which the postponement application was brought by the appellant and its attorney is not consistent with their duty of respect to the court.

Notwithstanding these remarks, the court went on to make an order regarding the postponement application that was brought by the appellant. In coming to its decision, the court considered the following well-known legal principles concerning an application for postponement:

"It is apparent that these sections of the TAA only make provision for an appeal against an assessment by a taxpayer, and not by SARS, and the court held that section 129 restricts the court's jurisdiction to hearing only 'the appellant's appeal'."

a) A court has a discretion to grant or refuse a postponement, which discretion has to be judicially exercised.

b) A judicial exercising of the discretion must commence with a careful consideration of the facts presented in support thereof by the applicant, who by seeking the postponement is asking for an indulgence.

c) The facts must establish that the applicant has true and genuine reasons (show good cause) for seeking the indulgence

d) To establish this the applicant should at the very least be open and candid with the court: the application must be made in good faith.

e) The applicant should place the full facts of its non-preparedness for the hearing before the court.

f) The facts must constitute a satisfactory reason for the non-preparedness.

g) The postponement must not result in the respondent having to endure a prejudice which cannot be cured by an order of costs.

h) The application must be brought timeously so that any prejudice that the respondent may suffer can be mitigated.

On the basis of these principles and on a balance of probabilities, the court found that the appellant's version that its original attorneys had withdrawn only 10 days before the hearing simply could not be true. It was noted that even if that version was true, the appellant failed to furnish any explanation as to why the knowledge of the withdrawal of the attorney came so late to the appellant. The court stated that the appellant also had to show that the withdrawal of its attorney was unforeseen, was not a consequence of its own actions and that it was not engineered to justify the postponement of the hearing. This, it was held, was necessary for the appellant to show that it had "true and genuine reasons for the postponement and that it was *bona fide* in seeking the indulgence".

Lastly, the court took into account the fact that the appellant made no effort to respond to SARS' concern that an extended delay in the proceedings would cause SARS prejudice that could not be cured by a costs order.

In the result, the postponement application was dismissed.

The appeal

After the decision by the court that the hearing would not be postponed, the court had to determine whether the appeal could proceed in the absence of any representative of the appellant and whether SARS would be entitled to present its evidence to increase the assessment that it had issued.

SARS provided the court with written submissions in this regard, arguing that there was still a live issue before the court and that the court was empowered, if not obliged, in terms of the Tax Administration Act, 2011 (the TAA), and the Rules of the Tax Court (the Rules), to determine whether the assessment issued by SARS may be altered.

It was noted that the appellant brought its appeal in terms of section 107 of the TAA, which appeal had to be dealt with in terms of section 117(1), and the decision to be made by the court had to be made in accordance with section 129.

"It is incumbent on all officers of the court to take the utmost precaution in ensuring that the rules of the court, and courtroom decorum in general, are observed at all times."

Section 107 enables a taxpayer that is objecting to an assessment to appeal against the assessment to the tax court or the tax board in the manner prescribed in the TAA and the Rules. Section 129 provides that the tax court, after hearing the appellant's appeal, may decide either to –

1. confirm the assessment;
2. order that the assessment be altered; or
3. refer the assessment back to SARS for further examination and assessment.

It is apparent that these sections of the TAA only make provision for an appeal against an assessment by a taxpayer, and not by SARS, and the court held that section 129 restricts the court's jurisdiction to hearing only "the appellant's appeal". It was found that the powers granted to the court in terms of section 129 to either confirm, alter or refer an assessment back to SARS, can only be exercised by the court after a taxpayer has exercised its rights to appeal and the court has heard the said appeal. On this basis, the court concluded that it would not be in a position to alter the assessment as requested by SARS, unless the appellant's appeal had been heard.

It was contended on behalf of SARS that rule 44(7) of the Rules nevertheless enabled the court to come to a decision in circumstances where –

1. one of the parties to the dispute fails to appear before the court;
2. the party that does appear requests the court to make the decision in terms of section 129;
3. there is proof that the prescribed notice of the sitting of the tax court has been delivered to the absent party; and
4. no question of law arises.

