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Issue 108 September/October 2024

30 Years of Democratic Transition

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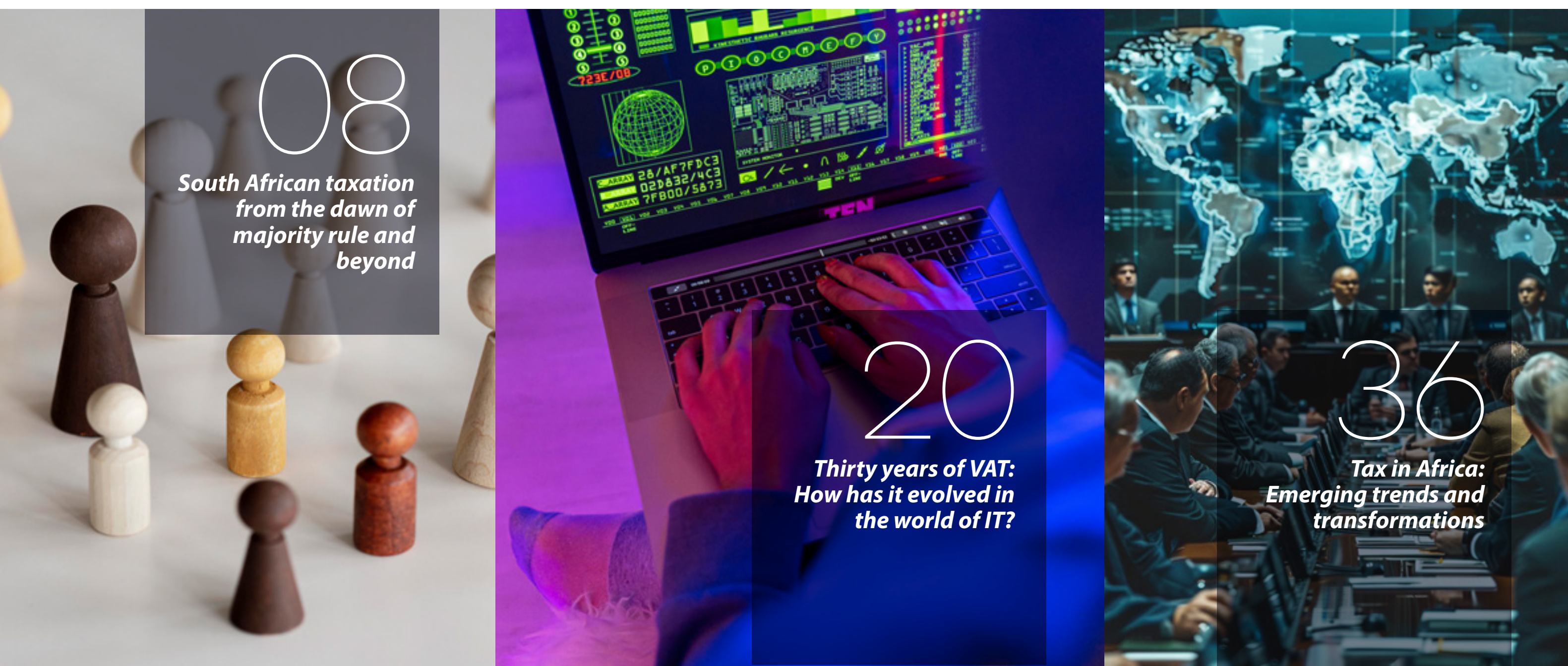

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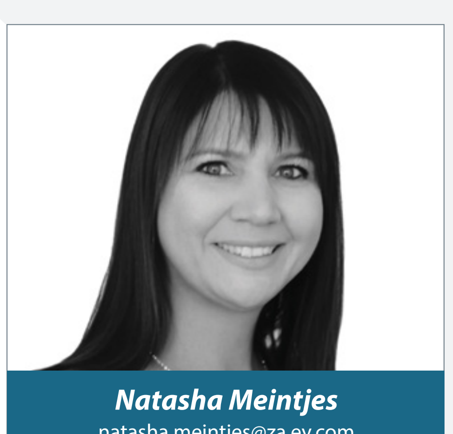

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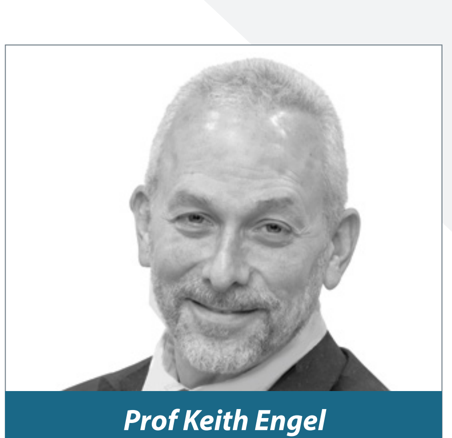

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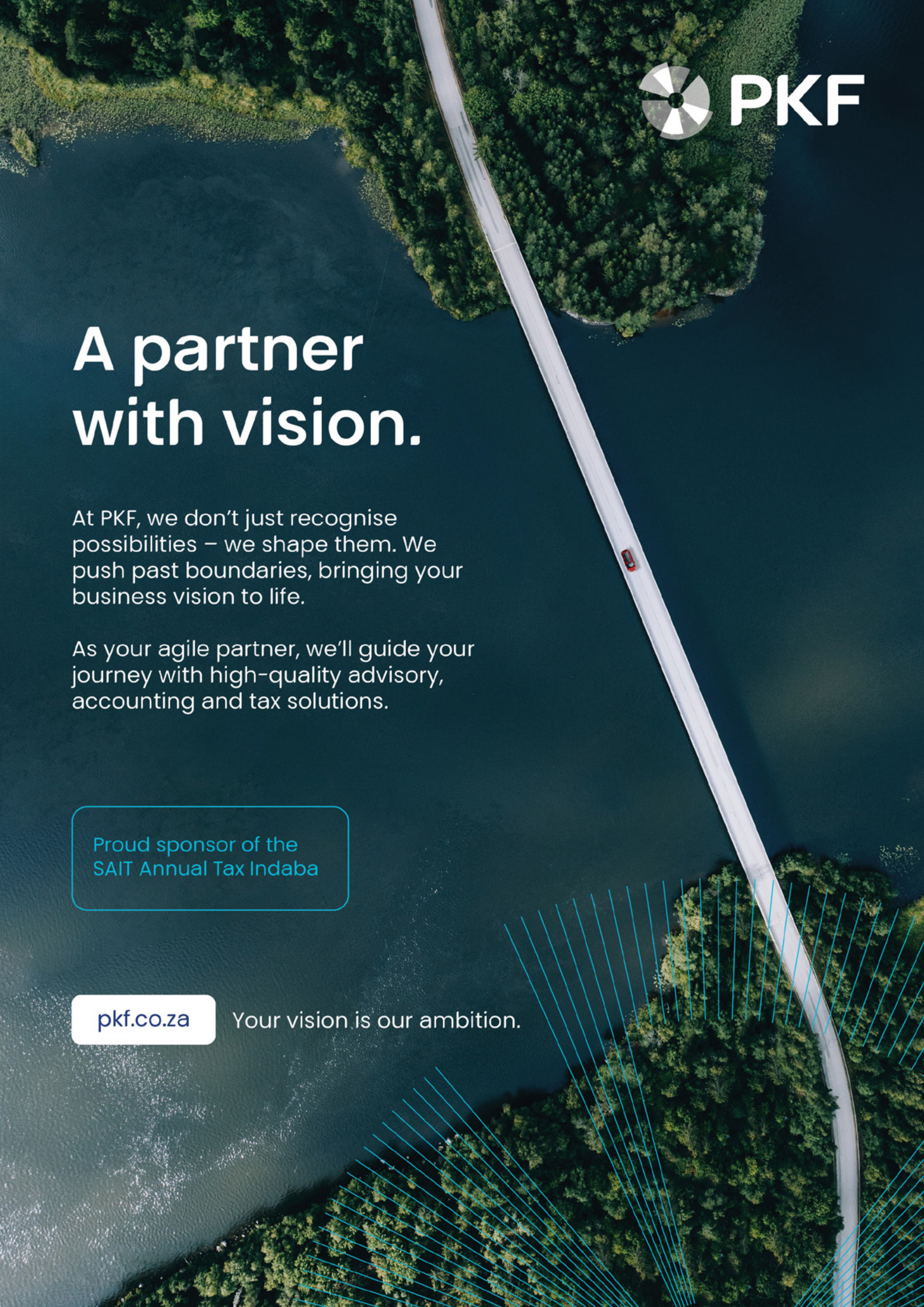
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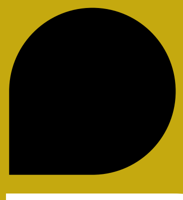

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SOUTH AFRICAN TAXATION FROM THE DAWN OF MAJORITY RULE AND BEYOND

▶ **PROFESSOR KEITH ENGEL,** CEO at SAIT

The South African tax system has substantially changed over the last thirty-plus years. These changes have occurred during several periods that have radically altered the South African tax landscape in terms of law and operations. I am proud to have been part of this change.

Period #1: Initial democratic transition (1991 to 1998)

As is well-known, the early 1990 negotiations ultimately led to the 1994 democratic transition from minority to majority democratic rule. At the time, the South African tax revenue and customs collection authorities were part of the South African Department of Finance (now National Treasury). Individual and company marginal rates were heavy, especially for employees. Two key changes that occurred shortly before 1994 were: (i) the introduction of the South African value-added tax (VAT) in 1991 (to replace the national sales tax) and (ii) the creation of a Secondary Tax on Companies (STC) for company payment of dividends in 1993.

A review of the former Government's finances revealed that the 'cupboards were bare'. Years of international isolation and internal conflict left the Government with little funding. Income inequality was high with the tax system being oblivious to this consideration. The tax base among the wealthy left much to be desired in terms of gaps and loopholes. Some of these gaps and loopholes were well-known and demonstrated in a notable book called 'Tax Strategy' by Edward Bloomberg. Revenue and customs enforcement were lacking.

It was clear that something had to be done in terms of revenue collection. A study was delegated to the Katz Commission from 1994 to 1999 for a complete overhaul of the entire tax system. The goal was to produce a more effective and internationally aligned tax system for raising badly needed revenue for the new Government while ensuring that the tax system was not favouring the previous minority. International alignment was considered critical so as to encourage foreign investment for economic growth. Many of the changes proposed by the Katz Commission, including its broad thrust, became the ultimate basis for the sweeping reforms that began at the end of the twentieth century.

A key achievement was the creation of the South African Revenue Service (SARS) in 1997. SARS became a stand-alone entity from National Treasury, which further combined tax and customs collections. The net effect was that National Treasury would henceforth make tax policy and SARS would audit and enforce. This duality remains. National Treasury currently drives tax policy through the annual budget process and substantive tax legislation. SARS drives all audits, collections, and interpretations (as well as tax administration legislation).

Period #2: The golden years (1999 to 2012)

The golden years of the tax system matched the golden years of South African growth. The net result was to broaden the tax base and alleviate the rates. The concern was that the working middle and lower classes were overpaying their fair share of tax while loopholes were benefiting the most fortunate. Tax was further seen as a way of partially mitigating the Gini-coefficient measurement of inequality (as opposed to a prior era in which the tax system seemingly contributed to inequality). Lower corporate tax rates with fewer loopholes were viewed as both better for tax economic efficiency as well as more favourable for investment.

In terms of base broadening, the period from 1999 to 2012 contained many sets of legislation, often occurring more than once per year such as:

- The tightening of rules to prevent false classification of employees as independent contractors, thereby ending schemes to avoid monthly payroll tax withholding;
- The enactment of capital gains tax on the disposal of investment and non-trading stock assets; and
- The introduction of a worldwide tax system, including the deemed taxation of foreign subsidiary income (via controlled foreign company legislation).

This period included many targeted anti-avoidance measures. These measures included ordinary taxation of share scheme incentives, limitations on employee deductions, cross-border withholding charges for funds flowing out of South Africa, debt-equity characterisation rules, mark-to-market taxation of derivatives held by banks, transfer pricing alignment with international standards, a revised general anti-avoidance rule as well as identification of reportable arrangements of suspect tax schemes.

While traditional tax holidays and certain loopholes were deleted, a narrow set of incentive regimes were added. Most of these narrow incentives focus on timing (e.g. accelerated depreciation for assets such as manufacturing) with a few incentives offering enhanced deductions (150 and 200 per cent deductions for the same item of expense). Despite the creation of these narrow incentives, the overall integrity of the tax system greatly improved.

The legislative changes during this period were accompanied by improved day-to-day tax administration. SARS revamped its process to increase enforcement across the board, including a larger focus on large corporations. SARS moved heavily into the technology space, turning away from cash-based and paper-based collections. A key change was the creation of simplified eFiling for all individuals.

The net result was to alleviate marginal income tax rates for the middle class, to reduce company tax rates to 28% and to remove certain stamp duties on financial instruments and automated teller machine (ATM) withdrawals. The tax regime was modernised by allowing for appropriate tax deferral for reorganisations and other internationally accepted business reinvestment practices. This period ended with the conversion of the anomalous Secondary Tax on Company distributions into the modern Dividends Tax.

