TAX UPDATE

For period: April 2026 to June 2026

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Tax Executive: Tax Dispute Resolution

Shepstone & Wylie ATTORNEYS

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1. FOREWORD

The second quarter of 2026 produced a number of important tax developments, particularly in the areas of tax procedure, VAT and transfer pricing.

Of particular significance is the Constitutional Court's judgment in United Manganese of Kalahari, which reshapes the circumstances in which taxpayers may approach the High Court instead of the Tax Court.

The quarter also saw important developments affecting VAT on valuable metals, advance pricing agreements and SARS' administrative practice.

This update summarises the principal developments and highlights their practical implications for taxpayers and advisers. Particular attention is drawn to the recent tax judgments, as well as SARS' interpretation notes, rulings and guidance, which provide valuable insight into SARS' current approach to the administration of the tax Acts.

Should you wish to discuss any of the matters addressed in this update, or require assistance with any tax-related matter, please feel free to contact me.

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2. MEDIA STATEMENTS

2.1. Publication of the Draft Amendments to the Regulations on the Domestic Reverse Charge relating to Valuable Metal, issued in terms of section 74(2) of the VAT Act

3 June 2026 – The National Treasury and SARS on this day published, for public comment, the draft amendments to the Regulations on the Domestic Reverse Charge relating to valuable metal, issued in terms of section 74(2) of the VAT Act (the Draft DRC Regulations) as well as the Draft Explanatory Memorandum (the Draft EM). The purpose of these proposed amendments is to enhance the efficacy of the VAT legislation on valuable metal transactions by clarifying the definition of 'residue' and the 1% gold content rule (the de minimis rule). The Draft DRC Regulations and the Draft EM are open for public comment.

2.2. Publication of the 2026 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill

National Treasury and SARS published the 2026 draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill (2026 draft Rates Bill) on 25 February 2026.

This draft Rates Bill contains, amongst others, details of adjustments to the various Tax Act thresholds, exemptions and limit amounts as well as changes to the excise duties on alcoholic beverages and tobacco-related products.

3. EXPLANATORY MEMORANDA

3.1. Draft Explanatory Memorandum to the Draft Amendments to the Regulations on the Domestic Reverse Charge relating to Valuable Metal, issued in terms of section 74(2) of the VAT Act

1. BACKGROUND

On 8 June 2022, government gazetted the regulations on domestic reverse charge relating to valuable metal ('the DRC Regulations'), issued in terms of section 74(2) of the VAT Act, which was effective from 1 July 2022. The aim of the DRC Regulations was to foreclose schemes and malpractices to claim undue VAT refunds from SARS by vendors operating in the value chain relating to high-risk goods containing gold. Government introduced further amendments to the DRC Regulations effective 1 January 2024 and 1 April 2025, respectively, to curb further abuse, as some taxpayers in this space became more creative in their anti-avoidance schemes, and to deal with certain practical difficulties experienced by the affected industries.

2. REASONS FOR CHANGE

With effect from 1 January 2024, the term 'residue' in regulation 2 of the DRC Regulations is limited to residue derived from or incidental to a mining operation due to concerns that the general inclusion of waste was too broad. In addition, a 1% rule was introduced as the definition of 'valuable metal' was also deemed to be too broad in including all gold-bearing goods supplied in the prescribed forms, notwithstanding the gold content. It came to Government's attention that the 1% rule created the opportunity to obtain undue VAT refunds from SARS as certain supplies of valuable metal are excluded from the ambit of the DRC Regulations, for example, unprocessed minerals containing gold, such as tailings and waste rock. It also had the unintended consequence of still excluding the 'holders' who were intended to be included in the Regulations by the removal of supplies made by these entities from the exclusions under the definition of 'valuable metal'.

Nonetheless, the purpose of the de minimis rule was to exclude supplies in which an insubstantial amount of gold could be included in such supply, but where the supply of gold was incidental.

3. PROPOSAL

Based on the above, it is proposed that the regulations be amended to address these issues. As such the industries in question are now specifically listed in the de minimis exclusion under 'valuable metal'.

4. EFFECTIVE DATE

It is envisaged that the draft amendments to the DRC Regulations will come into effect on 1 August 2026.

4. NOTICES / REGULATIONS

4.1. Promulgations

SHORT TITLE	AMENDMENT ACT NUMBER	PROMULGATION DATE
Rates and Monetary Amounts and Amendment of Revenue Laws Act, 2026	No. 3 of 2026	1 April 2026
Tax Administration Laws Amendment Act, 2026	No. 4 of 2026	1 April 2026
Taxation Laws Amendment Act, 2024	No. 5 of 2026	1 April 2026

4.2. Table of interest

Interest rates charged on outstanding taxes, duties and levies and interest rates payable in respect of refunds of tax on successful appeals and certain delayed refunds.

DATE FROM	DATE TO	RATE
1 January 2025	28 February 2025	11,50%
1 March 2025	30 April 2025	11,25%
1 May 2025	31 Aug 2025	11,00%
1 September 2025	31 October 2025	10,75%
1 November 2025	28 February 2026	10,50%
1 March 2026	Until change in the Public Finance Management Act rate	10,25%

Interest rates payable on credit amounts (overpayment of provisional tax) under section 89*quat*(4) of the IT Act.

DATE FROM	DATE TO	RATE
1 January 2025	28 February 2025	7,50%
1 March 2025	30 April 2025	7,25%
1 May 2025	31 August 2025	7,00%
1 September 2025	31 October 2025	6,75%
1 November 2025	28 February 2026	6,50%
1 March 2026	Until change in the Public Finance Management Act rate	6,25%

As from 1 April 2003 the 'prescribed rate' is linked to the rate determined in terms of section 80(1)(b) of the Public Finance Management Act, but for IT purposes the rate only becomes effective as from the first day of the second month following the date on which the PFMA rate comes into operation.

A taxable benefit (fringe benefit) arises if an employee incurs a debt in favour of the employer, any other person by arrangement with the employer, or an associated institution in relation to the employer, if no interest is payable or if the interest payable is less than the 'official rate of interest'. The difference between the amount which would have been payable if the debt had incurred interest at the official rate, and the interest actually paid by the employee, is taxed as a fringe benefit.

DATE FROM	DATE TO	RATE
1 February 2025	31 May 2025	8,50%
1 June 2025	31 August 2025	8,25%
1 September 2025	30 November 2025	8,00%
1 December 2025	31 May 2026	7,75%

1 June 2026	Until change in the Repurchase rate as announced by the Reserve Bank	8,00%

The 'official rate' as defined in section 1(1) of the IT Act is linked to the repurchase rate plus one%. The official rate is adjusted at the beginning of the month following the month during which the Reserve Bank changes the repurchase rate.

4.3. Penalties are being implemented for the non-submission of Income Tax Returns by Trusts

2 April 2026 – On 27 March 2026, a public notice was issued listing the non-submission of income tax returns by Trusts as an incidence of non-compliance subject to an administrative non-compliance penalty under section 211 of the TA Act. Administrative penalties may be imposed on taxpayers who fail to comply with an obligation under a tax Act. The penalties are designed to encourage compliance, applied consistently, and may recur monthly until corrected.

From 4 May 2026 SARS will issue a penalty assessment notice (AP34) to notify taxpayers of administrative non-compliance penalties that have been imposed for non-compliance with regard to outstanding trust income tax returns. The penalty assessment notice will reflect imposed penalties, outstanding income tax returns for which tax periods, and corrective measure to be followed to prevent recurring penalties. Taxpayers are also advised to submit a request for remission if they do not agree with the penalty imposition. This penalty will apply to trusts with outstanding income tax returns (ITR12T) for tax periods from 2024 onwards.

4.4. Returns to be submitted by a person in terms of section 25 of the TA Act

1. General

(1) Any term or expression in this notice to which a meaning has been assigned in a ‘tax Act’ as defined in section 1 of the TA Act has the meaning so

assigned, unless the context indicates otherwise and the following terms have the following meaning—

'2026 year of assessment' means—

(a) in the case of a company, the financial year of the company ending during the 2026 calendar year; and

(b) in the case of any other person, the year of assessment ending during the period of 12 months ending on 28 February 2026;

'income tax return' means a return for the assessment of normal tax in respect of the 2026 year of assessment, including a turnover tax return if a person is a registered micro business under the Sixth Schedule to the IT Act; and

'trust' means a trust as defined in section 1 of the IT Act.

(2) Notice is hereby given in terms of section 25 of the TA Act, read with section 66(1) of the IT Act, that a person specified in terms of paragraph 2 is required to submit an income tax return within the period prescribed in paragraph 4.

2. Persons who must submit an income tax return

The following persons must submit an income tax return:

(a) Every company or other juristic person, which was a resident during the 2026 year of assessment that—

(i) derived gross income of more than R1 000;

(ii) held assets with a cost of more than R1 000 or had liabilities of more than R1 000, at any time;

(iii) derived any capital gain or capital loss of more than R1 000 from the disposal of an asset to which the Eighth Schedule of the IT Act applies; or

(iv) had taxable income, taxable turnover, an assessed loss or an assessed capital loss;

(b) Every trust that was a resident during the 2026 year of assessment;

(c) Every company, trust or other juristic person, which was not a resident during the 2026 year of assessment, that—

(i) carried on a trade through a permanent establishment in South Africa;

(ii) derived income from a source in South Africa; or

(iii) derived any capital gain or capital loss from the disposal of an asset to which the Eighth Schedule to the IT Act applies;

(d) Every company incorporated, established or formed in South Africa, but that was not a resident as a result of the application of any agreement entered into with the Government of any other country for the avoidance of double taxation during the 2026 year of assessment;

(e) Every natural person who during the 2026 year of assessment—

(i) was a resident and carried on any trade (other than solely in his or her capacity as an employee); or

(ii) was not a resident and carried on any trade (other than solely in his or her capacity as an employee) in South Africa;

(f) Every natural person who during the 2026 year of assessment—

(i) was a resident and had capital gains or capital losses exceeding R40 000;

(ii) was not a resident and had capital gains or capital losses from the disposal of an asset to which the Eighth Schedule to the IT Act applies;

(iii) was a resident and held any funds in foreign currency or owned any assets outside South Africa, if the total value of those funds and assets exceeded R250 000 at any stage during the 2025 year of assessment;

(iv) was a resident and to whom any income or capital gains from funds in foreign currency or assets outside South Africa was attributed in terms of the IT Act;

(v) was a resident and held any participation rights, as referred to in section 72A of the IT Act, in a controlled foreign company;

(vi) was a resident and had taxable turnover; or

(vii) subject to the provisions of paragraph 3, at the end of the 2026 year of assessment—

(aa) was under the age of 65 and whose gross income exceeded R95 750;

(bb) was 65 years or older (but under the age of 75) and whose gross income exceeded R148 217; or

(cc) was 75 years or older and whose gross income exceeded R165 689;

(g) Subject to the provisions of paragraph 3, every estate of a deceased person that had gross income during the 2026 year of assessment;

(h) Every non-resident whose gross income during the 2026 year of assessment included interest from a source in South Africa to which the provisions of section 10(1)(h) of the IT Act do not apply;

(i) Every person who is requested by SARS in writing to furnish a return, irrespective of the amount of income or nature of receipts or accruals of the person; and

(j) Every representative taxpayer of any person referred to in items (a) to (i) above.

3. Persons not required to submit an income tax return

(1) A natural person or estate of a deceased person is not required to submit an income tax return in terms of paragraph 2(f)(vii) or (2)(g) if the gross income of the person during the 2026 year of assessment consisted solely of gross income described in one or more of the following items:

(a) Remuneration (other than remuneration referred to in item (e)) paid or payable from a single employer, which does not exceed R500 000 and employees' tax has been deducted or withheld in terms of the deduction tables prescribed by SARS;

(b) Interest (other than interest from a tax free investment) from a source in South Africa not exceeding—

(i) R23 800 in the case of a natural person below the age of 65 years at the end of the year of assessment;

(ii) R34 500 in the case of a natural person aged 65 years or older at the end of the year of assessment; or

(iii) R23 800 in the case of the estate of a deceased person;

(c) Dividends that are exempt from normal tax and the natural person was a non-resident throughout the 2026 year of assessment;

(d) Amounts received or accrued from a tax-free investment; and

(e) A single lump sum benefit received from a pension fund, provident fund, pension preservation fund, provident preservation fund or retirement annuity fund, and tax has been deducted or withheld in terms of a directive issued by SARS.

(2) Subparagraph (1) does not apply to a natural person—

(a) who was paid or granted an allowance or advance as described in section 8(1)(a)(i) of the IT Act other than an amount reimbursed or advanced as described in section 8(1)(a)(ii) or an allowance or advance referred to in section 8(1)(b)(iii) that does not exceed the amount determined by applying the rate per kilometre for the simplified method in the notice fixing the rate per kilometre under section 8(1)(b)(ii) and (iii) to the actual distance travelled;

(b) who was granted a taxable benefit described in paragraph 7 of the Seventh Schedule to the IT Act; or

(c) who received any amount or to whom any amount accrued in respect of services rendered outside South Africa.

(3) A natural person is not required to submit an income tax return in terms of paragraph 2(f)(vii) if—

(a) the person is notified by SARS in writing that he or she is eligible for automatic assessment; and

(b) the person's gross income, exemptions, deductions and rebates reflected in the records of SARS are complete and correct as at the date of the assessment based on an estimate to give effect to automatic assessment.

4. Periods within which income tax returns must be furnished

Income tax returns must be submitted within the following periods:

(a) In the case of any company, public benefit organisation approved by SARS in terms of section 30(3) of the IT Act, and recreational club approved by SARS in terms of section 30A(2) of the Act, within 12 months from the date on which its financial year ends; or

(b) In the case of all other persons (which include natural persons, trusts and other juristic persons, such as institutions, boards or bodies)—

(i) on or before 23 October 2026;

(ii) on or before 22 January 2027 if the return relates to a provisional taxpayer;

(iii) on or before 22 January 2027 if the return relates to a trust; or

(vi) where accounts are accepted by SARS in terms of section 66(13A) of the IT Act in respect of the whole or portion of a taxpayer's income, which are drawn to a date after 28 February 2026 but on or before 30 September 2026, within 6 months from the date to which such accounts are drawn.

5. Form of income tax returns to be submitted

The relevant income tax return in the form prescribed by SARS can be retrieved on SARS eFiling which is accessible at www.sars.gov.za, or can be completed at an office of SARS by appointment on SARS eBooking which is also available at www.sars.gov.za .

6. Manner of submission of income tax returns

(1) Income tax returns must—

(a) in the case of a company, be submitted electronically by using the SARS eFiling platform;

(b) in the case of natural persons or trusts be submitted electronically—

(i) by using the SARS eFiling platform, provided the person is registered for eFiling; or

(ii) through the assistance of a SARS official at an office of SARS

(c) in the case of institutions, boards or bodies be—

(i) submitted electronically by using the SARS eFiling platform, provided the person is registered for eFiling;

(ii) submitted electronically through the assistance of a SARS official at an office of SARS;

(iii) forwarded by post to SARS; or

(iv) delivered to an office of SARS, other than an office which deals solely with matters relating to customs and excise.

(2) Returns for turnover tax must be forwarded by post to SARS or delivered to an office of SARS, other than an office which deals solely with matters relating to customs and excise.

(3) SARS may agree that a person, who is required to submit a return in the manner prescribed in subparagraph (1) or (2), may submit the return in an alternative manner.

5. DRAFT NOTICES / REGULATIONS

5.1. Explanatory Note – IT Act: Insertion of Part IA in Chapter III

The Tax Administration Laws Amendment Act, 2023, inserted Part IA in Chapter III of IT Act, which introduced the framework for the advance pricing agreement programme. At the time the Memorandum of Objects of the Amendment Act, explained the introduction of the programme as follows:

‘The implementation of an advance pricing agreement (“APA”) programme is in keeping with international trends, e.g. Action 14 of the OECD/G20’s Base Erosion and Profit Shifting Action Plan, and the recommendations of the Davis Tax Committee. An APA programme will provide taxpayers with a greater level of certainty when embarking on large-scale international transactions that have transfer pricing implications. This is in line with SARS’ first strategic objective of providing clarity and certainty to taxpayers to promote voluntary compliance and complements SARS’ advance tax rulings system, which provides rulings on the tax implications of proposed domestic transactions.

SARS released a discussion paper on an APA programme for public comment in November 2020, followed by the release of a high-level model and draft legislation in December 2021. The proposed legislation seeks to introduce the enabling framework for the APA programme. The framework is inserted in the IT Act, in the light of its close relationship with section 31 and other provisions of the Act. It deals with persons eligible to apply for APAs, fees, pre-application consultation, content of applications, amendment and withdrawal of applications, criteria for rejecting applications, processing of applications, finalisation of APAs, annual compliance reports, extension of APAs, termination of APAs, record keeping and SARS's power to prescribe procedures and guidelines for the implementation of the programme. It also provides for consultation with affected treaty partners at key points of the process.

As the APA programme will require scarce resources, it is envisaged that the programme will commence with a pilot shortly after the legislative framework has been put in place. It is currently envisaged that the pilot will initially only accept bilateral APA applications, which will allow for learning from other jurisdictions and the managed expansion of capacity before SARS extends the programme. The proposed framework provides a degree of flexibility in eligibility criteria and implementation in that most of the detail will be dealt with in subordinate legislation. This also enables the expansion of the programme to other types of APAs over time.'

The initial resources for the APA programme have now been put in place so the following pieces of subordinate legislation in respect of the pilot phase of the APA programme have been prepared and are released for public comment:

- Draft notice in terms of section 76C of the IT Act, prescribing the persons eligible to apply to SARS for a DTA, i.e. a bilateral, APA;
- Draft notice in terms of section 76D of the IT Act, prescribing the fees payable by an applicant in an application for a DTA APA;
- Draft notice in terms of section 76I(b) of the IT Act, prescribing the additional requirements that may lead to the rejection of an application for a DTA APA;
- Draft notice in terms of section 76J(1) of the IT Act, specifying the requirements for processing an application for a DTA APA;
- Draft notice in terms of section 76J(3) of the IT Act, prescribing the information to be contained in a preliminary DTA APA; and

- Draft notice in terms of section 76P of the IT Act, specifying the procedures and guidelines for the implementation and operation of the DTA APA system.

5.2. Persons eligible to apply to SARS for a DTA advance pricing agreement in terms of section 76C of the IT Act

1. General

Any term or expression in this notice to which a meaning has been assigned in a 'tax Act' as defined in section 1 of the TA Act, has the meaning so assigned, unless the context indicates otherwise.

2. Persons eligible to apply for a DTA advance pricing agreement

A person who is a party to an affected transaction, or contemplating entering into an affected transaction, is eligible to apply to SARS for a DTA advance pricing agreement, provided that—

2.1 the person proves to SARS that the person had a turnover in excess of R50 billion in the year of assessment preceding the year of assessment in which the person requests a pre-application consultation meeting;

2.2 the affected transaction is in relation to the following functions:

2.2.1 Distribution;

2.2.2 Manufacturing; or

2.2.3 Imported intragroup services;

2.3 the affected transaction does not constitute financial assistance, and does not constitute or result in the creation of intangible property;

2.4 the value of the affected transaction for each of the years of assessment in section 76K(5) of the IT Act is expected to exceed:

2.4.1 R1 billion for a distribution or manufacturing function; or

2.4.2 R300 million for the receipt of intragroup services;

2.5 SARS retains a discretion, based on the nature of the transaction, the industry in which the prospective applicant operates, and the available resources to accept or reject the application; and

2.6 the prospective applicant is tax compliant to the extent referred to in section 256(3) of the TA Act.

3. Commencement

This Notice will apply to all applications received on or after the date of publication of this Notice in the Government Gazette.

5.3. Fees payable by an applicant in an application for a DTA advance pricing agreement in terms of section 76D of the IT Act

1. General

Any term or expression in this notice to which a meaning has been assigned in a 'tax Act' as defined in section 1 of the TA Act has the meaning so assigned, unless the context indicates otherwise.

2. Fees payable by an applicant in an application for a DTA advance pricing agreement

The following fees are payable by an applicant in an application for a DTA advance pricing agreement:

2.1 Pre-application consultation fee

A prospective applicant must pay a non-refundable pre-application consultation fee of R100 000, which must be paid within seven days of the date of the invoice that is issued in accordance with section 76D(2) of the IT Act.

2.2 Cost recovery fees

2.2.1 Where SARS has notified a prospective applicant that they may apply for a DTA advance pricing agreement, the eligible applicant must pay a cost-recovery fee of R1 000 000 towards the processing of the application for a DTA advance pricing agreement.

2.2.2 A deposit of R200 000 in respect of the cost-recovery fees under paragraph 2.2.1 must be paid within seven days of the date of the invoice that is issued in accordance with section 76D(2) of the IT Act.

2.2.3 In accordance with section 76J(2), SARS must invoice the applicant for the remaining R800 000 at 90-day intervals, comprising eight equal instalments, each of which must be paid within seven days of the date of the invoice that is issued in accordance with section 76J(2).

2.2.4 Where necessary, and in consultation with the applicant, an additional amount may be charged to recover any ancillary costs in relation to the application for a DTA advance pricing agreement.

2.2.5 Any fee charged under 2.2 is not refundable.

2.3 Fees associated with the maintenance of an existing DTA advance pricing agreement Once a DTA advance pricing agreement has been concluded or extended, a fee of R100 000 per annum to maintain a DTA advance pricing agreement must be paid by the applicant to SARS within seven days of the date of the invoice that is issued in accordance with section 76D(2) of the IT Act.

2.4 Fees associated with the extension of an existing DTA advance pricing agreement:

2.4.1 Where the applicant seeks an extension of an existing DTA advance pricing agreement, SARS must communicate the associated costs to the applicant for considering and processing the extension.

2.4.2 The fees for the extension of the DTA advance pricing agreement will be based on the facts and circumstances of the case and must be paid within seven days of the date of the invoice issued in accordance with section 76D(2) of the IT Act.

2.5 Interest will be charged at the official rate on late payments.

3. Commencement

This Notice will apply to all applications received on or after the date of publication of this Notice in the Government Gazette.

5.4. Rejection of an application for a DTA advance pricing agreement in terms of section 76I(b) of the IT Act

1. General

Any term or expression in this notice to which a meaning has been assigned in a 'tax Act' as defined in section 1 of the TA Act has the meaning so assigned, unless the context indicates otherwise.

2. Additional requirements for the rejection of an application for a DTA advance pricing agreement.

In addition to section 76I(a) of the IT Act, SARS may reject an application for a DTA advance pricing agreement in the following circumstances:

2.1 The proposed DTA advance pricing agreement would not reflect the economic reality of the transaction.

2.2 The application requires SARS to consider the legal form of an affected transaction without taking the substance of the transaction into account.

2.3 The proposed advance pricing agreement would not ensure that there is alignment between economic activities and the profit outcomes in South Africa.

2.4 An affected transaction appears to lack commercial substance or is entered into primarily to avoid tax.

2.5 The application involves the interpretation of a general or specific anti-avoidance provision or doctrine.

2.6 The application is in respect of an issue that is the same as, or substantially similar to, an issue that is subject to:

2.6.1 a proposed amendment to a tax Act that has been published;

2.6.2 dispute resolution under Chapter 9 of the TA Act or an Article in an agreement for the avoidance of double taxation; or

2.6.3 a voluntary disclosure program application by the applicant.

2.7 The application pertains to the tax consequences of transactions contained in any other agreement which has already been concluded with SARS.

2.8 The application differs materially from the details provided during the pre-application consultation stage.

2.9 The application is submitted for academic purposes.

2.10 The application is in respect of a frivolous or vexatious issue.

2.11 The applicant fails or refuses to provide additional information requested by SARS.

2.12 The applicant does not pay the prescribed fees in section 76D of the IT Act.

2.13 The competent authority of the other country does not want to be party to the DTA advance pricing agreement.

2.14 The applicant is not tax compliant to the extent referred to in section 256(3) of the Tax Administration Act.

3. Commencement

This Notice will apply to all applications received on or after the date of publication of this Notice in the Government Gazette.

5.5. Information to be contained in a preliminary DTA advance pricing agreement in terms of section 76J(3) of the IT Act

1. General

Any term or expression in this notice to which a meaning has been assigned in a 'tax Act' as defined in section 1 of the TA Act, has the meaning so assigned, unless the context indicates otherwise.

2. Information to be contained in a preliminary DTA advance pricing agreement

2.1 The legal names, e-mail addresses, postal addresses, physical addresses, and countries of residence of the parties to the DTA advance pricing agreement.

2.2 The contact details of the competent authorities that are party to the agreement.

2.3 The date the application for the DTA advance pricing agreement was filed.

2.4 A definition of each of the key terms in the DTA advance pricing agreement.

2.5 The primary business activities of the applicant.

2.6 Background to the affected transaction, including a summary of the applicant's business and functional analysis.

2.7 The organisational structure of the applicant in relation to the other affected parties and their organisational structures.

2.8 The latest financial information available, including unaudited annual financial statements to the extent the applicant represents that the annual financial statements give an accurate view of an affected transaction in the DTA advance pricing agreement.

2.9 The applicable accounting standards on which the applicant's annual financial statements are based.

2.10 The currency in which an affected transaction is calculated, expressed and paid.

2.11 An affected transaction that will form part of the DTA advance pricing agreement, with the following information in respect of each affected transaction:

2.11.1 the applicable critical assumptions;

2.11.2 the quantum;

2.11.3 the most appropriate transfer pricing method;

2.11.4 the selection of comparables;

2.11.5 the arm's length transfer price;

2.11.6 the arm's length allocation; and

2.11.7 the adjustments, where necessary.

2.12 The duration of the DTA advance pricing agreement but not exceeding the periods specified in sections 76K(5), 76K(6) and section 76M(3) of the IT Act.

2.13 The date on which the compliance report must be submitted.

2.14 Where section 76K(6) is applicable, an undertaking by the applicant to submit to SARS within 21 days after the finalisation of the DTA advance pricing agreement, the appropriate amended income tax return applying the transfer pricing methodology in terms of the DTA advance pricing agreement.

2.15 Any other information that SARS may consider to be relevant for purposes of the DTA advance pricing agreement.

3. Commencement

This Notice will apply to all applications received on or after the date of publication of this Notice in the Government Gazette.

5.6. Procedures and guidelines for the implementation and operation of the DTA advance pricing agreement system in terms of section 76P of the IT Act

1. General

Any term or expression in this notice to which a meaning has been assigned in a 'tax Act' as defined in section 1 of the TA Act has the meaning so assigned, unless the context indicates otherwise.

2. Procedures and guidelines for the implementation and operation of the DTA advance pricing agreement system

The procedures and guidelines for the implementation and operation of the DTA advance pricing agreement system are as follows:

2.1. Language requirement for the administration of an advance pricing agreement system

2.1.1. All correspondence for purposes of administering Part IIA of the IT Act must be in English.

2.1.2. SARS will not accept an application for a DTA advance pricing agreement unless the competent authorities agree, prior to the submission of the application, that the processing of the application proceedings will be conducted in English.

2.1.3. The applicant must ensure that the information in relation to the application for a DTA advance pricing agreement to be provided to the competent authority of the other country will be in the language required by such competent authority.