The court held that rule 44(7) overlooked the fact that where an appellant does not appear, the appeal is not heard and that in applying the rule to these circumstances, there would be a disregard of the provisions of sections 107 and 129. It was reiterated that the provisions of the TAA, being the primary legislation, remain predominant, whereas the rules (being delegated legislation) are subordinate. Furthermore, the tax court is a creature of statute and the provisions of the statute lay down the parameters of its jurisdiction.

The court concluded that once counsel for the appellant had withdrawn from the proceedings and no representative for the appellant was present, the appeal was effectively withdrawn. This was so despite the fact that the appeal was not formally withdrawn.

The court therefore dismissed the appeal without allowing SARS to lead its evidence and granted a costs order in favour of SARS.

COMMENT

It is incumbent on all officers of the court to take the utmost precaution in ensuring that the rules of the court, and courtroom decorum in general, are observed at all times. The consequences of the failure to do so may result not only in adverse outcomes of the legal proceedings as demonstrated in this case, but may also result in disciplinary action being taken against the transgressor.

Cliffe Dekker Hofmeyr

Acts

- Tax Administration Act 28 of 2011: sections 107, 117(1) & 129.

Other documents

- Rules of the Tax Court: rule 44(7).

Cases

- *ABC (Pty) Ltd v The Commissioner for the South Africa Revenue Service* (TAdm 13950) [2020] ZATC 1 (24 February 2020).

Tags: rules of the court; costs order.

TAXPAYER'S RIGHT TO PRIVACY TRUMPS PUBLIC PROTECTOR'S POWERS

In a High Court of South Africa judgment, delivered on 23 March 2020 by Judge J Mabusa, in the case of Commissioner for the South African Revenue Service v the Public Protector and Others, *[2020], it was ordered that the South African Revenue Service (SARS) was permitted to withhold taxpayer information from the Public Protector. The Public Protector's subpoena powers do not entitle it access to taxpayer information relating to former President Jacob Zuma in contravention of SARS' obligation to keep taxpayer information confidential as required in terms of section 69(1) of the Tax Administration Act, 2011 (the TAA).*

The essence of the matter was whether SARS was permitted, under the provision of "just cause" contained in section 11(3) of the Public Protector Act, 1994 (the PPA), read with section 69(1) of the TAA, to withhold taxpayer information and that the Public Protector's subpoena powers do not extend to access to taxpayer information.

Section 11(3) of the PPA provides that:

"… any person who, *without just cause*, refuses or fails to comply with a direction or request under section 7(4) or refuses to answer any question put to him or her under that section or gives to such a question an answer which to his or her knowledge is false or refuses to take the oath or to make affirmation at the request of the Public Protector in terms of [s]ection 7(6), shall be guilty of an offence." [our emphasis added]

"Judge Mabusa was scathing in his criticism of the Public Protector, stating that the 'stance by the Public Protector is unsustainable, completely puzzling, disregards the law completely, and is reckless'."

It was acknowledged in the judgment that the issue in this matter was not complex and turned on the meaning of the term "just cause" in section 11(3) of the PPA. It was held that, the phrase simply means "valid grounds" or "reasonable grounds" or "valid reasons". Accordingly, in the absence of valid reason, a person may not refuse or fail to comply with the direction or request or refuse to answer any question put to him or her by the Public Protector. Conversely, it means that a person who has a valid reason or reasonable grounds may refuse to provide information to the Public Protector.

In terms of section 69(1) of the TAA, "[a] person who is a current or former SARS official must preserve the secrecy of taxpayer information and may not disclose taxpayer information to a person who is not a SARS official". "Taxpayer information" is defined, in section 67(1)(b) of the TAA, as "… any information provided by the taxpayer or obtained by SARS in respect of the taxpayer, including biometric information".

Accordingly, in this case, SARS was prevented by the provisions of section 69(1) from complying with the Public Protector's subpoena for taxpayer information. Accordingly, section 69(1) constituted "valid grounds" or "just cause" and, as such, SARS has a basis on which it could refuse to provide the taxpayer information to the Public Protector.

Judge Mabusa was scathing in his criticism of the Public Protector, stating that the "stance by the Public Protector is unsustainable, completely puzzling, disregards the law completely, and is reckless. It compels SARS to act contrary to the letter of the TAA. And to make matters worse the Public Protector is not without a remedy".

