South African Institute of Taxation

Tax Cases and SARS interpretation

Decoding the Latest SCA Tax Rulings

12 June 2025

YOUR KEY TO THE TAX COMMUNITY

Agenda

1. Meet the Expert Guest and Anchor
2. Henque 3935 CC t/a PQ Clothing Outlet v Commissioner for SARS
3. Commissioner for the South African Revenue Service v Virgin Mobile

Dr Julia Choate

Partner at Bowmans

Julia is a Partner in the Cape Town office Tax Practice at Bowmans. She has extensive experience in tax dispute resolution and has been involved in litigating and settling several large income tax and customs and excise disputes. Julia has a particular interest in the application of Constitutional and administrative law principles to tax administration and disputes, and has completed a doctorate in this field.

Julia also specialises in indirect tax and international trade, advising clients on the customs, excise and VAT implications of import and export transactions, tariff classifications, customs valuations, claiming of customs and excise duty refunds and drawbacks. Julia also advises clients on the implementation of multilateral trade instruments, particularly the South African Customs Union (SACU) Agreement and the African Continental Free Trade Area Agreement (AfCFTA).

Julia regularly advises on a wide range of corporate tax issues for both South African and multinational groups, including the establishment of a business presence in South Africa and issuing opinions on the tax implications of various domestic and cross-border corporate transactions.

Keitumetse Sesana MTP (SA)

LLM (Tax Law), registered SARS Tax Practitioner and
Master Tax Practitioner

Keitumetse Sesana is the Acting Deputy Chief Executive Officer at SAIT.

Keitumetse currently specialises in tax legislative policy engagement and leads strategic initiatives aimed at shaping and refining the tax legislative framework. She plays a key role in managing key stakeholder relations, including facilitating collaboration with key government departments such as Parliament, National Treasury, SARS, and other key entities. Her strategic oversight extends to leading the SAIT Tax Technical workgroups, ensuring that tax specialists within the group collaborate effectively to draft and submit policy proposals that influence legislative reform.

In addition to her policy and stakeholder engagement responsibilities, Keitumetse leads webinars and curates content aimed at supporting tax practitioners' Continuous Professional Development (CPD). She is also leads technical content in the media on behalf of the Institute.

Keitumetse holds a Master of Laws (LLM) specialising in Tax Law, a Bachelor of Laws (LLB), and a Bachelor of Commerce (BCom) Law degree.

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Henque 3935 CC t/a PQ Clothing Outlet v Commissioner for SARS

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Henque v Commissioner of SARS

https://bowmanslaw.com/insights/south-africa-perceived-clarity-real-confusion-unpacking-the-scas-henque-judgment/

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Henque v Commissioner of SARS

- **When does a tax debt arise**
  - The central question was whether a tax liability arises at the time of the 'tax event', or only once SARS issues an assessment. The SCA held that a tax liability arises when the taxing event occurs, which in turn is determined by tax legislation. The SCA relied on its judgment in Christoffel Hendrik Wiese and Others v CSARS 2025 (1) SA 127 (SCA) (Wiese) where the Court found that a 'tax debt' may come into existence prior to the issuing of an assessment, provided the relevant 'tax event' has occurred.
  - However, in Henque, the SCA found that in the case of income tax, the liability arises at the end of the tax period (when the taxpayer's tax liability for the period is effectively finalised in terms of section 5 of the Income Tax Act), and in the case of VAT, at the time of supply, as determined by the time of supply provisions (section 9) read with section 7 of the VAT Act.
  - The SCA concluded that the subsequent tax assessment (whether issued by SARS or by way of self-assessment) does not create the liability; it merely quantifies an existing liability and creates a further obligation pay the relevant amount of tax to SARS.
  - Because Henque's 2017 year of assessment concluded before business rescue commenced, the 2017 income tax liability was a pre-commencement debt. Crucially, the SCA held that the issuing of an additional assessment in May 2018 merely served to adjust the liability created by operation of law at the end of Henque's 2017 tax period, and did not create any new tax liability. The same reasoning applied to the VAT liability for January 2018 – the relevant supplies were made (and received) before the commencement of business rescue, and so the determination of Henque's VAT liability for the 01/2018 period was a pre-commencement liability.

Henque v Commissioner of SARS

Enforcing pre-commencement debts indirectly by set-off

- Section 154(2) of the Companies Act provides that once a company enters business rescue, creditors may only enforce pre-commencement claims in accordance with the adopted business rescue plan. SARS, the Court emphasised, is not exempt from this rule. Critically, the SCA found that section 191 of the Tax Administration Act 28 of 2011, which provides for automatic set-off of tax refunds against outstanding tax debts, is overridden by section 133(1)(c) of the Companies Act, which prohibits enforcement action during business rescue proceedings.
- By applying set-off against refunds that accrued post-commencement, the Court was of the view that SARS was effectively enforcing pre-commencement debts outside of the business rescue process. The SCA held that this was impermissible as SARS cannot do indirectly what it is barred from doing directly.