Period #3: The state capture disruption (2013 to 2018)

Unfortunately, many improvements made to the tax system suffered setbacks and reversals during the period of state capture. This period began with an excessive amount of state spending that placed net government revenues under severe pressure, attendant with an unfortunate removal of skilled staff in favour of cadre deployment.

"Unfortunately, many improvements made to the tax system suffered setbacks and reversals during the period of state capture"

At a policy level, increased expenditure (and the misuse thereof) inevitably led to pressure for more tax revenues to cover the shortfall. Individual top rates went from 40 per cent to 45 per cent, along with the dividends tax, which went from 15 per cent to 20 per cent. Capital gains rates increased accordingly. Even the VAT had to be increased from 15 per cent to 16 per cent. Marginal tax brackets could not be fully adjusted for inflation. The net effect was to undo much of the tax relief obtained for the middle and lower working classes during the previous golden era.

More visible, reverses occurred within SARS during this period. Changes at the leadership level in favour of cadre deployment were filtered through the organisation to detrimental effect. Top skills were removed and side-lined. Service and public engagement dropped dramatically while SARS employees became subject to excessive oversight in an oppressive atmosphere. While revenues were maintained, revenue collection strategies fell into question, especially the refusal to issue VAT refunds that should have been promptly paid in accordance with the law.

Period #4: Renewal in a challenging economic environment (2018 to 2023)

Changes in top political leadership ultimately brought the state capture period to an end. The first beneficiary of this change was SARS. Top leadership changes eliminated cadre deployment and skills were restored. SARS was again free to do its work.

Unfortunately, the damage to Government coffers was not so easily repairable. Excessive waste and patronage still lingered over government expenditure. Debt-to-GDP ratios remained high and economic growth was anaemic. The economic situation was exacerbated by the shock of COVID-19, attendant with forced global and national shutdowns. Debt-to-GDP ratios now exceed 70 per cent and the interest charges on Government debt have become a large-scale drag on the fiscal deficit.

National Treasury has consistently taken a 'holding of the line' position in terms of tax policy. It is difficult to raise tax rates and other forms of significant taxes much further in fear of damaging (already limited) economic growth. In fact, National Treasury sought to bring the company tax rate down from 28 per cent to 27 per cent in line with international company tax norms (but this rate cut was offset by an 80 per cent limit on company tax losses). Selective excise taxes were raised, along with some tightening of anti-avoidance measures against multinational companies in line with the action plans of the Organisation for Economic Cooperation and Development (OECD), e.g. the multilateral instrument and the minimum top-up tax.

Emphasis is instead placed on SARS to garner more revenue. Rather than create new taxes, it is believed that current tax laws should be more effectively enforced. It is hard to tax the honest if tax evasion for the illegal goes unchecked. Criminal tax cases are now being prosecuted on a more widespread basis. SARS has turned to technology to uncover undisclosed income.

The strategy of increased enforcement (versus new taxes) has been largely successful. SARS is managing to increase tax revenue without additional tax laws. Of concern, however, is the lack of prosecution against those who stole millions under state capture but this lack of activity is due to weaknesses elsewhere in the Government.

Prospects ahead (2024 and beyond)

The surprising shift in the 2024 election will undoubtedly bring about a new era of tax policy as South Africa falls under a Government of National Unity. The fragility of this arrangement will no doubt temper any drives for radical tax change. Hopes for higher economic growth may also result in decreased tax pressures. However, it is doubtful whether South Africans will receive any substantial tax relief in the near future.

This is not to say that there may be some major tax policy considerations ahead. The status of National Health Insurance legislation will create significant pressures for higher payroll taxes (pushing rates above 45 per cent) or even VAT. Calls for a wealth tax to remedy inequality remain in the background while Government promises VAT relief in the form of zero-rating certain foodstuffs. Enforcement intends to expand its technological reach but may face information risks outside its control.

We will just have to wait and see. All that can be said is that it is hoped that we, as the electorate, will have a meaningful say in the matter.

ONE WOULD BE FORGIVEN FOR CALLING ME A NAYSAYER:

A political analysis of 30 years of democracy

▶ **CLAUDE DE BAISSAC,** CEO at Eunomix

Since 2008, I have ceaselessly analysed, documented, reported, warned, admonished and advised South Africa on the threats of the African National Congress (ANC) presented to the country and then on the systematic enterprise of destruction that came with the near-absolute rule.

When the new dawn was introduced, I cautioned against the irrational exuberance of what rapidly proved to be a false dawn. More recently, I warned that the Government of National Unity (GNU) was but a fragile political compromise of necessity between parties that had all lost the election—none more than the ANC itself.

The short term does not do much justice, whether the last three months or the next. My work focuses on what Marxists call social reproduction: how individual countries, regions and global society gain, maintain and lose their capacity to provide sufficiently safe, stable, sustainable livelihoods to their people. I seek to understand and document the past trajectories of countries over two or three decades and compare them to other countries in order to discover what may have accounted for relative success and relative failure. Then, I make propositions. However, one cannot make truthful propositions to untruthful leaders. In those circumstances, one must focus on warning them that through their repeated failures, their time will come. Bad leaders rarely escape their eventual humiliation, though it can take an incredibly long time for this to happen.

The year 2024 marks thirty years of democracy. It started with a GNU. We now, through the will of the people, have a GNU. Democracy started with a country teetering on the brink. We now again have a country teetering on the brink. What this GNU does is far more critical to the country's future than what the first one did. But where Nelson Mandela once stood, one among a fellowship of philosopher princes is not where Cyril Ramaphosa stands.

"The work is not done. Establishing the GNU was the easy part: negotiations to advance their interests are what political parties do in their sleep"

When he became president in 2018, I gave him only a 50 per cent chance of winning a second term. The political economy maths did not add up to a successful first term: 1) of all ANC presidents ever elected, he had the lowest votes and a slate he did not control; 2) he inherited an economy depleted by a decade of regulatory mismanagement, under-investment and organised looting; 3) as a result, the political capital demanded to clean-up an apparatus of government that had been systematically subverted to serve state capture, was absent. He could not rebuild the foundation for economic reconstruction nor initiate that reconstruction. Without a performing state, there cannot be a performing economy. Failed states are states where life is, as Thomas Hobbes famously wrote, "*nasty, brutish and short.*"

If not for the GNU, Ramaphosa would not be president today. The success of his second term depends on his ability to command the ship of state inside the perfect storm into which the ANC recklessly navigated South Africa: a divided government, a weak state bordering on failure in many parts of the country, an exhausted economy running on empty and a society immiserated by rising unemployment, poverty and inequality. To make that perfect storm even worse, today's world is not the world of 1994. Optimistic globalisation and deconfliction have given way to hyperpowers' enmity, trade barriers and regional wars, while climate change takes a mounting toll on humanity and pandemics released by hyperconnectivity; the storm looms large.

Yet, this is South Africa's best shot since 2008.

It is also the moment I had been hoping would come: the moment when the economy had been so damaged that citizens would no longer tolerate incompetent and corrupt governance. The moment when politics would have to submit itself to the urgent and vast needs of a society impatient for change. The moment when, instead of doubling down on irresponsible rule, as so many countries have done in similar situations by nationalising key sectors and printing money through 'the people's quantitative easing', the elites have finally found the wisdom to reach out to each other and begin the hard work of reconstruction. For this is about reconstructing both the economy and society. Indeed, objective measurements of the conditions of both show levels of destruction that are not very far from those observed in countries that have experienced military conflict. Driving across both rural and urban parts of South Africa, including driving in the economic heartland of Greater Johannesburg, conjures impressions of the Democratic Republic of the Congo (DRC) in the latter half of the 2000s: infrastructure abandoned, public equipment stolen, roads impracticable, rubbish and its stench everywhere, people scraping daily feats of survival amid burning tyres that keep them warm while killing them slowly, industrial buildings vacated and left to decay as there is no longer a market for them to be acquired and repurposed. And that is just the visible manifestation of collapse in a public service that long abandoned its mission to serve and protect. For it is in the collapse of the state that South Africa finds the source of 15 years of growth collapse and its vast consequences.

My carefully calibrated sense of optimism comes from the very fact that the ANC is left with a singular choice: do or die. However, the moment only represents an inflexion point that creates a possibility. The work is not done. Establishing the GNU was the easy part: negotiations to advance their interests are what political parties do in their sleep.

Despite all the destruction, South Africa still has tremendous assets it can muster as long as the government stops acting as prime saboteur and, instead, becomes prime enabler to the vast wealth, natural and societal, the country harbours. Operation Vulindlela, about which I was extremely sceptical in light of the many plans the ANC nauseatingly served us year after year after year, is bearing some precious fruits. Select turnarounds and reforms are being effected with surprisingly good results, notably and vitally in power generation and key transport infrastructure. A new form of governance is being created, centred in the Presidency and Treasury. This is still too little and it is nearly too late, as the Presidency itself has acknowledged.

Many government departments and vast numbers of local governments have not yet caught on to the new vibe, as most like their resources and skills. Many passively resist. Some do so brazenly. They know that the political window for a turnaround, restructuring and reform that threatens their personal interests is narrow. The GNU faces possible expiry in 2026 when local elections come or when the ANC leadership conference takes place in 2027. What comes after that is unknown. There is no obvious successor to Ramaphosa who will represent continuity. In the background are forces biding their time; this uncertainty limits confidence and hobbles long-term investment. With good reason: as Barrack Obama recently said, "*We have seen that movie before and we all know that the sequel is usually worse.*"

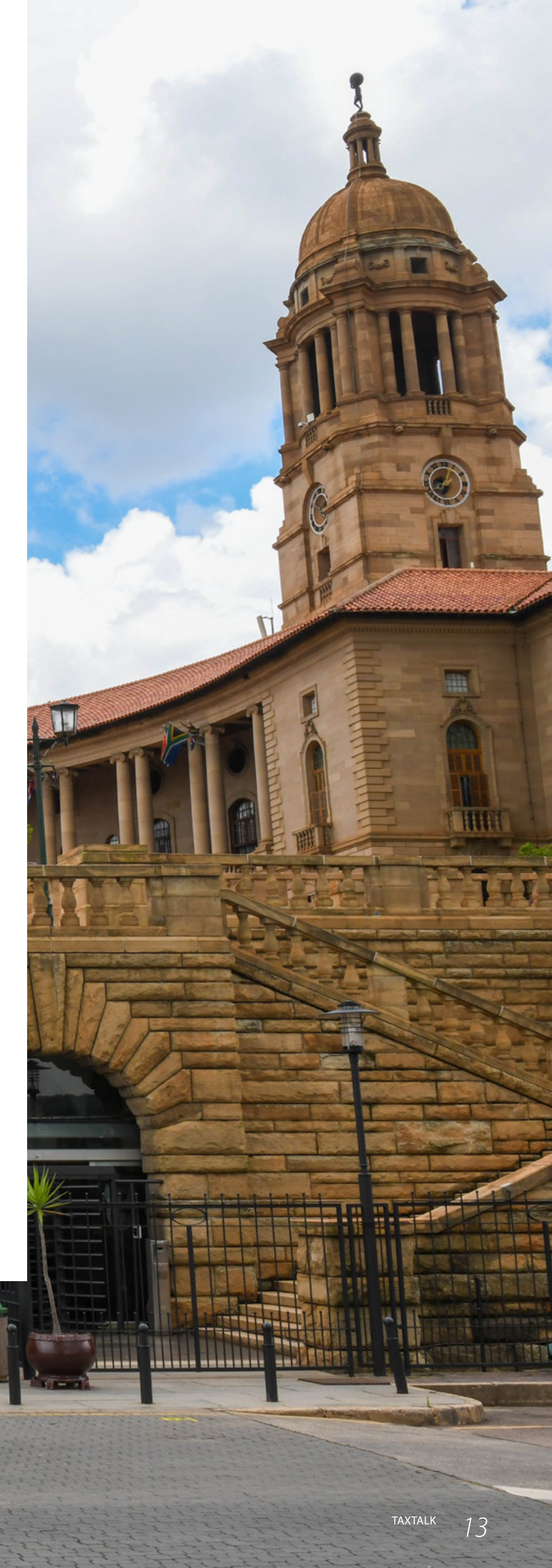
And indeed, when people abandon themselves to undue optimism, as many did at the onset of the New Dawn, I remind them that Thabo Mbeki delivered both fiscal consolidation and economic growth, leading to rising employment, decreasing inequality and the best years South Africa had had in a very long time. And I remind them that the ANC punished him for this, absurdly calling him neo-liberal when he was that rare African nationalist who actually delivered rather than talking nationalism and acting against the nation. And what did they do then? They rewarded a reckless and demonstrably corrupt man with nearly unfettered powers, which he used and abused to destroy the fiscus, growth, employment and just about everything else but the judiciary, the free press and the spirit of South Africans.

I borrow much from classical political economists like Adam Smith, John S.Mills, Jeremy Bentham and Karl Marx. They understood that an economy is, first and foremost, a political and social object. They did not seek to abstract economic laws from the societies within which an economy operates. Production and consumption —whether centralised in a Leviathan-like state, communal and reciprocal in very small societies or through arms-length markets—is a fundamentally political activity. The American political scientist, Harold Laswell, famously quipped that politics is about "*who gets what, when and how*." The same goes for the economy. The economy belongs to the people. The state is a mere custodian. The private sector and the markets are mere instruments of wealth creation and allocation.