The remedy available to the Public Protector (contained in section 69(2) of the TAA) entails the circumstances when taxpayer information may be lawfully disclosed to a person other than the taxpayer. This provision enables SARS to disclose taxpayer information:

- to the SAPS or the NPA where a taxpayer is suspected of having committed a tax offence;
- as a result of an order granted by the High Court; or
- where the information constitutes public information.

The judgment, besides reaffirming the taxpayer's right to privacy and SARS' obligation to keep taxpayer information confidential, brings to the fore a number of interesting legal issues dealing with whether there was any inconsistency between the provisions of the Constitution of the Republic of South Africa, 1996, and the PPA and the TAA; The judgment also highlights the duty of care and professional responsibility of litigants.

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Acts

- Tax Administration Act 28 of 2011: sections 67 & 69(1) & (2);
- Public Protector Act 23 of 1994: sections 7(4) & (6) & 11(3).

Cases

- *Commissioner for the South African Revenue Service v the Public Protector and Others* [2020] 84074/19.

Tags: taxpayer information; taxpayer's right to privacy.

APPORTIONMENT V DIRECT ATTRIBUTION

The debate between taxpayers and the South African Revenue Service (SARS) as to what constitutes a fair and appropriate apportionment formula to determine the deductible value-added tax (VAT) incurred on expenses where the taxpayer makes both taxable and exempt supplies, is ongoing. However, it is up to the taxpayer to determine whether an expense incurred is wholly attributable to making taxable supplies, in which case the total amount of VAT incurred is deductible. SARS cannot rule beforehand on whether an expense is directly attributable to taxable supplies, by virtue of a notice published in terms of section 80(2) of the Tax Administration Act, 2011 (the TAA), namely GN 748 of 24 June 2016, also known as the "no-rulings" list.

The tax court (Megawatt Park, Sunninghill) was recently called upon in the case of *ABC (Pty) Ltd v The Commissioner for the South African Revenue Service*, [2020], to determine whether the VAT on certain expenses incurred by the taxpayer were wholly attributable to making taxable supplies and therefore fully deductible as input tax, or whether the expenses were subject to apportionment. The tax court found in favour of the taxpayer and held that the VAT was fully deductible as input tax.

THE FACTS AND ISSUES CONSIDERED

The taxpayer carries on business as a bureau de change in the course of which it exchanges travellers' cheques and currencies for inbound and outbound travellers. It carries on business in three separate divisions, being the head office, treasury and a branch network of 52 branches. The treasury division is responsible for setting exchange rates for buying and selling foreign currencies to the customers; it sets the rate of the currency and adds a margin thereon. The branch network is responsible for the exchange and sale of foreign currencies to customers. The branch processes the currency exchange transactions of customers and charges the customer a commission or fee for its services.

The taxpayer argued that its branch network only makes taxable supplies for which it charges commissions or fees to customers, and that the total amount of VAT incurred on expenses by its branch network is deductible as input tax.

The tax court had to consider whether the branch network only made taxable supplies, or whether it was involved in making both taxable and exempt supplies.

"The judgment turned on the interpretation of the proviso to section 2(1)*(a)* to determine whether the taxpayer only made taxable supplies at the branches, which justified the direct attribution applied by the taxpayer."

LEGAL FRAMEWORK

The relevant provisions of the Value-Added Tax Act, 1991 (the VAT Act), which were considered by the tax court in deciding the matter, are the following:

- Section 2(1)*(a)* deems the activity comprising of the exchange of currency to be a financial service. Section 12*(a)* exempts from VAT the supply of a financial service.
- The proviso to section 2(1) excludes from "financial services" the activity comprising of the exchange of currency to the extent that the consideration payable for the activity is any fee or commission.
- The definitions of the terms "goods" and "services" in section 1(1) both exclude money. The word "money" is defined to include any bill of exchange. This definition is similar to the definition of "currency" in section 2(2), where the word is defined to mean "any banknote or other currency of any country".
- The term "consideration" is defined in section 1(1) to mean, "in relation to the supply of goods or services to any person", any payment made or to be made "in respect of, in response to or for the inducement of the supply of any goods or services".

JUDGMENT

The case concerns the exchange of currency, which involves the buying and selling of currency against the payment of a commission or fee. The tax court stated that the taxpayer's treasury division is responsible for buying and selling the foreign currency and sets the daily buy and sell rates for the branches. The services rendered at the branches involve customers buying and/or selling foreign currency notes in person at the branch, for which the branches charge a commission or fee.