Henque v Commissioner of SARS

Set-off and section 133(1)(c): A problematic interpretation

- Section 133(1)(c) prohibits enforcement in a forum and has traditionally been interpreted as applying to litigation or legal process, not automatic legal effects like set-off which occurs extrajudicially by operation of law where mutual debts exist. In any event, set-off is expressly included as an exclusion in terms of section 133(1)(c). The SCA's view seems to ignore the distinction between enforcement by legal process and legal consequences arising by operation of law.
- In practice, creditors and debtors in business rescue often continue trading, and mutual debts naturally arise. If the Court's ruling is taken to mean that any set-off during business rescue is impermissible, this could discourage ongoing commercial engagement with companies under rescue.
- This issue is further complicated by the judgment's failure to specify whether the prohibition applies pre- or post-adoption of a plan. Set-off before a plan is adopted may still be permissible, especially if both debts are due, liquidated and reciprocal. Once a plan is adopted, and claims are compromised, set-off may no longer meet the legal criteria. But the judgment does not clearly draw this line.

Henque v Commissioner of SARS

Clarity at first glance — confusion on closer reading

- The prevailing sentiment in the market appears to be one of relief that clarity has finally been achieved. But this perception does not hold up to scrutiny.
- While the Court has, to some extent reaffirmed what was already established in *Wiese*, namely, that tax debts arise at the time of the underlying tax event, *Wiese* itself is not settled law, as it is currently before the Constitutional Court on appeal. At the same time, the *Henque* judgment introduces new uncertainty regarding the permissibility of set-off and the interpretation of the statutory moratorium.
- In our view, the Court's analysis leaves two core questions unanswered:
    - **Is set-off impermissible even if it does not occur in a legal forum**?: If so, this would mark a significant shift in the jurisprudence and one that the text of section 133(1)(c) does not support, especially given that set-off is expressly included as an exclusion under that section.
    - **Does the judgment apply before or after the adoption of a plan?**: The judgment remains silent on this issue. This leaves practitioners in the dark as to whether SARS or any other creditor may lawfully raise set-off before a compromise has been adopted, even where the legal requirements for set-off are otherwise met.

Henque v Commissioner of SARS

The VAT clawback issue remains unresolved

- Despite expectations, the judgment also does not seem to provide any clarity on the VAT clawback issue under section 22(3) of the VAT Act.
- While the Court clarified that VAT liabilities arise in line with the time of supply rules, it did not engage with the specific question of when a clawback under section 22(3) is triggered in the context of business rescue. The interaction between VAT clawbacks and the protective framework of business rescue remains underdeveloped.
- Instead, the SCA seemingly only confirmed that, as decided in Wiese (which is currently before the Constitutional Court), an assessment does not give rise to a tax liability. Henque does not develop the law in this regard, and as a result, the core uncertainty around VAT clawbacks remains unresolved.

Commissioner for the South African Revenue Service v Virgin Mobile

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SARS v Virgin Mobile

Introduction

- This longstanding matter aims to clarify and provide certainty on the Rule 56 application process!
- Issue: Whether SARS needed to apply for condonation after late filing of a Rule 31 statement following a Rule 56(1) notice.

https://www.sars.gov.za/wp-content/uploads/Legal/Judgments/SCA/Legal-DRJ-SCA-2025-05-CSARS-v-Virgin-Mobile-South-Africa-Pty-Ltd-1303-2023-2025-ZASCA-77-04-June-2025.pdf

SARS v Virgin Mobile

Introduction

- This longstanding matter aims to clarify and provide certainty on the Rule 56 application process!
- Issue: Whether SARS needed to apply for condonation after late filing of a Rule 31 statement following a Rule 56(1) notice.
- The SCA has resolved long-standing uncertainty in the Tax Court regarding the role of a Rule 56(1) notice. The Court confirmed that this notice serves as a procedural tool designed to help a compliant party move the appeal process forward—either by prompting the other side to comply or by enabling a default judgment if they fail to do so.

Facts

- SARS missed the 45-day deadline under Rule 31.
- Virgin Mobile issued a Rule 56(1) notice.
- SARS complied within the 15-day period.
- Virgin Mobile still applied for default judgment.
- SARS challenged this as an irregular step under Rule 30.

SARS v Virgin Mobile

- **Unpacking the legal provisions**
  - **Rule 30**: Allows a party to challenge irregular steps.
  - **Rule 31**: Requires SARS to file a statement of grounds within 45 days.
  - **Rule 56(1)**: Allows a party to demand compliance within 15 days, failing which default judgment may be sought.
  - **Rule 52(6)**: Permits condonation applications for late filings.

- The primary aim of Rule 56(1) is not to punish, but to encourage resolution by compelling compliance. Its function is to move the dispute toward finality. Once compliance is achieved, the purpose of the Rule is fulfilled. As a result, there is no requirement for the defaulting party to seek condonation after complying with the notice.