2.2. Pre-application consultation

2.2.1. The request for a pre-application consultation meeting must be sent to the following email address: APAapplications@sars.gov.za

2.2.2. Once the request is received, SARS must issue an invoice for the pre-application consultation fee in accordance with section 76D(2) of the IT Act. The fee must be paid within seven days of the date of the invoice.

2.2.3. For purposes of the pre-application consultation meeting, the applicant must prepare and submit a presentation that includes the information required in section 76E(3) of the IT Act.

2.2.4. Once the required pre-application consultation fee is paid and the presentation in paragraph 2.23 is received, SARS will arrange a pre-application consultation meeting with the prospective applicant.

2.3. Rollback

2.3.1. A prospective applicant must make the specific request in in section 76K(6) of the IT Act, during the pre-application consultation. Issues relating to the Period of limitations for issuance of assessments in accordance with section 99 of the Tax Administration Act, in respect of the years of assessments in section 76K(6), must be addressed during the pre-application consultation.

3. Commencement

This Notice will apply to all applications received on or after the date of publication of this Notice in the Government Gazette.

5.7. Public Notice prescribing the Information that must be Contained in a Certificate in terms of section 18A(2B) and (2C) of the IT Act

Schedule

1. General

In this notice, any term or expression to which a meaning has been assigned in a 'tax Act' as defined in section 1 of the Tax Administration Act, 2011, (Act No. 28 of 2011) has the meaning so assigned, unless the context indicates otherwise, and the following terms have the following meaning:

'accounting officer or accounting authority' means an accounting officer or accounting authority contemplated in the Public Finance Management Act or the Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003); and

'section 18A-approved entity' means a public benefit organisation, institution, board or body, or department of government that has been approved by the Commissioner in terms of section 18A(1)(cc), 18A(1)(b), or 18A(1)(c).

2. Information required in a certificate as specified in terms of section 18A(2B) and (2C) of the Income Tax Act

The following information must be included in a certificate as specified in terms of section 18A(2B) and (2C) of the Income Tax Act:

2.1 The name and address of the section 18A-approved entity.

2.2 The date the section 18A approval was granted to the section 18A-approved entity.

2.3 The nature of the approval granted by the Commissioner to the section 18A-approved entity (i.e. approved under section 18A(1)(a)(i), 18A(1)(a)(ii), 18A(1)(b) or 18A(1)(c)).

2.4 The section 18A approval reference number issued by the Commissioner under section 18A(2)(a)(i) to the section 18A-approved entity.

2.5 The income tax reference number of the section 18A-approved entity.

2.6 The year of assessment or financial year to which the certificate applies.

2.7 Confirmation of the number of section 18A receipts issued by the section 18Aapproved entity during the year of assessment or financial year.

2.8 Confirmation of the total rand value of donations for which section 18A receipts were issued by the section 18A-approved entity.

2.9 The date on which the certificate of examination is issued.

2.10 Details of the person issuing the certificate of examination

2.10.1 Registered tax practitioner

2.10.1.1 Full name;

2.10.1.2 Professional designation;

2.10.1.3 SARS tax practitioner registration number issued in terms of section 240 of the Tax Administration Act;

2.10.1.4 Recognised controlling body approved by SARS and membership number;

2.10.1.5 Contact details (i.e. telephone number and email address).

2.10.2 Certificate issued by an accounting officer or accounting authority:

2.10.2.1 Full name

2.10.2.2 Capacity (i.e. accounting officer or accounting authority)

2.10.2.3 Department, institution, board, or body

2.10.2.4 Legislative basis of appointment (i.e. the Public Finance Management Act or the Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003)

2.10.2.5 Contact details (i.e. telephone number and email address)

Scope and nature of the examination

2.11 A confirmation by the registered tax practitioner, accounting officer or accounting authority that—

2.11.1 the examination was conducted in his or her professional or official capacity, as the case may be, and was limited to an independent examination of the records and information relevant to donations for which section 18A receipts were issued during the year of assessment or financial year to which the certificate relates; and

2.11.2 the examination was restricted to assessing compliance with the specific statutory requirements applicable to section 18A and did not constitute an audit, a review, or an assurance engagement, and that accordingly, no audit or assurance opinion is expressed in the certificate.

Administrative and control confirmations

2.12 A confirmation by the registered tax practitioner, accounting officer or accounting authority that based on the procedures performed and information made available, in all material respects, the section 18A-approved entity—

2.12.1 maintained adequate records of all donations for which section 18A receipts were issued;

2.12.2 had systems capable of identifying donors to whom section 18A receipts were issued;

2.12.3 retained donation, receipt and donor information sufficient to meet SARS third party reporting requirements; and

2.12.4 implemented internal controls to ensure that section 18A receipts were issued only for qualifying donations.

2.13 Confirmation by the registered tax practitioner, accounting officer or accounting authority, that where applicable, donation records were capable of reconciliation with section 18A receipts issued, and receipts issued were within the scope of the organisation's section 18A approval.

Statutory confirmation and conclusion

2.14 The registered tax practitioner, accounting officer, or accounting authority, as the case may be, must confirm that, based on the procedures performed and information made available, to his or her reasonable satisfaction, and in all material respects—

2.14.1 in the case of a public benefit organisation, or an institution, board, or body approved under section 18A(1)(a), all donations received or accrued during the relevant year of assessment, in respect of which section 18A receipts were issued under section 18A(2), were utilised solely for public benefit activities listed in Part II of the Ninth Schedule to the Income Tax Act in South Africa, as contemplated in section 18A(2A)(a);

2.14.2 in the case of a public benefit organisation approved under section 18A(1)(b), all donations received or accrued during the relevant year of assessment, in respect of which section 18A receipts were issued under section 18A(2), were—

(a) utilised solely to provide funds and assets to public benefit organisations, institutions, boards, or bodies approved under section 18A(1)(a), or departments approved under section 18A(1)(c), as contemplated in section 18A(2A)(b)(ii);

(b) applied by such recipient organisations solely for public benefit activities listed in Part II of the Ninth Schedule to the Income Tax Act in South Africa; and

(c) distributed in the manner contemplated in section 18A(2A)(b)(i);

2.14.3 in the case of a department approved under section 18A(1)(c), all donations received or accrued during the relevant financial year, in respect of which section 18A receipts were issued under section 18A(2), were utilised solely in carrying on public benefit activities listed in Part II of the Ninth Schedule to the Income Tax Act, as contemplated in section 18A(2A)(c).

2.15 The registered tax practitioner, accounting officer or accounting authority must further confirm that the information contained in the certificate is, to the best of his or her knowledge and belief, true and correct, having regard to the procedures performed and the information obtained in the course of the examination.

2.16 Based on the examination described above and the confirmations in paragraph 2.14, nothing has come to the attention of the registered tax practitioner, accounting officer or accounting authority that causes him or her to believe that donations, in respect of which section 18A receipts were issued during the relevant year of assessment or financial year, were not applied, in all material respects, in the manner contemplated in section 18A(2A) of the Income Tax Act.

Independence and objectivity declaration

2.17 In the case of a registered tax practitioner, a declaration confirming that the tax practitioner—

2.17.1 is independent of the relevant section 18A-approved entity;

2.17.2 is not an employee, trustee, director, member, office bearer, nor involved in the governance or management of the section 18A-approved entity;

2.17.3 did not participate in the receipt, management, allocation or application of the donations examined; and

2.17.4 has no personal or financial interest that may impair the person’s objectivity in issuing the certificate.

Competence and professional responsibility

2.18 Confirmation that—

2.18.1 the registered tax practitioner, accounting officer or accounting authority, possesses the appropriate knowledge, experience and professional standing to perform the examination contemplated in section 18A(2B) or 18A(2C), as applicable;

2.18.2 the procedures performed by the registered tax practitioner, accounting officer or accounting authority were sufficient and appropriate to support the confirmations made in the certificate;

2.18.3 the certificate is issued based on evidence obtained, and not merely on representations made by management;

2.18.4 the certificate is issued in reliance on the registered tax practitioner's professional status, or in reliance on the official capacity of the accounting officer or accounting authority, as the case may be, and is subject to the ethical, professional and disciplinary standards applicable to the relevant designation; and

2.18.5 the registered tax practitioner, accounting officer or accounting authority understands that he or she may be required to substantiate the basis on which the certificate was issued should SARS request further information.

Confirmation and declaration

2.19 A declaration by the registered tax practitioner, accounting officer or accounting authority that the information contained in the certificate is, to the best of his or her knowledge and belief, true and correct for the purposes for which the certificate is issued.

2.20 Confirmation by the registered tax practitioner, accounting officer or accounting authority that the declaration under paragraph 2.19 is made in his or her capacity as the person issuing the certificate of examination and having regard to the procedures performed and the information obtained in the course of the examination described in the certificate.

6. TAX CASES

6.1. United Manganese of Kalahari (Pty) Ltd v C:SARS and four other cases[1] - General Principles (88 SATC 1)

The Constitutional Court handed down a unanimous judgment in five consolidated applications for leave to appeal concerning the interpretation and application of section 105 of the TA Act.

Section 105 of the TA Act provided that a taxpayer must challenge an assessment in the Tax Court unless the High Court directs otherwise, in which event it would grant a 'section 105 direction.'

The court referred to the five cases before it by the relevant taxpayers' abbreviated names, as follows (taking them in the order set out in the heading of this judgment): *United Manganese*, *Rappa*, *Forge*, *Absa* and *Lueven*. In these cases the taxpayers sought review or declaratory relief or both and the question in each case was whether the taxpayer was entitled to pursue that relief in the High Court, having regard to section 105 of the TA Act. All five cases were argued in the order set out in the heading to this judgment.

At the court's direction, argument was confined to the questions (*a*) whether the taxpayer in each case was entitled to pursue relief in the High Court; and (*b*) if so, what order should be made for the further adjudication of such relief, in particular whether the matter should be adjudicated on its merits by this court or remitted for hearing by the High Court or the Supreme Court of Appeal.

The cases before the court raised the following questions about the interpretation and application of section 105 of the TA Act:

(a) Is a section 105 direction needed when a taxpayer applies to the High Court to have an appealable assessment (*ie* appealable to the Tax Court) or decision set aside on review, whether in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) or the principle of legality?

(b) Is a section 105 direction needed when a taxpayer applies to the High Court for a declaratory order on a question which, if answered in favour of the taxpayer, would show that an appealable assessment or decision is wrong?

[1] 2025 (5) BCLR 530 (CC)

(c) What is the effect of section 105 on the High Court's jurisdiction prior to the granting of a direction?

(d) When and how should a section 105 direction be sought and adjudicated?

(e) What test should the High Court apply when deciding whether to give a section 105 direction? In particular, is the test one of 'exceptional circumstances'?

(f) What factors should the High Court take into account when deciding whether to give a section 105 direction?

(g) What effect, if any, should section 105 have where a review or declaratory application is brought before an assessment is issued?

(h) What is the nature of the High Court's power to grant or withhold a section 105 direction?

In particular, does it involve the exercise of a true discretion, in which case the grounds of appellate interference would be more limited than otherwise?

It was convenient for the court to address these questions generally before turning to the facts of the five cases and hence the first 130 paragraphs of the judgment cover the general principles bearing upon the interpretation and application of section 105 and thereafter each individual appeal is dealt with in the judgment.

In *United Manganese of Kalahari (Pty) Ltd* v *C:SARS* (UMK) the taxpayer sought to review additional assessments based on alleged procedural irregularities and to obtain declaratory relief on a point of law.

The Constitutional Court found that neither the review relief nor the declaratory relief sought by the taxpayer was appropriate for High Court adjudication, and thus a section 105 direction should not be granted. The court thus granted leave to appeal but dismissed the appeal.

In *Rappa Resources (Pty) Ltd* v *C: SARS* (Rappa) the taxpayer launched a review application without first objecting to the assessments and sought to compel SARS to produce a Rule 53 record.

The Constitutional Court confirmed that until a section 105 direction is granted, the High Court's jurisdiction is conditionally suspended, and thus the High Court could not order production of a Rule 53 record and the court thus granted leave to appeal but dismissed the appeal.

In *Forge Packaging (Pty) Ltd* v *C:SARS* (Forge) the taxpayer applied for leave to appeal the High Court's refusal to grant a section 105 direction for a review based on alleged non-compliance with section 42(2)(*b*) of the TA Act.

The Constitutional Court refused to condone the late filing of the taxpayer's application for leave to appeal, as the taxpayer did not enjoy reasonable prospects of success and, based on this, the court dismissed the application.

In *Absa Bank and Another* v *C:SARS* (ABSA) the taxpayers sought to review SARS' intention to issue assessments under the general anti-avoidance Rules.

The Constitutional Court granted the taxpayers leave to appeal, overlooking peremption in the interests of justice. The court found that the two issues raised by the taxpayers were indeed pure points of law, and although the presence of other disputes about the assessments militated against High Court adjudication, it allowed the High Court's section 105 direction to stand and the court granted leave to appeal the order of the Supreme Court of Appeal and held that the remaining issues in the appeal will stand over for later determination in accordance with directions to be issued by the court.

In *Lueven Metals (Pty) Ltd* v *C:SARS* (Lueven) the taxpayer applied for declaratory relief before assessments were issued, with both parties initially agreeing that the case was suitable for determination by declaratory order.

The Constitutional Court held that since no assessment had been issued when the taxpayer applied for declaratory relief, section 105 did not apply directly. The court found that the Supreme Court of Appeal had erred in declining to decide the merits of the case. Therefore, the court granted leave to appeal the order of the Supreme Court of Appeal and held that the remaining issues in the appeal would stand over for later determination in accordance with directions to be issued by the court.

Judge Rogers held the following:

<u>As to the general principles relating to the interpretation and application of section 105</u>

(i) That an appeal to the Tax Court is not an appeal in the conventional sense. The Tax Court is not bound by any record that may have come into existence before the noting of the appeal. The parties may present new evidence and make new arguments, provided that they are relevant to the issues arising from the Rules 31, 32 and 33 statements. Except in relation to matters that are within SARS' discretion and are not expressly made subject to appeal, the Tax Court gives its own decision on the merits of the case in place of SARS' decision. The tax appeal is thus a wide appeal involving a hearing afresh.

(ii) That in order for section 105 to apply, there must be in existence an assessment or decision as contemplated in section 104. Section 105 envisages that a taxpayer could notionally dispute an assessment in the High Court. Since there is no right of appeal from an assessment to the High Court, the phrase 'dispute an assessment' in section 105 cannot, in relation to potential High Court proceedings, mean to dispute by way of an appeal.

(iii) That what then were the ways in which a taxpayer could dispute an assessment in the High Court? The only two that occur to mind are review and declaratory applications. A taxpayer that seeks to have an assessment set aside on review 88 SATC 1 at 6 can properly be said to be disputing the assessment. The same is true where the taxpayer seeks a declaratory order on a question going to the correctness of an assessment.

(iv) That whether or not the taxpayer explicitly says so, it may appear from the papers that the purpose of a declaratory application is to attack an assessment. Unless the declaratory relief were purely academic (in which case it might be objectionable for that reason), the taxpayer would be seeking to deploy a favourable declaratory order either to compel SARS to amend the assessment or to bind the Tax Court. A court would look to the substance to see what the declaratory application is really about. In Barnard Labuschagne Inc v C:SARS 84 SATC 351 this court considered declaratory applications to be encompassed by section 105, even though that was not the focus of the case and the court did not hear oral argument.

(v) That the purpose of section 105 was that challenges to assessments that the High Court, but not the Tax Court, could entertain should ordinarily be excluded in favour of Chapter 9 appeals that only the Tax Court may entertain. The fact that the Tax Court did not have jurisdiction to entertain PAJA and legality reviews or grant declaratory orders may be relevant in assessing whether a section 105 direction should be given, but section 105 is applicable to such High Court proceedings.

(vi) That section 105 did not confer review or declaratory jurisdiction on the High Court. That was a pre-existing jurisdiction. However, and with the coming into force of section 105 in its amended form, that jurisdiction has been conditionally suspended – conditionally, because the suspension may fall away if the High Court gives a section 105 direction. Section 105 in its amended form enabled the High Court to lift the suspension by giving a direction and that was the plain and unambiguous meaning of the section. The High Court thus cannot, in matters falling within the scope of section 105, exercise the review or declaratory jurisdiction it has unless and until in a particular case it has given a section 105 direction. It followed that the High Court could not order production of a Rule 53 record until the question of its jurisdiction was resolved.

(vii) That a court must be competent to make whatever orders it issues; if the court lacks such competence, its order is a nullity. Rule 53 only finds application where review proceedings are instituted before a competent court. The Rule facilitates the raising of grounds of review and the proper performance by the court of its review function, but in order for the court to perform its review function it has to have the necessary authority. The object of Rule 53 cannot be achieved if the court lacked jurisdiction.

(viii) That until a section 105 direction is given, the High Court's jurisdiction is suspended. Since a court may not order the production of a Rule 53 record until the contested question of its jurisdiction is resolved, the High Court must first determine whether a section 105 direction should be given. If the direction is given, the court may then order production of the record. If a direction is refused, the court can plainly not order production of the record.

(ix) That section 105 prohibited an approach to the High Court unless a section 105 direction had been given. If a direction is refused, the effect is not merely dilatory. It will be apparent that a section 105 direction needs to be sought and adjudicated at the threshold. This did not mean that a preliminary stand-alone application was needed. The claim for a direction can be included in the notice of motion.

(x) That, however, if the coercive power of the High Court was needed before the main case was ready for hearing, the applicant would need to set the case down for a preliminary hearing on the claim for a direction. That would typically be the case if SARS declined to produce a Rule 53 record or refused to file papers on the merits in a review or declaratory application in the absence of a section 105 direction. Because this was in the nature of an interlocutory matter, the preliminary hearing should be expedited as far as possible, subject of course to 88 SATC 1 at 7 the way in which rolls are organised in the different Divisions of the High Court.

(xi) That SARS contended that a taxpayer seeking a section 105 direction must show that there were exceptional circumstances justifying its grant. The taxpayers submitted that this heightened standard was not justified. The court disagreed with the statement in Rappa SCA that an exceptional circumstances test was clear from the language, context, history and purpose of section 105. As to the language, the expression 'exceptional circumstances' did not appear in the section. It would thus have to be implied. Words cannot be read into a statute by implication unless the implication is ‘a necessary one in the sense that without it effect cannot be given to the statute as it stands’ or was ‘necessary in order to realise the ostensible legislative intention or to make the [statute] workable.’

(xii) That section 105 was workable and effect could be given to it without adopting a heightened exceptional circumstances test. The purpose of section 105 could likewise be achieved without that test, as appeared from what followed. As to context, there was nothing in the TA Act as a whole pointing to an exceptional circumstances test. On the contrary, the lawmaker was familiar with the statutory ‘exceptional circumstances’ test and employed it six times in the TA Act, five of those instances being in Chapter 9 itself. Yet the lawmaker chose not to use the same expression in section 105.

(xiii) That in the broader legislative context, section 7(2)(c) of PAJA empowers a court to exempt a party from exhausting an ‘internal remedy’ in ‘exceptional circumstances.’ To the extent that section 7(2) of PAJA might otherwise have applied, section 105 of the TA Act takes its place, and it was significant that the exceptional circumstances standard of section 7(2)(c) of PAJA had not been adopted.

(xiv) That as to the history of section 105, neither its initial formulation nor the extract quoted in Rappa SCA from the explanatory memorandum that accompanied the Tax Administration Laws Amendment Bill of 2015 cast light on the test to be applied by the High Court in deciding whether to give a section 105 direction.

(xv) That, as to purpose, the lawmaker had ordained that an appeal to the Tax Court should be what may conveniently be called the default forum for resolving disputes about assessments. In other words, such disputes must be dealt with on appeal to the Tax Court unless there was reason to justify a different course. However, there was no need to set the test for determining whether a different course was justified at the level conveyed by the phrase ‘exceptional circumstances.’ The High Court’s discretion to give a section 105 direction was not fettered in this way. While it was unnecessary to gloss the language of section 105, Judges would remain true to the purpose of section 105 by asking themselves whether recourse to the High Court rather than the Tax Court was appropriate or whether there was good cause to approach the High Court rather than the Tax Court.

(xvi) There was a final overarching consideration not mentioned in the Supreme Court of Appeal judgments, namely the injunction in section 39(2) of the Constitution. When interpreting any legislation, a court ‘must promote the spirit, purport and objects of the Bill of Rights.' Section 105 of the TA Act implicated the right to just administrative action guaranteed by section 33 of the Bill of Rights, because it placed a restriction on the right of litigants to pursue the primary remedy for unjust administrative action, namely judicial review. Section 105 also implicated the right of access to courts guaranteed by section 34 of the Bill of Rights, because it placed a restriction on the right of litigants to have disputes adjudicated in review and declaratory proceedings. For this reason, an interpretation that minimised rather than maximised the restriction should be preferred.

(xvii) That, in summary, the test for granting a section 105 direction was not whether exceptional circumstances were present but whether there was a justification for departing from the default remedy. Such justification could fairly be tested by 88 SATC 1 at 8 asking whether the departure was appropriate or whether there was good cause for the departure.

(xviii) That section 105 did not specify the factors to which the High Court must have regard when deciding whether to give a direction under that section. The High Court had a wide discretion. It was neither possible nor desirable to lay down hard and fast Rules on how Judges should exercise that discretion. Each case would depend on its own facts. We cannot anticipate the infinite variety of circumstances that may present themselves. This said, it would not be amiss to provide some guidance, since the five cases before the court raise a range of typical factors.

(xix) That since a section 105 direction was only needed if an assessment had already been issued, a factor that will be relevant both to review and declaratory cases was whether the taxpayer had lodged an objection to the assessment and whether the objection had been disallowed. In a review case, the process of objection is an internal remedy for purposes of section 7(2) of PAJA. If the taxpayer has not lodged an objection and there are no exceptional circumstances to exempt the taxpayer from doing so, it is difficult to see how granting a section 105 direction would be appropriate. In a declaratory case, there is no statutory obligation to exhaust internal remedies. Nevertheless, since declaratory relief is a discretionary remedy, the taxpayer seeking a section 105 direction would need to satisfy the High Court that it should not be required to follow the statutory process before invoking the High Court's jurisdiction.

(xx) That an important factor that may arise both in review and declaratory cases was judicial aversion to piecemeal adjudication because of its potential to cause delay, multiply costs and result in the inefficient use of scarce judicial resources. Where a taxpayer wished to pursue a review or declaratory case in the High Court while also pursuing other grounds of appeal in the Tax Court, there was an obvious danger of piecemeal adjudication. The tax appeal may need to be held in abeyance while the High Court proceedings are finalised, including appeals from the High Court's judgment. If the High Court proceedings were ultimately determined in favour of the taxpayer in the final appellate court, the need to continue with the Tax Court appeal may fall away. But if the taxpayer ultimately failed in the High Court proceedings, the tax appeal will need to resume after a hiatus of several years. The Tax Court's judgment might then itself go through the appellate hierarchy.

(xxi) That if the substance of the point that the taxpayer wishes to pursue in the High Court could be adjudicated in the Tax Court, the avoidance of piecemeal adjudication will be a powerful factor against giving a section 105 direction. If all the issues are before the Tax Court, that court can decide how best to manage the litigation and whether it should allow any particular point to be adjudicated separately from others.

(xxii) That in considering factors that bear on the exercise of the section 105 power in review cases, there is a preliminary question as to the ambit of the grounds of appeal a taxpayer can raise in an appeal to the Tax Court. Can a taxpayer challenge an assessment on a ground other than one going to the correctness of the assessment? What is the position where a component of an assessment is the result of the exercise by SARS of a discretionary power?

(xxiii) That, turning to relevant factors in review cases, the court distinguished between cases where the assessment:

(a) has no discretionary component;

(b) has a discretionary component that is expressly subject to appeal;

(c) has a discretionary component that is not expressly subject to appeal.

(xxiv) That where no discretion was involved, the closer a review ground was to a permissible ground of appeal in the Tax Court, the less likely it was that granting a direction will be appropriate. Review grounds of this kind would typically include complaints that:

(a) the assessment was materially influenced by an error 88 SATC 1 at 9 of law or fact;

(b) irrelevant considerations were taken into account or that relevant considerations were not considered;

(c) the assessment was not authorised by the taxing provisions on which SARS relied;

(d) the assessment was not rationally connected to the information before SARS or to the reasons given by SARS for the assessment; or

(e) the assessment was so unreasonable that no reasonable person could have exercised the power to issue it. Complaints of this kind in essence assert that the assessment is wrong, and these are matters that the Tax Court can adequately address. The taxpayer's prospects of success in a review of this kind would not carry much weight, because they can be fully vindicated in a hearing before the Tax Court.

(xxv) That where the taxpayer's proposed grounds of review are not concerned with the merits of the assessment in the above sense, but with prior procedural irregularities, the court assumed that the Tax Court did not have the power to review and set aside the assessment. The High Court should, however, take into account that in a tax appeal the taxpayer will have the fullest opportunity to be heard. To that extent, the failure by SARS to accord the taxpayer the necessary procedural fairness before the assessment was issued can be cured: not only because the taxpayer will receive full procedural fairness in the Tax Court, but because any error on the merits attributable to SARS' lack of procedural fairness can be corrected.

(xxvi) There was no inflexible Rule that the unfairness of an initial decision cannot be cured by a full and fair appeal. To return to section 105, the High Court would need to consider whether in the circumstances it should give preference to the curative remedy in the Tax Court or the review remedy in the High Court. In non-discretionary matters, the curative remedy of the Tax Court might in general be regarded as adequate, if not better than a review.

(xxvii) That the High Court could also properly consider the practical utility of a review remedy. If the assessment were set aside and remitted to SARS in order for the latter to comply with procedural requirements, would it be likely to affect the outcome? The court said this in full awareness that the no-difference principle had been rejected in other contexts. Here, however, the question arose not in relation to a substantive ruling on lawfulness but in relation to the question whether a discretionary direction should be given to allow the review to proceed. The context is also different from the typical disciplinary or review case, because of the unique procedures in Chapter 9 of the TA Act and the availability of a fresh hearing before the Tax Court. In terms of these procedures, the taxpayer and SARS were not confined to a single opportunity to state their respective positions.

(xxviii) That insistence on procedural fairness at first instance has value in itself, even though the taxpayer has second and third bites at the cherry through an objection and a tax appeal. If SARS were to come under the impression that procedural irregularities would never be scrutinised in review proceedings, administrative fairness within SARS might become lax. This might tend to give rise to a greater number of wrong decisions. And although a taxpayer with sufficient resources can appeal a wrong decision, not all taxpayers have the resources or energy to pursue an appeal. So, the High Court might appropriately in a given case decide that the alleged procedural irregularity should be permitted to be taken on review. The more egregious or wilful the departure from the required procedure, the more likely it is that such a course would be appropriate. Prospects of success may also play a role in cases of this kind.

(xxix) That where the proposed review was based on serious malfeasance, for example corruption or bad faith, a section 105 direction may well be appropriate, provided that these grounds of review were properly substantiated in the founding affidavit. A taxpayer should not be encouraged to make flimsy allegations of this kind simply to shoehorn its case into the High Court.