We must not give a blank check to this government nor to any of its constituent parties, let alone to the capricious cults of one man that pass as the two main opposition parties. We must take the measure of the toll exacted upon us, our children, our friends, our colleagues and our neighbours by 15 years of unforgivably bad governance. We must do so repeatedly to remind ourselves that this economy and this state are ours; they do not belong to the ANC, nor to the Democratic Alliance (DA), the Inkatha Freedom Party (IFP), the uMkhonto weSizwe (MK), the Economic Freedom Fighters (EFF), nor to any other party, leader or vested interest group that may claim to act on our behalf.

I raise my glass in the direction of those who believe me to be irretrievably pessimistic and I say to them: "*To the next three years and to the next thirty. Now let's get back to work, alert, agile and committed.*"

Post scriptum: behind the turnaround of Eskom and of Transnet—as tentative as these are—and behind the vast efforts being applied to fix the grave water crisis we face are devoted South Africans from all walks of life. Organisations like Business Unity South Africa (BUSA) through their many initiatives, and government through Operation Vulindlela, need funding. Every rand counts. I appeal to you, dear reader, to approach BUSA and offer financial support to these initiatives.



BIG IDEAS
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REFLECTING ON THE EVOLUTION OF TAX FILING IN SOUTH AFRICA:

FROM PAPER TO EFILING

▶ **SIDNEY FLETCHER,** Manager: General Tax Compliance at Tax Consulting South Africa

When I read the most recent report on the statistics about the first two weeks of the 2024 tax filing season, I couldn't help but think back to a time before 2007. This was the era before eFiling when millions of tax returns were printed and posted to taxpayers nationwide.

I remember how many of these were returned to SARS marked as 'address unknown'. Postboxes outside the SARS buildings were flooded with envelopes on deadline day as disciplined taxpayers hurried to submit their tax returns on time. SARS Mail Rooms had to extend working hours to get paper-based returns sorted and date-stamped.

This frenzy was only matched by the queues of taxpayers snaking around buildings, rushing to get their tax filings in on time. Exhausted 'meter greeters' manning and trying to organise these queues always had the same question: "Why do people always leave this for the last minute?"

The dawn of eFiling

As part of SARS' Modernisation Strategy, eFiling was introduced in 2007. Initially only able to process Personal Income Tax Returns, the platform was met with scepticism by the industry and taxpayers alike. It was not until 2009 that the true benefits of electronic filing were experienced across the tax base. During this time, the platform introduced Value-added Tax (VAT) and Corporate Tax return submissions. SARS also launched E@syfile Employer and e@syFile™ Practitioner in 2008. Although e@syFile™ Practitioner never really caught on, e@syFile™ allowed SARS to prepopulate employer-provided data directly onto individual tax returns, which later became known as third-party data.

Transforming tax filing

At this point, the Tax Filing Season initiative looked completely different. The paper-based return was replaced with the ability to use the Tax Return Wizard, allowing taxpayers to customise their returns. In some cases, this reduced returns from twelve pages to just two. This transformation significantly reduced the number of 'walk-ins' at SARS branch offices.

The benefits for taxpayers were tangible. The return submission process was simpler and more efficient, allowing SARS to process refunds quickly. With all these benefits, SARS recorded a more than 80% growth in electronic filings at the end of the 2010 tax year. This also significantly enhanced SARS' ability to realign its focus to various enforcement initiatives, as they could now detect fraud and non-compliance at a very early stage.

The modern eFiling era

Fast forward to 2024, where we have seen significant changes to the eFiling platform over the years. One notable improvement is the merging of various usernames into a primary username. Add to that the different profile types that allow you to create various portfolio types. Depending on your requirements, you can select an Individual, organisation or tax practitioner portfolio type. Each allows you the appropriate functions on the eFiling platform. You can add different users, each with their own submission level and user rights, offering your organisation or practice the ability to limit access to certain users while allowing additional access to other users.

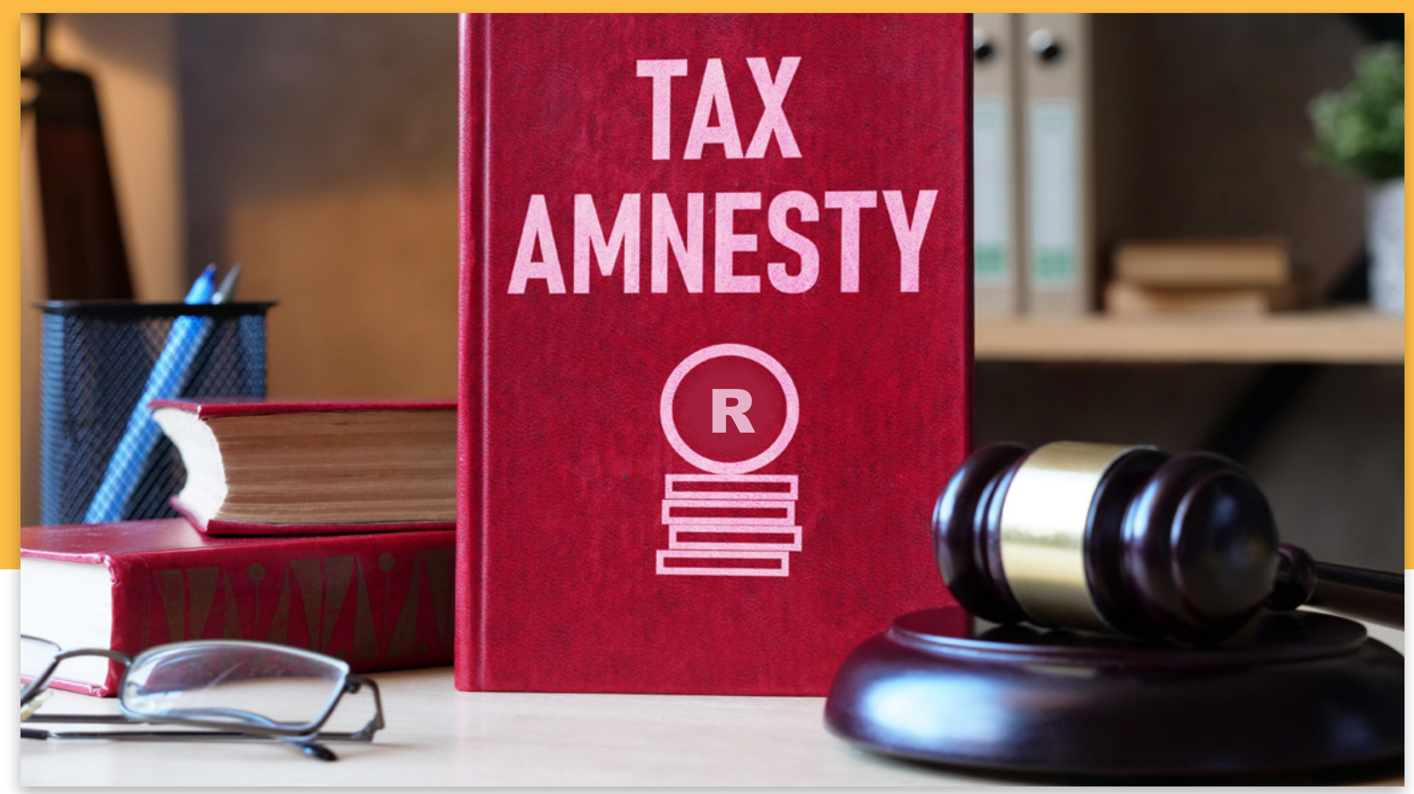
With all these system improvements, SARS has aggressively enhanced its third-party data submission Initiative by adding more and more data from institutions. These institutions include employers, banks, investment houses, medical aids, etc. The most recent additions are public benefits organisations and trusts. This allows SARS the ability to create accurate Estimated and Auto Assessments.

Challenges and continuous improvements

The platform is by no means perfect. Several queries are still being escalated to SARS via the various registered controlling bodies (RCBs). Evidence of this is the confusion caused by SARS' noble attempt to empower taxpayers when it comes to eFiling by introducing the 'eFiling Security Details' and the emphasis placed on the functions of a Registered Representative. More recently, several taxpayers and practitioners were logged out of their profiles due to registered details captured on the RAV01.

Conclusion

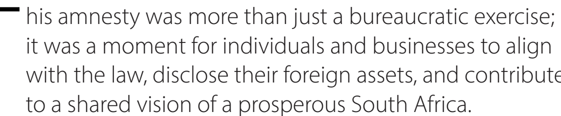
Looking back, it is clear that the journey from paper-based tax returns to eFiling has been transformative for South Africa's tax system. The introduction of eFiling marked a significant step in making tax filing more accessible, efficient and accurate. The transition from paper-based returns to a comprehensive online system has revolutionised how South Africans file their taxes. Moreover, the eFiling platform continues to evolve, offering enhanced functionalities and efficiencies that benefit taxpayers, tax practitioners and SARS. While challenges remain, the continuous improvements and innovations in the eFiling platform demonstrate SARS' commitment to modernising and enhancing the tax filing experience for all South Africans. As we move forward, it will be interesting to see how the platform continues to evolve and adapt to meet the needs of taxpayers and the ever-changing technological landscape.



THE TIME IS RIGHT FOR another amnesty

▶ **PAUL GERING,** Partner at PKF

In 2003, South Africans were given a lifeline—a chance to come clean and regularise any offshore funds they had kept under the radar.



This amnesty was more than just a bureaucratic exercise; it was a moment for individuals and businesses to align with the law, disclose their foreign assets, and contribute to a shared vision of a prosperous South Africa.

But, as time has shown, not everyone took that lifeline. Despite the government's efforts, a significant amount of money remained unreported, hidden and out of reach.

Why the 2003 amnesty was necessary?

The 2003 amnesty was introduced with three main goals in mind:

1. **To enable regularisation**: People who had crossed the line could set things right without facing harsh penalties.
2. **To maximise disclosure**: The government wanted full transparency regarding foreign assets, making it easier to bring those assets back home.
3. **To expand the tax base**: By encouraging repatriation, the amnesty aimed to increase revenue, fuelling the nation's growth.

Back then, there was a wave of optimism in South Africa. The economy was on the upswing, and there was a genuine belief that investing in our own country was the way forward. The government, recognising this momentum, established the Financial Intelligence Centre and began expanding its network of international treaties to track down undisclosed foreign funds.

▶

The amnesty was part of a broader strategy—a nudge to encourage people to contribute to the nation's progress.

Global context and the need for compliance

The world was changing. Tax havens were losing their appeal as the global community became increasingly intolerant of untaxed funds. For South Africans, the message was clear: disclose now or face the consequences later.

The government's timing was strategic. With the economy booming and the tools in place to track non-compliance, the 2003 amnesty seemed like a win-win. South Africans had an opportunity to come clean and the country could harness those funds to build a better future.

An amnesty of limited success

Some 42 679 applications were submitted in the 2003 amnesty and R68.6 billion foreign assets were regularised, raising some R2.9 billion in the amnesty levy.

But even with all the right ingredients, the 2003 amnesty did not fully succeed. Fast forward fourteen years and the Special Voluntary Disclosure Programme (SVDP) was introduced—a more stringent version of the amnesty; but, this too, revealed that not all funds had been brought to light.

The SVDP was tougher. It required more detailed information and imposed higher penalties, which made it less attractive to those still holding out. Even so, it managed to uncover R3.8 billion in foreign assets, proving that there were still plenty of undisclosed funds out there.

Clearly, not everyone regularised their foreign assets the first time and I would suggest that not everyone regularise their assets in the SVDP.

Challenges with the current Voluntary Disclosure Programme

Today, the Voluntary Disclosure Programme (VDP) continues to offer a path to regularisation, but it is not without flaws. The lack of clarity on how far back one needs to go to regularise matters, especially older contraventions, is a major stumbling block. The interest rates imposed by the VDP can be crippling, even for minor infractions.

While it is true that death and tax are certain, neither are inherently voluntary by nature and when a very narrow interpretation is given by SARS to the term 'voluntary' with a view to exclude applications, the process is brought into disrepute.

While the South African Reserve Bank has maintained a similar rate for regularisation in both the amnesty and the SVDP, the current rules are not as transparent or reasonable as they need to be to encourage widespread compliance. As a result, many South Africans have found other ways to keep their funds hidden or move them offshore without detection.

New opportunity with the Government of National Unity

Despite the economic challenges we face, there is a sense of hope with the Government of National Unity. Just as the 2003 amnesty opened a door for regularisation, the current climate offers a new opportunity to bring unregularised funds into the fold.

A fresh amnesty, designed with the right balance of incentives and penalties, could be the key to unlocking these hidden assets. It is about finding that 'just right' approach—one that encourages participation without being too lenient or too harsh.

Urgent action is needed

SARS was hit hard during the state capture era; it lost key personnel and effectiveness. While it is improving its systems by accelerating the use of technology and leveraging global information exchange agreements, the process of audit and dispute resolution remains slow and cumbersome.

The urgency is very real. Our economy cannot afford to wait. A new amnesty could provide a quicker, more efficient solution, bringing in much-needed revenue to address the pressing needs of our country.

Many countries have successfully used amnesties and even redesigned their banknotes to bring hidden cash into the formal economy. By requiring people to exchange old notes for new ones within a specific timeframe, they have managed to recover previously untaxed funds. South Africa can take a decisive step by adopting similar strategies.