- The SCA compared Rule 56(1) to a notice of bar under the Uniform Rules, where no condonation is needed if the party complies within the prescribed five-day period. The Court emphasised the importance of the innocent party invoking such a rule promptly, as it is intended to enforce procedural compliance. In this instance, however, Virgin Mobile delayed issuing the Rule 56(1) notice for 14 months after SARS's Rule 31 statement of assessment grounds was due.

SARS v Virgin Mobile

Court findings

- **Appealability**: The SCA held that the matter was appealable as it involved a procedural issue under the Tax Administration Act.
- **Compliance with Rule 56(1):** SARS' timely response to the Rule 56(1) notice cured the default.
- **No Need for Condonation**: Once SARS complied with the Rule 56(1) notice, no further condonation was required.
- **Default Judgment Application**: Declared an irregular step and set aside.

KEY TAKEAWAYS FOR TAX PRACTITIONERS?

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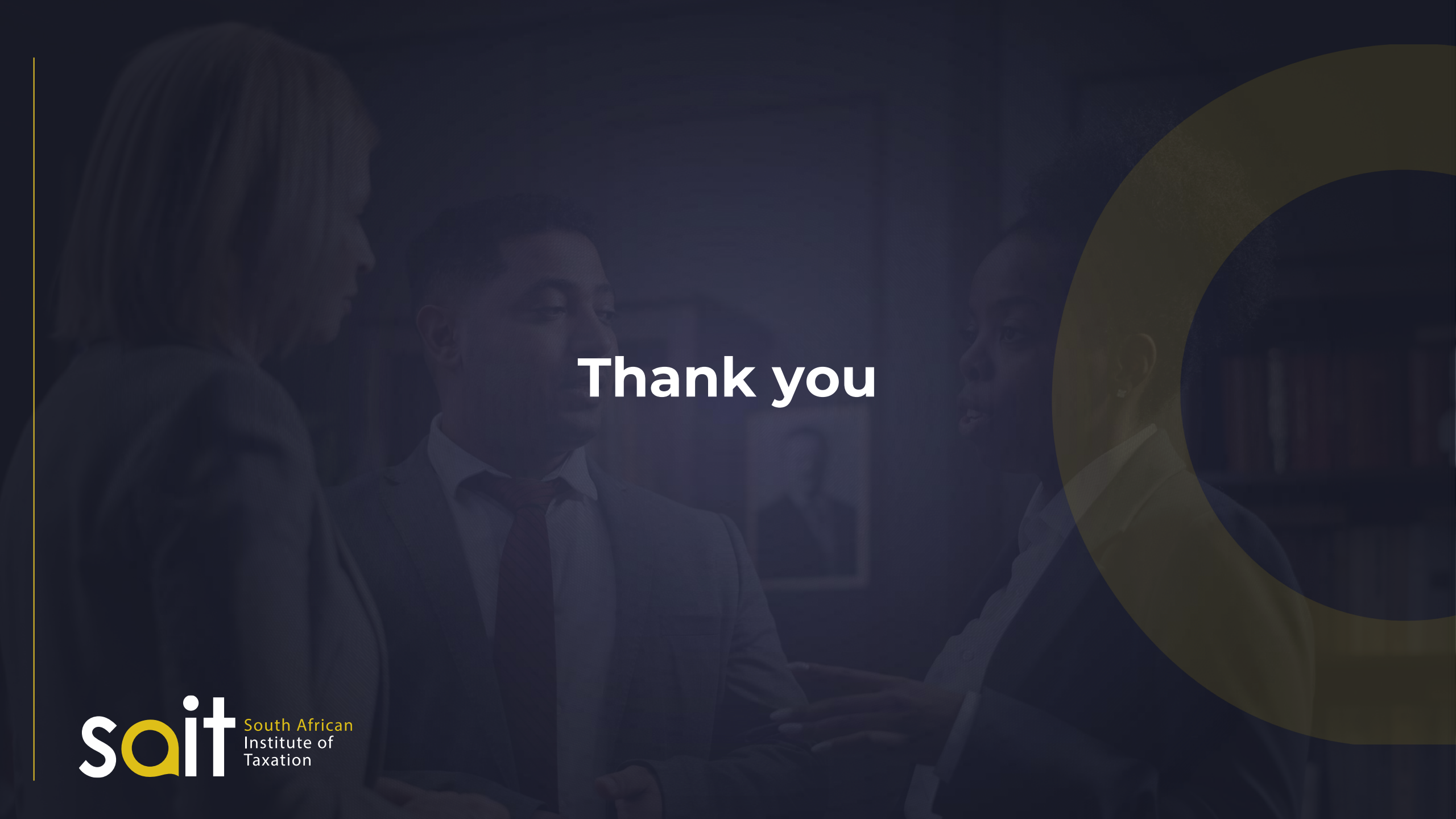

Thank you

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