(xxx) That where the taxpayer has an express entitlement to object to and appeal against a discretionary decision of SARS, the relevant factors are likely to be much the same as those set out above in relation to non-discretionary cases. However, there may be a need to distinguish between a discretion 'in the strict sense', a so-called 'true' discretion (where there may be more than one permissible outcome on identical facts) and a discretion 'in the loose sense' (where there is, in the eyes of the law, only one right answer, even though the decision-maker must have regard to a 'number of disparate and incommensurable features' in coming to a decision).

(xxxi) That in the case of a discretion in the loose sense, there is only one right answer, and a full right of appeal to the Tax Court stands essentially on the same footing as an appeal in a non-discretionary case. In the case of a true discretion, however, SARS and the Tax Court could notionally and permissibly reach different outcomes. The taxpayer may say that before it subjects itself to the Tax Court's discretion (which might go against the taxpayer) it wishes to have a proper exercise of the discretion by SARS (since this might go in favour of the taxpayer). If a plausible case for differing outcomes were made out in the founding papers, this might be a reason for the High Court to allow the review to proceed.

(xxxii) That the court had assumed that where a discretionary component of an assessment is not expressly subject to appeal, the Tax Court may, when hearing an appeal against an assessment, perform a quasi-review function in relation to the discretionary component. Since prevailing case law indicated that the grounds of appeal in this respect were coextensive with review grounds, it may be difficult for the taxpayer to persuade the High Court to grant a section 105 direction. There would need to be some added benefit achievable in a High Court review that could not be achieved in a Tax Court quasi-review. Some of the factors mentioned below in relation to declaratory applications might be relevant here.

(xxxiii) That a declaratory application may be justified where the taxpayer is raising a pure point of law. When a section 105 direction is sought for leave to pursue such an application, the High Court will need to satisfy itself in the first place that the point is indeed a pure point of law. If there are factual disputes, the Tax Court is the obvious forum for dealing with the matter.

(xxxiv) That even if the declaratory application concerned a pure point of law, the Tax Court had the power to decide such a point in the course of determining an appeal against the assessment, even though it could not grant relief in the form of a declaratory order. A taxpayer seeking to pursue the point in the High Court may thus need to show something more than that the point was one of law. Factors that may (not necessarily will) justify High Court proceedings are that the point of law:

(a) is one of general importance so that a judgment with precedential value will have public utility; or

(b) did not apply only to existing assessments but will affect the tax treatment of the taxpayer on an ongoing basis.

(xxxv) That the High Court would also need to take into account that in Tax Court proceedings SARS was protected against adverse costs unless its grounds of assessment were found to be unreasonable. The taxpayer has a like protection. The legislative policy behind this protection might be thwarted if taxpayers were too readily granted permission to pursue declaratory cases in the High Court. This factor could be neutralised if the taxpayer were to forego a request for costs in the High Court or to subject itself to the test that would have been applied by the Tax Court in terms of section 130(1) of the TA Act.

(xxxvi) That in the light of judicial disapproval of piecemeal adjudication, it will be important for the High Court to know whether the point of law is the only basis on which the taxpayer challenges an assessment. If there are other challenges which can only properly be pursued in the Tax Court, it is unlikely to be 88 SATC 1 at 11 appropriate to permit a law point, which could be determined by the Tax Court along with the other grounds, to be adjudicated separately in the High Court.

(xxxvii) That where an assessment has not yet been issued, section 105 is not directly applicable. However, because review and declaratory remedies are discretionary, the High Court could properly decline to entertain such an application if an assessment were in the offing and if, upon the issuing of the assessment, a section 105 direction would not be appropriate.

(xxxviii) That if the High Court considered that the taxpayer was 'jumping the gun' in order to avoid the direct application of section 105, the High Court might well be justified in declining to entertain the case. SARS' attitude might be a relevant factor. Other relevant factors would include (a) the time likely to elapse before an assessment is issued; (b) the need for a more urgent determination than could be achieved by following the processes of the TA Act and the Rules. If a potential assessment will be disputed solely on a point of law, and if that point crystallises sufficiently early, the High Court might consider it unduly burdensome to require the taxpayer to wait for an assessment and then to go through the processes of the TA Act and the Rules.

(xxxix) That the question here was whether the High Court's power to grant or refuse a section 105 direction was a discretion in the true sense or only in the broad sense. This affected the test for appellate interference. If the power is a true discretion, a court may only interfere on appeal if the discretion was not exercised judicially; or was influenced by wrong principles or a misdirection on the facts; or if the court of first instance reached a result that could not reasonably have been reached by a court properly directing itself to all the relevant facts and principles. If the power is a discretion in the broad sense, the court on appeal can substitute its own evaluation for that of the court of first instance, though broader policy considerations may mandate a measure of caution before the appellate court intervenes.

(xl) That factors that point in the direction of a true discretion are that the discretion:

(a) is procedural in nature;

(b) is of a kind where legitimate differences of opinion on the appropriate decision may occur;

(c) may be exercised at any time during the proceedings, in other words not only at the end as part of a final judgment. Another factor is whether it would be inconsistent with the policy of the law to permit unrestricted appeals against the exercise of the power in question.

(xli) That in the court's view the power to grant or refuse a section 105 direction is a true discretion. It is procedural in nature, since it regulates access to the High Court. At least in some instances, legitimate differences of opinion might be expected as to whether a direction should be granted. Importantly, the direction must be granted or refused at the threshold of proceedings. Although that may also be the end of proceedings if a direction is refused, if the direction is granted it marks only the beginning of proceedings. It is undesirable that such a direction should be subject to unrestricted attack on appeal. One would not want to encourage preliminary appeals which require the main case to be held in abeyance. Nor would one want to find, at the end of a review or declaratory case, that the proceedings are too readily nullified by a successful appeal against the granting of the section 105 direction.

(xlii) That it followed that the test for appellate interference is the test applicable to true discretions.

6.2. United Manganese of Kalahari (Pty) Ltd v C:SARS and four other cases – UMK (88 SATC 1)[2]

UMK, a manganese miner, had furnished its transfer pricing report to SARS for the 2011, 2012 and 2013 years of assessment and in March 2017 SARS had begun an audit into UMK's tax affairs.

The audit concerned transactions between UMK and 'offshore connected parties' and SARS had made requests for information which UMK had supplied.

SARS wrote to UMK in terms of section 42(2)(*b*) of the TA Act identifying transfer pricing adjustments which SARS was minded to raise by way of additional assessments for UMK's 2011, 2012 and 2013 years of assessment.

The transactions comprised (*a*) an ore supply agreement between UMK and Afro Minerals Trading Limited (AMT), a Swiss company; (*b*) an agency and marketing agreement between UMK and Kalahari Trading AG (KT), also a Swiss company;

[2] CC

and (*c*) a technical services agreement between UMK and Renova Manganese Investments Limited (RMI), a Cypriot company and SARS' view was that UMK was a 'connected person' in relation to each of AMT, KT and RMI.

The proposed transfer pricing adjustments were to be made in terms of section 31 of the IT Act.

The expression 'connected person' was defined in section 1 of the IT Act and in relevant part par. (*d*) (*v*A).

It was not in dispute between the parties that RMI, MMC, Tromata, AMT and KT were part of the same group of companies and were thus connected persons in relation to each other (par. *d*(i) of the definition). It was also not in dispute that UMK and RMI were connected persons in relation to each other, because RMI held at least 20% of the shares in UMK and no shareholder in UMK held the majority voting rights (par. (*d*)(v) of the definition).

What was disputed was whether UMK was a connected person in relation to AMT and KT and this depended on par. (*d*)(*v*A) of the definition.

In the section 42(2)(*b*) notice SARS contended that RMI and MMC respectively 'managed or controlled' KT and AMT respectively, because a Mr Fabrizio Ferrari was at all material times the sole director of RMI, MMC, AMT and KT. SARS stated that this common directorship enabled RMI to manage or control KT, and MMC to manage or control AMT (First Thesis).

On the First Thesis UMK was a connected person in relation to AMT and KT.

The section 42(2)(*b*) notice also set out SARS' views about the arm's length pricing that would have prevailed between UMK on the one hand, and AMT, KT and RMI respectively on the other, had they been independent persons. In each case, so SARS provisionally concluded, AMT, KT and RMI had earned higher than arm's length returns, with a resultant tax benefit to UMK through reduced taxable income.

In July 2019 UMK's attorneys had sought clarification on the section 42(2)(*b*) notice. SARS was asked to provide the factual basis for the First Thesis. SARS was also asked to provide an analysis of its interpretation of the phrase 'managed or controlled' and its application to the facts.

On 30 August 2019 UMK's attorneys furnished UMK's response to the section 42(2)(*b*) notice. UMK gave information as to the persons who were directors of RMI, MMC, AMT and KT during the three years of assessment and the dates on which they were appointed or resigned, as the case may be. This information, if correct, rendered the First Thesis untenable. UMK also disputed SARS' views on arm's length pricing and tax benefit.

On 31 January 2020 SARS issued additional assessments for UMK's 2011, 2012 and 2013 tax years and provided a detailed explanation in accordance with section 96(2)(*a*) of the TA Act. In the section 96(2)(*a*) notification, SARS advanced a different basis for the conclusion that UMK was a connected person in relation to AMT and KT. As appeared from SARS' answering affidavit in the review, SARS changed its stance because it accepted the facts which UMK had provided in contradiction of the First Thesis. SARS now contended that UMK and RMI were not only connected persons in relation to each other but that RMI 'managed or controlled' UMK by virtue of the rights conferred on RMI in the technical services agreement read with the UMK shareholders agreement. Because RMI managed or controlled UMK, and because RMI was a connected person in relation to AMT and KT (they belonged to the same group of companies), UMK was also a 'connected person' in relation to AMT and KT (Second Thesis).

On 24 March 2020, and having not yet filed an objection, UMK issued a High Court application for declaratory and review relief. In its notice of motion, UMK sought, 'insofar as it may be required', a section 7(2) exemption (PAJA) and a section 105 direction. Substantively, UMK sought an order reviewing and setting aside the additional assessments and an order declaring that in par. (*d*)(*v*A) of the 'connected person' definition 'managed or controlled' means the exercise of actual *de facto* management or the exercise of actual *de facto* control.' The essence of the case for review was that SARS should have afforded UMK the opportunity of commenting on the Second Thesis before issuing the additional assessments, in other words, that a further section 42(2)(*b*) notice should have been issued.

SARS opposed the High Court application, including the request for a section 7(2) PAJA exemption and section 105 direction. SARS delivered a Rule 53 record, UMK filed a supplementary founding affidavit, after which opposing and replying papers were delivered.

In June 2020, and at UMK's request, SARS agreed to extend the period for objection until the finalisation of the High Court application and any ensuing appeals.

The High Court gave judgment on 30 September 2021, dismissing the application with costs, including the costs of two counsel. The judgment was not altogether clear. It appeared that the High Court refused to grant a section 7(2) PAJA exemption. The

High Court stated, incorrectly, that UMK had not sought a section 105 direction. The High Court nevertheless considered the merits. In regard to the review, the High Court considered that SARS had complied with section 42(2)(*b*) of the TA Act. Section 42 did not, in the High Court's opinion, impose on SARS a duty to issue a fresh section 42(2)(*b*) notice upon receiving the taxpayer's response. In regard to the declaratory relief, the High Court set out at some length the contentions of the parties but did not reach a conclusion. The High Court did hold, however, that the declaratory relief was not competent in view of the fact that UMK had not objected to the assessments.

The High Court granted UMK leave to appeal to the Supreme Court of Appeal, which delivered judgment on 24 March 2023. The Supreme Court of Appeal quoted two paragraphs from the High Court's judgment in which that court said that UMK had not sought a section 105 direction and that a proper case needed to be made out for such a direction. The Supreme Court of Appeal said, with reference to *Rappa SCA* (85 SATC 517), that the High Court could not be faulted. The Supreme Court of Appeal did not address the merits of the review and declaratory relief. The appeal was dismissed with costs, including the costs of two counsel.

On 27 January 2023, shortly before the appeal was argued in the Supreme Court of Appeal, UMK filed its objection to the assessments. There was no evidence as to whether SARS had Ruled on the objection and, if so, what its ruling was or whether there was as yet an appeal pending in the Tax Court and, if so, what stage the appeal had reached.

<u>As to the appeal of United Manganese of Kalahari (Pty) Ltd v Commissioner for South African Revenue Service</u>

Judge Rogers held the following:

(i) That UMK could only pursue the review application if it obtained a section 105 direction. The declaratory relief was in substance an attack on the additional 88 SATC 1 at 12 assessments and thus also required a section 105 direction. In regard to the declaratory relief, the High Court's reliance on Medox Ltd v Commissioner for South African Revenue Service 77 SATC 233 was misconceived. In Medox the disputed assessments had long since become final and could thus no longer be impugned. In the present case, by contrast, the High Court heard the matter at a time when the period for objection had been indefinitely extended. The additional assessments had not become final in terms of section 100 of the TA Act. UMK was clearly going to deploy a favourable declaratory order in order to impeach the additional assessments, either by compelling SARS to act on the declaratory order by withdrawing the assessments or by relying on the High Court's order in the Tax Court proceedings.

(ii) That at the time of the High Court proceedings, UMK also needed a section 7(2) exemption under PAJA. Whether there was still a need for a section 7(2) exemption depended on whether SARS had Ruled on UMK's belated objection. Unless SARS was given an extension, it would have Ruled on the objection in April or May 2023. If SARS had already Ruled on the objection, the dilatory effect of section 7(2) of PAJA had lapsed. The court focused on section 105. If UMK was not entitled to a section 105 direction, it would almost certainly not be entitled to a section 7(2) exemption, given that the latter exemption imposed the heightened standard of exceptional circumstances.

(iii) The High Court and the Supreme Court of Appeal erred when they said that UMK had not sought a section 105 direction. It thus fell to this court to decide whether UMK should have been given such a direction. This needed to be considered separately in relation to the review and the declaratory relief.

(iv) That the basis of the review was SARS' alleged non-compliance with section 42(2)(b) of the TA Act. SARS did, of course, comply with its obligations to issue a notice under that subsection and UMK responded fully. The criticism was that SARS then switched from the First Thesis to the Second Thesis without issuing a revised section 42(2)(b) notice. UMK's complaint was thus one of non-compliance with a provision aimed at affording taxpayers procedural fairness.

(v) That the court accepted that the Second Thesis differed materially from the First Thesis. The court assumed in UMK's favour, without finally so deciding, that when SARS intended to assess on a materially different basis to the one set out in a section 42(2)(b) notice, it should give the taxpayer a fresh section 42(2)(b) notice, unless the revised basis accorded with the taxpayer's response to the initial notice. Although UMK's response to the section 42(2)(b) notice negatived the First Thesis, the response did not itself provide a basis for the Second Thesis. UMK thus had a plausible case for review based on procedural unfairness.

(vi) That the question was whether this procedural misstep by SARS needed to be vindicated in review proceedings or whether the curative effect of a tax appeal sufficed. In the court's view, a tax appeal sufficed. The question whether UMK was a connected person in relation to AMT and KT was not a discretionary matter. Either the test was satisfied or it was not. UMK will thus not be hamstrung, in a tax appeal, by the fact that its contentions on the Second Thesis were not before SARS when the additional assessments were issued.

(vii) That, moreover, the right of response in terms of section 42(3) was not the only opportunity for UMK to respond to the Second Thesis. It could do so in an objection to the additional assessments. To the extent that its contentions prevailed (through allowance), UMK would have no cause of complaint. To the extent that its contentions failed (through disallowance), one would have evidence that those same contentions would in all likelihood have failed if they had been put up in response to a fresh section 42(2)(b) notice. At the time of the High Court proceedings, UMK had not yet filed its objection and had thus not yet availed itself of this second opportunity. This failure, and the need for UMK to demonstrate exceptional circumstances for a section 7(2) exemption, counted heavily 88 SATC 1 at 13 against UMK. UMK did subsequently file its objection, and we must assume that in its objection it set out its contentions on the Second Thesis and those contentions have either been accepted or rejected by SARS.

(viii) That SARS' failure to issue a fresh section 42(2)(b) notice had not been shown to be a deliberate flouting of its procedural obligations. SARS could reasonably have thought that it had done its duty by issuing the first section 42(2)(b) notice and by taking UMK's representations into account when deciding to issue the additional assessments. In a letter to SARS dated 18 September 2019, in which ENS, its attorneys, conveyed UMK's reluctant agreement to a further extension of the period of prescription to 31 January 2020, ENS had stated that SARS had all the necessary information required to make a final decision in respect of the outcome of the audit.

(ix) That the court doubted that the question raised by the declaratory application was suitable for declaratory relief, at least not in the form claimed by UMK. The word 'control' often presented difficulties in statutory interpretation. UMK contended for a narrow interpretation and proposed in effect to substitute the actual words in the definition, 'managed or controlled' with other words, 'the exercise of actual de facto management or the exercise of actual de facto control.' The substituted words did not necessarily resolve the imprecise boundaries inherent in the expression 'managed or controlled.' What rendered management or control 'de facto'? How frequent or extensive did the 'exercise' of powers of management or control have to be to constitute 'the exercise' of such powers for purposes of UMK's substituted wording? Did intervention on one or two occasions during the course of a year amount to 'the exercise' of management or control?

(x) That this led to another consideration. One cannot be sure that the section 96(2) notice constituted SARS' final formulation of its case. It was clear from the notice that SARS took the view that it was sufficient that RMI had the power to exercise de facto management or control of UMK, even if RMI did not actually exercise the power. SARS would not be precluded, however, from alleging in its Tax Court pleadings that RMI actually exercised the power from time to time. It was thus desirable that the interpretation and application of the expression 'managed or controlled' should be decided once all the relevant facts were known. The question was not suitable for decision on a premature and abstract basis.

(xi) That, quite apart, there was the question of piecemeal adjudication. The Tax Court was capable of deciding the legal question raised by the declaratory relief. If it were suitable for adjudication in advance of other issues, this could be done. In those circumstances it would not be appropriate to hive off one legal question for decision by the High Court. Importantly, UMK's challenge to the additional assessments was not confined to the law point raised by the declaratory application. UMK also took issue with SARS' case on arm's length pricing and tax benefit, and these were matters that could only be decided in the Tax Court.

(xii) That, moreover, the declaratory relief did not challenge the proposition that RMI and UMK were connected persons in relation to each other, so the transfer pricing adjustments that SARS had made in respect of the technical services agreement between UMK and RMI would have to be decided by the Tax Court in any event.

(xiii) That in those circumstances, it would not be appropriate to hive off one legal question for decision by the High Court. More than three years had passed from the date of the additional assessments to the date on which the Supreme Court of Appeal gave judgment, and the case was only heard in this court more than four and a half years after the date of the additional assessments. If the Supreme Court of Appeal or this court were to have adjudicated the declaratory application on its merits and dismissed it, the Tax Court appeal would then have 88 SATC 1 at 14 to wend its own course to trial, with the potential of further appeals on other issues.

(xiv) That although leave to appeal should be granted, the appeal must fail because the granting of a section 105 direction was not appropriate. The actual orders granted by the High Court and Supreme Court of Appeal thus stood, but for the reasons stated in this judgment. To the extent that the High Court expressed views on the merits of the case, its judgment will not be binding on the Tax Court.

(xv) That in regard to costs, UMK was in part seeking to pursue a review. Review proceedings generally attract Biowatch protection where a private party loses against an organ of state. Biowatch should also apply to a request for a section 105 direction to bring a review.

(xvi) That since the interpretation and application of section 105 have only now been clarified by way of this judgment, UMK's application in the High Court cannot be said to have been frivolous, improper, instituted without sufficient ground or otherwise manifestly inappropriate. Taxpayers should be warned, however, that an application such as UMK's might well in the future be so branded, now that this court has provided clarity on the interpretation and application of section 105.

(xvii) That while UMK's application for review relief benefitted from Biowatch, its application for declaratory relief did not and in the circumstances it would be just for UMK to pay 50% of SARS' costs in this court, including the costs of two counsel.

6.3. United Manganese of Kalahari (Pty) Ltd v C:SARS and four other cases – Rappa (88 SATC 1)[3]

Rappa was a gold exporter and in March 2019 SARS obtained an order in terms of sections 50 and 51 of the TA Act for an inquiry into suspected tax non-compliance by various players in the gold supply chain. Rappa was not one of the parties to be investigated, but two directors of the company were subpoenaed to give evidence.

SARS began an audit into Rappa's VAT affairs in March 2020. Information was requested and supplied. On 11 December 2020 SARS sent Rappa a notification in terms of section 42(2)(b) of the TA Act. This was a lengthy document and, in essence, SARS' conclusion was that Rappa was complicit in an abuse of the provisions of the VAT Act.

[3] CC

In its section 42(2)(b) notice, SARS set out particulars of Rappa's transactions with ten vendors for the VAT tax periods January 2019 to June 2020. SARS proposed to disallow Rappa's input tax deductions of R4 094 169 764 on these transactions.

Rappa was given an opportunity to respond to the proposed adjustments, to which would be added interest and a 10% penalty in terms of section 39 of the VAT Act. Rappa was also invited to give reasons why SARS should not raise USP in terms of sections 222 and 223 of the TA Act and Rappa provided its response on 29 January 2021.

On 29 March 2021 SARS decided to raise additional assessments and issued a notice in terms of section 96(2). SARS stated that it was limiting the additional assessments to Rappa's transactions with three of the ten vendors mentioned in the section 42(2)(b) notice, adding that there existed evidence or strong suspicions in respect of the other seven vendors as well. The section 96(2) notice was again a lengthy document and it included a lengthy response to Rappa's representations on 29 January 2021.

The disallowed input tax deductions totalled R2 848 497 753. SARS also levied USP at 75%, yielding R2 136 373 314, giving total additional assessments of R4 984 871 067. The grounds of assessment were essentially the same as those foreshadowed in the section 42(2)(b) notice.

On 28 April 2021, and without having filed an objection to the assessments, Rappa launched a High Court application. Part B of the notice of motion sought the review and setting aside of the additional assessments. Rappa did not seek a section 7(2) exemption in terms of PAJA or a section 105 direction in terms of the TA Act. Part A of the notice of 88 SATC 1 at 15

motion claimed urgent interim relief, namely that, pending the determination of the review, SARS be interdicted from taking any steps arising from the assessments, including steps aimed at collecting money or enforcing the assessments.

The review relief was claimed in terms of PAJA, alternatively the principle of legality.

On 13 May 2021 SARS filed an answering affidavit in respect of Part A. With a view to disposing of Part A, SARS offered an undertaking that it would not institute collection procedures pending the outcome of the review. SARS nevertheless responded to the whole of the founding affidavit. It pointed out that Rappa had not sought a section 7(2) exemption, and that it needed a section 105 direction in order to pursue the review.

On 20 May 2021 Rappa filed a replying affidavit, limited to Part A. Rappa contended that an objection under the TA Act was not an internal remedy in relation to the review, and that the High Court could in any event condone Rappa's failure to exhaust an internal remedy. Rappa alleged that section 105 of the TA Act did not preclude a review application, since the review was directed at the lawfulness of the decision to issue the assessments, not the correctness of the assessments. If section 105 were, however, held to be applicable, Rappa asked the High Court to direct that the issues raised in its application, and in particular the urgent relief claimed in Part A, could be pursued. In the event, the Part A relief was resolved in terms of the undertaking by SARS.

On 3 June 2021 Rappa launched an application in terms of Rule 30A of the Uniform Rules to compel SARS to deliver the record contemplated in Rule 53(1)(b).

SARS' opposition to this application was based on section 105 of the TA Act. With regard to the scope of a tax appeal, SARS stated that if SARS had misdirected himself in law or fact, the Tax Court could substitute its findings for those of SARS. The appeal, among other things, constituted a review of SARS' decision. The Tax Court could analyse whether SARS had considered all the relevant facts and applied its mind, and could 'pronounce on the legality of an assessment, and whether SARS properly applied his mind or acted in a mala fide and biased manner.' The Tax Court was said to possess 'not only the powers of [a] court of review in the legal sense, but also the functions of a court of appeal with additional privileges and can deal with the whole matter afresh as a court of first instance'. SARS contended that Rappa needed a direction in terms of section 105 before becoming entitled to the Rule 53 record.

In its replying affidavit in the Rule 30A proceedings, Rappa persisted with its stance concerning section 7(2) of PAJA and section 105 of the TA Act and contended that it had an unqualified right to the Rule 53 record. However, Rappa now took the precaution of giving notice that at the hearing of the Rule 30A application it would seek an amendment to its Rule 30A notice of motion so as to include a claim, insofar as might be necessary, for a section 105 direction.

The High Court granted the amendment to the notice of motion so as to insert a prayer for a section 105 direction but postponed consideration of that prayer, ruling that it should be heard together with the main review. In the meanwhile, the High Court ordered SARS to furnish the Rule 53 record and to pay the costs of the Rule 30A application.

SARS sought leave to appeal to the Supreme Court of Appeal, which the High Court granted.

According to the High Court's judgment granting leave to appeal, the Judge's attention had not, in argument on the Rule 30A application, been drawn to the Constitutional Court's judgment in Competition Commission of South Africa v Standard Bank of South Africa Limited and related matters 2020 (4) BCLR 429 (CC), which held that if a review court's jurisdiction was contested, the jurisdictional issue must be decided before any order in the review proceedings (including an order for the production of the Rule 53 record) is made. That case, however, took centre stage when leave to appeal was argued and it was the main basis on which the High Court granted leave.

The Supreme Court of Appeal reversed the High Court's decision, holding that section 105 deprived the High Court of jurisdiction unless and until a section 105 direction was granted. The Supreme Court of Appeal placed reliance in that regard on the Constitutional Court's judgment in Standard Bank, supra and stated that the Tax Court's wide power of revision included the power to determine the legality of an assessment on grounds of review, referring in that regard to KBI v Transvaalse Suikerkorporasie Bpk 47 SATC 34 and South Atlantic Jazz Festival (Pty) Ltd v C:SARS 77 SATC 254.

The Supreme Court of Appeal was not willing to entertain an argument that it should grant a section 105 direction if one was needed. This was because the High Court had declined to grant a section 105 direction as part of its decision on the Rule 30A application, and Rappa had not cross-appealed such refusal.

The Supreme Court of Appeal thus upheld the appeal with costs and replaced the High Court's order with one dismissing the Rule 30A application with costs.

Meanwhile, on 2 June 2021, Rappa had filed an objection to the assessments. This was slightly more than two months after it launched the review, and the day before it served its Rule 30A application. The introductory part of the objection repeated Rappa's contention that the procedures in Chapter 9 of the TA Act were not of application in relation to the review. The review, if successful, would be dispositive of the matter, including the additional assessments. Rappa thus required that SARS' consideration of the objection be stayed pending the outcome of the review.

In its answering affidavit in the Constitutional Court, SARS stated that on 4 November 2021 it had disallowed Rappa's objection. Whether Rappa had changed its mind or SARS had acted unilaterally did not appear. Anyway, Rappa filed a notice of appeal to the Tax Court. SARS' affidavit did not indicate whether, before filing its tax appeal, Rappa had availed itself of Rule 6 of the Tax Court Rules by requesting reasons for the assessments so as to clarify matters which were said to be vague, confusing or contradictory. The pleadings in the tax appeal had closed, several pre-trial conferences had taken place and the parties had exercised their right to call for discovery.