New amnesty, brighter future

The time is ripe for the Minister of Finance to introduce a new amnesty in the upcoming mini-Budget in October 2024. Clear legislation with a time limit, reasonable rules, tolerable rates and bearable penalties will see South Africans willingly stepping forward to regularise their foreign assets.

I propose the following approach:

Like the 2003 amnesty and the SVDP, foreign exchange regularisation should be based on the value of assets as of 30 September 2024, with a levy of 5% for repatriation and 10% for funds kept offshore.

Similarly, for income tax, PAYE and VAT regularisation, a 10% levy should be applied to the value of assets, be they local or foreign, as of 30 September 2024. This would also reset the assets' base value for Capital Gains Tax at that point.

Let me be equally clear, the regularisation is not only for the foreign assets and the income that generated those assets. Regularisation is also for those skeletons buried deep in South African entities seemingly far away from the grasp of SARS.

This is not just about collecting taxes; it is about building a future where everyone contributes to the nation's growth and prosperity—where every South African has a stake in shared success. I urge the Minister to seize this golden opportunity to bring hidden assets into the light. Now is the time to act!

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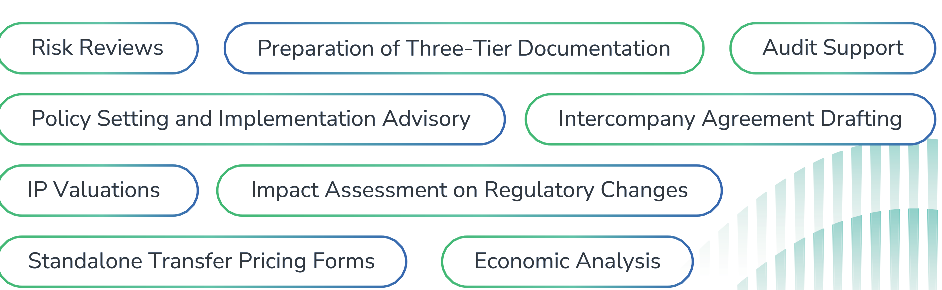

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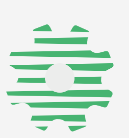

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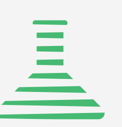

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THIRTY YEARS OF VAT:

How has it evolved in the world of IT?

▶ **MABUTHO MTHEMBU,** Associate Director at SNG Grant Thornton

In 1991, South Africa enacted *Value-Added Tax, No. 89 of 1991 (the VAT Act)* and as South Africa marks 30 years of democratic transition in 2024, the VAT legislation has also undergone substantial transformation necessitated by a variety of variables such as the ever-changing business environments in various sectors of the economy; the concept of globalisation; digital trading of goods and services; global developments; the South African economic structure; and competing socio-economic needs.

The transformation of the VAT regime has been a global phenomenon; South Africa has also made strides to ensure that its VAT system adapts to change and keeps up with global best standards.

The road to the evolution of VAT in the world of IT has been a long journey. Who would recall that when the VAT Act was enacted filing VAT returns was a manual process? However, the SARS improved its processes by introducing the e-filing system to keep up with the information technology developments. Today, vendors file their VAT returns and other relevant material on an online platform and communicate with SARS online. Certain audits are performed via an online platform. Responding to the information technology developments has certainly improved efficiency, tax compliance and, without doubt, has improved oversight over client tax affairs and enhanced tax collections in general. The journey can never be taken for granted.

The evolvement of a dynamic digital services market

In April 2014, South Africa introduced VAT Laws and Regulations pertaining to VAT on electronic services in response to the evolution of the digital economy, which transformed the ways in which businesses and consumers transact globally. The fast-changing digital economy that introduced digital trading of both goods and services through online platforms created taxation challenges for business and revenue authorities globally. Principally, it raised concerns about whether the developing countries that mostly consume such services are fairly granted their right to collect tax on services consumed in their respective countries.

SARS introduced changes to the provisions related to VAT on electronic services in June 2019, which considerably widened the scope of electronic services subject to VAT. Recently, SARS released Draft Taxation Amendment Bills (Draft Tax Bills), which also include proposed amendments to the provisions related to VAT imposed on electronic services. The series of amendments testify to the fast pace of transformation in the digital economy, which creates a need for taxation laws to respond adequately; thus, it limits uncertainty for businesses impacted by such provisions.

In summary, when the 2014 Regulations were introduced, SARS sought to capture non-resident suppliers of electronic services in the South Africa VAT network by introducing VAT registration obligations for such suppliers and levying VAT on their supplies of electronic services to South African resident customers. Traditionally, the South African VAT construct contained provisions that SARS could not effectively administer with regard to business-2-customer (B2C) transactions on electronic services since the VAT provisions required that VAT be paid by the recipient of the services to the extent that such services are utilised, used or consumed for purposes other than making taxable supplies. Effectively, this means that SARS had to find a mechanism to collect VAT on individuals who are not registered for VAT purposes, which proved to be a challenge. It is on this basis that SARS opted to introduce Regulations and VAT provisions related to electronic services that transferred the liability to register for VAT to the non-resident supplier of electronic services and thus enabled SARS to collect the VAT, both B2B and B2C supplies.

Fast forward to 2019, amended Regulations were introduced, which significantly expanded the scope of services that fall within the ambit of electronic services. In terms of the amended regulations, electronic services are defined to mean "*any services supplied by a non-resident for a consideration by means of an electronic agent, an electronic communication or the internet*", essentially the net seeks to capture all electronic services supplied via these platforms, both B2B and B2C in nature. The amended Regulations further clarified the nature of the services which fall outside the scope of electronic services, such as certain educational services, telecommunications services and certain supplies of services, where the supplier and recipient belong to the same group of companies. Even with the amended Regulations, uncertainties remained on certain services which could either qualify or not qualify as electronic services—a clear demonstration of the complexity of the digital economy, notably the group exclusions. It is also important to note that, unlike in other jurisdictions, the South African Regulations do not distinguish between B2B and B2C supplies as far as electronic services are concerned.

The evolution of digital economy forces tax authorities to ensure they are quick to adapt their tax rules to this fast-changing and dynamic economy. Recently, SARS has released draft tax bills in which SARS proposes to amend the regulations related to electronic services. In terms of the proposed amendments, the VAT registration requirement will only be limited to non-residents supplying electronic services to non-VAT registered customers. Essentially, it means that B2B non-resident suppliers of electronic services will not be required to register for VAT purposes in South Africa. It appears that SARS is aligning the provisions on electronic services with the provisions applicable to imported services, which also excludes B2B supplies to the extent that the recipient will utilise the services for taxable supplies.

The proposed amendments are surely welcomed; however, they raise a variety of administrative and legal questions, which include whether the non-resident vendor will be required to obtain and maintain any form of evidence as proof that the recipient is a non-vendor, more so in the event of an audit by SARS.

Evolving digital transmission of data

SARS announced a significant initiative in October 2023, detailed in the '*Discussion Paper on VAT Modernisation*'. The purpose of the Discussion Paper is summarised as follows:

- *Explain, at a high level, the modernisation of the South African Value-Added Tax (VAT) administrative framework. The modernisation will impact businesses that are registered or required to be registered for VAT (vendors). In line with international trends in making the VAT system agile and easy to administer (both for the tax authority and vendors), there is a growing acceptance for the adoption and implementation of real-time or close to real-time transmission of VAT data from vendors to the tax authority, and the reporting of VAT data using the modern VAT return.*

- *Invite businesses (vendors), accounting system software developers or suppliers, modernize controlling bodies, public finance entities, municipal finance entities and the public to submit contributions, and comments, as part of a consultative process to modernize the VAT administrative framework.*

This initiative aims to enhance compliance and real-time reporting by facilitating the digital transmission of VAT data from taxpayer Enterprise Resource Planning (ERP) systems directly to SARS' software systems. This transition will necessitate the integration of stand-alone e-invoicing software into existing ERP systems and consequently reshape the VAT landscape for businesses across the country.

While VAT modernisation promises to streamline processes and improve revenue collection, it is anticipated to introduce substantial challenges for both SARS and taxpayers, according to the discussion paper. The complexities of VAT regulations, particularly within sectors such as Higher Education and Financial Services, coupled with the need for intricate system configurations, will pose significant hurdles, in my view. Moreover, the readiness of ERP systems and taxpayers' existing VAT accounting processes are crucial factors that will influence the success of this modernisation effort.

Further, it remains to be seen how SARS will navigate the integration of small and informal businesses into the VAT modernisation grid, given the complexities and challenges faced by the sector, some of which may be reliant on manual processes and for which software and ERP acquisition implementation may be a cost between survival or closure.

Since the publishing of the Discussion Paper, SARS is yet to communicate any further developments on the project plan for the implementation of VAT modernisation and the form or shape that it is likely to take. However, such developments are congruent with global developments on VAT modernisation, where several countries, including Kenya, Uganda, United Kingdom, United Arab Emirates, Kingdom of Saudi, and India have already phased in VAT modernisation. For now, we hold onto our complex tax seats and wait with bated breath for the next pronouncements.

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THE COURTS: Which way are they leaning towards?

DR EMIL BRINCKER, Director and National Head of Tax and Exchange Control practice at Cliffe Dekker Hofmeyr

Taxpayers are generally most aggrieved about the extent to which they lose cases in a South African Court, whether in a Special Court or in any of the Higher Courts. As such, the popular view of taxpayers is that the Courts lean towards the fiscus as opposed to taxpayers in handing down judgments.

The view that the Courts favour the fiscus is also supported by the statistics that are provided by the SARS in its annual reports. However, the support is then found in matters considered by the higher courts, especially the Supreme Court of Appeal and the Constitutional Court. On this basis, the statistics show that for the 2021/2022 year of assessment, all matters heard by these courts were held in favour of SARS whereas for the 2022/2023 year of assessment SARS still had a success rate in excess of 90%.

These statistics, however, do not take into account the process to reach the Tax Court or the higher courts. For instance, in the 2021/2022 year of assessment SARS conceded a substantial number of matters. Even with reference to appeals proceeding to the Tax Court:

- 23% were settled;
- taxpayers withdrew appeals in 34% of the matters; and
- SARS conceded 26% of all appeals.

Should one consider the relevant number of appeals from the 2020/2021 year of assessment until 2022/2023, the relevant appeals increased from 6 498 to 10 285 in circumstances where only 217 of these appeals ended up in Tax Court in 2020/2021, 263 in 2021/2022 and 286 in 2022/2023. With reference to matters referred to the Tax Court in 2022/2023:

- SARS conceded 15% of the matters;
- taxpayers withdrew 29% of the matters;
- 3% were handed down in favour of taxpayers; and
- 3% of the appeals were dismissed.

The overall success rate of SARS was 87% of the matters that proceeded to Court. However, this is a small percentage of the matters where objections and appeals were filed in the first instance. A number of high profile cases were handed down in favour of taxpayers over the last couple of years. These include the following:

- in *Sasol Oil (Pty) Ltd v CSARS* 81 SATC 117, the Supreme Court of Appeal restated and confirmed the simulation principle in favour of the taxpayer and indicated that the test is whether agreements have the effect according to its tenor. A Court will examine the transaction as a whole, including all surrounding circumstances, any unusual features of the transaction and the manner in which the parties intend to implement it, before determining whether a transaction is simulated;
- in *CSARS v The Thistle Trust* 85 SATC 347, the Supreme Court of Appeal indicated that SARS is not able to impose an understatement penalty to the extent that the taxpayer had erred if they did so in good faith and acted unintentionally;
- even though the Supreme Court of Appeal decided against the taxpayer in *CSARS v Coronation Investment Management SA (Pty) Ltd* 85 SATC 413, it still indicated that no understatement penalties could be imposed where the taxpayer had obtained an opinion supporting same and where they had prepared and submitted their tax returns under the guidance of their auditors. In addition, the Constitutional Court in Case No: CCT47/23 found in favour of Coronation in circumstances where it indicated that, in the context of the controlled foreign company legislation, the approach of SARS was illogical, did not make business sense and undermined the objects of section 9D. The approach adopted by SARS would inadvertently "*discourage legitimate business practices that contribute to the efficiency and competitors of South African companies on a global stage*"; and
- in *Capitec Bank Ltd v CSARS* (12 April 2024), the Constitutional Court recently interpreted the VAT legislation in favour of the taxpayer with reference to the VAT input claims that it sought in relation to policy payouts to clients.

The above cases illustrate the fact that the South African Courts, when faced with issues of principle, have been and are still independent considering matters with reference to the case law, the intention of the legislature and policy objectives. Other matters where taxpayers have lost are more debatable and there are support for the approach adopted by the Courts.

The only instance where one can potentially find a leniency on the part of the Courts in favour of the fiscus relates to process and where SARS has neglected to stay within the time periods within which to process disputes, including objections and appeals as well as the ability of taxpayers to approach the High Court directly as opposed to proceeding to the Tax Court. Even in this context, the Court recently indicated in *Poulter v CSARS* (a88/2023) on 28 June 2024 that the jurisdiction of the Tax Court is not limited to attorneys and counsel as opposed to taxpayers being represented by other professional representatives.

Therefore, in having regard to these issues, one would not have substance in criticising the judgments of the South African Courts in circumstances where a minute portion of these ultimately reach the Courts and where critical decisions have been handed down in favour of taxpayers.