The taxpayer led evidence that the services rendered at the branches are administratively intense and time-consuming, as forms need to be completed, data needs to be captured in systems, and cash needs to be counted. FICA compliance must be ensured and SARB requirements must be met.

The judgment turned on the interpretation of the proviso to section 2(1)*(a)* to determine whether the taxpayer only made taxable supplies at the branches, which justified the direct attribution applied by the taxpayer. The issue was whether the exchange of currency falls within the definition of "financial services", the supply of which is exempt under section 12*(a)* of the VAT Act.

The tax court considered the contractual arrangement under which the supply is made. The agreements provide for the exchange of specified currencies at a particular rate of exchange nominated by the taxpayer, and the payment by the customers of a commission. The margin at which the taxpayer purchases and sells foreign currency is not part of the agreements, as it is not known by the treasury division or the customer when the transaction is closed at the branch.

The tax court commented that it will be absurd and untenable to decide VAT consequences of transactions with reference to margins or profits earned by vendors as opposed to relying on the true nature of the rights and obligations arising from a particular contract.

The tax court found on the facts and the evidence that the only payment that the customer makes for the exchange of currency is the commission or fee. The consideration in the form of a commission removes the activity of the "exchange of currency" from being a deemed financial service. The margin which the taxpayer made when buying or selling foreign currency was not considered to be relevant for purposes of deciding the case. The tax court seems to have accepted the taxpayer's arguments that the profit margin was not a payment made in respect of, in response to, or for the inducement of, the exchange of currency. The margin was part and parcel of the exchange, of which the customer was ignorant. The margin was further not a term of the contract, but was a consequence for the taxpayer of the terms of the contract, because it produced a profit for the taxpayer.

The tax court concluded that the only consideration charged for the exchange of the currency was the taxable commission or fee, and that the branches therefore only made taxable supplies. The VAT incurred by the branches on their expenses was consequently directly attributable to such taxable supplies, and as such the VAT qualified in total as input tax.

COSTS

Section 130(1) of the TAA allows for an order for costs to be made in certain specific circumstances. However, it is rarely the case that an order for costs is made by the tax court.

In this case the tax court considered the grounds of assessment and the decision of SARS to disallow the input tax deduction to be unreasonable, "especially for insisting that the appellant reverts to and must continue to use the apportionment method and not the direct attribution method without any legal justification in circumstances where it was reasonable to expect it to". Consequently, SARS was ordered to pay the costs of the taxpayer.

APPEAL

In view of the significance of the judgment and the implications thereof, it is not surprising that SARS has applied for leave to appeal, which we understand has been granted. The appeal court (the Supreme Court of Appeal or the High Court) will have to determine, amongst others, whether the tax court was correct in finding that the exchange of currency is neither the supply of goods nor services; whether the charging of a commission or fee removes the exchange of currency completely from being a financial service; and whether the margin earned by the taxpayer is irrelevant for determining the VAT status of the supplies.

Vendors who operate on a similar basis as the taxpayer in this case should consider the judgment with caution, as an appeal court could interpret the relevant provisions of the VAT Act differently and overturn the judgment of the tax court.

Cliffe Dekker Hofmeyr

Acts

- Tax Administration Act 28 of 2011: sections 80(2) & 130(1);
- Value-Added Tax Act 89 of 1991: sections 1(1) (definitions of "consideration", "financial services", "goods", "money and "services"), 2(1) & (2) (definition of "currency") & 12*(a)*;
- Financial Intelligence Centre Act 38 of 2001 (FICA).

Other documents

- Government Notice 748 (24 June 2016) (known as the "no-rulings" list).

Cases

- *ABC (Pty) Ltd v The Commissioner for the South African Revenue Service* [2020] (Case No: VAT 1626 – 3 March 2020).

Tags: input tax; currency exchange transaction; supply of goods or services; financial services; taxable supplies.

IMPORTED SERVICES AND GOODS SOLD IN EXECUTION

On 1 June 2020, the South African Revenue Service (SARS) issued an external guide titled "Manage Declaration for Non-Registered VAT Vendors" (the SARS Guide). The SARS Guide provides guidance to non-vendor recipients of imported services and in instances where goods are sold in execution of a debt, on how to settle their VAT liabilities with SARS.