<u>As to the appeal of Rappa Resources (Pty) Ltd</u>

Judge Rogers held the following:

(i) That in the light of the court's analysis of section 105, Rappa needed and still needs a section 105 direction if it wishes to pursue the review. Counsel for Rappa argued that this was not so, because Rappa was not seeking to review the assessments. Rappa was targeting SARS' prior decision in terms of section 92 of the TA Act in terms of which SARS was 'satisfied' that Rappa's self-assessments did not reflect the correct application of the VAT Act. Counsel acknowledged that this was a new way of putting Rappa's case. It was at odds with Rappa's notice of motion in the High Court, which sought a review of SARS' decision to issue the assessments and the setting aside of the assessments.

(ii) That, in any event, counsel's argument was based on a false dichotomy. Section 92 conferred a single power, namely, to issue an additional assessment. Apart from the fact that section 92 conferred no discretion on SARS, the fact that SARS must be satisfied that the original assessment was incorrect as a prerequisite for issuing an additional assessment did not mean that the state of being satisfied was a separate reviewable decision. Absent an assessment, SARS' state of being satisfied had no external effect and was irrelevant. The additional assessment was the external manifestation of SARS' view that the original assessment was wrong.

(iii) That where the exercise of a statutory power was dependent on the decision-maker being satisfied of something or holding a particular opinion, the satisfaction or opinion was said to be a 'jurisdictional fact' for the exercise of the power. If an aggrieved party considered that the satisfaction or opinion was absent or was defectively arrived at, the review is directed at the resultant 88 SATC 1 at 17 exercise of the power, on the basis that the jurisdictional fact contemplated by the statute was not satisfied. If a taxpayer could target SARS' 'satisfaction' as a separate act, section 105 of the TA Act would be a dead letter.

(iv) That because the High Court's review jurisdiction was suspended in the absence of a section 105 direction, the High Court did not have the power to order SARS to deliver a Rule 53 record while at the same time deferring a decision as to whether a section 105 direction should be given.

(v) That the Supreme Court of Appeal thus came to the right conclusion on this question. The High Court might also have done so if its attention had been drawn to this court's judgment in Standard Bank, supra. As this court's judgment in Standard Bank, supra, made plain, a review applicant needed to establish the review court's jurisdiction in its initial founding papers. Rule 53(1)(b) of the Uniform Rules did not sanction a fishing expedition. It permitted a supplementation of a review case properly made out in the founding papers. In order to properly make out a review case, the jurisdiction of the review court must be established. If the information known to the taxpayer when it launched its review did not justify the granting of a section 105 direction, it cannot insist on obtaining a record in the hope that something will emerge justifying the exercise of jurisdiction by the High Court.

(vi) That the Supreme Court of Appeal, having correctly decided that the High Court could not order SARS to produce the Rule 53 record in the absence of a section 105 direction, declined to entertain a request for a section 105 direction because Rappa had not cross-appealed. Technically, that was right. On the assumption that this court, unlike the Supreme Court of Appeal, is not hamstrung by the absence of a cross-appeal, the question was whether the court should now decide whether Rappa was entitled to a section 105 direction.

(vii) That in the court's view it should not. The court would be undertaking the analysis at first instance, since the question had not yet been considered on its merits by the High Court or the Supreme Court of Appeal. The question was properly one for the High Court. If Rappa wished to pursue the review, it may enrol the application for a preliminary ruling on section 105. That question was obviously not res judicata (already decided), as no court had yet considered it.

(viii) That Rappa had also needed a section 7(2) PAJA exemption. However, it appeared from SARS' affidavit in this court that the process of objection had been exhausted. The need for an exemption had thus fallen away.

(ix) That the result was that Rappa should be granted leave to appeal but its appeal should be dismissed. Based on Biowatch, the parties should bear their own costs in this court. The court was not inclined to interfere with the costs orders made by the Supreme Court of Appeal. Rappa did not seek leave to appeal the Supreme Court of Appeal's costs orders independently of the merits of the appeal.

6.4. United Manganese of Kalahari (Pty) Ltd v C:SARS and four other cases – Forge Packaging (88 SATC 1)[4]

In this case the Applicant was Forge Packaging, and its only relevant activities in the years of assessment relevant to this case were to borrow and lend money at interest.

On 31 January 2018 SARS addressed a letter to Forge headed 'Verification of Income Tax Return'. This letter notified Forge that its 2016 tax return had been 'identified for verification' in terms of the TA Act. Forge was notified that the notice of assessment reflected all the information that SARS had obtained from Forge's tax return. Forge was asked to review this information. If Forge found any errors, it was to correct these by submitting a revised tax return. If Forge found no errors, it was to complete a prescribed supplementary declaration and this was to be done within 30 days.

Having received no response, SARS wrote again to Forge, giving it a final opportunity within 30 days to comply with the previous letter in order to enable SARS 'to finalise the verification.'

On 16 May 2018 Forge submitted a supplementary declaration in which it now reflected the loss of R19 500 644 as a non-deductible capital loss and this reduced its taxable loss for the 2016 year to R2 224 036.

On 4 July 2018 SARS notified Forge that SARS was 'unable to complete the verification' of the 2016 return 'as additional information is required in order to finalise the verification process.' In an accompanying letter, SARS sought a detailed breakdown and calculation of the capital loss of R19 500 644 together with supporting documents and requested reasons as to why this capital loss was 'not clogged' in terms of item 39 of the Eighth Schedule to the IT Act.

Forge replied on 6 August 2018, explaining the computation of the capital loss and furnishing SARS with a copy of the sale agreement. Forge acknowledged that the capital loss should be 'clogged' as the transaction was with a connected person – 'this was a mere oversight by the clerk while completing the tax return.'

On 8 August 2018 SARS issued notices of additional assessments in respect of Forge's 2014, 2015 and 2016 tax years and an accompanying letter tabulated the results. The court commented on the aforesaid tabulation that 'it was fair to say that this was not SARS' best work.'

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On 11 October 2018 Forge lodged objections to the additional assessments and on 11 January 2019 SARS disallowed the objections. SARS stated that Forge's first tax year was 2011. In that year Forge had submitted a nil return. In every subsequent year Forge had made losses and carried them forward. Since inception Forge had never made a profit on borrowed money and there was thus no trade in respect of moneylending.

On 27 February 2019 Forge lodged appeals, repeating and expanding upon the points made in its objections. Forge stated that it performed the function of a treasury company within a group of companies. Its interest expenditure qualified for deduction under section 11(a) and SARS had failed properly to apply Practice Note 31. To the extent that there were errors in the tax returns, the resultant understatements were the result of a 'bona fide inadvertent error' as contemplated in section 222(1) of the TA Act.

Alternative dispute resolution was tried but failed and on 9 December 2020 SARS filed its Rule 31 statement.

Instead of filing its Rule 32 statement, in April 2021 Forge instituted review proceedings in the Tax Court based on the principle of legality. According to Forge, SARS' Rule 31 statement contained allegations never previously drawn to its attention. SARS was seeking to supplement or revise the reasons it had given for the assessments. This was a manifest breach, so Forge claimed, of its right to fair administrative action. Forge complained that SARS had not complied with sections 42(2)(b) and 106(5) of the TA Act.

SARS brought an interlocutory application in terms of Rule 42 of the Tax Court Rules read with Rule 30 of the Uniform Rules, contending that the review application was an irregular step. SARS contended that the taxpayer had no right to object and appeal against the alleged procedural non-compliance with sections 42 and 106 of the TA Act. SARS also argued that any review powers which the Tax Court had could only be exercised in the context of deciding a tax appeal and not by way of a separate review application. The Tax Court, while not deciding the first of these contentions, accepted the second.

On 19 October 2021 the Tax Court thus set aside the review application as an irregular step. Because Forge had intimated its intention to approach the High Court if the Tax Court Ruled that a review application in the latter court was not competent, the Tax Court directed that the tax appeal be stayed pending a determination of a review application to be launched in the High Court within 30 days, failing which the tax appeal was to proceed.

Forge launched its High Court review application on 17 December 2021. In its notice of motion it sought, insofar as necessary, an extension of the period of 180 days specified in section 7(1) of PAJA for the bringing of a review application. Forge did not seek a section 105 direction.

The review was based on PAJA, alternatively the principle of legality. Forge did not frame its notice of motion in terms of Rule 53 and, in particular, it did not call upon SARS to deliver a record.

SARS opposed the review and pointed out that if Forge had been uncertain of the basis of the assessments, it could have sought reasons in terms of Rule 6 of the Tax Court Rules before filing its appeal in the Tax Court.

SARS opposed condonation for Forge's non-compliance with section 7(1) of PAJA and SARS also contended that in order to proceed with the High Court review, Forge needed a section 105 direction.

The High Court (see Forge Packaging (Pty) Ltd v C: SARS 85 SATC 357) delivered judgment on 13 June 2022, refusing to give a section 105 direction, striking the review from the roll and ordering Forge to pay SARS' costs. The High Court held that because Forge was seeking to have the assessment set aside it needed a section 105 direction. An appeal to the Tax Court being the default remedy, a taxpayer seeking a section 105 direction had to show good cause why an exception should be made to the usual procedure. The High Court said that such might be the case where the matter turned wholly on a point of law but rejected Forge's argument that its review turned wholly on a point of law.

Even if the alleged non-compliance with section 42(2)(b) were a purely legal question, it would be undesirable to permit parallel legal proceedings. In any event, the High Court was not satisfied that the section 42(2)(b) point was purely one of law.

The High Court refused Forge leave to appeal and an application to the Supreme Court of Appeal for leave to appeal suffered a similar fate and subsequently on 13 March 2023 Forge brought an application to the Constitutional Court for leave to appeal.

<u>As to the appeal of Forge Packaging (Pty) Ltd v C:SARS</u>

Judge Rogers held the following:

(i) That Forge needed condonation in three respects: for the late filing of its application for leave to appeal, which was late by 27 days; for the late filing of the record, which should have been filed on 3 November 2023 but was filed on

9 November 2023; and for the late filing of its submissions, which should have been filed on 10 November 2023 but were filed on 14 November 2023.

(ii) That the High Court was right to hold that Forge needed a section 105 direction. The High Court was generous in permitting Forge to ask for it from the bar. Such a direction should be sought in the notice of motion and needed to be properly substantiated in the founding affidavit.

(iii) That in the Constitutional Court Forge had argued the matter as if it were at large to reach its own view on whether a section 105 direction should be given. No attention was paid to the nature of the discretion exercised by a Judge when granting or refusing a section 105 direction. As the court explained earlier, the High Court exercised a true discretion and the High Court's refusal of a direction could thus only be impeached if the discretion was not exercised judicially or was influenced by wrong principles or a misdirection on the facts or if the result was one that could not reasonably have been reached by a court properly directing itself to all the relevant facts and principles.

(iv) That Forge did not try to demonstrate that the High Court had gone awry in a way justifying appellate interference with the exercise of a true discretion. No such basis existed. The High Court did not adopt an exceptional circumstances test. It asked itself whether there was 'good cause' to justify a departure from the normal procedure. This was an unobjectionable way of asking whether such a departure was appropriate or justified.

(v) That the High Court said that such justification might exist if an appeal turned wholly on a point of law. This was not necessarily so in all cases, but the High Court went on to make the important point that Forge's attack on the assessments was not confined to a complaint of non-compliance with section 42(2)(b) of the TA Act. It was known from Forge's grounds of objection that Forge contended that it was carrying on a trade entitling it to deduct all its expenditure in terms of section 11(a) of the IT Act. The questions whether Forge was carrying on a trade and whether its expenses were incurred in the production of income from that trade were matters to be determined in the tax appeal. To allow a review in these circumstances was open to the objection of piecemeal adjudication, as the High Court rightly observed.

(vi) That the High Court had also said that the review ground based on alleged non-compliance with section 42(2)(b) of the TA Act was not purely a point of law, because evidence might shed light on whether the process followed by SARS was verification or audit. This, in the court's view, was charitable to Forge. In this case there was only one request for information and it concerned a matter that had become uncontentious, namely the computation of the capital loss and that it should be 'clogged'.

(vii) That Forge's objections to the assessments and its notices of appeal stated that Forge had been selected for 'audit verification'. This was not an expression used in the TA Act, but there was nothing to show that Forge thought it had been the subject of an audit triggering section 42 of the TA Act. This was apparent from the fact that Forge did not complain of non-compliance with section 42(2)(b) in its objections and notices of appeal.

(viii) That the complaint of non-compliance with section 42(2)(b) was made for the first time in Forge's review application to the Tax Court. The court was driven to conclude that in making this complaint Forge opportunistically latched onto the averment in SARS' Rule 31 statement that on 31 January 2018 SARS had notified Forge that it would be conducting an 'audit' into its tax affairs. The letter itself showed that this averment was wrong. Instead of clarifying this with SARS, Forge launched a review application, and had persisted with it despite SARS' statement, under oath in opposition to the review, that Forge was selected for verification, not audit.

(ix) That this review ground was thus not a plausible one, and it was not one which the High Court could have been expected to allow to go forward. Anyway, section 42(2)(b) would not have been the only occasion on which Forge saw and could comment on SARS' grounds of assessment. Before it launched the review, Forge had a full statement of SARS' reasoning and had responded to it by way of its Rule 32 statement. By the time the review was launched, it would have been a hollow formality to require SARS to comply with section 42(2)(b), assuming it to be applicable at all. The battle lines had been clearly drawn.

(x) That the other complaint in the review, namely that SARS' Rule 31 statement contained reasoning that SARS had not previously disclosed, was also not one that was worthy of consideration on review. SARS was not precluded by Rule 31(3) from amplifying its reasoning. Despite the somewhat cryptic contents of SARS' letter of 8 August 2018, the bases of the adjustments were clear enough and SARS' grounds of assessment in its Rule 31 statement were consistent with those bases.

(xi) That if, however, Forge thought that SARS' Rule 31 statement went beyond the grounds of assessment that SARS was entitled to rely upon, its remedy was to apply to the Tax Court to strike out the impermissible material on the basis that it contravened Rule 31(3). If Forge's complaint was that it could not discern, from SARS' letter of 8 August 2018 and from SARS' notices of disallowance of

11 January 2019, what the grounds of assessment were, it was entitled to request reasons in terms of Rule 6 before lodging its notices of appeal. There was 88 SATC 1 at 21 nothing to show that Forge had been prejudiced in any way in conducting its defence in the Tax Court.

(xii) That in order to succeed in this court, Forge not only has to displace the High Court's refusal of a section 105 direction but also the High Court's refusal to condone Forge's non-compliance with section 7(1) of PAJA. Here, too, the High Court exercised a discretion, which was probably to be categorised as a true discretion. In any event, the court could find no fault with the High Court's reasons for refusing condonation.

(xiii) That apart from the absence of a satisfactory explanation for the delay, the possible need to condone non-compliance with section 7(1) in order to prevent an injustice was diminished in cases where a review is not the only remedy available to the aggrieved person and, here, Forge had the remedy of a tax appeal.

(xiv) That although the High Court dealt with delay as a separate matter, the fact that Forge needed condonation for non-compliance with section 7(1) was a factor that could have been taken into account in deciding whether a section 105 direction should be given. The fact that the taxpayer will need condonation if a section 105 direction is given, and that its prospects of getting it were bleak, were factors that could properly be taken into account in refusing a section 105 direction.

(xv) That since Forge did not enjoy reasonable prospects of success, condonation for the late filing of its application for leave to appeal must be refused. Although uncertainty about the interpretation and application of section 105 might have justified granting leave if that were the only point in issue between Forge and SARS, Forge also needed to impeach the High Court's refusal to condone its non-compliance with section 7(1) of PAJA and its lack of prospects on that leg of the case puts paid to the proposed appeal as a whole.

(xvi) That in the court's view, Forge should not receive Biowatch protection. Its review was opportunistic and altogether lacking in merit. It delayed unreasonably in bringing review proceedings. Its application was filed in the Constitutional Court more than four years after its objections to the assessments were disallowed. A straightforward and mundane tax case had been held up by manifestly inappropriate litigation.

(xvii) That Forge should thus be directed to pay SARS' costs, including the costs of two counsel.

6.5. *United Manganese of Kalahari (Pty) Ltd v C:SARS and four other cases – ABSA (88 SATC 1)*[5]

In this case the Applicants were Absa Bank Ltd (Absa) and United Towers (Pty) Ltd (United). Absa and United concluded transactions which were identical for present purposes and they were assessed on identical grounds.

Between 2013 and 2015 Absa concluded four subscription agreements to acquire preference shares issued by PSIC Finance 3 (RF) (Pty) Ltd (PSIC3).

Absa received tax-exempt dividends on these preference shares. The transactions were introduced to Absa by the Macquarie Group (collectively Macquarie). Absa concluded related agreements with entities in Macquarie. These agreements included a right on Absa's part to put the preference shares to Macquarie in certain circumstances and an obligation by Macquarie to make up any shortfall in Absa's anticipated returns on the shares, including any shortfall arising if the dividends were taxed contrary to expectation.

In May 2018 SARS notified Absa that it would be conducting an audit into the tax treatment of the preference shares. SARS sought information from Absa, which was given and SARS also obtained information from other persons.

On 13 November 2018 SARS gave Absa notice in terms of section 80J(1) of the IT Act setting out its reasons for proposed GAAR assessments in respect of Absa's 2014 to 2018 tax years (section 80J notice). Having IT obtained an extension to respond, Absa on 15 February 2019 wrote to SARS setting out reasons as to why, in Absa's opinion, the assessments proposed in the section 80J notice should not be issued and asking SARS to withdraw the notice in the exercise of his powers under section 9 of the TA Act.

On 5 March 2019 Absa was notified by SARS that SARS disagreed with Absa's contentions and refused the request to withdraw the section 80J notice.

On 17 October 2019 SARS notified Absa that it intended to issue GAAR assessments. As required by section 96(2)(a) of the TA Act, SARS set out the grounds of the assessments. The assessments were issued shortly afterwards.

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SARS determined the tax consequences of the arrangement by re-characterising the tax-exempt preference share dividends received by Absa as taxable interest. Cumulatively over the five tax years in question, this had the effect of increasing Absa's taxable income by R185 716 100, resulting in additional tax of R52 000 508. SARS also imposed USP at 75%, totalling a further R39 000 381.

According to SARS, Absa had participated in an impermissible tax avoidance arrangement devised by the Macquarie Group. The arrangement consisted of a sequence of transactions and SARS stated that all of the steps were 'inextricably linked (contractually and practically)'.

On 28 March 2019 the Applicants had launched a High Court review application to set aside SARS' refusal to withdraw the section 80J notices. SARS delivered the Rule 53 record without objection. This was the state of play when SARS issued the GAAR assessments in October 2019.

On 1 November 2019 the Applicants filed a second supplementary founding affidavit in which they alleged that the assessments perpetuated the errors contained in the section 80J notices and they said that they would now be seeking additional relief, namely the reviewing and setting aside of SARS' decision to issue the additional assessments.

On 11 March 2021 the High Court (see Absa Bank Ltd and Another v C:SARS 83 SATC 401 per Sutherland DJP) delivered judgment in the main case.

The High Court held that the Applicants were raising points of law, and that this justified a section 105 direction and an exemption from having to exhaust the objection procedure.

The High Court held that the section 80J notices were reviewable in terms of the legality principle (the notices were not final and did not have external legal effect, and so did not constitute 'administrative action' as defined in PAJA) while the notices of assessment were reviewable in terms of PAJA (this was common cause).

On the merits, the High Court upheld the Applicants' argument on the alleged party error. A scheme 'requires a unity to tie the several transactions into a deliberate chain.' Absent a factual basis to allege that Absa was anything more than an investor in preference shares, no scheme that reached Absa was established. There was also no factual basis supporting an inference that Absa's investment was in the least motivated by an intention to obtain relief from an anticipated tax liability.

The High Court also accepted the Applicants' case on the alleged tax benefit error. Whether a tax liability has been avoided was to be determined by the 'but for test.' The question was thus: but for the purchase by Absa of preference shares in PSIC3, how might an anticipated tax liability have been avoided? No foundation for such a result was set out in the section 80J notices or the assessment letter.

The High Court thus granted the Applicants leave to pursue the review, set aside SARS' refusal to withdraw the section 80J notices, set aside SARS' letters of assessment, and ordered SARS to pay costs, including the costs of two counsel.

The High Court granted SARS leave to appeal to the Supreme Court of Appeal (SCA) and that court delivered judgment on 29 September 2023 (see C:SARS v Absa Bank Ltd and Another 86 SATC 195).

In regard to the review of the section 80J notices, the SCA held that the notices themselves had no adverse effect or impact. Section 80J(3) sets out the powers of SARS in light of the taxpayer's response to a notice. A decision by SARS not to withdraw the notices in terms of section 9 of the TA Act was not reviewable.

With regard to section 105, the SCA referred to Rappa SCA and said that the High Court had recognised that it could only exercise jurisdiction in exceptional circumstances. The Supreme Court of Appeal seems to have accepted that the High Court could properly have granted a section 105 direction if the review raised only points of law, but it disagreed with the High Court that the two alleged errors were pure questions of law.

As to the alleged party error, the SCA disagreed with the High Court's supposed finding that SARS had accepted the facts stated by the Applicants about their knowledge of the transactions. The section 80J notices and the assessment letters set out SARS' reasons for believing that the GAAR provisions applied; they were 'not statements of the accepted factual basis for application of the GAAR provisions.' Whether the Applicants had knowledge of the full nature of the transactions comprising the alleged arrangement, and whether their sole or main purpose in participating was to secure a tax benefit were 'matters of disputed fact.' So too was the question whether the 'arrangement' constituted an 'impermissible avoidance arrangement.'

As to the alleged tax benefit error, this was also, in the SCA's view, a question of fact. It was not 'a mere question of law, determinable upon the basis of the assessment as framed by SARS'.

Because the grounds of review did not raise pure questions of law, so the SCA reasoned, the High Court had erred in finding that exceptional circumstances existed for giving a section 105 direction. The SCA thus upheld the appeal with costs, including the costs of two counsel, and substituted the High Court's order with one dismissing the review application with costs, including the costs of two counsel.

On 19 March 2024, some six months after the SCA had delivered judgment, the Applicants filed an application for leave to appeal to the Constitutional Court and for the consolidation of the hearing of their case with UMK, Rappa and Forge which the Constitutional Court had already decided to hear.

<u>As to the appeal of Absa Bank Ltd v C:SARS</u>

Judge Rogers held the following:

(i) That the Applicants had sought condonation for the late filing of their application for leave to appeal which should have been filed by 20 October 2023 and contended that the delay would cause no significant prejudice to SARS. SARS opposed condonation and raised an additional objection to the application, namely that on the Applicants' own version the appeal had been perempted by their deliberate decision not to pursue an appeal against the SCA's judgment and SARS criticised the Applicants for not addressing the question of peremption in their founding affidavit. On the merits of leave to appeal, SARS agreed with the SCA's finding that the two alleged errors involved factual disputes.

(ii) That the Applicants alleged that there were overriding constitutional and policy considerations militating against the enforcement of peremption and it would be extremely prejudicial to the Applicants if they were barred by peremption. SARS contended that the Applicants should indeed have dealt with peremption, given that their founding affidavit in the Constitutional Court disclosed that they had deliberately decided not to appeal. Peremption was said to take effect by operation of law; it did not need to be pleaded by a respondent.

(iii) That in the view of the court the Applicants' application for leave to appeal had sufficient merit to warrant adjudication if peremption and condonation were not a fatal obstacle in the Applicants' way. The court noted that the judgments dealing with peremption showed how various the circumstances were in which peremption may be overlooked in the interests of justice. Little purpose was served by trying to show how similar or different one case was from another. Each case must depend on its own facts.

(iv) That in the absence of prejudice to SARS, it would be undesirable to allow peremption to stand in the Applicants' way in circumstances where the issues they wish to ventilate include issues that the court may in any event decide in the context of the other four cases. The court was by no means persuaded that peremption was a matter going to the jurisdiction of a court or that it was a matter of which a court may take notice of its own accord. Being a species of waiver, peremption technically is an objection to be raised by the other party. In the circumstances the court considered that the Applicants should not be held to the peremption.

(v) That in regard to granting condonation to the Applicants for their delay in filing their application for leave to appeal, the court had summarised their explanation for the delay and was of the view that the absence of prejudice to SARS was an important consideration. However, the Applicants' delay in seeking leave had not in the event delayed the court's hearing of the case and thus it granted condonation.

(vi) That, in regard to the merits, the Applicants did not argue that the Supreme Court of Appeal was wrong to conclude that SARS' refusal to withdraw the section 80J notices was not reviewable. The court thus dealt only with the review of the assessments. Although in the High Court the Applicants needed a section 7(2) exemption, this had become moot. The internal remedy of objection had now become exhausted, since the Applicants eventually filed objections and SARS had disallowed those objections.

(vii) That the question of section 105, on the other hand, remained a live issue. The Applicants had an express right to object and appeal against SARS' decision to invoke section 80B of the IT Act. Since the High Court granted a section 105 direction, the first question was whether the SCA was entitled to interfere with this exercise of a true discretion. If the court found that the SCA was entitled to interfere, the next question was whether the court was entitled to interfere with the true discretion that the SCA exercised in substitution of the High Court's decision.

(viii) That a proper consideration of a request for a section 105 direction requires the High Court to consider any undesirable prospect of piecemeal and parallel adjudication. This means that the High Court must consider whether the applicant impugns an assessment on other grounds that do not feature in the High Court litigation. By overlooking additional disputes and their implications for piecemeal adjudication, the High Court had misdirected itself and that was sufficient to entitle the SCA to consider the matter afresh. However, this was not the basis on which the SCA interfered with the High Court's section 105 direction. The SCA differed from the High Court only on whether the questions were pure points of law and it thus acted on a wrong principle.

(ix) That, in the court's view, the SCA had also misdirected itself in holding that the two alleged errors involved disputed facts and were not purely questions of law. Since the SCA had acted on a wrong principle and had misdirected itself on the character of the issues raised by the proposed review, the Constitutional Court was at large to decide whether a section 105 direction should have been given. The two alleged errors were points of law, and this was a factor (though not necessarily decisive) favouring the grant of a section 105 direction.

(x) That while it was unnecessary in this case finally to decide to what extent SARS may depart from the grounds given in a letter of GAAR assessment, the fact that his right to do so may be restricted and may be contested was a factor in favour of determining the questions of law arising from assessment letters.

(xi) That the presence of other disputes about the assessments militated against High Court adjudication. Piecemeal adjudication would be avoided if the Tax Court were to adjudicate the two alleged errors along with the remaining attacks on the assessments. It was nevertheless fair to observe that the two alleged errors were not a sideshow. They were the two main grounds on which the Applicants contested the assessments and a decision on those two points would go a long way to disposing of the case.

(xii) That in favour of the Tax Court adjudication is that permitting the High Court to adjudicate the review exposed the losing party to an adverse costs order. SARS should not lightly be deprived of the costs protection that it enjoyed in the Tax Court.

(xiii) That if the court were assessing the section 105 question at first instance, it would probably have declined to give a direction, since the two alleged legal errors were not the only grounds on which the Applicants had attacked the assessments. Nevertheless, and as the court had shown, the case for refusing a direction was not clear-cut. At first instance, SARS' exposure to High Court costs could perhaps have been neutralised by requiring the Applicants to forego costs in the main case or to subject themselves to the same test as would be applied by the Tax Court in terms of section 130(1)(a) of the TA Act.