60 minutes CPD

UNPACKING THE CORONATION CASE

▶ ADVOCATE PETER H O'HALLORAN

In this article, the reader will be guided through the events that ultimately led to the decision of the Constitutional Court, where the Coronation holding company in South Africa was absolved from being taxed upon the net income of its Irish subsidiary company.

The Constitutional Court ruling is applicable to all South African Investment Companies that operate similar models. It is also highly beneficial and relevant to South African Investors.

Note that South Africa is not a member of the Organisation for Economic Development and Co-operation, but Ireland is. Thus, the Irish Revenue Authority accepted the Organisation for Economic Co-operation and Development (OECD) Pillar 2 rules, which have as their object a minimum corporate tax rate of 15% to be imposed globally.

The Coronation story begins with what has been described as one of the most successful walkouts in South Africa.

In 1993, fifteen professionals walked out of a (then) leading investment house to form Coronation in Cape Town.

The Irish subsidiary, named Coronation Global Fund Managers (Ireland) Ltd, was set up in the Dublin International Financial Services Centre (IFSC) company zone.

The Irish IFSC is a special economic zone where International Financial Service Centre Companies do business. The IFSC zone is an area surrounding the docklands of Dublin.

In 2007, CGFM applied to the Irish Financial Services Regulatory Authority for authorisation of an Undertaking for Collective Investment and Transferable Securities (UCITS) and received its Licence from the Central Bank of Ireland.

The Licence stipulated that it was a 'management company' in accordance with the European Communities Regulations under Investment Services Directive 93/22/EEC 2125.

International financial service centre companies

The Dublin IFSC, operating as a special economic zone since 1987, initially obtained European Union approval to apply a 10% corporate tax rate for 'designated financial services activities'. This approval expired in 2005. Before the expiry of the approval, the Irish Government legislated to effectively have a national flat rate by reducing the overall Irish corporate tax rate from 32% to 12.5%.

Since 1 January 2006 to October 2021, companies in the IFSC paid tax at a corporate tax rate of 12.5%. After the October 2021 budget, this only applies to firms making less than €750m a year.

The Irish Government agreed to a global deal on corporate tax reform that set a minimum rate of 15 per cent for large companies, in terms of the OECD Pillar 2 rules. The new 15 per cent minimum global tax rate was implemented in 2023. This is in line with the OECD drive to impose a global minimum tax rate of 15% on corporates.

Patently, the Irish Corporate tax rate at 12,5 or 15% is much less than that of South African corporates, which are subject to a flat rate of 27%.

Controlled foreign companies

The definition of 'controlled foreign company' at Section 9D(1) of the SA Income Tax Act includes the requirement that, in order to qualify as a controlled foreign company (CFC), the SA resident shareholder has to hold 50% or more of the participation rights or must be able to exercise more than 50% of the voting rights in the foreign company.

It is undisputed that the CGFM company was a CFC in the 2012 tax year.

Since 2001, South African Tax Residents have been liable for tax on their worldwide income, including the potential liability for the 'net income' of a CFC.

Stated in layman's terms, the net income of a South African resident's company, whose company is located offshore, is liable to be taxed in that SA Resident's hands unless one of the exemptions provided under the Income Tax Act applies.

CGFM was incorporated in Ireland during 1997 to provide opportunities for clients to invest in South African and Irish-domiciled collective investment funds.

A South African-domiciled company would not have been able to offer any Irish Collective Investment Schemes to its clients.

It is highly relevant that Coronation Investment Managers SA (Pty) Ltd (CIMSA) was the only shareholder in 2012 of CFM (Isle of Man) Ltd.

CFM (Isle of Man) Ltd was then the sole shareholder of CGFM in Ireland.

Coronation Investment Managers SA had an indirect 'participation right' in excess of 50% in CGFM Ireland, through CFM Isle of Man. This is why CGFM was a CFC, as defined at Section 9D of the SA Income Tax Act.

Section 9D is an anti-avoidance provision. It was introduced to deal with the taxation of South African taxpayers on their income earned abroad, particularly income earned by South African-owned foreign corporates. The section is drafted to balance the anti-tax deferral interests of the fiscus against the need to provide for international competitiveness on the part of South African multinational companies.

The South African rules in respect of controlled foreign companies are similar to those of other jurisdictions. The upshot is that if a SA multinational suffers a heavier tax burden with regard to its offshore enterprises, the playing field will be uneven, favouring other nations with whom South African multinational corporations compete.

In its business plan, which was attached to its Licence application, CGFM presented an outsourcing business model where CGFM concentrates on being a 'product provider'. All non-core functions, such as investment, administration and custodial functions, are outsourced. According to the business plan, because these functions are outsourced to independent third-party service providers, CGFM is not subject to South African Transfer Pricing rules. CIMSA denied that CGFM outsourced functions of 'its business' as referred to in the definition of foreign business establishment (FBE) and contended that investment management services were not a necessary part of a fund manager's business.

The dispute

Then, after CGFM had experienced good success and had been posting very decent returns for investors, the SA Revenue Authority assessed the SA Holding company CIMSA to tax upon the CGFM net income and understatement penalties in respect of the 2012 tax year.

After the initial objection was disallowed, Hack AJ in the Western Cape tax court upheld CIMSA's objection under case number 24596 and found that CGFM was a '*foreign business establishment*' (FBE) as defined in s 9D (1) of the Act.

The Tax Court thus held that CIMSA qualified for a tax exemption as an FBE.

It set aside SARS' additional assessment against CIMSA and ordered it to issue a reduced tax assessment, in which no amount was included in CIMSA's income under s 9D of the Act pertaining to CGFM's income. SARS was thus also not entitled to claim understatement penalties in terms of Section 222 of the Tax Administration Act. Nor was SARS entitled to claim understatement penalties for provisional tax under Paragraph 20 of the Fourth Schedule to the Act. It was also not entitled to Section 89(2) interest.

What was the dispute about?

SARS averred that as CGFM outsourced the function of investment management, and the outsourcing was to companies not domiciled in Ireland, its primary function was thus not conducted in Ireland. In SARS' opinion, the primary function of investment management, in terms of the investment management license, was not conducted by CGFM in Ireland. On the evidence of CIMSA's witnesses, who agreed that the income received by CGFM was fees from investments, SARS contended that the primary operation of the company was investment from which it derived its fees.

Foreign business establishment

In order to prove that CGFM was an FBE, CIMSA had to satisfy the Court that it complied with all of the five requirements as per Subsection 9D (1). These are:

- Its fixed place of business is located outside the Republic of South Africa.
- The place of business is conducted in a physical structure.
- The place of business is suitably staffed.
- The business is suitably equipped to conduct the business and that this place has suitable facilities for conducting the business purpose.
- It is not located outside of SA for the purpose of postponing or reducing tax imposed in SA.

The arguments

SARS did not challenge the evidence of CIMSA that, to provide South African investors with the opportunity to invest in an Irish Collective Investment Scheme, a management company had to be incorporated and licensed in Ireland.

The Court accepted that CIMSA could not offer Irish Collective Investment Schemes to its clients without the existence of CGFM.

The main issue in dispute was whether the CIMSA had proven whether the primary operations of the business of CGFM were conducted at its office in Dublin. The Respondent also disputed the CIMSA compliance with the fifth requirement.

The question of whether the primary business of CGFM was conducted at the Dublin premises was analysed in some detail by the Tax Court. It held that it was common cause that when CGFM sought to obtain its Licence it elected the choice, to which it was bound, of an outsourcing business model.

"The Tax Court correctly distinguished between fund management and investment management and noted that CGFM is not an investment management company but a fund management company"

It proceeded to outsource four functions of its business.

The investment management was delegated to a UK-registered company, CI Limited.

Administration and record custody were delegated to three Irish companies. The distribution function was delegated to CIMSA and to the UK company CI Limited.

The Tax Court held that the management of funds was the primary business of CGFM and that this function was carried out in Dublin, Ireland.

CGFM's transfer pricing report stated that the fund management function in relation to the Irish Funds was performed by CGFM, who had been appointed as the fund manager to all Irish Funds and was responsible for the overall management of the Irish Funds including, but not limited to the investment management function.

It held that while investment management is an important function, if all the important functions were to be labelled as primary, then investment management is one of the primary functions.

The Income Tax Act, however, used the word 'primary' to refer to the single most important function.

Tax Court satisfied

CIMSA satisfied the Court that the activities performed in Dublin were directed at maintaining the Licence and managing the ability to offer investments in ICS. Those activities were held to be properly described as 'Fund Management'. This is different from the day-to-day management of investments.

Dissatisfied with the outcome of the Tax Court, SARS then appealed to the Supreme Court of Appeal (SCA).

The case before the SCA

CIMSA's evidence before the SCA was that it was not authorised to perform investment management services. However, it was authorised to operate as a fund manager.

Before the SCA, SARS accepted that CGFM met the FBE definition in all respects but one: economic substance. As of 2012, CGFM had offices in Dublin with a staff component of four people: a managing director, two accounting officers and a compliance officer.

SARS accepted that CGFM had conducted its business for more than a year through one or more offices in Dublin (Section 9D(1)(a)(i)) and that it had 'a fixed place of business' in Ireland (Section 9D(1)(a)(ii)), which was suitably staffed and equipped with suitable facilities (Section 9D(1)(a)(ii), (iii) and (iv)). SARS also accepted that the business was located in Ireland for a reason other than the postponement or reduction of South African tax (Section 9D(1)(a)(iv)).

It contended, however, that CGFM didn't meet the economic substance requirements, as '*the primary operations*' referred to in Section 9D(1)(a)(ii), (iii) and (iv) were not based in Ireland.

SARS argued that the Dublin office was not suitably staffed with employees, nor suitably equipped, nor did it have suitable facilities to conduct 'the primary operations' of CGFM's business. It argued that if the investment functions had been outsourced to a company which was subject to tax in Ireland – where CGFM is located Subsection (aa), within the same group of companies, (bb), and to the extent that the structures, employees and facilities are located in Ireland (cc) – it would have qualified as an FBE. Because CGFM outsources its investment management functions to CAM and CIL, neither of whom are subject to tax in Ireland, the requirements of Subsection (aa) and Subsection (cc) of the proviso to the FBE definition had not been met.

The outcome before the SCA and the *ratio decidendi*

The Full bench of the SCA agreed with SARS' submissions. It held that CIMSA's case that it "*has not been approved by the CBI to perform investment functions*" was incorrect and was not borne out by its own witnesses.

The FBE definition is, according to the SCA, not solely aimed at advancing international competitiveness for offshore businesses. Nor is the legislation concerned only to prevent diversionary, passive or mobile income from eroding the South African tax base. It is also to limit a situation where an exemption is obtained over earnings in a low-tax jurisdiction when the primary operations for the business are not conducted there.

As a result, the SCA held that the net income of CGFM is imputable to CIMSA for the 2012 tax year in terms of Section 9D (2).

Understatement penalties and interest

Regarding understatement penalties and interest, it did not follow that CIMSA lacked bona fides because it did not disclose the opinion that it had obtained from a tax expert. The SCA held that SARS had to prove that CIMSA lacked bona fides. CIMSA's submission that understatement and provisional tax underestimation penalties imposed in terms of Sections 222 and 223 of the Tax Administration Act were inapplicable as the non-inclusion by CIMSA of the net income of CGFM was due to a bona fide error, was accepted.

The SCA held that interest was payable upon the unpaid provisional tax in terms of Section 89 quat (2).

Appeal to the Constitutional Court

CIMSA, arguing that important constitutional points were at stake, appealed to the Constitutional Court (CC).

The full bench of the Constitutional Court then upheld CIMSA appeal and overturned the Judgment of the full bench of the SCA.

Facts noted by the Constitutional Court

The facts that were noted by the CC included:

- In its business plan, CGFM enumerated the managerial functions that it was licensed and required to perform – these were identified by the Central Bank of Ireland (CBI) as operational functions.
- Its Licence, issued by the CBI under the European Communities, does not authorise CGFM to conduct investment management trading activities.
- It adopted as a business model, per the business plan, the delegation of investment management trading activities to third parties, as provided for under Undertakings for Collective Investments in Transferable Securities (CITS) Regulations.
- CGFM executed its business activities in terms of its Licence through its directors. Oversight and supervision of the investment management functions, outsourced to CAM and CIL, formed a significant part of CGFM's tasks.

The Tax Court correctly distinguished between fund management and investment management and noted that CGFM is not an investment management company but a fund management company. It held that CGFM fulfilled the requirements of an FBE because its fixed place of business is conducted in a physical structure, it is suitably staffed and equipped, has suitable facilities to conduct its primary operations (of fund management) and is located outside South Africa, not for the purpose of postponing or reducing tax imposed in South Africa.

It had economic substance, did not merely exist on paper and was not formed to avoid tax in SA.

Constitutional Court verdict

The unanimous verdict of the nine Concourt Judges was that the SCA had misconceived what the business of CGFM entailed by misreading both the oral and documentary evidence.

The SCA ruling was reversed, including the Section 89 quat interest.

Disaster avoided

The upshot is that if the SCA ruling had been upheld, CIMSA would have been forced to compete with its international rivals on an unequal basis. The outsourced model is, per evidence led before the various tribunals, used by other international financial service providers. It is patent that the model is cost-effective.