The VAT principles applicable to imported services and goods sold in execution of a debt are first briefly described below.

IMPORTED SERVICES

Subject to certain exceptions, VAT is payable at the standard rate of 15% by a South African recipient of imported services. This is irrespective of whether the recipient is a registered VAT vendor or a non-vendor. There are four requirements for a service to fall within the ambit of the definition of "imported services" in section 1(1) of the VAT Act, namely:

- The services must be rendered by a supplier who is resident outside South Africa or who carries on business outside South Africa;
- The recipient of the services must be a resident of South Africa;
- The services must be utilised or consumed in South Africa; and
- The purpose for acquiring the services must be otherwise than for the making of taxable supplies.

Where imported services are acquired for a value exceeding R100, the recipient is required to pay VAT on such importation where the services are acquired wholly or partly for a non-taxable purpose.

South Africa introduced legislation with effect from 1 June 2014 requiring foreign suppliers of "electronic services" (e-services) to register as VAT vendors in South Africa to the extent that they make taxable supplies of e-services to South African recipients. The regulations defining what constitutes e-services were amended and the scope of what constitutes e-services was significantly broadened from 1 April 2019. The effect of the amendment is that virtually all services that are supplied by way of electronic means such as cloud computing, computer software, music, games and any online services are now included as "electronic services". As a result, most foreign suppliers of e-services will be registered vendors in South Africa. This removed the obligation to pay VAT on such services from the South African recipient to the foreign supplier. Consequently, a South African recipient who acquires e-services from a non-resident supplier will only be required to pay VAT on imported services if the supplier is not registered as a vendor under the e-services provisions.

GOODS SOLD IN EXECUTION

Where a person purchased goods under a credit arrangement and then defaults, another person, normally the sheriff of the court, may take possession of the goods purchased, and the sheriff may then sell the goods in execution of the debt owed by that person.

Where goods are sold in execution of a debt, the sale is, in certain circumstances, deemed to be made in the course of an enterprise and the sale will therefore be subject to VAT. In this instance, the seller, and not the owner of the goods, is required to account for VAT thereon to SARS.