(xiv) That the court was not, however, deciding the question at first instance and it could not ignore later developments. The High Court granted a section 105 direction at a time when the test for doing so was not firmly established. The High Court's direction was not manifestly inappropriate. Importantly, the High

Court went on to decide the merits of the case. Much time has passed since the High Court gave judgment in March 2021. The avoidance of piecemeal adjudication cannot now be achieved, as might have been possible at the threshold. A refusal of a section 105 direction at this late stage would nullify the High Court's judgment and require the Tax Court to adjudicate the same points afresh.

(xv) That although the court did not have the benefit of a judgment on the merits from the SCA, it did have the High Court's judgment on the merits, so it would not be deciding the merits at first instance. The two points of law are undoubtedly important questions of general significance in GAAR cases.

(xvi) That, in the circumstances, the court considered that the High Court's direction should be allowed to stand and that this court should give directions for a hearing in due course on the merits of the review. Although it is a review in form, in substance the successful party will have a declaration in their favour on the two legal issues.

(xvii) That, in the court's view, the appropriate order in the present case is to condone the late filing of the application for leave to appeal; to confirm, albeit for different reasons, the High Court's grant of a section 105 direction; and to grant leave to appeal on the merits, on the basis that directions will be issued for the enrolment of the appeal itself in due course.

6.6. United Manganese of Kalahari (Pty) Ltd v C:SARS and four other cases – Leuven Metals (88 SATC 1)[6]

The Applicant, Lueven Metals (Pty) Ltd, refined scrap gold and supplied the refined gold to Absa Bank Limited (Absa) in the form of bars.

Lueven bought gold-bearing scrap, including jewellery, with a view to refining and supplying the gold in the form of bars (one of the eight forms) to a bank, Absa. Absa, in common with the other institutions named in section 11(1)(f) of the VAT Act, required the gold bars to have a purity of 99.5%. Lueven refined the scrap gold into bars with a purity of 80% to 90% (partially refined bars).

Lueven deposited the partially refined bars with Rand Refinery Limited (Rand Refinery), which further refined them into bars with a purity of 99.5% (fully refined bars).

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This was done on a contract basis, with Lueven remaining the owner of the gold. Lueven sold the fully refined bars to Absa, with delivery made on Lueven's behalf by Rand Refinery.

Lueven, which obtained its precious metals refining licence in November 2012, treated its sales of fully refined bars to Absa as zero-rated in terms of section 11(1)(f) of the VAT Act. The zero-rating allowed Absa to buy the bars at a price that did not include VAT and allowed Lueven to deduct, as input tax, the output tax it paid to the suppliers of the scrap gold.

In March 2020 SARS notified Lueven that in terms of section 40 of the TA Act it had been selected for a VAT verification in respect of the tax period September 2019 to February 2020 and in June 2020 SARS notified Lueven that it was to be the subject of a VAT audit in respect of the VAT periods March 2018 to March 2020 and an income tax audit in respect of the 2019 year.

On 8 April 2021 SARS furnished Lueven with a notification in terms of section 42(2)(b) of the TA Act and told Lueven that it was minded to treat its sales of fully refined bars to Absa over the period March 2018 to March 2020 as standard-rated rather than zero-rated.

In SARS' view, the fully refined bars were made from gold which had previously undergone a manufacturing process as contemplated in section 11(1)(f), namely the manufacture of the gold into jewellery, electronic components and the other items that Lueven had bought from its suppliers as scrap gold.

Lueven's sales to Absa over this period were R4 007 123 079, of which the tax fraction was R521 305 417.

Lueven responded to SARS and on the merits its contention was that the phrase 'which has not undergone any manufacturing process' in section 11(1)(f) was merely part of a provision regulating the form in which the gold must be in order to qualify for zero-rating. As long as Lueven simply refined the gold and supplied it in one of the forms permitted by section 11(1)(f), without subjecting the gold to any other process of manufacture or investigation into the source of the gold. On USP, Lueven contented itself with an assertion that because it had correctly treated the sales as zero-rated, there was no scope for USP.

Lueven then gave notice to SARS in terms of section 11(4) of the TA Act that it intended to approach the High Court for declaratory relief.

Lueven launched its application in the High Court on 24 June 2024 and at that stage no additional assessments had been issued. However, and in case such assessments should follow during the course of the litigation, Lueven sought a section 105 direction.

Following the institution of this application, SARS did not issue additional assessments and that remained the position. SARS took the view that the question was one of law and suitable for decision by the High Court.

The High Court delivered judgment on 19 May 2022 (see Lueven Metals (Pty) Ltd v C:SARS 84 SATC 447).

The High Court found that SARS' interpretation of section 11(1)(f) of the VAT Act was correct and observed that zero-rating was based on policy considerations and that the provision was promulgated with the specific intention of providing the mining industry with a favourable tax regime in order to enhance the viability of gold mining in the context of a highly capital intensive industry.

The court considered Lueven's interpretation of section 11(1)(f) but concluded that:

> 'The supply of gold which is derived from gold which had previously been refined and subsequently undergone any manufacturing process before being refined or manufactured in the prescribed eight unwrought forms for purposes of supply to the listed recipients, is therefore excluded from zero-rating.'

For this reason, said the High Court, Lueven was not entitled to a declaratory order and its application was dismissed with costs. The High Court granted Lueven leave to appeal to the Supreme Court of Appeal (SCA).

The SCA delivered judgment on 8 November 2023 (see 86 SATC 474) and the appeal was dismissed with costs. The members of the court were agreed on the outcome but divided on the reasoning. The majority said that the parties' approach to section 105 came down to one of mere timing, with no logical explanation as to why a taxpayer who had only received a notice of intention to assess should be placed in a better position than a taxpayer who had already been assessed.

The SCA emphasised the discretionary nature of declaratory relief and, as to such relief in tax matters, the majority was critical of the line of cases where this had been held to be permissible. Although the majority did not altogether Rule out the possibility of declaratory relief in tax disputes, their occurrence in the majority's view was likely to be 'rare and their circumstances exceptional or at least unusual'.

The majority in the SCA considered that the present case was on any reckoning not suitable for declaratory relief. The SCA was of the view that the disputes were in truth matters for adjudication in accordance with the special machinery created by the TA Act and the circumstances of the case did not favour piecemeal consideration.

In her separate judgment Molemela P stated that in the absence of an assessment section 105 did not find application. No direction under that section was needed in order for the High Court to exercise the jurisdiction conferred by section 21(1)(c) of the Superior Courts Act 10 of 2013.

She stated that seeking declaratory relief on the interpretation of tax legislation was unequivocally established by authority. However, the majority was right, in Molemela'section view, to say that the parties had adopted diverging views not only in relation to the law but also the facts. This meant that declaratory relief was not appropriate and the High Court's actual order – the dismissal of Lueven's application – could thus not be faulted.

On 28 November 2023 Lueven turned to the Constitutional Court for leave to appeal.

Lueven contended, inter alia, that the case raised arguable points of law of general public importance and that included the interpretation of section 11(1)(f) of the VAT Act.

<u>As to the appeal of Lueven Metals (Pty)Ltd v C:SARS</u>

Judge Rogers held the following:

(i) That Lueven did not need a section 105 direction and still did not need one, because no additional assessments had been issued and SARS' counsel for all practical purposes conceded this at the hearing.

(ii) That the majority in Lueven SCA (86 SATC 474) was nevertheless right to observe that section 105 played a role when it came to the High Court's discretion to entertain an application seeking declaratory relief in advance of an anticipated assessment. However, since the test of exceptional circumstances did not apply when section 105 was directly applicable, it also did not apply when declaratory relief was sought before an assessment was issued. The Constitutional Court thus could not endorse the majority's statement that the circumstances in which declaratory relief could be entertained in tax cases were likely to be 'rare and their circumstances exceptional'.

(iii) That, in the court's view, the majority and the minority in Lueven SCA erred in finding that the present case was not suitable for declaratory relief. The only point of contention between the parties was whether Lueven's supply of fully refined bars to Absa was zero-rated in terms of section 11(1)(f) of the VAT Act. That depended, in turn, on the interpretation of that provision, and in particular the phrase 'which has not undergone any manufacturing process other than'. Did this phrase refer only to a manufacturing process undertaken by the vendor who supplied gold in one of the eight forms to a listed recipient or did it include a manufacturing process to which the gold was subjected at some earlier stage of its life? A declaratory order will resolve this question one way or the other. If the point is finally determined against Lueven, it did not claim that its supplies to Absa were zero-rated on any other basis. SARS itself had confirmed that a declaratory order would be dispositive. The determination of the question also transcends the interests of the immediate parties in this case, because it would apply to all similarly-placed gold refiners.

(iv) That neither the majority nor the minority in Lueven SCA explained why they considered there to be factual disputes. This is something that should have received closer attention, given that the litigants themselves did not think that there were any relevant factual disputes and that the High Court's reasoning did not reveal the existence of any such disputes.

(v) That in order to establish whether relevant factual disputes existed, one must have regard to the affidavits. The court had not been able to discover, in the affidavits, any relevant factual dispute about manufacturing and refining processes or the distinction between manufacturing and production. Co-mingling and the binding class rulings likewise did not raise factual disputes as the rulings spoke for themselves. The fact that Rand Refinery mingled gold deposited with it from multiple sources was also common cause.

(vi) That, as to the reasonable care standard and USP, the court acknowledged that if Lueven ultimately failed in getting the declaratory relief it sought, SARS may impose USP. USP are a risk in every case if the taxpayer loses. If that were a reason for declining to decide a declaratory matter, declaratory relief could never be obtained in tax cases.

(vii) That the majority in the SCA thought that they might be precluded from deciding the substantive merits of the case because it was supposedly approached as if an appeal lay against the reasons for judgment. The court had difficulty in following that concern. The refusal of declaratory relief on the merits was a final and appealable order. The SCA and former Appellate Division had often entertained such appeals, as had the Constitutional Court.

(viii) That the SCA's reasoning on the question of discretion was not altogether clear. While the majority evidently would have exercised its discretion not to entertain the case, it did not squarely address whether appellate interference was justified and, if so, why. This said, the High Court did not expressly address itself to the question of discretion, perhaps because both sides were in agreement that the High Court should entertain the case. If on this basis one supposed that the High Court did not exercise a discretion at all, the SCA would have been entitled to exercise its own discretion. If that be the case, the Constitutional Court was entitled to interfere in the SCA's exercise of that discretion because of the misdirections that the court had identified.

(ix) That it followed that the SCA had erred in dismissing the appeal on the basis that it did. Whether the appeal should have failed on its merits had yet to be determined. It was unfortunate that the SCA did not express its view on the merits to cover the eventuality of a further appeal to the Constitutional Court. However, it had the benefit of the High Court's judgment. The legal issue was a 88 SATC 1 at 29 crisp one and it would cause substantial further delay and expense to remit the matter to the SCA.

(x) That the appropriate order, therefore, was to grant leave to appeal and for this court to adjudicate the merits. Whether there should be a further hearing did not have to be decided then. Sometimes the Constitutional Court decides appeals by way of substantive judgments on the strength of written argument alone. This case might perhaps be suitable for such treatment. However, the parties would be afforded an opportunity to file supplementary submissions on the merits in which they could also address the question whether in their view an oral hearing was reasonably required.

6.7. Sishen Iron Ore Company (Pty) Ltd v C:SARS (88 SATC 123)[7]

Sishen Iron Ore Company (Pty) Ltd (Sishen), conducted open cast mining for iron ore in the Northern Cape province in terms of a converted mining right issued in terms of the provisions of the Mineral and Petroleum Resources Development Act (the 'MPRDA') and granted in respect of a specified area of land (the mining area). The mining area included the open pit where Sishen had been conducting mining for many

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years and it also included an area to the west of the pit, which prior to the tax years in question, had not yet been mined.

Section 25(2)(d) of the MPRDA required Sishen, as the holder of the mining right, to comply with the provisions of the MPRDA, which by definition included the regulations under the MPRDA, and any ‘other relevant law.’ The Mine Health and Safety Act and the regulations promulgated thereunder (the Safety Act) was such a relevant law.

Section 5(2)(b) of the Safety Act provided, in general terms, that an employer, such as Sishen, must as far as reasonably practicable, ensure that persons who are not employees, but who may be directly affected by the activities of the mine, were not exposed to any hazards to their health and safety.

To the west of the open mine pit, but still within the mining area covered by Sishen’s mining right, were some roads, railways and electricity and water infrastructure belonging to third parties (the SWEP infrastructure). Further to the west of the south-western boundary of the mining area, at a distance of approximately 600 meters, was Dingleton. It was situated on land not owned by Sishen and in respect of which Sishen did not hold any mining right. The SWEP infrastructure was within Sishen’s mining area. Sishen could not mine that area because of the physical obstacles presented by the SWEP infrastructure, and the safety buffer required to be maintained between any of its mining operations and Dingleton.

The optimal exploitation of its mining area accordingly required Sishen to relocate the SWEP infrastructure as part of waste stripping of that area, to allow access to the iron ore subsurface. As such exploitation progressed, a new safety buffer zone situated further to the west, encroaching on land on which Dingleton was situated, would be required. Dingleton would have to be relocated to maintain a 500-meter safety buffer between it and the most western point to which Sishen’s mining operations would advance.

Regulation 10(1)(f) of the regulations promulgated under the MPRDA provided that an application for a mining right must include a Mining Work Programme (‘MWP’). The MWP forms part of the mining right when granted. Section 25(2)(c) of the MPRDA required the holder of a mining right to actively conduct its mining in accordance with the MWP.

If Sishen conducted mining operations in contravention of the MPRDA or MWP or breached any material term of the mining right, then the Minister of Minerals and

Energy could, in terms of section 47 of the MPRDA, suspend or cancel Sishen's mining right.

Consistent with what was required by the MWP, Sishen embarked on the relocation of Dingleton to maintain a safety buffer as its mining operations advanced increasingly to the west. It also relocated the SWEP infrastructure to allow it to mine that portion of the mining area optimally.

Sishen also incurred legal expenditure in respect of fees paid to legal practitioners who advised the Dingleton residents on their relocation.

The mining operations conducted by Sishen made extensive use of electricity to drive various items of equipment and the 66kV line was part of the plant belonging to Sishen and used by it to successfully conduct its mining operations and it provided the mine equipment with electricity from the main Eskom electricity supply. The 66kV line was moved as the need arose to operate mine equipment in new locations, in accordance with Sishen's MWP and its mining operations. The 66kV line expenditure claim entailed the costs of dismantling the old line and masts and relocating the parts thereof, as could be used, to new positions, where it was re-established with old parts being replaced with new parts where required.

Sishen had sought to deduct various of its expenses from its taxable income for the 2012-2014 tax years. These expenses included the costs of relocating the Dingleton township and relocating infrastructure referred to as the Sishen Western Expansion Project (SWEP), legal costs associated with the relocation of Dingleton, and the costs of relocating a 66kV power line supplying electricity to mine equipment.

SARS had disallowed these deductions and had imposed USP, as well as interest in terms of section 89quat(2) of the IT Act whereafter Sishen had noted an appeal to the Tax Court.

Sishen had claimed the relocation expenditure as a tax deduction based on sections 15(a) and 36(7C) of the IT Act (expenditure incurred in terms of a mining right other than in respect of infrastructure) and in the alternative, Sishen contended that the relocation expenditure was of a revenue nature, being part of its operating costs, or its obligation to pay compensation in terms of section 54 of the MPRDA and should have been allowed under section 11(a).

SARS had disputed that this expenditure was in terms of Sishen's mining right and had contended that it was capital in nature.

The court a quo, being the Gauteng Tax Court (per Malindi J) had disallowed the deduction of the relocation expenditure and the legal expenditure but had allowed the deduction of the 66kV line expenditure, finding that it was integral to mine equipment and qualified in terms of sections 36(11)(a) and section 11(a) of the IT Act and had set aside the USP and the interest raised, with no order as to costs.

The Tax Court had disallowed the legal costs as deductions against its income and it found that as the removal and relocation costs of the Dingleton area were not deductible under sections 36(11)(e) or section 11(a), the legal costs incurred in the process were not incurred in terms of an existing mining right and the legal costs were accordingly not incurred in the course of or by reason of the ordinary operations undertaken by the taxpayer in the carrying on of the taxpayer's trade, as contemplated in section 11(c) of the IT Act.

The Tax Court had accordingly dismissed Sishen's appeal except for allowing the 66kV line expenditure as deductible and setting aside the USP and the interest thereon, with no order as to costs.

Sishen, on appeal to the Supreme Court of Appeal, had appealed against the disallowance of the relocation and legal expenditure, and SARS cross-appealed against the order allowing the deduction of the 66kV line expenditure and disallowing the interest.

The issues before the Supreme Court of Appeal accordingly were:

- Whether:
    - the relocation expenditure constituted deductible expenditure incurred 'in terms of a mining right' but other than in respect of infrastructure, within the meaning of section 36(11)(e);
    - the 66kV line expenditure was in respect of 'mine equipment' as contemplated in section 36(11)(a), or whether it qualified for the depreciation allowance under section 11(e);
- In the alternative to par. (a), whether the relocation, and 66kV line expenditure, constituted expenditure actually incurred in the production of income, and which was not of a capital nature, for the purposes of section 11(a);
- Whether the legal expenditure was of a revenue nature incurred in the production of Sishen's income derived from mining operations and therefore deductible under section 11(a) alternatively section 11(c);

- In respect of the interest raised, whether it properly accrued and if so, whether it was 'beyond the control of the taxpayer' as contemplated in section 89quat(3), and should have been waived.

Judge Koen held the following:

As to the deductibility of expenditure

(i) That the IT Act specially permits Sishen, because it derives its income from mining operations, to deduct certain expenditure, of a capital nature, from its income in accordance with what is generally referred to as the special deductions provisions and it generally permits Sishen, like any other taxpayer, to deduct expenditure incurred in the production of its income, if not of a capital nature in accordance with what is generally referred to as the general deductions formula.

(ii) That as Sishen derived its income from mining operations, the IT Act allowed the deduction of specific expenditure, even if of a capital nature, in recognition of the nature of the mining industry, the high financial risks involved, the significant upfront capital investment required, and the extended periods which might follow after the expenditure was incurred but before income was earned. Sishen, in keeping with other mining companies, was accordingly allowed the deduction of certain capital expenditure, otherwise not deductible from income, or the immediate deduction of certain expenditure, as opposed to the deduction thereof over a period of time. The special deductions provisions of the IT Act in respect of capital expenditure relevant to this appeal are found in section 15(a) read with section 36(7C) and section 36(11).

As to whether the relocation expenditure constituted deductible capital expenditure incurred 'in terms of a mining right' but other than in respect of infrastructure – section 36(11)(e)

(iii) That the deductibility of the relocation expenditure under this heading depended on a proper textual, contextual and purposive interpretation of what was meant by the phrases, 'in terms of' and 'infrastructure'. It was correct, as SARS had submitted, that the expenditure must be directly connected to the mining right, which was itself 'subject to…any relevant law.'

(iv) That the removal of the overburden by waste stripping was an ongoing process for the further optimal mining of viable iron-ore deposits within the mining area of Sishen. It was specifically required in the mining right granted to Sishen.

Unless the SWEP was relocated and the Dingleton residents translocated, the progression of the mine pit to the west, as contemplated by and in terms of the mining right, could not continue.

(v) That the 'overburden' constituted by the SWEP infrastructure would have precluded Sishen from fully mining its mining area in accordance with the Mining Work Programme (MWP), and its mining right. The failure to actively conduct mining optimally and in accordance with the MWP as contemplated by sections 51 and 25 of the MPRDA would risk the possible suspension or cancellation of Sishen's mining right by the Minister in terms of section 47 of the MPRDA.

(vi) That the MWP in giving recognition to the various realities described had detailed the applicable time frames and scheduling of various implementation phases of the mining operation. The relocation of the Dingleton township was specifically addressed, with reference to schedules and costs, in the annual revision of the life-of-mine plan. It was also addressed as part of the obligations to be discharged during the 30-year development phase of the mine and the extraction of the iron ore, over development phases, during the following 25 years. The MWP provided that by 2022 Sishen would extract ore from the 500 meter safety buffer.

(vii) That the terms 'mining operation' and 'mining' are defined in the MPRDA in broad terms to include 'every method or process by which any mineral is won from the soil.' The relocation expenditure was incurred as a necessary part of the method and process of opencast mining. Without the relocation, Sishen could not have adhered to the MWP in respect of the mining rights it held and which it was obliged to optimise.

(viii) That it was difficult to envisage expenditure more indispensable to mining the mining area optimally in terms of its mining right, and to maintain productivity and sales volumes, than for Sishen to have attended to the relocations. Absent the relocations, Sishen would have breached, or stood to breach, the provisions of its mining right and applicable legislation. The expenditure was necessary and inextricably connected and indispensable to its obligations to comply with the MWP and the mining right. The relocation expenditure was incurred in terms of a mining right, as contemplated in section 36(11)(e).

(ix) That Sishen was entitled and indeed required in optimally mining the mining area in accordance with its mining right, to mine the areas occupied by the

SWEP infrastructure, and the safety buffer zone (which necessitated the relocation of Dingleton). Sishen simply anticipated its expected and reasonable legal obligations in terms of what its mining right and MWP required it to do.

(x) That in considering the effect and meaning of the phrase 'excluding expenditure relating to 'infrastructure'', insofar as the expenditure was on infrastructure, it was not infrastructure owned by Sishen. Sishen did not acquire the right to use third party infrastructure as part of its income earning structure. Its income earning structure was not enhanced by the relocation expenditure.

(xi) That the court agreed with Sishen that the reference to 'infrastructure' was to infrastructure owned by and forming part of the income-earning structure belonging to, created or controlled by Sishen for the purpose of conducting mining operations. Although the provision did not expressly confine the reference to 'infrastructure' to infrastructure of the taxpayer and not that owned by third parties, the distinction was required on a proper interpretation of the provision in its context.

(xii) That the words 'any expenditure' in section 36(11)(e) were broad enough to sensibly include compensation paid to third parties, whether in kind or otherwise, in respect of damages or anticipated damages caused by or inevitably to arise from Sishen's mining operations, as opposed to being in respect of the acquisition of a fixed asset infrastructure item required for mining.

(xiii) That, accordingly, the Tax Court had erred in not concluding that the relocation expenditure was deductible under section 36(11)(e). The appeal in respect of the disallowed relocation expenditure accordingly succeeded. This conclusion made it unnecessary to consider the deductibility of the relocation expenditure as a general deduction.

<u>As to whether the 66kV line was expenditure in respect of 'mine equipment' as contemplated in section 36(11)(a) of the IT Act</u>

(xiv) That to qualify for deduction under section 36(11)(a), the expenditure relating to the relocation of the 66kV line had to be in respect of 'mine equipment'. The term 'mine equipment' was not defined in the IT Act. It however has been pointed out that SARS has 'continued with a practice of a broad interpretation of this term to include all underground equipment as well as surface railway lines, administrative buildings, schools, storage facilities and processing plants, among others.'

(xv) That it was difficult to envisage equipment more integral to the mining process than the equipment required to conduct the electricity to a point where it was required to energise what was plainly mining equipment. Clearly the 66kV line was an integral part of the mine equipment. The particular 66kV line, supported by the pylons erected to carry it into the mining pit and suspending it at a safe height to allow the passage of traffic underneath, had to be relocated as the mining progressed to the west.

(xvi) That the Tax Court had been correct in concluding that the expenditure relating to the relocation and reconstruction of the 66kV line had constituted expenditure incurred on mine equipment, and hence deductible as contemplated under section 15(a) read with section 36(11)(a). The court also discussed the deduction of the 66kV line expenditure, in the alternative, under the general deductions formula, i.e. section 11(a) of the IT Act.

(xvii) That in regard to whether the 66kV line expenditure qualified as a general deduction, the court applied the test for determining whether expenditure was of a capital or revenue nature. The general deductions provision in section 11(a) permitted the deduction from income of expenditure and losses actually incurred in the production of the income, provided that they were not of a capital nature. The distinction between revenue and capital was one which our courts, and those in foreign jurisdictions, have had to grapple with and develop and guidance had accordingly to be sought from the relevant case law.

(xviii) That Sishen had claimed the deduction of the 66kV line expenditure, in the alternative to it being a section 36(11)(a) deduction, on the basis of section 11(a), as expenditure related to its trade and not of a capital nature. In the further alternative, Sishen had claimed the expenditure as wear and tear or depreciation in terms of section 11(e) of the IT Act.

(xix) That to qualify as a general deduction, the 66kV line expenditure had to comply with two requirements. First, it had to be expended in carrying on Sishen’s trade. Second, it could not be of a capital nature. Sishen thus bore the onus in terms of section 102(1)(b) of the TA Act, of proving that the expenditure was: actually, incurred for the purposes of producing income; bona fide incurred for that purpose; and was so closely connected to its business operations that it would be proper and reasonable to regard the expense as part of the costs of performing its business operations, and hence not capital in nature.

(xx) That the expenditure incurred, including any costs of part of the infrastructure required to be replaced, was inextricably and closely connected to Sishen's income producing activities. The predominant purpose in incurring the expenditure was not to enhance Sishen's corporeal income earning structure, but to enable it to operate mining equipment for the proper utilisation of its mining right and to earn income from its trade.

(xxi) That the income earning structure, which was the mining pit, buildings and the like, would have been acquired and would constitute expenditure of a capital nature. But relocating the electricity supply lines when circumstances demanded that mine equipment be used as part of the income producing process in a new location, and probably new locations in the future, was expenditure inherently involved in generating mining income.

(xxii) That the 66kV line expenditure was, by its very essence, required to properly energise the electrical mining equipment so that iron ore could be extracted and an income earned. The expenditure was inextricably part of conducting mining operations. Common sense dictated that the expenditure should be recognised as a revenue expense and not as of a capital nature.

(xxiii) That, accordingly, the Tax Court had correctly concluded that the 66kV line expenditure was 'deductible under section 11(a), read with section 36(11)(a) of the IT Act. The 66 kV line expenditure was deductible in terms of section 36(11)(a), alternatively section 11(a). SARS' cross-appeal in respect of the 66kV line expenditure accordingly fell to be dismissed.

<u>As to the deductibility of the legal expenditure in terms of section 11(c) of the IT Act</u>

(xxiv) That the legal expenditure comprised fees paid by Sishen to legal practitioners to assist the Dingleton residents with advice in respect of their relocation. The legal expenses were claimed as deductible under section 11(c) read with section 11(a) of the IT Act. Section 11(c) provided for the deduction of expenses incurred in respect of fees for the services of legal practitioners, actually incurred during the year of assessment, in respect of any claim, dispute or action at law 'arising in the course of or by reason of the ordinary operations undertaken' by a taxpayer in carrying on his trade.

(xxv) That the Tax Court had concluded that the legal expenditure was not incurred in the course of, or by reason of, the ordinary operations undertaken by Sishen in the carrying on of its trade. SARS had supported that finding and he maintained that the legal expenditure was not incurred 'in the production of income' of Sishen as it was not sufficiently closely connected to the business operations of Sishen, for it to be proper, natural and reasonable to regard such expenditure as part of Sishen's legal costs in performing its mining operations.