Had the SCA ruling not been overturned, CGFM and all other SA multinationals operating on a similar basis would have been faced with some tough choices, due to higher costs associated with in-house investment management, higher tax in the intervening years and interest payable.

Undoubtedly, the Constitutional Court ruling was in the best interests of the investing public and SA multinational financial service provider (FSP).

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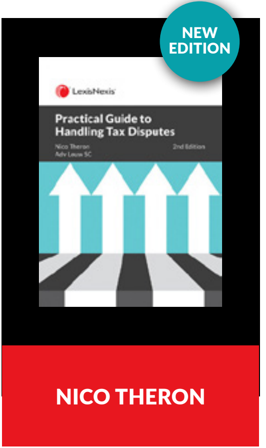

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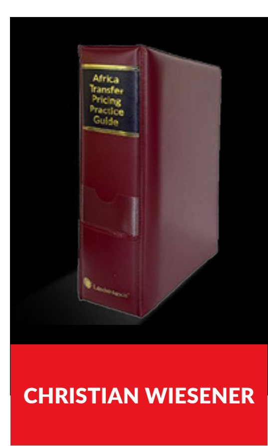

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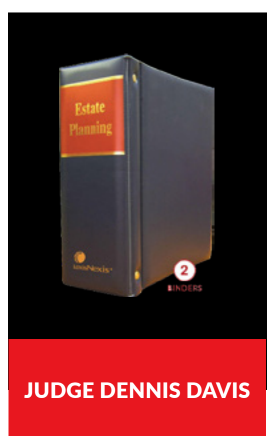

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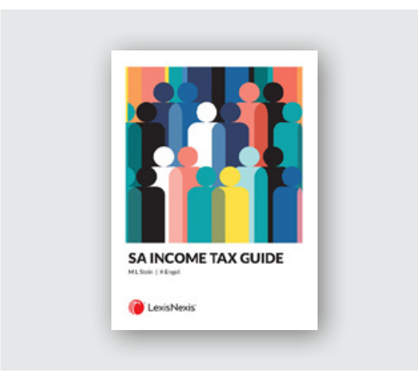

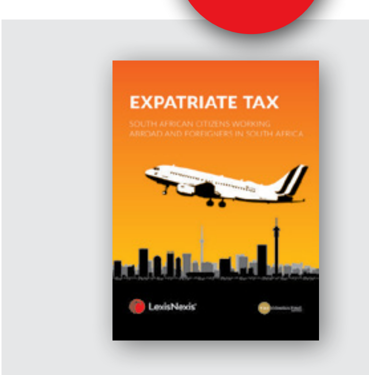

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NEW LIMITATIONS AND APPORTIONMENT RULES

for tax years shorter than 12 months

▶ **GERT VON BENECK,** Senior Lecturer at North-West University and **PROF HERMAN VIVIERS,** Associate Professor, School of Accounting Sciences, North-West University

Where the year of assessment of a natural person taxpayer is shorter than a full 12 month period, such a tax year is generally referred to as a 'broken' year of assessment. Common examples of instances where a broken year of assessment will arise include the following:

- During the year of birth; or
- During the year of death; or
- During the year in which a natural person is declared insolvent.

Furthermore, during a year of assessment in which a natural person ceases to be a resident, such a natural person will be deemed, in terms of section 9H(2) of the Income Tax Act (58 of 1962) (hereafter referred to as 'the Act') to effectively have two years of assessment during a single 12-month period. In such a case, the first deemed year of assessment will start on 1 March and will cease to apply at the end of the date immediately before the person leaves South Africa due to emigration, while the second deemed year of assessment of such a person will commence on the date on which the natural person leaves South Africa and will end on the last day of February.

The purpose of this article is to highlight and explain (with some examples) the recent limitations and apportionment rules that were recently introduced into the Act relating to various tax-exempt and/or deductible amounts in instances where a natural person's year of assessment constitutes a period of less than 12 months.

Cognisance should, however, be taken of the fact that a natural person taxpayer who starts or ceases employment or who becomes a resident of South Africa for normal tax purposes due to immigration to South Africa during a specific year of assessment will not have a broken year of assessment as explained above. Such taxpayers will still have a tax year comprising a full 12-month period; none of the new limitation and apportionment rules that were recently introduced will apply to such taxpayers.

What are the new limitations and apportionment rules?

Local interest exemption

Section 10(1)(i) of the Act affords natural persons an exemption for local interest (i.e. interest that was earned from a South African source) received in aggregate up to R23 800 (if below the age of 65), or R34 500 (if 65 years or older), during a specific year of assessment. However, this exemption is not applicable to any local interest earned on any investment that is classified as a 'tax-free investment' as defined in terms of section 12T(1) of the Act, which is discussed later.

A new proviso was recently added to the ambit of section 10(1)(i), which now specifically determines that if a natural person's year of assessment is less than a period of 12 months, the interest exemption (i.e. either R23 800 or R34 500 in total) must be apportioned in the same proportion as the number of days in that year of assessment that such a period bears to 365 days. Although the legislator hard coded the number '365' in this new proviso in the Act, it is submitted that the number of days that need to be applied in the calculation of the apportionment ratio will be 366 days in the case of a leap year.

"These new rules that were recently introduced via either the addition of new provisos or amendments made to various existing exemption and deduction provisions need to be carefully considered by natural persons from a tax planning perspective"

When determining the timing of when an amount of interest is received by or accrues to a taxpayer during a specific year of assessment and if it needs to be included in the gross income of such taxpayer, section 24J(3) of the Act deems interest earned on an income instrument to accrue at the yield to maturity (i.e. an effective interest rate) on a day-to-day basis. For interest falling outside the scope of section 24J but which still needs to be determined for purposes of applying the Act, section 7D*(b)* stipulates that such interest needs to be determined as simple interest that is calculated daily.

Therefore, to align the deemed day-to-day or daily accrual of interest earned in terms of section 24J(3) and section 7D(b) of the Act with the local interest exemption available to natural persons in terms of section 10(1)(i) of the Act, the new proviso under section 10(1)(i) requires the maximum exemption amount (depending on the age of an individual) to also be apportioned based on days. If these maximum exemption amounts were to be apportioned based on the number of months within a broken year of assessment period, this would have caused a mismatch between the way in which interest is deemed to accrue as opposed to how its accompanying exemption will be allowed for normal tax purposes.

The following practical example explains the effect of applying the newly introduced proviso under section 10(1)*(i)* of the Act:

> Mr A (40 years old), who had always been ordinarily resident in South Africa, decided to emigrate on 1 September 2024. He owns various long-term investments earning interest in South Africa (which do not qualify as 'tax-free investments' as defined). Due to changes in the interest rate, Mr A earned local interest of R15 800 during the first half and R8 000 during the second half of his 2025 year of assessment.

Based on the application of section 9H(2), Mr A will be deemed to have two South African years of assessment due to his emigration within a single 12-month period as follows: The first year will start on 1 March 2024 and end on 31 August 2024 during which he will be taxed as resident on his worldwide income, while his second year of assessment will be starting on 1 September 2024 and ending on 28 February 2025, during which he will be taxed as a non-resident on his South African source income.

Because Mr A had always resided in South Africa, he would have been present in South Africa for a period of more than 183 days in total before the local interest of R8 000 accrued to him in his capacity as a non-resident taxpayer of South Africa. This will disqualify him from utilising the local interest exemption available to non-residents in terms of section 10(1)(h)*(i)* of the Act. However, Mr A will still qualify for a section 10(1)*(i)* local interest exemption, which is now required to be apportioned based on the same ratio as the number of days in that year of assessment that such a period bears to 365 days.

This means that the R23 800 annual local interest exemption available to Mr A (who is younger than 65 years) in each of his two deemed tax years within his full 12 month 2025 year of assessment period will be as follows:

- From 1 March 2024 to 31 August 2024: R23 8 00 x 184/365 days = R11 998; and
- From 1 September 2024 to 28 February 2025: R23 800 x 181/365 days = R11 802.

It is therefore evident that although Mr A only earned local interest of R23 800 in total (i.e. R15 800 + R8 000) during the full 12-month period making up his 2025 year of assessment, the full local interest exemption amount of R23 800 provided for in terms of section 10(1*)(i)* will not be available to him due to the newly required apportionment rule that was introduced. This means that only R11 998 of the R15 800 local interest earned by Mr A during his first deemed year of assessment will qualify for the section 10(1)*(i)* exemption and that R3 802 will be taxed, while the full R8 000 of local interest earned during his second deemed year of assessment will be tax-exempt, since it is below the allowed tax-exempt portion of R11 802.

Exemption for returns on 'tax-free investments'

Section 12T of the Act was introduced as an incentive to encourage household savings by exempting all returns earned by a natural person (or a deceased or insolvent estate of such person) on 'tax-free investments'. This means that any type of return earned on a tax-free investment, irrespective of it being income in nature (such as dividends or interest) or capital in nature (such as capital gains upon disposal), will be exempt from normal tax. However, tax-free investments held at the time of death will still be subject to estate duty. Additionally, an annual investment limitation of R36 000 and a lifetime investment limitation of R500 000 in terms of section 12T(4)*(a)* of the Act applies per natural person in respect of contributions made towards tax-free investments in aggregate. Where a natural person in aggregate contributes towards tax-free investments in excess of these contribution limitation amounts, 40% of such excess contributions will be deemed to be an amount of normal tax which such a person will be liable to pay in terms of section 12T(7)*(a)* of the Act.

Recent amendments were made to the wording of both section 12T(4)*(a)* and section 12T(7)*(a)* of the Act, clarifying that the annual investment contribution limitation of R36 000 now applies to any year or years of assessment during the period of 12 months beginning in March and ending at the end of February of the immediately following calendar year. Therefore, these amendments aim to prevent a natural person from benefiting from a double annual investment contribution limitation (i.e. R36 000 x 2 = R72 000) in terms of section 12T where such a person has two deemed years of assessments within a single 12-month period. This will, for example, occur when a natural person emigrates during a specific year of assessment where the provisions of section 9H(2) (as discussed earlier) will be triggered. For example, if an individual who holds tax-free investments in South Africa emigrates on 1 September 2024, this will mean that, in the absence of the amendments made to the wording of section 12T(4)*(a)* and section 12T(7)*(a)* of the Act, such a person could have qualified for an annual section 12T investment contribution limitation of R36 000 for its deemed year of assessments from 1 March 2024 to 31 August 2024, as well as for another annual section 12T investment contribution limitation of R36 000 for its deemed year of assessment starting on 1 September 2024 and ending on 28 February 2025. Therefore, the new limitations rules in terms of section 12T(4)*(a)* and section 12T(7)*(a)* now prevent natural persons from double benefiting from the allowed tax-free investment annual limitation contribution. It is, however, important to note that the annual limitation contribution limit (R36 000) itself is, unlike section 10(1)*(i)*, not apportioned for a year of assessment shorter than 12 months.

Tax rebates

Section 6(2) of the Act provides natural person taxpayers with an annual rebate to reduce their normal tax liabilities depending on the age of such persons. However, section 6(4) of the Act determines that the age rebates allowed in terms of section 6(2) need to be apportioned if the period on which the natural person is assessed is shorter than 12 months. This apportionment needs to be performed by applying the same ratio that the period assessed bears to 12 months. This apportionment rule will need to be applied in any qualifying scenario where a natural person has a 'broken' year of assessment and includes deemed years of assessment where a natural person ceases South African tax residency during a year of assessment to which section 9H(2) of the Act applies.

Deduction for retirement fund contributions

Since 1 March 2016, section 11F of the Act has allowed taxpayers to qualify for a deduction in respect of any contributions made towards any 'retirement fund' (as defined). This deduction serves as an incentive to encourage natural person taxpayers to save up for retirement and to be rewarded for that by means of an annual section 11F deduction to be claimed against income.

However, the section 11F deduction is subject to specific limitations, in which an individual's retirement fund contributions made during a specific year of assessment are limited to the lesser of various limitations option amounts, as stipulated in terms of section 11F(2)*(a)* to *(c)*. One of these limitations amount options is an amount of R350 000, which is indicated in section 11F(2)*(a)*. However, a new proviso was recently added to section 11F(2)*(a)*, which determines that: " . . . *where any person's year of assessment is less than a period of 12 months, the aggregate of amounts that shall be allowed as deductions under this paragraph for years of assessment during the period of 12 months commencing in March and ending at the end of February of the immediately following calendar year must not exceed R350 000*."

Akin to section 12T(4)*(a)* read with section 12T(7)*(a)* of the Act (as discussed earlier), this newly introduced proviso under section 11F(2)*(a)* also aims to prevent a natural person from double benefiting from the R350 000 limitation amount (i.e. R350 000 x 2 = R700 000) where such a person has two deemed years of assessments within a single 12-month period.

Annual exclusion for capital gains tax purposes

Paragraph 5(1) of the Eighth Schedule to the Act grants an annual exclusion amount of R40 000 to a natural person and a special trust to be set off against the sum of such a person's capital gains or losses during a specific year of assessment. A new proviso was also inserted under paragraph 5(1), which determines that in the event that such taxpayers have a tax year that is shorter than 12 months, the
R40 000 annual exclusion for capital gains tax purposes may not exceed R40 000 per taxpayer during a 12-month period starting in March and ending in February of the immediately preceding calendar year. This also serves as a measure to prevent abuse of utilising this benefit amount more than once in a single specified 12 month tax period.