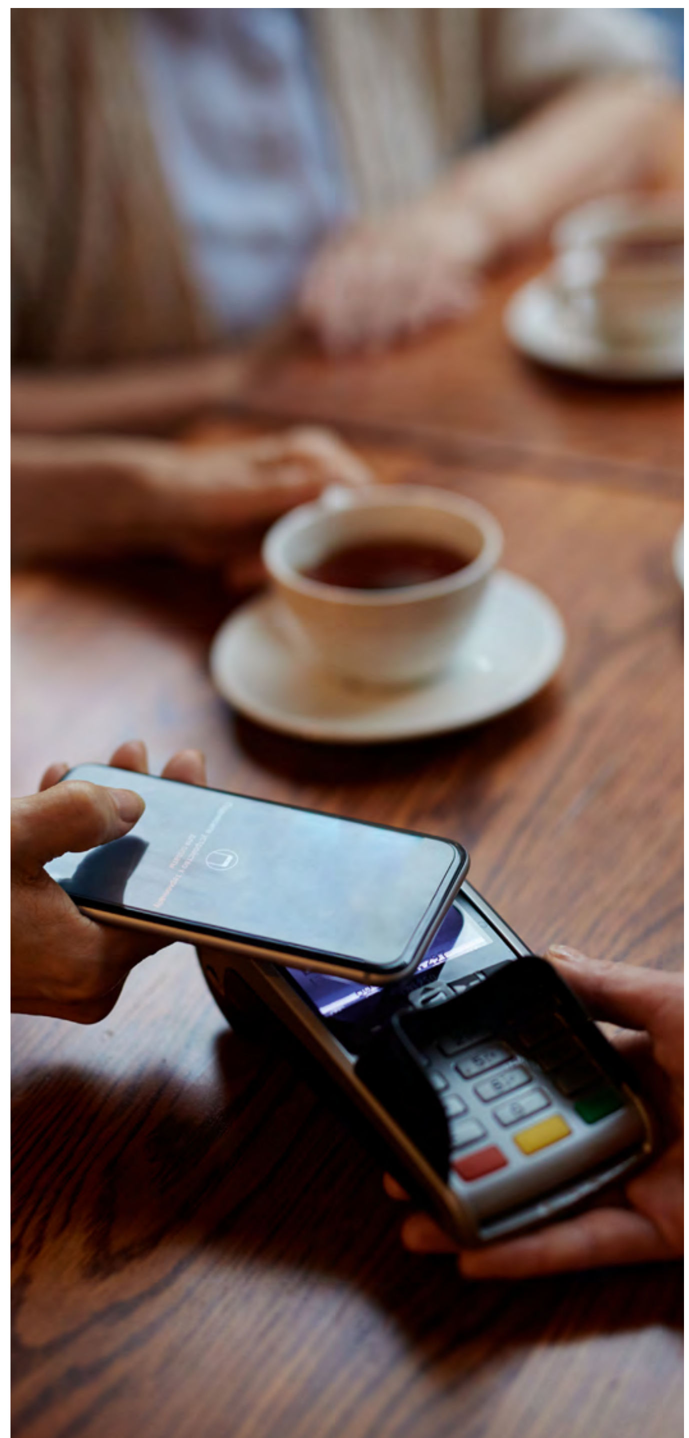
THE DECLARATION PROCESS

Where imported services are acquired by a recipient who is a registered vendor, the VAT liability in respect thereof may be included in the vendor's VAT201 declaration. However, where the recipient is a non-vendor, such non-vendor was previously required to complete a form VAT215 and to make payment of the VAT to a SARS branch office.

Where goods are sold in execution of a debt and the sale is subject to VAT, the VAT on such sale must be accounted for and paid separately to SARS and may not be accounted for under the VAT number of the seller or that of the owner of the goods. The seller was previously required to complete a form VAT216 and to make payment of the VAT at a SARS branch office.

Where the recipient of imported services is not registered for VAT, there is no VAT number under which payment can be made to SARS. The making of payments without a VAT number at a SARS branch office became a challenge and SARS branch offices often refused to accept these payments as they did not seem to know how to process payments without a VAT number and where to allocate such payment. The process for making these payments has now been amended and the SARS Guide has been issued to clarify the payment process. The VAT215 and VAT216 forms have been updated accordingly.

"Where goods are sold in execution of a debt and the sale is subject to VAT, the VAT on such sale must be accounted for and paid separately to SARS and may not be accounted for under the VAT number of the seller or that of the owner of the goods."



In terms of the SARS Guide, the VAT liability must be determined by completing a form VAT215 (imported services) or a form VAT216 (sale in execution), which are available on the SARS website. The VAT liability must then be paid via the liable person's SARS e-filing profile following the process as described in the SARS Guide.

Once the payment has been successfully made via SARS e-filing, the e-filing system will generate a payment confirmation receipt number. The recipient of the imported services, or the seller of the goods sold in execution, as the case may be, is then required to insert the payment confirmation receipt number in the "Receipt Number" field on the VAT215 or VAT216 form. The recipient or the seller, as the case may be, is not required to submit the completed VAT215 or VAT216 forms to SARS; they are simply required to retain the completed form for a period of five years and must be able to produce this to SARS if requested to do so. Consequently, the recipient or the seller will no longer be required to visit a SARS branch office for purpose of making payment.

COMMENTS

It is important to note that to make the VAT payments to SARS in respect of imported services or goods sold in execution via SARS e-filing, the income tax reference number of the recipient of the imported services or seller of goods sold in execution is a prerequisite. Therefore, only recipients or sellers who are registered for income tax and who are also registered on the SARS e-filing system will be able to adhere to the new mandated declaration and payment process. It seems, however, that the requirement to be registered for income tax represents a shortcoming in the process because there could be instances where a non-vendor recipient of imported services may not be registered for income tax, even though such instances are exceptional.

The amended process of making payments of VAT electronically in these circumstances is welcomed. However, SARS may need to consider introducing an alternate declaration process for persons who are also not registered for income tax.

Cliffe Dekker Hofmeyr

Acts

- Value-Added Tax Act 89 of 1991: Section 1(1) (definition of "imported services");

Other documents

- *Manage Declaration for Non-Registered VAT Vendors* (external guide issued by SARS);
- VAT201 declaration;
- Forms VAT215 (imported services) & VAT216 (sale in execution) – forms for completion by non-vendors and sellers, respectively.

Tags: goods sold in execution of a debt; imported services.