(xxvi) That Sishen carried on trade by conducting mining operations. What required to be decided was whether these were legal expenses incurred in conducting that trade. Ultimately, a court had to assess the closeness of the connection between the expenditure and the income-earning operations to determine the purpose of the expenditure. The 'purpose' and 'effect' of the legal expenditure were decisive considerations in determining whether the expenditure was incurred in the production of Sishen's income.

(xxvii) That the legal expenditure in this appeal was not incurred by Sishen for its own direct benefit. It had not been shown to fall within any of the categories that would qualify for deduction. It was expenditure incurred for the benefit of the Dingleton residents and the purpose of the legal expenditure was to provide the Dingleton residents with legal advice in regard to the relocation project.

(xxviii) That the relocation expenditure in respect of the Dingleton residents had been allowed under section 36(11)(e) of the IT Act but that did not include the legal expenditure relating to legal advice made available to the Dingleton residents. The legal expenditure was not incurred in terms of any mining right, nor was it sufficiently closely related to Sishen's trade.

(xxix) That Sishen's trade was to mine for iron ore, not to provide legal assistance to the Dingleton residents. The legal costs were not incurred directly, or naturally, to earn or to produce income, but were simply another expense, with an insufficiently close, if any, nexus to the production of income in its trade.

(xxx) That, accordingly, Sishen had not discharged the burden of proving that the legal expenditure had been incurred in the production of its income and the legal expenditure was correctly disallowed as a deduction. Sishen's appeal against that finding must fail.

<u>As to the USP and interest</u>

(xxxi) That the Tax Court had set the USP imposed by SARS aside as being unjustified and the Tax Court was correct. SARS cross appealed against the disallowance of the understatement penalty, but this cross appeal was rightly abandoned in his heads of argument and, accordingly, the order of the Tax Court setting aside the USP therefore stood.

(xxxii) That SARS contended that interest was chargeable in terms of section 89quat(2) of the IT Act and, as regards the discretion in section 89quat(3), SARS contended that there was no basis to waive interest. The interest raised by SARS was set aside by the Tax Court. It had erroneously categorised the interest as 'Interest on USP.' As it set aside the USP, it also set aside the interest and, in doing so, it had misconceived the basis for the interest claimed by SARS in terms of section 89quat(2) and had erred. The parties were agreed that the assessment of the section 89quat(2) interest should be set aside and referred back to SARS for reconsideration and assessment.

(xxxiii) That in reconsidering the aspect of the interest, SARS should also consider the application of section 89quat(3) and any factors relevant to the exercise of his discretion.

(xxxiv) That, in summary, Sishen's appeal had succeeded in respect of the deduction of the relocation expenditure for Dingleton and the SWEP infrastructure but had failed in respect of the deduction of the legal expenditure. SARS' cross-appeal had failed in respect of the 66kV line expenditure and the USP. The section 89quat(2) interest, if any, and whether it should be waived, were referred back to SARS for determination afresh.

6.8. Aveng Mining Shafts & Underground v C:SARS (88 SATC 215)[8]

Aveng Mining Shafts and Underground, a division of Aveng (Africa)(Pty)Ltd (Aveng) was a vendor as defined in section 1 of the VAT Act.

Aveng's enterprise entailed shaft sinking and mining construction activities for various mining clients. From time to time it employed employees who were deployed to mines for limited periods to do work required for specific projects. These employees were required to be accommodated close to the mines where they performed the work, and they were provided with food.

Aveng paid the suppliers the amounts charged for the accommodation and food and these charges, it was common cause, constituted entertainment expenses.

[8] SCA

Aveng's enterprise did not involve the making of taxable supplies of entertainment in the course of its enterprise and it did not separately charge its mining clients for these costs. An estimate of the costs was included in the overall price at which it tendered to do the shaft sinking and mining for its clients and by the time the entertainment expenses were actually incurred, they may differ from the costs which prevailed when the tender price was determined.

Aveng, in submitting its VAT returns for the period June 2012 to August 2016, claimed input tax in the sum of R17 495 071.81 in respect of entertainment expenses incurred in respect of these employees and the input tax was claimed in terms of the provisions of section 17(2)(a) of the VAT Act.

SARS disallowed the input tax deduction, because the entertainment expenses were for employees who were not away from their usual place of work and Aveng did not recoup the expenses from the employees.

Aveng's subsequent appeal to the Tax Court against the disallowance of the input tax was unsuccessful (see ITC 1977 (2023) 86 SATC 406 per Makume J) and it then appealed to the Supreme Court of Appeal (SCA) with the leave of the Tax Court.

The issue in this appeal was whether section 17(2)(a)(i)(bb) of the VAT Act allowed Aveng to deduct certain input tax in respect of entertainment expenses, from its output tax for the period June 2012 to August 2016.

The court a quo, being the Tax Court, found that Aveng was not entitled to the deductions in issue because it did not recoup the entertainment expenses from the employees and accordingly it was precluded from deducting the input tax.

Section 17(2)(a) of the VAT Act dealt with the deductibility of input tax from output tax and section 17(2)(a)(i)(bb) provided:

'(2) Notwithstanding anything in this Act to the contrary, a vendor, shall not be entitled to deduct from the sum of the amounts of output tax and refunds contemplated in section 16(3), any amount of input tax:

(a) in respect of goods or services acquired by such vendor to the extent that such goods or services are acquired for the purposes of entertainment: Provided that this paragraph shall not apply where-

(i) such goods or services are acquired by the vendor for making taxable supplies of entertainment in the ordinary course of an enterprise which-

(aa) ……..

(bb) supplies entertainment to any employee or officeholder of the vendor or any connected person in relation to the vendor, to the extent that such taxable supplies of entertainment are made for a charge which covers all direct and indirect costs of such entertainment;'

Judge Koen held the following:

(i) That a proper interpretation of section 17(2)(a)(i)(bb) of the VAT Act required that the text, the context and the purpose of its provisions be examined and they must be considered simultaneously and holistically.

(ii) That, as regards context and purpose, Aveng invoked the neutrality principle. The thesis of the neutrality principle was that VAT was not a cumulative tax but a tax on value gained during the interval since a previous supply and paid only on the value that is added in each step of a production process. Thus, where a vendor makes taxable supplies, it should be completely relieved of the burden of paying VAT on its inputs and, accordingly, Aveng maintained that the input tax on the entertainment expenses should be allowed as a deductible input tax.

(iii) That the context applicable to a statutory instrument was important, but it was not everything. Specifically, it was not a licence to contend for meanings unmoored from the text and the structure. The text and structure have a gravitational pull that was very important and often conclusive. Context and purpose may be used to elucidate the text, but it cannot displace the ordinary meaning of the express wording of a statute.

(iv) That, turning to the text of the relevant provisions of the VAT Act, it was significant that the definition of 'input tax' did not include the input tax on all goods and services supplied to and acquired by a vendor. In terms of its definition, input tax was allowed only 'to the extent' determined in accordance with the specific provisions of section 17, and the goods or services were acquired by the vendor for making taxable supplies in the course of its enterprise.

(v) That, furthermore, a vendor was not entitled in terms of section 17(2)(a) of the VAT Act to deduct from its output tax an amount of input tax in respect of goods or services acquired 'for the purposes of entertainment.' The neutrality principle accordingly could not find application in the light of this express prohibition against the deduction of input tax in respect of entertainment expenses. The general principle emerging from section 17(2)(a) was that a vendor was not entitled to deduct any input tax charged on a taxable supply of goods and services acquired for the purposes of entertainment.

(vi) That the only input taxes that may be deducted in respect of entertainment expenses were those falling within the express exceptions listed in subpar. (i) to (ix) of the proviso to section 17(2)(a) of the VAT Act. Being exceptions to the otherwise general prohibition disallowing the deduction of input taxes in respect of goods or services acquired for the purpose of entertainment, they must be interpreted restrictively.

(vii) That the question was purely whether a vendor could establish that a particular input tax fell squarely within the parameters of one of the exceptions. Aveng had endeavoured to show that the input tax it sought to deduct fell within the exception in subpar. (bb) of section 17(2)(a)(i) of the VAT Act.

(viii) That entertainment was not the enterprise of Aveng. The input tax incurred was not in respect of goods and services acquired 'for making taxable supplies of entertainment' by Aveng. They were acquired, at best for Aveng, in respect of making taxable supplies of sinking mining shafts and related mining work. That was Aveng's enterprise. The provisions of section 17(2)(a)(i) had not been satisfied and the appeal failed at this preliminary level.

(ix) That, however, assuming that a taxable supply of entertainment was made for a charge in the course of Aveng's enterprise, Aveng had failed to recover the charge from its employees directly. In the alternative, if it would be sufficient for the purposes of the exception, to recover the charge from Aveng's clients, it failed to establish that what it built into the price charged to clients covered all the direct and indirect costs of such entertainment and for these reasons too the appeal must fail.

Appeal dismissed with costs.

6.9. ITC 1989 (88 SATC 224)

The taxpayer was a South African resident trust that had purchased two properties in Bloemfontein from the GN trust.

The properties were ‘the Absa precinct’ where Absa Bank leased offices and ‘the Life facility’ where Life Healthcare Limited leased a hospital.

The Sanlam Group (‘Sanlam’) financed the purchase of the two properties, by making two loans to the taxpayer. The first was a R115 million loan for the purchase of the Absa precinct and the other was a loan of R295 million for the purchase of the Life facility and the transfers of the properties took place in 2012.

Over the years that followed there were further loans from Sanlam to the taxpayer and in 2014 the taxpayer refinanced the Absa precinct with a R170 million facility, which it used to settle the initial capital advanced, and to pay a building contractor who was working on a new project in Cape Town. The taxpayer refinanced the Absa precinct again in 2018 with a R170 million loan from Sanlam. In addition to these loans, Sanlam provided the taxpayer with a mezzanine finance facility of R35 million in 2014, which the taxpayer used to make alterations and improvements to the Absa precinct. In addition to the loans on the Absa precinct, in 2019 Sanlam provided a R150 million extension on the Life facility loan and the taxpayer used this to pay down R142 million on the Life facility loan and used the remainder to acquire another property.

All the Sanlam loans were arranged by Sanlam Capital Markets (Pty)Ltd (SCM) and for this facility SCM charged raising fees. The salient features of the raising fees were virtually identical. First, they were 2% of the capital raised in each instance. Second, the drawing down of the loans was conditional upon the payment of the raising fees and, third, in raising the finance, SCM acted as a facility agent, whether or not it also loaned the money.

Three of the raising fees were relevant:

- the R3.4 million fee on the 2018 Absa precinct refinancing;
- the R320 000 fee in respect of the 2018 mezzanine refinancing; and
- the R3 million fee on the 2019 Life facility extension.

The first two fees fell in the taxpayer’s 2019 fiscal year and the third in its 2020 fiscal year.

The taxpayer contended that the raising fees were deductible ‘interest or similar finance charges’ as envisaged in section 24J of the IT Act and, in the alternative, that the raising fees were deductible under section 11(a) of the IT Act.

SARS was of the view that the raising fees were not 'interest or similar finance charges' as defined in section 24J of the IT Act, but were, in the alternative, capital in nature, and hence not deductible.

The relevant statutory provisions were sections 11(a) and 11(x) and sections 24J(1) and 24J(2) of the IT Act.

Section 24J(1), which resides under 'this Part' (see section 11(x)), defines 'interest' and 'issuer':

"interest' includes the-

(a) gross amount of any interest or similar finance charges, discount or premium payable or receivable in terms of or in respect of a financial arrangement;

…

'issuer' in relation to any instrument-

(a) means any person who has incurred any interest or has any obligation to repay any amount in terms of such instrument…'

Judge Myburgh held the following:

(i) That the determination of this matter involved the interpretation of statutory provisions and the interpretive principles derived from the case law and included the search for the meaning embedded in the text, and in this sense, meaning is 'the most compelling and coherent account that the interpreter can provide.' Moreover, meaning was ascertained by way of a unitary exercise 'making use of the sources of interpretation', i.e. the triad of text, context and purpose. One must guard against a meaning that strains the language of the provision, and one must also guard against an interpretation that yields an unbusinesslike and unwieldy result.

(ii) That the first point of contention was whether the raising fees fell under the definition of 'interest or similar finance charges' and, if so, they were deductible in terms of section 11(x) of the IT Act read with sections 24J(1) and (2). If not, it had to be determined whether they were deductible under section 11(a) of the IT Act.

(iii) That section 24J(1) provided for an expanded definition of what was generally understood as interest where it provided that 'interest' for the purposes of section 24J included 'interest or similar finance charges'. Thus 'interest' as defined must necessarily be wider than 'interest' in the common law or normal sense. It cannot be otherwise. If a diminished meaning was envisaged, the definition would exclude things rather than include them.

(iv) That the use of ‘including’ enlarged or broadened the definition of interest for purposes of section 24J and the use of ‘or’ between ‘interest’ and ‘similar finance charges’ was also significant. ‘Or’ is ‘used to link alternatives’. Thus ‘similar finance charges’ was an alternative to ‘interest.’ It was something other than interest.

(v) That, as to the meaning of ‘finance charge’, the Oxford Online Dictionary defines it as ‘an amount paid by the borrower to a lender for arranging a loan, or interest amounts paid on the loan.’ It was accepted by all that raising fees were finance charges.

(vi) That the word ‘similar’ and its various iterations connoted resemblance of some sort. The extent of the similarity is often indicated by adverbs such as ‘vaguely’, ‘very’ or ‘remotely’ or the context in which the word is used. ‘Similar’ did not mean ‘identical to’ or something to that effect, certainly not in this context. If it were so, that would render the whole phrase ‘similar finance charges’ superfluous. In the court’s view, the notion of ‘relevant resemblance’ made sense. It spoke to the peculiar context of the case.

(vii) That ‘interest’ for purposes of section 24J was not necessarily interest determined with reference to the time value of money, it could be compensation in exchange for the provision of credit. A once-off lump sum payment based on a percentage of the value of the finance advanced, without regard to the period of the loan, may therefore not be closely associated with the time value of money, but that did not make it dissimilar to interest for purposes of section 24J of the IT Act.

(viii) That SARS argued that for a raising fee to be a ‘similar finance charge’ it must have to have the fundamental characteristics of common law interest. In the court’s view a timing difference as to the incurral of raising fees and the incurral of interest was not a relevant dissimilarity as it did not change the nature of the charges in question.

(ix) That the payment of the raising fees was part and parcel of the compensation for the loan. Without the payment of the raising fees there would be no loan, and the taxpayer would not have had the benefit of the money.

(x) That it was argued for SARS that raising fees were a consideration for arranging the loans and not for the use of the loan. The raising fees were indeed a consideration for the arrangement of the loan. Without the payment of the raising fees there would be no loan. This underlined the close proximity or association between the raising fees and the loans and was indicative of a relevant similarity between the two.

(xi) That, accordingly, the raising fees in question were 'interest or similar finance charges' as envisaged by section 24J(1) of the IT Act and were accordingly deductible in terms of section 24J of the IT Act.

Appeal upheld.

6.10. Henque 3935 CC c C:SARS (88 SATC 237)[9]

Henque was a close corporation and it traded as a retailer of apparel and beauty products, sold through branded stores located in shopping malls around South Africa.

In terms of section 5(1)(*d*) of the IT Act, Henque was required to pay tax on its income earned or accrued during each of its financial years and it filed a tax return for 2017 with SARS in which it claimed to have made a loss of R46 000 and was therefore not obliged to pay any income tax.

SARS on 29 November 2017, issued a notice of an original assessment for the 2017 year of assessment based solely on the claims made by Henque in its tax return and in the same notice SARS informed Henque that it would be subjected to an audit.

Henque, on 31 January 2018, commenced business rescue in terms of the Companies Act. On the same day the business rescue practitioner was appointed and SARS was informed of Henque's commencement of business rescue.

SARS, on 1 May 2018, raised an additional assessment for the 2017 income tax year of assessment and on 31 May 2018 the business rescue plan was published and was sent with a notice of meeting of creditors to all known creditors and the business rescue plan and all the annexures were served on SARS.

SARS, on 2 August 2018, lodged a claim with the business rescue practitioner recording the 2017 additional assessment as a pre-business rescue debt.

[9] SCA

The business rescue practitioner also submitted Henque's VAT returns for the June 2018 to March 2019 periods. At that stage Henque had accumulated a VAT credit of R1 018 320.80.

SARS, on 14 February 2019, informed the business rescue practitioner that it had set-off the VAT credit against the 2017 additional income tax assessment debt and the VAT liability for the January 2018 period.

SARS had asserted that it was entitled to apply the set-off as both liabilities were post business rescue debts, which were not subject to the payment and enforcement terms under the business rescue plan.

Attempts to resolve the dispute between the parties regarding the refund of the VAT credit failed and Henque thereafter on 11 June 2020 issued a statutory notice in terms of section 11(4) of the TA Act informing SARS of its intention to institute legal proceedings.

Henque then brought an application in the High Court (see *Henque 3935 CC t/a PQ Clothing Outlet (in Business Rescue) v C: SARS* 86 SATC 136) for a *declarator* that any liability from normal tax in terms of the IT Act in respect of a period of assessment which ended on or before the date of commencement of business rescue, was a liability which arose prior to the commencement of business rescue and a similar contention was made regarding VAT liability.

The High Court found that such debt constituted a post-commencement debt which was not subject to the business rescue plan and that it could be set off against the VAT refund that became payable by SARS to the company after it was placed in business rescue.

On appeal to the Supreme Court of Appeal the following issues were raised:

- Whether the High Court had jurisdiction to hear an application for declaratory relief concerning the tax liability of a company in a business rescue;
- Whether Henque's liability arising from the 2017 additional tax assessment and the VAT period 01/2018 was a pre – or post-commencement debt;
- Whether SARS was entitled to set off VAT refunds, to which Henque became entitled after the commencement of business rescue, against Henque's liability in the 2017 additional income tax assessment and for the VAT period 01/2018.

As regards the first issue above, SARS submitted that the High Court did not have jurisdiction to entertain the application for a *declarator*, contending that Henque had incorrectly launched the proceedings for a *declarator* after receipt of the additional income tax assessment for the 2017 year of assessment, instead of disputing that assessment in the Tax Court in terms of section 104(1) of the TA Act and, furthermore, in the absence of a section 105 direction, the High Court did not have the requisite jurisdiction to entertain the matter.

As regards the second issue above, Henque submitted that the income tax liability arising from the 2017 additional income tax assessment and the liability for the VAT January 2018 was a pre-business rescue commencement debt and it was the creation of the obligation that determined whether the debt was a pre – or post-business rescue commencement debt.

SARS submitted that its claim for income tax related to the 2017 additional assessment which was due and payable on 31 May 2018, which was after the commencement of the business rescue. SARS argued that this was so because a tax debt is owed upon receiving notice by SARS in respect thereto. It submitted further that the moratorium did not prohibit set-off as envisaged in section 191 of the TA Act.

Judge Zondi held the following:

<u>As to the High Court's jurisdiction to consider the application for declaratory relief</u>

(i) That the dispute between the parties related to the characterisation of the tax liability of a company in business rescue for the purposes of section 154 of the Companies Act and whether such liability may be set-off against the VAT refund that became due to the company after the commencement of business rescue.

(ii) That Henque's grievance did not concern 'an assessment' or 'decision' in terms of section 104(2)(*c*) of the TA Act. Henque did not seek a declaratory order on a question going to the correctness of an assessment. What Henque challenged was not a decision or assessment which is appealable to the Tax Court. Henque is not challenging the correctness of the assessments or seeking their setting aside, it disputed the manner in which SARS characterised its income tax liability arising from the 2017 additional assessment and whether such liability could be set-off against the VAT refunds which became payable to Henque after it commenced business rescue.

(iii) That the issue was whether such liability fell to be paid in terms of the business rescue plan as a pre-business rescue debt or whether it should be paid as a post-business rescue debt. The declaratory relief that Henque sought will not have any effect on any of the assessments that SARS had issued against Henque since it was placed in business rescue on 31 January 2018. The declaratory order that is sought will merely direct how the amounts owing to SARS by Henque should be paid.

(iv) That the court accordingly found that the High Court did have jurisdiction to consider the application for declaratory relief and, accordingly, SARS' contention that the High Court could not exercise its declaratory jurisdiction absent a section 105 direction, had to fail.

<u>As to the merits</u>

(v) That in terms of section 152(4) of the Companies Act a business rescue plan that has been adopted is binding on each of the creditors of the company. Section 154(2) made it clear that, where the business rescue plan had been adopted and implemented, a creditor was not entitled to enforce any debt owed by the rescued company at the commencement of the business rescue process, except to the extent as provided for in the business rescue plan.

(vi) That section 5 of the IT Act created and imposed a liability for income tax in respect of the taxable income received or accrued during the relevant year. Immediately after the end of the year, or shorter period, the taxation debt is owed, even though it may not yet have been quantified and was not due and payable. The process of quantification is by means of the submission of a return by the taxpayer for the assessment of tax in a further period allowed after the end of the year or period of assessment, in terms of section 66 of the IT Act and the making of an assessment by SARS on the basis of such return in terms of section 91 of the TA Act. The notice of assessment fixes the date by which the liquidated debt owed becomes due.

(vii) That SARS was empowered to make an additional assessment where the assessment did not reflect the correct application of the tax. The effect of this was to permit SARS to re-quantify and correctly state the debt that was owed at the end of the relevant financial year. The re-quantification of the debt in the additional assessment did not create a new liability. Henque's 2017 financial year ended on 28 February 2017. SARS issued the original 2017 income tax assessment on 29 November 2017, after the end of Henque's 2017 financial year and prior to 31 January 2018, the commencement date of the business rescue.

(viii) That, accordingly, any income tax liability that Henque owed to SARS in respect of the 2017 financial year was owed at the end of the 2017 financial year, prior to the commencement of business rescue on 31 January 2018 and, as such, this liability was a pre-business rescue commencement liability.

(ix) That, similarly, Henque's VAT return for the January 2018 period did not originate the tax liability, it quantified the extent of the tax liability payable to SARS. The liability for VAT is created by section 7 of the VAT Act. This section provided that VAT shall be levied and paid on the supply by any vendor of goods or services supplied in the course or furtherance of any enterprise carried on by a vendor. The vendor's liability to pay the VAT to SARS is an 'output tax' as defined. The vendor's liability was reduced by the deduction from the output tax of VAT which the first vendor paid to other vendors for the supply of goods or services in the course of the first vendor's enterprise during the relevant period and this latter VAT is defined as 'input tax.'

(x) That liability arose, and the tax was owed, at the time of a relevant supply. The liability for VAT was thus a liability that arose on each individual transaction. Henque was required to account to SARS for the tax by rendering a VAT return but the submission of the return (self-assessment) quantified its liability but it did not create liability.

(xi) That as the debt arose on the supply, the debt was owed when Henque made the taxable supply. The debt did not arise when the return was due or made. While income tax is levied at the end of the year of assessment in which the tax debt is owed, VAT is levied on each individual relevant transaction (a supply). SARS' pre-commencement claims for VAT were therefore, in respect of those supplies that had taken place, or were deemed to have taken place in terms of the Companies Act, prior to the commencement date.

(xii) That the January 2018 VAT accounting period ended on 31 January 2018, which was the commencement date of the business rescue. The end of the VAT period, 31 January 2018, coincided with the commencement date and, accordingly, all the VAT supplies made or received by Henque in January 2018 up to and including 31 January 2018 were pre-commencement claims, subject to the business rescue plan by reason of the provisions of section 154(2) of the Companies Act.

(xiii) That in the court's view both tax liabilities, income tax and VAT, were pre-business rescue commencement debts, subject to payment under the business rescue plan.

(xiv) That the next question was whether SARS was entitled to set-off VAT refunds against income tax liability. SARS' attempt to rely on its right in terms of the common law to set-off refunds owed to Henque against tax debts it claimed were due to it, would circumvent the legislative scheme regulating the payment and recovery of tax debts in the TA Act and the statutory provisions relating to business rescue in the Companies Act. In any event, even under the common law, SARS' attempt to apply set-off should fail.

(xv) That in the present case, set-off was not applicable since Henque's tax debts were, by operation of law, pre-business rescue debts. The debt SARS seeks to collect by applying set off of the VAT refunds due to Henque in the course of business rescue is a pre-business rescue tax liability. The additional assessment SARS had raised on 1 May 2018 related to the 2017 year of assessment. SARS had initially assessed Henque for income tax on 1 January 2018 for the 2017 year of assessment. The fact that SARS raised the assessment on 1 May 2018, after business rescue had commenced, did not change the nature of this liability. The January 2018 VAT liability became liquid and mature when Henque submitted the self-assessment VAT return, accounting for the January 2018 VAT period to SARS on 18 March 2018. Both the income tax debt and VAT debt were pre-business rescue debts to be paid in terms of section 154(2) of the Companies Act.

(xvi) That the VAT credits became payable by SARS to Henque after the commencement of the business rescue. These credits were post-commencement credits and SARS may not apply set-off of the pre-commencement debts against the post-commencement VAT refunds.

(xvii) That, in conclusion, the court found that the re-quantification of the debt in the additional assessment did not create a new liability and therefore any income tax liability that Henque owed to SARS in respect of the 2017 financial year was owed at the end of the 2017 financial year before the commencement of the business rescue on 31 January 2018 and that tax liability was therefore a pre-business rescue commencement liability payable in terms of the approved business rescue plan. The liability for the VAT January 2018 period was created in terms of section 7 of the VAT Act when Henque made and received taxable supplies on or before 31 January 2018. Both the income tax and VAT debts were not capable of being set off against the VAT refunds which became payable to Henque after the commencement of business rescue.

Appeal upheld with costs including the costs of two counsel.

6.11.C:SARS v Virgin Mobile South Africa (Pty) Ltd (88 SATC 254)[10]

SARS had issued an additional assessment against the Virgin Mobile South Africa (Pty) Ltd (Virgin) for the 2014, 2015 and 2016 tax years.

Virgin had filed a notice of appeal against the assessment on 22 May 2019 and in terms of Rule 31 of the Tax Court Rules, SARS was then obliged to file a statement within 45 days in response to the appeal.

SARS failed to file its statement and despite compliance reminders being sent to SARS, it remained in default and, on 13 October 2020, Virgin filed a notice in terms of Rule 56(1)(*a*) of the Tax Court Rules calling upon SARS to remedy its default within 15 days, failing which, it would apply for default judgment against it.

On 20 October 2020 (five days after the notice was served) SARS complied with the notice and filed its Rule 31 statement.

Notwithstanding SARS' compliance with the notice, Virgin applied for default judgment on 30 November 2020.

SARS, on 14 December 2020, filed a notice in terms of Rule 30 of the Uniform Rules of Court, read with Rule 42 of the Tax Court Rules, calling upon Virgin to withdraw the default judgment application, failing which, it would launch an application to set it aside as an irregular step.

SARS contended that it had complied with Virgin's notice, thereby curing its default.

Virgin disagreed, prompting SARS to launch the Rule 30 application, which the Tax Court had dismissed with costs.

SARS, in turn, appealed against the Tax Court's order to the High Court, the majority of which dismissed the appeal with costs.

The SCA granted SARS leave to appeal.