The following table provides a snapshot overview summary of the new limitations and apportionment rules that were recently introduced for tax years shorter than 12 months.

INCOME TAX ACT PROVISION	HOW AMENDED?	EFFECTIVE DATE	EFFECT IN BRIEF
Section 10(1)(i)	A new proviso was newly inserted under s 10(1)*(i)*.	From 1 March 2023 and applicable to years of assessment commencing on/after this date.	The limits are apportioned based on days.
Section 12T	The wording of s12T(4)*(a)* and s 12T(7)*(a)* was amended.	From 1 March 2024 and applicable to years of assessment commencing on/after this date.	The limits now apply to a 12 month period in total.
Section 6(2) read with section 6(4)	The rebate amounts in s6(2) were amended, read with s 6(4).	From 1 March 2023 and applicable to years of assessment commencing on/after this date.	The limits are apportioned based on days (aligned with the SARS practice).
Section 11F	A new proviso was newly inserted under s11F(2)*(a)*.	From 1 March 2024 and applicable to years of assessment commencing on/after this date.	The limit now applies to a 12 month period in total.
Paragraph 5, Eighth Schedule	A new proviso was newly inserted under Paragraph 5(1), of the Eighth Schedule to the Act.	From 1 March 2023 and applicable to years of assessment commencing on/after this date.	The limit now applies to a 12 month period in total.

Take away

In conclusion, it is therefore imperative for natural person taxpayers to be cognisant of the impact that the new limitations and apportionment rules could have on their normal tax positions. These new rules that were recently introduced via either the addition of new provisos or amendments made to various existing exemption and deduction provisions need to be carefully considered by natural persons from a tax planning perspective, especially where such taxpayers can control events (such as the date of emigration) that would result in a year of assessment that is lesser than a full 12-month period.

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SCAN ME

TAX IN AFRICA: EMERGING TRENDS AND TRANSFORMATIONS

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In recent years, Africa has witnessed a remarkable evolution in its tax landscape. As the continent's economies grow and diversify, several key trends and transformations are shaping the future of taxation.

This article explores the emerging trends in African tax systems, including digital economy taxation, base erosion and profit shifting (BEPS) implementation, tax incentives, environmental, social, and governance (ESG) considerations and more, while providing insights into recent developments in specific regions like Nigeria, Kenya, Zimbabwe and Zambia.

Key emerging trends include:

- Tax authorities who are primarily focused on transfer pricing, broadening of the tax base and digitisation to enhance tax efficiency but also on combatting tax evasion and avoidance;
- Narrowing budget deficits by expanding revenue sources, e.g. the focus on stamp duty in Nigeria;
- Reliance on indirect taxes, reporting transparency and information-sharing between countries to curb non-compliance;
- Technology advances, e.g. the introduction of e-invoicing in countries such as Kenya, Nigeria, and Zambia; and finally,
- The low-hanging fruit for tax authorities is being vigilant about tax compliance, with the onus on the taxpayer to ensure they keep track of their tax affairs and that these are in good standing.

1. Digital economy taxation

The rise of the digital economy has presented both opportunities and challenges for African tax administrations. As global tech giants expand their operations across the continent, traditional tax frameworks struggle to address the complexities of taxing digital services. Notwithstanding this, Africa attempts to remain in step with taxing the digital economy. Kenya is a case in point. Kenya has taken significant steps to address this issue by introducing a Digital Service Tax (DST) effective January 2021. The DST targets online services, including e-commerce and digital advertising; it aims to ensure that multinational companies pay taxes commensurate with their economic activities in Kenya. This move aligns with global efforts to modernise tax systems to capture digital revenue. The tax is charged on the gross transaction value of digital services provided by non-resident companies without a permanent establishment in Kenya.

Other countries that are considering similar taxes include Tanzania and Nigeria.

2. BEPS implementation and its implications

Base erosion and profit shifting (BEPS) remain a critical focus for African tax authorities. The BEPS Action Plan of the Organisation for Economic Cooperation and Development (OECD) provides guidelines to combat tax avoidance strategies used by multinational corporations to shift profits to low-tax jurisdictions. More recently, the implementation of Pillar Two actively seeks to combat profit shifting and to ensure that profits are taxed where the value is created. Nigeria has been actively working on implementing BEPS measures. The country adopted the BEPS Action Plan into its tax policy, focusing on transfer pricing rules and anti-avoidance measures. The Nigerian Government's commitment to these reforms aims to curb tax base erosion and ensure a fair tax system.

Other initiatives that tax authorities are implementing to ensure taxes are being paid by multinational enterprises (MNEs) in the countries in which they operate include foreign Value-added Tax (VAT) registration requirements and Significant Economic Presence (SEP) Tax. For example, Nigeria and, most recently, Kenya have also been looking to introduce SEP Tax on non-residents without permanent establishment.

3. Tax Incentives

Tax incentives are a double-edged sword in Africa. While they can stimulate investment and economic growth, they also risk creating inequities and revenue losses if not properly managed. A case in point is Zimbabwe's tax incentive regime, which includes various exemptions and reductions that are aimed at attracting foreign direct investment (FDI). However, these incentives have sometimes led to significant revenue shortfalls. Recent calls for reform emphasise the need for a balanced approach that attracts investment while safeguarding tax revenues.

What is more prevalent in Africa, though, is exemptions for customs/import duties / VAT/Tax holidays (Free Zones) for certain industries rather than large incentive programmes. It is also important to note whether a country has an investment centre that should be registered, e.g. the Ghana Investment Centre in Ghana.

4. ESG factors: Africa's position and policy actions

Environmental, social, and governance (ESG) factors are increasingly influencing tax policy worldwide. In Africa, the integration of ESG considerations into tax policy is still evolving and has a long way to go. Compared to other regions, Africa is in the early stages of incorporating ESG into tax policy. However, countries like South Africa are leading the charge with robust initiatives such as carbon tax implementation. For the continent, key actions include developing tax incentives for green investments and enforcing stricter corporate governance standards.

There is a stronger interest in the African carbon markets from the developed world since the formation of the African Carbon Market Initiative. Numerous countries in Africa, including Ghana, Kenya, Rwanda, Tanzania and, most recently, Nigeria, are setting up carbon market frameworks, including fiscal issues of carbon credits.

With the rollout of the International Sustainability Standards Board's latest standards (S1 and S2), some African countries like Nigeria are early adopters of the standard, which will result in more robust ESG disclosures for businesses.

5. Cooperation and organisation: exchange of information

Tax authorities in Africa, like in other parts of the world, are increasingly focusing on improving tax compliance and reducing tax evasion through the exchange of information between countries. This has been a long-standing challenge for tax authorities which, in turn, has caused great frustration for taxpayers. However, African tax authorities are notably improving in this regard. The level of implementation and the specific rules being considered vary from country to country and the landscape is continually evolving as more countries join international efforts to combat tax evasion and improve tax transparency.

Emerging initiatives for tax authorities are to be involved in regional cooperation; for example, Nigeria forms part of the Economic Community of West African States (ECOWAS). Nigeria engages in regional efforts to harmonise tax policies and practices, which can facilitate easier exchange of tax information among member states. Similarly, many countries such as Rwanda and Uganda in East Africa are doing this.

Kenya has, for example, strengthened its participation in international information exchange agreements. The country is a member of the Global Forum on Transparency and Exchange of Information for Tax Purposes, which enhances its ability to combat tax evasion by sharing information with other jurisdictions.

7. Modernisation of tax administrations

A very positive development during the COVID-19 epidemic is that the majority of tax authorities in Africa have implemented e-filing platforms. Modernising tax administrations is crucial for improving compliance and efficiency. Various reforms to modernise tax administration,

"Tax treaties and multilateral agreements are essential for reducing double taxation and enhancing cooperation among countries"

including the adoption of digital tax platforms and automated systems, have been a welcome trend in many African countries, for example:

- The South African Revenue Service (SARS) has had this platform for many years; it offers an online service called eFiling, which allows individuals and businesses to file their tax returns, make payments and access various tax-related services online.
- The Kenya Revenue Authority (KRA) has an online tax system called 'iTax' that enables taxpayers to register, file tax returns, pay taxes and access other services electronically.
- The Federal Inland Revenue Service (FIRS) of Nigeria has implemented the Integrated Tax Administration System (ITAS), which is an online platform for filing tax returns, making payments and obtaining tax clearance certificates.
- The Ghana Revenue Authority (GRA) introduced the Integrated Tax Application and Preparation System (iTaPS), an online service for personal income tax filing. They also have a portal for other tax types and services.
- The Zambia Revenue Authority (ZRA) has a system called 'TaxOnline' for electronic tax registration, filing and payment.

African tax authorities are enhancing tax compliance convenience for taxpayers and improving their tax monitoring and collection capabilities through these continuously evolving platforms.

8. Transfer pricing regulations

Transfer pricing remains a critical area of focus as multinational companies use pricing strategies to shift profits across borders. Many African countries are implementing and updating their transfer pricing policies to remain abreast with other regions. Zimbabwe is one such country that has updated its transfer pricing regulations to align with international standards. The new regulations aim to prevent profit shifting and ensure that intercompany transactions are conducted at arm's length, reflecting a commitment to the OECD's BEPS guidelines.

A key component of transfer pricing in Africa is for MNEs to understand the compliance requirements. Many countries have separate transfer pricing returns that are required to be completed and filed at the same time as their Corporate Income Tax (CIT) returns, e.g. Ghana and Nigeria. In other countries, the actual local file needs to be filed, e.g. in Zambia and Botswana. Furthermore, several countries now require Country-by-Country Reporting (CbCR) filings, e.g. Ghana and Zambia.
Therefore, it is very critical to understand each country's requirements. The non-compliance penalties for failure to file these returns/documents in several countries should be considered, as these could become costly.

10. Tax treaties, multilateral agreements and exchange of information

Tax treaties and multilateral agreements are essential for reducing double taxation and enhancing cooperation among countries. Many African countries are actively negotiating and implementing tax treaties with various countries to facilitate trade and investment.

The difficulty for MNEs remains, in practice, the challenge of being able to claim duty relief. Recently, Ghana introduced procedural requirements that need to be complied with to qualify for double tax agreement (DTA) relief.

11. Alternative dispute resolution

Alternative dispute resolution (ADR) mechanisms such as mediation and arbitration, provide effective means to resolve tax disputes outside traditional court settings. South Africa has recently incorporated ADR mechanisms into its tax dispute resolution process. The introduction of a formal mediation process aims to expedite dispute resolution and reduce the burden on the judicial system, offering a model for other African nations to consider.

In practice, this initiative is still in its early stages and encounters significant challenges before it can achieve a successful outcome.

Conclusion

As Africa continues to evolve economically, its tax systems are undergoing significant transformations. The reality is that the focus for tax authorities remains the collection of more tax to support the budget deficits. Tax amnesty programmes are continuously introduced to encourage taxpayers to volunteer non-compliance and collect additional tax revenue, owing to tax authorities' capacity constraints to cover enough tax audits. From the digital economy taxation and BEPS implementation to tax incentives, the continent is navigating complex challenges and opportunities. By learning from regional examples and embracing modernisation and cooperation, African countries can develop robust tax frameworks that support sustainable growth and economic development. The ongoing reforms and emerging trends highlight the dynamic nature of tax policy in Africa and the need for continued adaptation in a rapidly changing global landscape.

It is encouraging to see an increasing number of African tax authorities inviting public commentary on proposed legislation, signalling a move towards more inclusive and transparent tax policymaking.

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CHANGES TO THE EXCHANGE CONTROL LANDSCAPE

FOR SOUTH AFRICA FROM 2010–2023

▶ **ANONYMOUS**

Many people have asked when South Africa's exchange controls will be abolished.

The South African Reserve Bank (SARB), which is responsible for the daily administration of exchange controls in South Africa, has opted for a staggered approach in lifting the requirements that South African residents, both individuals and juristic entities, need to adhere to instead of implementing a big bang approach.

Since 2010, some significant changes have been implemented by the SARB regarding South Africa's exchange control landscape. Please view some of the most significant highlights presented here.

2010

1) Authorised Dealers are allowed to acquire direct and indirect foreign exposure up to a macro-prudential limit of 25% of their total liabilities, excluding total shareholder's equity.
2) Private Equity Funds mandated to invest in Africa are allowed to apply for approval to perform foreign direct investments.
3) The introduction of Active Currency Management whereby residents may hedge their underlying foreign exposure for a maximum period of up to six months.
4) The Single Discretionary Allowance of individuals is increased from R100 000 per annum to R750 000 and subsequently increased to R1 000 000 per calendar year.
5) The exit levy of 10% for emigrants who wish to externalise more than R4 000 000 is abolished.
6) The Foreign Investment Allowance for individuals is amended from a once-off amount of R4 000 000 to R4 000 000 per calendar year.
7) The prudential limits for pension funds and asset managers were increased from 20% and 30% to 25% and 35% respectively.
8) The SARB allows Authorised Dealers to approve new as well as renewal application requests for royalties and payments in respect of the importation, distribution and resale of goods, the publication of books and the opening of franchises. Authorised Dealers were also allowed to authorise application requests for consultancy/service agreements.
9) The Exchange Control Department of the SARB formally amends its name to the Financial Surveillance Department (FinSurv).

2011

1) International Headquarter Companies (IHQs) is introduced whereby foreign persons may establish headquarter companies in South Africa to raise and deploy capital offshore without restriction.
2) Form F178s to monitor export proceeds is abolished and replaced with the Export Monitoring System.
3) Concerning Foreign Direct Investments performed by juristic residents, the loop structure is increased from 10% to 20%; it further allows Authorised Dealers to approve extension requests to previous foreign direct investment (FDI) authorities granted whereby applicants did not utilise the full amount during the previous period of authority. FinSurv also allows applicants to establish offshore subsidiaries outside the CMA that were not in line with their current line of business.
4) The classification of inward listed shares is amended from 'foreign' to 'domestic'.
5) The Import Verification System goes live.
6) Resident individuals are allowed to utilise their Single Discretionary Allowance to invest abroad apart from their Foreign Investment Allowance.

2012

1) The time lag between paying funds away and receiving goods within South Africa is increased from four to 10 months provided the importer provides a suitable explanation for the delay.
2) Intellectual Property is included in the definition of an asset.
3) Tax Clearance Certificates are introduced for resident individuals wishing to avail of their Foreign Investment Allowance.
4) Legislation is amended that includes the introduction for the requirements for companies to register as Treasury Outsource Companies, thereby allowing more participants to offer FX trading services within the local market.
5) The 180-day rule for export proceeds to be retained in a Customer Foreign Currency Account (CFC) may be held indefinitely in these accounts.
6) Johannesburg Stock Exchange (JSE) obtains approval to trade Zambian referenced grain derivatives on its exchange and allows the trades to be settled locally in USD.

2013

1) During February 20213, FinSurv introduces the HoldCo. Listed companies on the JSE may establish a subsidiary within South Africa that may invest into Africa and abroad and will be free from having to comply with Exchange Controls up to R750m per calendar year and act as a cash management centre for both local and offshore subsidiaries.
2) During August 2013 FinSurv introduces the new Balance of Payments Reporting System Version 3, referred to as the FinSurv Reporting System, which expands the number of Balance of Payments (BoP) categories exponentially and allows for third party reporting.

2014

1) Clients who purchased foreign currency at spot or under forward exchange contracts for firm and ascertainable commitments are allowed to credit these proceeds at these contracts' time of maturity to CFC accounts for a period of 30 days.
2) FinSurv introduces new legislation whereby advance import payments below R50 000 are now exempt from having the Authorised Dealer to follow-up on the SAD500 within a period of four months from the date of payment.
3) FinSurv increases the limit for international online card purchases from R20 000 to R50 000 per transaction.
4) FinSurv increases the limit for listed entities to establish HoldCos to R2bn per calendar year and allows unlisted entities to establish HoldCos within a limit of R1bn per calendar year.
5) FinSurv advises that emigrants are now allowed to export their unlisted shares held in SA companies subject to certain conditions.
6) FinSurv introduces a new section in the Rulings whereby these types of unlisted companies may apply to primary list on offshore exchanges or raise additional capital or foreign loans for their operations, subject to certain conditions.
7) FinSurv introduces a new section in the Rulings whereby listed companies on the JSE may apply to secondary list on foreign stock exchanges, subject to certain conditions.
8) Form M.P. 1423 is abolished. This form had to be completed when resident individuals wished to externalise funds abroad in terms of their investment allowances.
9) FinSurv expands the types of operating categories for businesses who are allowed to operate as Authorised Dealers with Limited Authority.
10) FinSurv introduces a new section in the Rulings whereby unlisted technology, media, telecommunications, exploration and other research and development companies may apply to primary list on offshore exchanges or raise additional capital or foreign loans for their operations, subject to certain conditions.
11) FinSurv introduces a new section in the Rulings whereby listed companies on the JSE may apply to secondary list on foreign stock exchanges, subject to certain conditions.

2015

1) FinSurv increases the limit for individuals regarding the Foreign Investment Allowance from R4m to R10m per calendar year as well as for family units from R8m to R20m per calendar year.
2) FinSurv increases the limit that Authorised Dealers may approve for Foreign Direct Investments from R500m to R1bn per calendar year.
3) FinSurv amends the use of the Single Discretionary Allowance for individuals so that they may now use the R1m for any legal purpose without the need to produce documentary evidence at the time of paying away the funds abroad, excluding for travel purposes.
4) FinSurv notifies the market that a new Letter of Imports Undertaking Dispensation will be introduced. The requirement for an auditor's letter to be submitted by applicants on an annual basis is abolished. New qualifying criteria will also be introduced.
5) FinSurv introduces amendments to the Single Discretionary Allowance whereby residents travelling abroad whose visas extend from one calendar year to the next calendar year may be accorded foreign currency for the following calendar year's allowances without the need to return to South Africa.
6) Soon thereafter FinSurv introduces further amendments whereby individuals may avail of both their Single Discretionary Allowance and Foreign Investment Allowance while abroad without the need to return to South Africa.

2016

1) On 29 June 2016 FinSurv abolishes the Exchange Control Rulings and introduces the Currencies and Exchanges Manual for Authorised Dealers.

2017

1) FinSurv introduces new legislation allowing Collective Investment Schemes Management Companies to apply for approval to inwardly list ETFs that reference foreign assets.
2) FinSurv introduces rules that Authorised Dealers may apply when reviewing the sale and licensing of Intellectual Property owned by residents without the need to apply directly for approval from the FinSurv.
3) FinSurv amends the previously introduced section allowing unlisted technology, media, telecommunications, exploration and other research and development companies to establish offshore subsidiaries without the need to primary list offshore. The dispensation further allows for loop structures to be created.
4) FinSurv introduces a new foreign exchange market participant in the form of Restricted Authorised Dealers.

2018

1) Amendments are introduced to the Foreign Direct Investment Regime whereby South African corporates may perform foreign portfolio investments and hold less than 10% of the voting rights in offshore incorporated target entities.
2) Amendments are introduced to the Foreign Direct Investment regime whereby SA corporates may now hold up to 40% of the equity and voting rights in offshore target entities that may invest or provide foreign loans into any CMA member country.
3) FinSurv increases the annual investment limit to R3bn and R2bn for listed and unlisted applicants respectively that they may invest in their HoldCos per calendar year.
4) FinSurv increases the prudential limits for institutional investors from 25% to 30% and 35% to 40%, as well as the African Allowance from 5% to 10%.

2019

1) FinSurv relaxes the requirements regarding loop structures created by resident individuals and increases the limit to 40%.
2) FinSurv removes the word 'HoldCo' and replaces it with the term 'domestic treasury management company (DTMC)'. It further introduces legislation allowing Authorised Dealers to establish DTMCs as well.
3) FinSurv increases the period for Active Currency Management from six to 12 months.
4) FinSurv removes the requirement for foreign national contract workers living and working in South Africa from having to comply with the 1:1 ratio when purchasing residential properties, exemption of Regulation 3(1)(f).
5) FinSurv removes the term 'Tax Clearance Certificate' from the Manual and replaces it with 'Tax Compliance Certificate' to be in line with SARS amendments for individuals.

2020

1) FinSurv announces the new Capital Flow Management Framework to be reviewed and introduced into the market that will be replacing Currencies and Exchanges Manual and the Exchange Control Regulations.
2) FinSurv updates the requirements whereby Authorised Dealers may sell foreign currency to residents of other CMA member countries.
3) FinSurv introduces requirements whereby SA corporates issuing bonds/notes abroad with recourse to South Africa will no longer be requiring prior FinSurv approval. These requests may now be authorised by Authorised Dealers and the matter be placed on record with the FinSurv within a period of 30 days after the issuance of the bonds/ notes abroad.
4) FinSurv allows institutional investors to conduct controlled foreign corporation (CFC) accounts locally to receive foreign currency when disinvesting from foreign assets held abroad. The funds may only be held in these CFC accounts for a period not exceeding 12 months and may not be funded from SA.
5) FinSurv introduces new rules whereby managing institutional investors may transfer retail assets to other managing institutional investors without the need to repatriate the funds back to SA first, as well as having to convert the funds from foreign currency to Rand and back to foreign currency again upon externalisation.

2021

1) Effective from 1 January 2021, the full 'loop structure' restriction is lifted. However, loop structures created after 1 January 2021 still has to be placed on record with the FinSurv. Furthermore, Authorised Dealers have to bear in mind that such requests avoid the re-domiciliation of SA assets.
2) From 1 March 2021, the concept of emigration as recognised by the South African Reserve Bank is phased out. SARS will be handling all emigration applications after the aforementioned date.
3) Residents will be allowed to retain foreign assets inherited abroad upon application and confirmation that the assets held abroad by the deceased comply with the provisions of the Regulations.

2022

1) FinSurv introduces legislation whereby private individuals may, as part of their single discretionary allowance and/or foreign capital allowance, export multi-listed domestic securities to a foreign securities register in a jurisdiction where such securities are listed, subject to tax compliance and reporting to the Financial Surveillance Department via a Central Securities Depository Participant, in conjunction with an Authorised Dealer.
2) FinSurv introduces legislation whereby resident individuals may utilise the investment portion of their single discretionary allowance and/or foreign capital allowance to participate in online foreign exchange trading activities. These online trading activities generally include one or a combination of options, such as trading global currencies against each other, trading a contract for difference, trading in foreign stocks, trading commodities including crypto currencies and trading foreign indices using the online trading platform of the broker concerned. Resident individuals may, however, not use their debit or credit cards to fund their international trading accounts.
3) FinSurv amends the rules for resident individuals whereby they may receive and retain abroad monetary and other legitimate gifts and donations received from a non-resident source without having to declare it to an Authorised Dealer.
4) FinSurv amends the prudential limits applicable to pension funds and asset managers by combining the limits of 30% and 40% respectively with the African Allowance limit of 10% into a single limit of 45%.
5) Institutional investors may open foreign currency accounts with Authorised Dealers for the purpose of obtaining offshore exposure in terms of the prudential limit. These accounts may be funded by either converting Rand to foreign currency through an Authorised Dealer or by accepting foreign currency deposits emanating from the disinvestment proceeds of foreign assets without the obligation of having to convert these funds to Rand. These accounts replace the CFC accounts previously introduced during 2020.
6) FinSurv increases the limit that Authorised Dealers may approve for FDI requests from R1bn per calendar year to R5bn.
7) FinSurv increases the annual limits for funding authorised DTMC structures from R3bn to R5bn and R2bn to R3bn for listed and unlisted applicants respectively.
8) FinSurv allows Authorised Dealers to remit the total remaining cash balances not exceeding R100 000 abroad on a once-off basis for individuals who cease to be tax residents without the requirement to have to refer such requests to SARS.

2023

1) FinSurv issues a directive stating that any asset that was previously blocked in terms of Regulation 4(2), the income and capital distributions from inter vivos trusts may be transferred abroad, subject to the tax compliance status (TCS) process being completed by the private individual and/or beneficiaries of the trust. For requests above R10m, an application to FinSurv together with a TCS must be done.
2) FinSurv amends the 30-day rule to allow applicants to repay foreign loans early provided the drawdown has correctly reported on the Loan Reporting System of FinSurv and there are no anomalies recorded against the foreign loan.

From the timeline described here, the SARB has introduced significant changes to the exchange control landscape in South Africa. More significant changes are still to come with the pending implementation of the Capital Flow Management Framework, easing the restrictions of the cross-border flows of funds in and out of South Africa even further.

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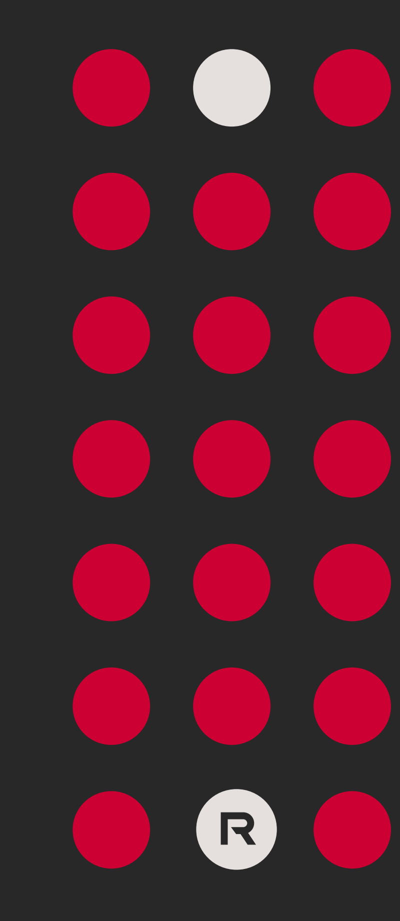

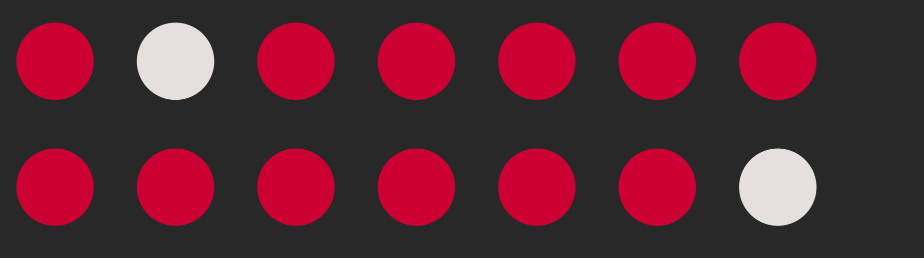

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