In adjudicating the matter, the SCA first decided the issue of the appealability of the High Court's order before determining the merits as, before the hearing, the SCA had requested the parties to file supplementary heads of argument as to whether the High Court's order was appealable.

[10] SCA

Virgin contended that the High Court's order was not appealable because (*a*) it was not final in effect, and (*b*) it was interlocutory.

SARS contended that it would be in the interests of justice for the SCA to decide the main issue due to the divergent judgments in different Tax Courts and it further contended that a decision of the SCA would create certainty.

Judge Musi held the following:

<u>As to whether the High Court's order was appealable</u>

(i) That section 133(1) of the TA Act addressed the issue of appealability in respect of decisions of the Tax Court: a taxpayer or SARS may appeal against 'a decision of the Tax Court under sections 129 and 130.' The question was thus whether the dismissal of an application in terms of Rule 30 of the Uniform Rules was a 'decision' as contemplated in section 129(2) of the TA Act.

(ii) That section 129(2)(*d*) gave the Tax Court the power to make appropriate orders in procedural matters. This power was linked to that court's jurisdiction under section 117(3) to hear applications in procedural matters relating to disputes. Virgin's appeal against SARS' additional assessment was a dispute under Chapter 9 of the TA Act. Was the Rule 30 application filed by Virgin a procedural matter relating to that dispute? If so, the decision of the Tax Court was appealable. In this instance, it appears that Rule 30 of the Uniform Rules was the most appropriate rule to have a step declared irregular.

(iii) That, essentially, an irregular step was taken when one party takes a procedural step inconsistent with the Rules, in order to advance the litigation, to the prejudice of the other party. Whether it would be in the interests of justice to determine the appealability of an order in a procedural matter must be decided on a case-by-case basis, after weighing up all the relevant factors.

(iv) That, in the court's view, the better approach would be that an application in a procedural matter relating to a dispute under Chapter 9 of the TA Act was appealable, provided that it was in the interests of justice to consider the appeal.

(v) That in terms of Uniform Rule 30(2)(*a*) an application to set aside an irregular step may be made only if the applicant has not taken a further step in the cause with knowledge of the irregularity. If SARS were to apply for condonation, it would amount to a further step in the progress of the matter and it would not be able to utilise the Rule to complain about the same irregular step. The order has a final effect and cannot be revisited by the Tax Court.

(vi) That there were conflicting decisions in the Tax Court on the main issue, which created uncertainty. Uncertainty as to the correct legal position was not in the interest of justice. Rather, the interests of justice required clarity regarding the proper interpretation of Rule 56(1) of the Tax Court Rules.

(vii) That, accordingly, the application in terms of Uniform Rule 30(1) to remove the irregular step was an application in a procedural matter as contemplated in the TA Act and it would be in the interests of justice to hear and determine the appeal.

As to the merits of the appeal

(viii) That the Tax Court held that where a party had not complied with the period in Rule 31 it must request an extension of time in terms of Rule 4(2). It found that the delivery of a Rule 56(1) notice and timeous response thereto, did not exempt the defaulting party from compliance with Rule 4(2). It reasoned that, absent an application for condonation or a Rule 4(2) extension, there was no impediment against an application for default judgment by the innocent party because in these circumstances the Rule 31 statement was invalid.

(ix) That the majority of the High Court found that 'obligation' in the context of Rule 56(1) read with 'default' referred to SARS' obligation to file a statement in terms of Rule 31 which complied in substance, form and time with the prescripts of Rule 31 and failing which SARS must cure the defect in terms of Rule 4 or Rule 52(6). It opined that to hold otherwise would render Rules 4 and 52(6) superfluous. The minority found that since SARS had complied with the Rule 56(1) notice, there was no need for it to apply for condonation or an extension of time. It would have held that the application for default judgment was an irregular step.

(x) That the Rule 56(1) notice served the purpose of a compliance notice. It is a procedural mechanism which assisted an innocent party to advance the appeal, either by ensuring compliance or by securing a default judgment. Absent compliance, the innocent party may, after giving the defaulter notice of its application, apply for default judgment. Since a final order under section 129(2) can be drastic, sufficient notice should be given before it is sought. However, the underlying objective of the Rule 56(1) notice procedure is not punitive. It is aimed at facilitating finality of the dispute by coercing compliance. Once compliance has been achieved, the Rule will have served its purpose.

(xi) That it was for this reason that, after compliance with the notice, there is no need for the defaulter to apply for condonation. Rule 56(1) is self-contained: its purpose was achieved when SARS complied with the demand that it files its Rule 31 statement within the period specified in the notice. The notice in this matter called upon SARS to remedy its failure to file its Rule 31 statement but incorrectly stated that SARS had 'consequently failed to comply with the periods and obligations under the Rules.'

(xii) That the duty to apply for condonation for non-compliance with the Rules was a matter between the court and the defaulting party, whereas the reference to 'obligations' in Rule 56(1) related to obligations between the parties.

(xiii) That the purpose of Rule 56(1) was to coerce compliance because a party has shunned the Rules, including Rules 4 and 52. Compliance with a Rule 56(1) notice was akin to complying with a notice of bar in terms of Rule 26 of the Uniform Rules. If a party is served with a notice of bar, it is enjoined to file the required pleading in the five days set out in the notice. If such party complies, the bar is automatically lifted by dint of compliance with the notice. A condonation application is therefore not necessary.

(xiv) That in terms of the Uniform Rules, a defendant may file a notice of intention to defend and fail to deliver a plea for years. Nothing will happen to advance the matter, until the plaintiff decides to deliver a notice of bar. The defaulting defendant may then deliver its plea without applying for condonation. It may even do so after the application for default judgment had been filed, subject to an adverse costs order. No condonation application is necessary under these circumstances.

(xv) That in an adversarial system such as ours, where the Rules allow the parties to regulate the advancement of a matter, specifically before *litis contestatio*, it is important for the innocent party to timeously invoke a Rule that is aimed at ensuring compliance with the Rules. The innocent party must be vigilant. The law favours and assists those who timeously pursue their procedural and substantive rights, and not those who delay or neglect them. Virgin could have invoked Rule 56(1) immediately after the lapse of the 45 days stipulated in Rule 31.

(xvi) That the High Court ought to have held that a party who is served with a Rule 56(1) notice need not apply for condonation after complying with the notice. It should have found that the default judgment application was an irregular step and granted the Uniform Rule 30 application.

Appeal upheld with costs.

6.12. *ITC 1990 (88 SATC 275)*

The taxpayer was an independent power producer operating a solar photovoltaic electricity generating farm ('the solar facility') in the Northern Cape Province. Its income resulted from a single trade, the sale of energy generated by it through the solar facility, to Eskom Holdings Society Limited ('Eskom').

The taxpayer's solar facility commenced operating on 21 May 2014 and it, at that stage, started earning revenue from its trading activities, being the sale of energy to its single client, Eskom.

The taxpayer, prior to it commencing its trading activities, had incurred significant expenditure in the construction, erection and establishment of the solar facility and this included not only raising loans and financial credit facilities necessary to fund the initial capital outlay required to reach the position from which it could begin its trading activities.

The taxpayer, in terms of its revised tax return for the 2014 tax year, had deducted certain expenditure incurred prior to the commencement of its trading activities and in preparation for the carrying on of its trading activities, described as 'development fees', in the sum of R320 984 903. The development fees represented the cost of expenditure incurred by the taxpayer in connection with the raising of funds and credit facilities required to provide the monies necessary to pay for the establishment of the solar facility.

The development fees were not directly included in the various credit agreements concluded by the taxpayer with its creditors that made the funding available.

The taxpayer alleged that the development fees fell within the meaning of 'related finance charges' and the definition of 'interest' contained in section 24J of the IT Act and that it was entitled to claim the development fees as deductions from income in the 2014 tax year in terms of section 11A(1)(*b*) of the IT Act.

SARS had initially allowed the deduction of the development fees but subsequent to an audit of the taxpayer's tax affairs by SARS, it had disallowed the deduction of the development fees in the taxpayer's 2014 assessment.

SARS, in its finalisation of audit letter, had recorded the taxpayer's response to its previous request for representations from the taxpayer in respect of a breakdown of the pre-trade expenses, being the developmental expenses, and an explanation as to why each expense should be allowed as a deduction by SARS.

The taxpayer had relied on the close connection to the obtaining of the loans and the furtherance of the project as a whole and had relied on the cases of *C: SARS* v *South African Custodial Services (Louis Trichardt) (Pty) Ltd* 74 SATC 61 (SACS) and *ITC 1870* 76 SATC 97.

The taxpayer's claims to the deduction of the development fees were premised on section 24J and section 11A of the IT Act. Section 11A permitted the deduction of income derived from a trade, of expenditure actually incurred by the taxpayer prior to the commencement and in preparation of the carrying on of that trade, if such expenditure would have been allowed as a deduction in terms of certain other provisions of the IT Act, had such expenditure been incurred after the taxpayer had commenced carrying on the trade.

Section 24J(2) permitted the deduction of interest expenditure from the income of a trade if that amount was incurred in the production of income, with no limitation or exclusion on the basis that the interest expenditure was capital in nature.

The taxpayer had relied on the definition of 'interest' in section 24J(1) during the 2014 year of assessment, that included the expression 'related finance charges'. Section 11A(1) permitted the deduction of interest expenditure under section 24J, if incurred after trade commenced, which could be deducted under section 11A if such expenditure had been incurred prior to the commencement of trade.

The taxpayer had claimed a deduction of the development fees on the basis that they comprised pre-trading expenses, pre-commencement expenditure, incurred in anticipation of it producing income because it was not trading at that time.

SARS, in the finalisation of audit letter, contended that *SACS* and *ITC 1870*, *supra*, only applied to section 11(*b*A) and not to section 24J. Accordingly, SARS refused the deduction of the development fees because they comprised related finance charges, category 2 expenses, and did not, according to SARS, meet the requirements of section 24J. Furthermore, SARS was of the view that reliance by the taxpayer on *SACS* and *ITC 1870*, *supra*, was misplaced as a result.

On 19 March 2024 SARS delivered its Rule 31 statement in which it conceded that *SACS* and *ITC 1870*, *supra*, were applicable, and that so called 'related finance charges', being category 2 expenses, may be deducted under section 24J. However, SARS, whilst conceding that the taxpayer had incurred the pre-trade expenditure, denied that it was deductible. The basis for denying the deduction in the Rule 31 statement was the paucity of specificity or particularity provided by the taxpayer in respect of the pre-trade expenditure.

The taxpayer then brought an interlocutory application for default judgment in the Tax Court in terms of Rule 56(1)(*a*) of the Tax Court Rules requesting an order in terms of section 129(2) of the TA Act to set aside SARS' Rule 31 statement and ordering it to deliver a Rule 31 statement that complied with Rule 31(3) of the Tax Court Rules and ancillary relief.

The taxpayer's complaint was that SARS' Rule 31 statement did not comply with Rule 31(3) of the Tax Court Rules which prohibited new grounds in a Rule 31 statement that constituted a novation of the whole of the factual or legal basis of the assessment or which required the issue of a revised assessment.

SARS contended that it did not introduce new grounds in its Rule 31 statement but had simply amplified its position as to why the section 11A pre-trade expenditure had not been shown satisfactorily to not be capital in nature.

Judge Crutchfield held the following:

(i) That in order to test if the new grounds in the Rule 31 statement constituted a contravention of Rule 31(3), it was necessary to compare the provisions of SARS' Rule 31 statement with the assessment itself, in this case the amended assessment.

(ii) That whilst SARS argued that the comparison ought to be made against the objection phase, that was incorrect. The scheme of the process and the wording of Rule 31(3) itself was such as to make the comparison between the Rule 31 statement and what was in the assessment itself. The wording of Rule 31(3) made it plain that the comparison was with the assessment.

(iii) That Rule 31(3) was permissive in that it provided that SARS may include in the statement a new ground of assessment or basis for the partial disallowance of the objection unless that new ground constituted a novation of the whole of the factual or legal basis of the disputed assessment, or which required the issue of a revised assessment. Accordingly, the comparison arose between the Rule 31 statement and the assessment itself and not the objection.

(iv) That SARS accordingly could not introduce new matter that constituted a novation of the assessment in terms of the objection or appeal stages of the process. SARS' use of the objection stage as a benchmark, in the circumstances, was legally impermissible.

(v) That the taxpayer had claimed a deduction of the development fees on the basis that they comprised pre-trading expenses, pre-commencement expenditure, incurred in anticipation of the taxpayer producing income as it had not been trading at that time. Section 11A enabled the deduction of pre-trade expenses comprising interest and finance charges in terms of section 24J, irrespective of whether it was of an income or capital nature. Section 24J did not have a non-capital requirement in it.

(vi) That the taxpayer had always acknowledged that the development fees were of a capital nature and its claim for a deduction did not arise in terms of par. (*a*) of section 11 of the IT Act but in terms of section 11A, read with section 24J of the Act.

(vii) That section 24J provided for two categories of expenditure, an interest charge that was directly related to the amount of credit and the period for which the credit was extended, and, secondly, 'related finance charges'. The latter referred to legal fees, guarantee costs, the cost of raising a loan and financing, brokers' and lawyers' fees, all fees not being included directly in the finance agreements themselves.

(viii) That the taxpayer had relied on the close connection to the obtaining of the loans and the furtherance of the project as a whole and had relied on two cases, *ie C: SARS* v *South African Custodial Services (Pty) Ltd* 74 SATC 61 (*SACS*) and *ITC 1870* 76 SATC 97. *SACS* had found that costs not directly included in credit agreements, being costs associated with credit, could be claimed as a deduction. SARS, in the finalisation of audit letter, had contended that *SACS* and *ITC 1870* only applied to section 11(*b*A) and not to section 24J. This was contrary to what had been held by the Supreme Court of Appeal in *SACS*. Accordingly SARS refused the deduction of the development fees because they comprised related finance charges and did not, according to SARS, meet the requirements of section 24J and, furthermore, reliance on *SACS* and *ITC 1870* had been misplaced by the taxpayer as a result.

(ix) That it was significant that SARS had acknowledged in the finalisation of audit letter that it had requested and received from the taxpayer a breakdown of the pre-trade development fees which SARS had factually accepted as having a close connection to the taxpayer procuring loans and raising finance for the furtherance of the solar farm project as a whole, and which SARS did not challenge factually at that stage.

(x) That when SARS delivered its Rule 31 statement it conceded that *SACS* and *ITC 1870* applied and that so-called 'related finance charges' could be deducted under section 24J. Hence SARS' position in its Rule 31 statement constituted a complete turnaround, whereas SARS had previously alleged that *SACS* and *ITC 1870* did not apply to section 24J and did not apply to the matter at hand, now SARS, in terms of its Rule 31 statement, conceded that *SACS* and *ITC 1870* applied directly to section 24J, related finance charges and to the matter at hand. SARS, in short, did a *volte-face*.

(xi) That SARS, in contrast to the grounds of the amended assessment and the basis for disallowing the objection, conceded the taxpayer's contention in respect of the applicability of 'related finance charges' in the definition of 'interest' in section 24J(1)(*a*) of the Act.

(xii) That, however, SARS, whilst conceding that the taxpayer had incurred the pre-trade expenditure, denied that it was deductible by it. The basis for denying the deduction in the Rule 31 statement was the paucity of specificity or particularity provided by the taxpayer in respect of the pre-trade expenditure. In other words, SARS, in terms of its Rule 31 statement, had proffered a factual challenge to a premise that SARS had previously accepted.

(xiii) That, according to SARS, the taxpayer had claimed a plethora of pre-trade expenses under the heading 'development fees' without including the necessary particularity required of it in order to discharge the burden of proof in terms of section 102(1)(*b*) of the TA Act. SARS' contention was surprising as it had previously acknowledged that the taxpayer had supplied it with a breakdown of the pre-trade expenditure and an explanation as to why that pre-trade expenditure was justifiable as a deduction.

(xiv) That SARS had not, prior to delivering its Rule 31 statement, challenged on a factual level, the closeness of the expenditure to the financial agreements concluded by the taxpayer. SARS' previous argument, in terms of the revised assessment, was that a close connection was insufficient to merit the deduction claimed by the taxpayer because the pre-trade expenditure did not arise in terms of the financial arrangements themselves.

(xv) That par. 13 of SARS' Rule 31 statement comprised a complete novation of the legal basis of the assessment and it was self-evident that SARS, in terms of the Rule 31 statement, did not merely elucidate or further articulate on the same position previously adopted by it. Contrary to SARS' contention, it did a complete about-turn in the Rule 31 statement.

(xvi) That SARS, in the revised assessment, contended that the taxpayer's stance was incorrect, that *SACS* and *ITC 1870* did not apply, that those cases applied to section 11(*b*A) and not to section 24J and that the finance charges had to arise directly from and in terms of the finance agreements. In SARS' Rule 31 statement it alleged that the wide meaning of 'related finance charges' always contended for by the taxpayer, was not applicable.

(xvii) That SARS had raised the alleged lack of particularity in respect of the pre-trade expenditure for the first time in its Rule 31 statement. However, SARS did not raise any such concerns prior to the Rule 31 statement. In fact, contrary thereto, SARS had accepted the close connection between the pre-trade expenditure claimed as development fees and the credit agreements concluded by the taxpayer. There was never a blurring of the nature of the pre-trade expenditure as alleged by SARS in the Rule 31 statement. The taxpayer had been clear throughout that the development fees were of a capital nature.

(xviii) That SARS' contention in the Rule 31 statement that there was a lack of particularity that the expenses qualified factually as expenses that were permitted by *SACS* and *ITC 1870*, was a completely new case proffered by SARS at the Rule 31 stage. Whereas previously SARS had accepted that the expenditure was category 2 expenditure but contended that such category 2 expenditure was legally insufficient to justify the deduction, now SARS advanced a wholly different and contrary case. The prejudice to the taxpayer resulting from SARS changing its course midstream was significant.

(xix) That, in the circumstances, SARS' Rule 31 statement did not comply with Rule 31(3) in that it constituted a novation of the whole of the factual and the legal basis of the disputed assessment, and, the new grounds introduced in the Rule 31 statement required the issue by SARS of a revised assessment.

(xx) That to allow SARS now to introduce an entirely new case and expect the taxpayer to go back eleven years in order to find the necessary proof, was prejudicial in the extreme, blatantly unfair and simply untenable.

(xxi) That it was apparent that SARS had abandoned the entire legal basis of the assessment, being its legal interpretation of section 24J as being distinguishable from *SACS* and *ITC 1870*.

(xxii) That, in the circumstances, given that SARS had abandoned the entire legal basis of its assessment, there was nothing left of this appeal and the matter stood to be determined in favour of the taxpayer.

(xxiii) That in these circumstances, and regard being had to sections 129 and 130 of the TA Act the court granted the following order:

The additional assessment dated 13 December 2018 stood to be altered in the following manner:

(i) The disallowance of the amount of development fees in the sum of R320 984 903 is to be reversed and such amount is to be allowed as a deduction in terms of section 11A of the IT Act;

(ii) The USP consequent upon such disallowance are to be reversed by SARS together with any consequent interest charges;

(iii) The taxpayer's pre-trade expenses are not to be ring-fenced but to be included in the calculation of taxable income or assessed loss, where applicable, to be carried forward to the following tax year; and

(iv) The USP consequent upon the ring-fencing are to be reversed, together with any consequent interest charges.

6.13. ITC 1991 (88 SATC 286)

During the period in question the South African entities within the taxpayer group concluded transactions with non-resident connected parties which qualified as 'affected transactions' for purposes of section 31 of the IT Act.

The main tax dispute between the parties related to a transfer pricing adjustment made by SARS, in terms of section 31(3) of the IT Act.

In terms of the aforesaid agreements the South African entities provided administration and procurement services, including the collection of franchise fees and remuneration, due to the non-RSA group companies. The South African entities also provided know-how services and other related intellectual property to franchisees outside South Africa. The franchise agreements also regulated the use of the taxpayer group's international trademarks.

In consideration of the rights granted in terms of the franchise agreements entered into between the taxpayer and the non-RSA subsidiaries, a franchisee was obliged to pay to the franchisor a franchise fee equal to 1% of the franchisee's gross sales and the basis applied to determine the royalty percentage was the sales price of the products sold by the franchisee through the outlet, exclusive of excise duties, and other taxes.

SARS conducted a transfer pricing audit in regard to the taxpayer and concluded that it was in fact the taxpayer and another subsidiary, SHL, that had determined the strategies with respect to the taxpayer's expansion into the African market and it was the taxpayer and SHL that had set the standard with respect to the development of the marketing intangibles in the non-RSA jurisdiction. This, according to SARS, was key to increasing the taxpayer's market share as the preferred supermarket outlet in each of the non-RSA jurisdictions.

This led SARS to conclude that the taxpayer did not receive any royalties from the non-RSA subsidiaries for the actual development, enhancement, maintenance, protection, and exploitation of the trademarks, know-how and related intangibles in terms of the franchise agreements concluded with the non-RSA subsidiaries.

According to SARS, the rate of 1% applied in calculating the royalty fees payable fell below the arm's length range (interquartile range of 4% to 5.3%). SARS maintained that the applicable rate should have been 4% of sales.

Based on the above, SARS concluded that SCL did not receive an arm's length compensation for the 2015 and 2016 years of assessment and hence it held that this resulted in SCL obtaining a tax benefit for the 2015 and 2016 years of assessment and this had triggered the application of section 31(2) of the IT Act.

SARS, in determining that an arm's length return for SCL would have been 4% of sales, had used the Comparable Uncontrolled Pricing method (the CUP method) to determine the royalty rate. This was one of the methods that could be used to determine or test the arm's length nature of prices in transactions concluded between related parties. Another method that could also be used was the Profit Split Method (the PSM method). The CUP and PSM methods were but two of the transfer pricing guidelines methods suggested by the Organisation of Economic Cooperation and Development (OECD) for use in determining the arm's length nature of prices in transactions concluded between related parties.

SARS, after conducting the above audit, had adjusted the taxable income of SCL in terms of section 31(2) of the IT Act for the 2015 and 2016 years of assessment.

It was against the application of section 31(2) of the IT Act that SCL had objected to and subsequently appealed to the Tax Court against the disallowance of the objections.

SCL contended that the arrangements did not give rise to non-arm's length revenue streams and that, even if any amounts in the form of franchise fees were not attributed to SCL, despite the absence of an agreement between it and the non-RSA group companies, the CUP method adopted by SARS was defective and inapplicable.

After SCL had lodged its appeal SARS delivered its statement of the grounds of assessment and opposition to the appeal in terms of Rule 31 of the Tax Court Rules.

Subsequently SARS also delivered an expert report by Dr Maning and SCL had objected to this report and accordingly notified SARS of its objection.

SCL contended that the aforesaid report not only did not support SARS's grounds of assessment as pleaded but had positively rejected them and had relied on the profit split method (PSM) and therefore the report could not serve any relevant purpose in the tax appeal as pleaded, and that it should be withdrawn.

SARS, in response to SCL's objection to the expert report, then notified SCL of its intention to amend its Rule 31 statement by including a paragraph at the end thereof to refer to Dr Maning's report and pleaded that it relied on this report for purposes of supporting the assessment raised and the determination of an arm's length compensation.

SARS then brought an interlocutory application in the Tax Court in terms of Rule 35(2) for leave to amend its Rule 31 statement of grounds of assessment and opposing an appeal.

SARS contended that the proposed amendment merely introduced an alternative method in support of SARS's assessment of an arm's length basis on which SCL should be compensated, without in any way derogating from its original assessment.

The taxpayer, SCL, on the other hand, contended that the amendment sought by SARS would amount to an innovation of the factual basis of the assessment and would require the issue of revised assessments.

The issue before the Tax Court was whether the proposed amendment would violate the provisions of Rule 31(3), i.e. did the proposed amendment constitute a novation of the whole of the factual or legal basis of the disputed assessment or require the issue of a revised assessment.

Judge Dolamo held the following:

(i) That it is a well-established principle that amendments ought to be granted where they are necessary to facilitate the proper ventilation of the dispute between the parties. An application for amendment will always be allowed unless the application to amend is *mala fide* or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or by some other suitable order such as postponement.

(ii) That it was a further established principle that the granting or refusal of an application for the amendment of pleadings is a matter for the discretion of the court, to be exercised judicially. The aim should be to do justice between the parties by deciding the real issues between them. The mistake or neglect of one of the parties in the process of placing the issues on record is not to stand in the way of this, his punishment is in his being mulcted in wasted costs, where that is applicable.

(iii) That in terms of Rule 35(2) of the Tax Court Rules the parties may agree on the amendment of a Rule 31 statement. If the other party does not agree to the amendment, the party who requires an amendment may apply to the Tax Court for an order allowing such amendment. SCL opposes the application by SARS to amend its Rule 31 statement on the ground that the proposed amendment, in contravention of Rule 31(3), constituted a novation of the whole of the factual basis of assessment, and required the issue of revised assessments. This, according to SCL, was an impermissible amendment.

(iv) That SCL submitted that, based on specific factual premises, the impugned assessments arose on the strength of SARS exercising its power under section 31(2) of the IT Act to calculate SCL's taxable income for the 2015 and 2016 years of assessment. SCL contended that the proposed amendment sought to justify it being taxed under section 31(2) on an entirely new factual basis. For such a basis to be legitimately in issue in the appeal it would require the issue of revised assessments pursuant to a fresh exercise of the section 31(2) power and it contended that this was, however, not permitted in terms of Rule 31(3).SCL further contended that the section 31(2) power was an extraordinary power which allowed SARS to apply a hypothetical basis, which by definition differed from the actual terms on which the taxpayer dealt. SCL submitted that SARS's power under section 31(2) was not itself an assessment but a decision capable of independent scrutiny as an exercise of administrative power. That being the case, the general principle of administrative law, which provided that where the lawfulness of a decision is challenged on review, the administrator is not permitted to rely on a different reason or a different basis for making the decision, as SARS attempted to do, was equally applicable to a decision under section 31(2), SCL submitted.

(v) That SCL further submitted that the factual conclusion that 4% of sales was the arm's length fee that would have been payable, was the result of SARS applying the CUP method as the most appropriate method for determining an arm's length royalty rate. It went on to contend that SARS had belatedly sought to amend its Rule 31 statement by incorporating reference to, and reliance, Dr Maning's expert report which stated that the PSM was the most appropriate method to determine the franchise fee that the non-RSA group companies should have paid to SCL and that the PSM analysis shared no factual characteristics whatsoever with the CUP method which was adopted by SARS as the basis for the assessments. According to SCL, this was a wholly new, both in method and factual foundation, assessment.

(vi) That SCL also challenged SARS's submission that the proposed amendment merely introduced an alternative method in support of SARS's assessment of an arm's length basis on which SCL should have been compensated, without in any way derogating from the SARS original assessment.

(vii) That the facts in *Lion Match Company (Pty) Ltd* v *C: SARS*, unreported Tax Court judgment IT 13950 [2017] ZATC 5, provided an illuminating example of what constituted the factual basis of an assessment. In that matter at issue was the base cost of shares disposed of by Lion Match in two companies in the 2008 year of assessment and this was determined by relying on the valuation report of an expert who had reviewed the valuation of Lion Match's investment in the two companies. SARS had arrived at a lower base cost for the shares disposed of and consequently the capital gain was determined at a higher amount than that disclosed by Lion Match. However, in the statement of grounds of assessment in terms of Rule 31 delivered subsequently SARS had changed the evaluation assumptions and factual basis on which the 2013 assessment had been determined. In a similar interlocutory dispute in the Tax Court Lion Match unsuccessfully contended that, by revising and increasing the 2013 assessment, SARS had made a new determination of its tax liability and had included grounds in its Rule 31 statement that had constituted a novation of the whole of the factual and legal basis of the 2013 assessment in respect of which SARS ought to have issued a revised assessment.

(viii) That in the present matter the court found that the jurisdictional facts for the application of section 31(2) of the IT Act in this case were:

- the affected transaction;
- entered into or effected between a person who is a resident and one who is a non-resident and, who are connected in relation to one another; and
- and any term or condition of the transaction in question which is different from a transaction concluded by parties dealing with each other at arm's length.

(ix) That the CUP method was not part of the factual or legal basis of the assessment. Whereas SARS used the CUP method, SARS's expert witness had criticised this method preferring the PSM method. He motivated why the PSM method would be suitable in the circumstances of this case. The taxpayer, SCL, contended that the expert witness had rejected the CUP method and the PSM method of analysis that he used shared no factual characteristics whatsoever with the CUP method used by SARS as bases for the assessments and this was wholly new, both in method and factual foundation of the assessments.

(x) That SCL's contention was without merit and it was immaterial whether the expert witness had concluded that the CUP method was not suitable. Neither the CUP nor the PSM method formed part of the factual basis of the assessment. The use of any of the two methods will not change the factual basis of the assessments and this, accordingly, was not a novation of the whole of the factual basis, which was prohibited by Rule 31(3) of the Tax Court Rules.

(xi) That the introduction of the expert witness's report wherein he advocated for the use of the PSM method to calculate the rate of the franchise fee that would have been payable did not equate to an abandonment of the CUP method and nor was SARS signifying through the proposed amendment an intention to abandon the CUP method. It merely sought to place on record an alternative method of calculating the franchise fee payable and, accordingly, the court was satisfied that the proposed amendment did not violate the provisions of Rule 31(3) of the Tax Court Rules.

(xii) That, in the result, SARS was granted leave to amend, within 30 days of the order, its Rule 31 statement of grounds of assessment and opposing the appeal.

7. INTERPRETATION NOTES

7.1. Allowance for future expenditure on contracts – No. 78 (Issue 2)

This Note provides guidance on the interpretation and application of section 24C when income is received in advance, but the expenditure under the contract will be incurred only in a subsequent year of assessment.

Section 5 provides that income tax is payable annually. An amount that is received by or accrued to a taxpayer in a particular year of assessment must be included in the taxpayer's gross income unless it is of a capital nature or despite being of a capital nature, is required to be included in gross income. The nature of a taxpayer's business may be such that the taxpayer receives amounts under a contract that will be used to finance expenditure to be incurred in the future in performing under that contract. Generally, expenditure must be actually incurred before a deduction can be allowed [for example, section 11(a)] and additionally, section 23(e) specifically prohibits the deduction of income carried to any reserve fund or capitalised in any way. A mismatch between income and expenditure therefore arises when income is received in one year and the related expenditure is incurred in a subsequent year of assessment. This mismatch can cause cash-flow problems for a taxpayer having to pay income tax on the gross receipts leaving insufficient funds to finance the future expenditure.

Section 24C was inserted in the IT Act as a relief measure for taxpayers that, because of the nature and special circumstances of their businesses, receive advance income during a year of assessment but incur related expenditure only in a subsequent year of assessment. The explanatory memorandum outlines the reason for the insertion of section 24C as follows:

> 'The new section caters for the situation which often arises in the construction industry and sometimes in manufacturing concerns, where a large advance payment is made to a contractor before the commencement of the contract work, to enable the contractor to purchase materials, equipment etc. In a number of instances such advance payments are not matched by deductible expenditure, resulting in the full amounts of the advance payments being subject to tax.'

Although section 24C was originally intended for taxpayers entering into building and manufacturing contracts, it can also be applied to taxpayers entering into other types of contracts. In ITC 1697 Galgut J stated the following:

> 'The fact that the allowance might have been intended for building contractors does not mean, however, that it is not available to others. On the contrary, by the particular wording of section 24C the types of trades that the individual taxpayer might carry on, and the types of contracts concerned, are in no way limited. The sole question is whether the provisions of section 24C otherwise apply . . . .'

Section 24C has been and can be applied to businesses in industries other than building and manufacturing provided the detailed requirements of the section are met. For example, the section has been applied to the motor industry, the financial services industry, publishers, share block schemes and the retail sector.

Section 24C was amended in 2015 to remove SARS' discretion under the section. Much of the case law relating to section 24C dealt with the exercise of this discretion regarding specific requirements under the section. These cases, however, remain relevant as guidance for the correct application and computation of the allowance, as set out in the Note, since the requirements are the same notwithstanding the deletion of SARS' discretion.

An assessment of whether section 24C applies must be performed annually taking up-to-date information into account.

Section 24C is subject to objection and appeal in accordance with Chapter 9 of the

TA Act.

7.2. Income Tax Exemption: Bargaining Councils – No. … (Issue …)

This Note provides clarity on the approval of registered bargaining councils as institutions, boards, or bodies under section 10(1)(cA)(i).

The Constitution guarantees fair labour practices for all. It grants workers the right to form trade unions, and employers the right to form employers' organisations. Both trade unions and employers' organisations are entitled to manage their own affairs, organise themselves, and form or join federations. Every trade union, employers' organisation and employer has the right to engage in collective bargaining.

The Constitution further provides that national legislation be enacted to regulate collective bargaining. The LRA was enacted to give effect to these constitutional labour rights, providing for all trade unions, employers' organisations and employers to engage in collective bargaining to promote economic development, social justice and labour peace.

LAWSA provides the following on the LRA:

> 'One of the primary objects of the Labour Relations Act is to provide a framework for orderly collective bargaining at sectoral level. Bargaining councils are central to this statutory imperative and provide a regulated structure designed to enable employers' organisations and trade unions to

collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest in a specific sector and area.'

(Footnotes omitted)

Because of their significant role in supporting the economy, registered bargaining councils are eligible for exemption under section 10(1)(cA)(i), as explained in this Note.

Bargaining councils registered under the LRA are central to promoting and facilitating collective bargaining and maintaining orderly industrial relations in South Africa. Their activities not only advance economic development but also provide necessary and useful services to both the State, and members of the general public, and also promote the industries within their registered scope.

Registered bargaining councils are granted preferential tax treatment under section 10(1)(cA)(i) if their constitutions meet the prescribed requirements. These requirements include the proper use of funds, a prohibition on distributions, and the transfer of remaining assets on dissolution. This preferential treatment provides a complete exemption from income tax on all receipts and accruals, as well as exemption from certain other taxes. The preferential tax treatment further ensures that the resources of registered bargaining councils that have been approved by the Commissioner as institutions, boards, or bodies are directed towards advancing collective bargaining, industrial stability, and the broader socio-economic objectives.

8. DRAFT INTERPRETATION NOTES

8.1. Deduction in respect of production of battery electric and hydrogen-powered vehicles

This Note provides guidance on the interpretation and application of section 12V which provides for a deduction by a person that is a motor vehicle manufacturer of the cost on any building, new and unused machinery, plant, implement, utensil or article or improvement to any building, machinery, plant, implement, utensil or article used mainly in the production of battery electric or hydrogen-powered vehicles in South Africa.

Government has through the Department of Trade, Industry and Competition, implemented various incentives over time to support the development of the automotive industry. These included programs to bolster the automotive sector's international competitiveness and global reintegration utilising strategies such as import duty reductions and export incentives significantly to grow production volumes in the specified motor vehicle industry and to promote value addition in the automotive component industry through stable and moderate tariffs, a local volume assembly allowance, a production incentive and grant funding.

The Department of Trade, Industry and Competition published the Electric Vehicles White Paper outlining its plan to transition the automotive industry from primarily producing internal combustion engine vehicles to a dual platform that includes the production of electric vehicles. The compelling reasons behind this transition include the urgent need to address environmental concerns and for countries to meet their national emission reduction commitments stemming from the Paris Agreement.

Additionally, some of South Africa's key export markets like the European Union and the United Kingdom have announced their intentions to ban the sale of new internal combustion engine vehicles by 2035. This paradigm shift threatens the country's strategic position in the global automotive export industry, since the majority of the vehicles manufactured in the country are currently exported to these countries.

To encourage investment in the local production of electric and hydrogen-powered vehicles, section 12V has been introduced and came into operation on 1 March 2026 and applies in respect of qualifying assets brought into use on or after that date. This section introduces a 150% allowance targeting new investments in the production of electric and hydrogen-powered vehicles in South Africa. This means motor vehicle manufacturers will be able to claim 150% of qualifying investment spending on production capacity for battery electric and hydrogen-powered vehicles in the year the investment assets are brought into use.

A motor vehicle manufacturer may claim a deduction under section 12V(1) of 150% of the cost of a building or asset (including the foundation and supporting structure) and improvements to an asset provided the building or asset is used mainly for the production of battery electric or hydrogen-powered vehicles in South Africa.

Deductions under section 12V(1) will be allowed only for buildings or assets brought into use on or after 1 March 2026 and before 1 March 2036.

9. VAT RULINGS

9.1. Supply of student accommodation – VR 015

This VAT ruling deals with the VAT treatment of a supply of student accommodation by a vendor directly to the students for an unbroken period exceeding 28 days.

In this VAT ruling, all references to sections hereinafter are to sections of the VAT Act unless otherwise stated. Unless the context indicates otherwise, any word or expression in this VAT ruling bears the meaning ascribed to it in the VAT Act.

This VAT ruling concerns the interpretation and application of the following provisions of the VAT Act:

- Section 1(1) definitions of 'commercial accommodation', 'dwelling' and 'enterprise'
- Section 10(10)
- Section 16
- Section 17
- Section 20

<u>Parties to the application</u>

The Applicant is a private company incorporated in and a resident of South Africa, operating as a developer of buildings for student accommodation.

<u>Background and facts</u>

The Applicant commenced with a development project to provide student accommodation for students studying at universities.

Students will be offered various options with varying pricing as follows:

- Room only.
- Room with internet access.
- Room with meals.

All rooms will be furnished and will have electricity.

Students can also purchase meals separately from the canteen and other amenities such as:

- a parking bay;
- internet access;

- laundry services;
- gym access;
- library access; and
- shuttle services.

SARS was requested to confirm the following:

- That the Applicant provides 'commercial accommodation' as defined in the VAT Act to students and is therefore conducting an 'enterprise' for VAT purposes.
- The Applicant is allowed a full input tax deduction on the VAT incurred on the construction and development costs of the student accommodation facility.
- The Applicant must charge VAT at the standard rate on monthly student rentals and all other supplies, including catering. The Applicant can also deduct full input tax on business-related expenses.
- In the case of an unbroken letting period exceeding 28 days, the Applicant will be entitled to levy VAT on 60% of the rental amount due.

Conditions and assumptions

This VAT ruling is subject to the Standard Terms, Conditions and Assumptions issued by SARS, and the provisions of Chapter 7 of the TA Act excluding sections 79(4)(f), (k), (6) and 81(1)(b).

Ruling

The binding private ruling issued to the Applicant is as follows:

- The accommodation to be supplied by the Applicant to the students will constitute 'commercial accommodation' as defined in section 1(1) and is therefore subject to VAT at the standard rate under section 7(1)(a).
- The Applicant may deduct VAT incurred on the construction and development costs to the extent that it qualifies as 'input tax' as defined, and subject to sections 16, 17 and 20.
- The lease payments in respect of the supply of said accommodation will be subject to VAT at the standard rate under section 7(1)(a).To the extent that the Applicant charges a consideration for supplying entertainment that covers all the direct and indirect costs of providing such entertainment or is equal to the open market value of the entertainment, the Applicant may deduct the input tax on such entertainment expenses.

- The consideration in money for an all-inclusive charge of the supply of the accommodation together with the domestic goods and services for an unbroken period exceeding 28 days, is, under section 10(10), deemed to be 60% of an all-inclusive charge. To the extent that the Applicant supplies ‘domestic goods and services’ as defined in section 1(1) and other goods and services if the consideration for those services does not form part of the all-inclusive charge, the provisions of section 10(10) will not apply.

9.2. Apportionment – VR 016

This VAT ruling approves the method of apportionment, being the varied turnover-based method, which is applied by the Applicant. The Applicant is one of South Africa’s largest retailers that offers a comprehensive portfolio of retail brands.

In this VAT ruling, all references to sections hereinafter are to sections of the VAT Act unless otherwise stated. Unless the context indicates otherwise any word or expression in this VAT ruling bears the meaning ascribed to it in the VAT Act.

This VAT ruling concerns the interpretation and application of the following provisions of the VAT Act:

- Section 1(1) – definition of ‘input tax’
- Section 16
- Section 17(1)

<u>Parties to the application</u>

The Applicant is a South African resident private company, wholly owned by its listed holding company.

<u>Description of the transactions</u>

The Applicant is a retail company that sells a broad range of merchandise to customers in-store and online. These include clothing, footwear, jewellery, sportswear, mobile phones, technology products, homeware and furniture. The brands cater to customers across value to upper market segments. The financial year-end of the Applicant is 31 March.

The Applicant sells the merchandise either on cash or on credit. Credit is provided on a six or 12-month basis, with interest accumulating on outstanding balances and debt collection fees earned on overdue accounts. The six-month payment option is interest free subject to the customer paying each instalment in full and on time. For the 12-month payment option, interest applies to the outstanding amount.

Various debt collections strategies are employed in relation to credit customers that involves actions such as sending e-mails and making telephone calls.

The Applicant considers the number of payment cycles that have lapsed since the last qualifying payment has been received to calculate write-offs in respect of trade receivables. No income (including collection fees) is recognised in respect of accounts if 40% of the instalments are paid more than four months ago (or more) (RD 4 or higher).

The Applicant also holds investments and provides intercompany loans to subsidiaries, as well as maintains bank accounts.

The following income streams are received in respect of the activities conducted:

- Trading income from the sale of merchandise to customers (taxable income)
- Interest from the following (exempt income):
  - Surplus cash in bank accounts
  - Favourable inter-company loan balances
  - Outstanding debtor's balances
- Dividend income from group companies (Other/Out of scope income)
- Fees (debt collection fees) recovered from collection activities relating to trade receivables (that is, customer arrears) in terms of the National Credit Act 34 of 2005 (Other/Out of scope income)

SARS is requested to issue a ruling under section 41B, read with section 17(1), confirming that the Applicant may apply the varied turnover-based method with effect from the commencement of the 2023 financial year, which includes operational and non-operational income with the following variations:

Including:

- dividend income received from subsidiaries calculated based on the difference between the Prime Interest Rate less the Johannesburg Interbank Average Rate (JIBAR) multiplied by the amount of dividends received; and
- a proxy to reflect the debt collection activity, calculated as the average collection fee charged per collection activity for that financial year multiplied by the number of credit customers in arrears at every payment cycle in the

financial period, excluding customers with four or higher payment cycles that have lapsed since the last qualifying payment has been received;

Excluding:

- interest received on current accounts with financial institutions which are used for the day-to-day operations of the Applicant.

Conditions and assumptions

This VAT ruling is subject to the Standard Terms, Conditions and Assumptions issued by SARS, and the provisions of Chapter 7 of TA Act, excluding sections 79(4)(f), (k), (6) and 81(1)(b).

Ruling

The VAT ruling made in connection with the transaction is as follows:

The Applicant may, for the purpose of determining the ratio to be applied to the VAT incurred relating to mixed expenses , apply the varied turnover-based method of apportionment as set out below:

y = a / (a+b+c) x 100

where:

y	=	Apportionment ratio/percentage;
a	=	The value of all taxable supplies made during the period;
b	=	The value of all exempt supplies made during the period, excluding bank interest received on current accounts with financial institutions which are used for the day-to-day operations of the Applicant;
c	=	The sum of any other amounts of income not included in ‘a’ or ‘b’ in the formula, which were received, or which accrued during the period (whether in respect of a supply or not), including:

- a percentage of dividend income received from subsidiaries, calculated based on the difference between the Prime Interest Rate and JIBAR. If no dividend income was received for a particular year, the dividend inclusion should be calculated based on the average over a three-year period (that is, the current and the preceding two years) multiplied with the difference between the Prime Interest Rate and JIBAR; and

- the inclusion of a proxy for collection fees calculated as the average collection fee charged per collection activity for that financial year multiplied by the number of credit customers in arrears at every payment cycle in the financial period, excluding customers classified as RD 4 or higher.

9.3. VAT treatment of auctioneering artwork for non-residents – VR 017

This ruling clarifies the VAT obligations of agents importing goods on behalf of non-resident principals.

In this VAT ruling, all references to sections hereinafter are to sections of the VAT Act unless otherwise stated. Unless the context indicates otherwise any word or expression in this VAT ruling bears the meaning ascribed to it in the VAT Act.

This VAT ruling concerns the interpretation and application of the following provisions of the VAT Act:

- Section 8(20)
- Section 9(9)
- Section 10(22B)
- Section 11(1)(a)(i)
- Section 16(2)(dA)
- Section 16(3)(a)(iii)
- Section 54(2A)(b)

<u>Parties to the application</u>

The Applicant is a South African resident private company.

<u>Background and facts</u>

The Applicant is a fine art auctioneer and art consultant and is a registered vendor for VAT purposes. The Applicant auctions the artwork on behalf of, amongst others, resident and non-resident owners.

The Applicant will enter into an agreement with the owner (non-resident and not registered for VAT) to import the artwork into South Africa and to sell the artwork, on behalf of the owner at one of the Applicant's auctions. The imported artwork is intended to be supplied to customers in South Africa and in some instances, customers outside South Africa.

The value of the artwork on importation is determined by an art specialist who will research the market and then determine a value at which the artwork may sell at auction. In some cases, the final bid on the artwork differs from the estimated value at the time of importation. The Applicant then prepares and submits a voucher of correction (VOC) to adjust the original value of importation to the value as per the auction results. The VOC prepared and issued is also declared on the Applicant's VAT return in the period when the VOC was submitted and taxes due are paid.

Conditions and assumptions

This VAT ruling is subject to the Standard Terms, Conditions and Assumptions issued by SARS, and the provisions of Chapter 7 of the Tax Administration Act 28 of 2011, excluding sections 79(4)(f), (k), (6) and 81(1)(b).

Ruling

The binding private ruling issued to the Applicant is as follows:

- The Applicant may deduct input tax on imported artwork under section 54(2A)(b) in respect of goods imported on behalf of a non-resident owner. This is only allowed if the Applicant has the documents required by section 16(2)(dA).
- Under section 8(20) and section 9(9), the Applicant is deemed to supply the artwork at the value under section 10(22B) when the import VAT is paid and not at the time of the auction sale (deemed supply). The VAT Act does not allow for any exceptions or for SARS to have a discretion in this regard.
- The Applicant supplies the artwork as an agent and therefore the supply is under section 54 made by the non-resident owner as principal (the actual supply). Therefore, the Applicant cannot rely on section 11(1)(a)(i) to zero rate the foreign sales of artwork as it is not a supply made by the Applicant.

9.4. Apportionment – VR 018

This VAT ruling approves the method of apportionment, being the transaction count-based method, to be applied by the Applicant, that is a company which operates in the financial services industry, specifically within the foreign exchange and money transfer sector.

In this VAT ruling, all references to sections hereinafter are to sections of the VAT Act unless otherwise stated. Unless the context indicates otherwise any word or expression in this VAT ruling bears the meaning ascribed to it in the VAT Act.

This VAT ruling concerns the interpretation and application of the following provisions of the VAT Act:

- Section 1(1) – definition of 'input tax'
- Section 16
- Section 17(1)

Parties to the application

The Applicant is a private company that is incorporated in and a resident of South Africa.

Description of the transactions

The Applicant is a company that conducts the business of providing money transfer services in partnership with one of the largest international money transfer service providers in the world. The financial year-end of the Applicant is February. The Applicant provides the money transfer service through mobile application software, which includes facilitating immediate remittance to cash pick-ups, mobile wallets and bank deposits.

The Applicant, in providing money transfer services, enters into two types of transactions:

- Outbound transactions – money is sent from South Africa to another country; and
- Inbound transactions – money is transferred to South Africa from another country.

Having regard to the above, the supplies can be easily identified as taxable and exempt or non-taxable, the transactions can be separately identified and counted, and the majority of the costs incurred by the Applicant are equally and simultaneously for the purpose of making both taxable and exempt supplies.

The Applicant's income streams from conducting its mobile money transfer activities are as follows:

- Transaction fee (commission) from inbound and outbound transactions

- Profit on foreign exchange, that is, the difference between the buy and sell rates for the foreign currency being exchanged (forex margin)
- Interest income from bank accounts
- The sale of equipment
- Gains on foreign exchange balances
- Transfer pricing revenue from its shareholder company.

The SARS is requested to issue a ruling under section 41B, read with section 17(1), confirming that the vendor may apply the transaction count-based method, as is set out in paragraph 6 below, with effect from the commencement of the Applicant's 2024 financial year, which includes operational and non-operational income without variations.

Conditions and assumptions

This VAT ruling is subject to the Standard Terms, Conditions and Assumptions issued by SARS, and the provisions of Chapter 7 of the TA Act, excluding sections 79(4)(f), (k), (6) and 81(1)(b).

Ruling

The VAT ruling made in connection with the transaction is as follows:

The Applicant may, for the purpose of determining the ratio to be applied to the VAT incurred relating to mixed-use expenses apply the transaction count-based method as set out below:

$y = a / (a + b + c) \times 100$

where:

y	=	Apportionment ratio/percentage
a	=	The total number of taxable income transactions for the period;
b	=	The total number of exempt income transactions for the period;

and

c	=	The total number of other income transactions not included in 'a' or 'b' in the formula, which were generated during the period (whether in respect of a supply or not).

For the purposes of the approved transaction count-based apportionment method, the following principles must be applied when determining the total number of transactions to be used in the apportionment formula:

- Exchange of currency – the exchange of currency is an exempt financial service unless it qualifies for zero-rating. Therefore, an exempt transaction is counted for each exchange of currency, unless it qualifies for zero-rating in which case a taxable transaction is counted;
- Fees earned on exchange and remittance of currency for outbound transactions – a taxable transaction is counted for each fee/commission charged on the exchange and remittance of currency;
- Fees earned on inbound remittances – a taxable transaction is counted for each fee/commission charged on the exchange and remittance of currency;
- Interest earned – an exempt transaction is counted on a monthly basis on each bank account on which interest is earned; and
- Other income – one transaction is counted each time an amount of income is received or earned, and this is either counted as ‘a’, ‘b’ or ‘c’ depending on the nature of the income received.

Notes:

- The term ‘transaction’ must be determined with reference to the principles set out above but is not limited to only those transactions specified in that paragraph.
- The apportionment percentage should be rounded off to two decimal places.

9.5. Consideration – VR 019

This ruling clarifies the VAT obligations related to dental benefit management service fees and dental benefit entitlement.

In this VAT ruling, all references to sections hereinafter are to sections of the VAT Act unless otherwise stated. Unless the context indicates otherwise any word or expression in this VAT ruling bears the meaning ascribed to it in the VAT Act.

This VAT ruling concerns the interpretation and application of the following provision of the VAT Act:

- Section 1(1) Consideration

Parties to the application

The Applicant is a dental benefit management services limited liability company incorporated in and a resident of South Africa.

Background and facts

The Applicant offers dental benefit management services to medical aid schemes (the Scheme(s)) and the said Schemes' clients.

The Applicant is accredited by the Council for Medical Schemes as a Managed Care Organisation, that is, it may contract with the Scheme in terms of Regulation 15A of the Medical Schemes Act, to provide a managed health care service.

In carrying out its mandate, the Applicant enters into agreements with various Schemes to amongst other things:

- negotiate tariffs;
- process claims;
- pay claims; and
- any other related service,

in respect of the dentistry benefits applicable to the Scheme.

The Applicant set out the pertinent clauses of the contractual arrangements in terms of the Dental Capitation Agreements between the Applicant and the respective Schemes. With regards to the Capitation Fee, the below is noted:

Scheme A	**Scheme B**	**Scheme C**	**Scheme D**
Scheme A pays the Applicant a monthly capitation fee, including VAT, for dental benefits and services during 2023. Payments cover dental claims and include both managed care and claims costs.	Scheme B pays the Applicant a monthly capitation fee, inclusive of VAT, based on actual claims costs and a 10% management fee. Invoices include reconciliations for prior months and the annual	Scheme C pays the Applicant a monthly capitation fee, including VAT, for dental benefits and services during 2023. Payments cover Scheme C dental claims on all capitated options and include both	Scheme C pays the Applicant a monthly capitation fee, including VAT, for dental benefits and services during 2023. Payments cover Scheme C dental claims on all capitated options and include both

	capitation fee is determined in arrears, no later than six months after the relevant calendar year .	managed care and claims costs	managed care and claims costs.

The Applicant demonstrated the arrangement under the Capitation Agreements as follows:

- A beneficiary will contract with the Scheme for medical (dental) insurance;
- The beneficiary receives medical treatment from a service provider who will render the service to the beneficiary;
- After treatment, the service provider will issue its invoice to the Scheme for payment. If the service provider is registered as a VAT vendor, it will levy VAT at 15% and account for output tax to the SARS;
- The Applicant (being appointed by the Scheme) will make payment to the service provider from the capitation fee that it received from the Scheme. No input tax will be deducted by the Applicant as the invoice was issued to the Scheme and the payment is merely facilitated by the Applicant on behalf of the Scheme;
- The Applicant will charge the Scheme a service fee for its administration and/or management services; and
- The Scheme will make payment to the Applicant in respect of services rendered by the Applicant.

Conditions and assumptions

This VAT ruling is subject to the Standard Terms, Conditions and Assumptions issued by SARS, and the provisions of Chapter 7 of the TA Act, excluding sections 79(4)(f), (k), (6) and 81(1)(b).

Ruling

The binding private ruling issued to the Applicant is as follows:

- The fee payable by the Scheme to the Applicant, in accordance with the various Capitation Agreements, will need to be allocated between that portion which is calculated based on the dental benefit entitlement (i.e. those amounts which is essentially for purposes of making payments to the service provider or the member) and that portion which is retained from the capitation fee by the Applicant for providing the dental services management and the managed care to the Scheme.

- The amount of the fee which is calculated based on the dental benefit entitlement and which is essentially for purposes of making payments to the service provider or the member will not be subject to VAT as it will not be consideration for a supply of any services and will therefore be regarded as an out-of-scope supply for VAT purposes.
- The amount of the fee for providing the dental services management and managed care to the Scheme is in respect of a supply of a service to the Scheme. The Applicant will have to account for VAT at the standard rate under section 7(1)(a).
- SARS is unable to make a determination on how much of the capitation fee should be allocated to dental services management and managed care. The Applicant or Scheme must make this factual determination based on the relevant Capitation Agreements.

9.6. Consideration – VR 020

In this VAT ruling, all references to sections hereinafter are to sections of the VAT Act unless otherwise stated. Unless the context indicates otherwise, any word or expression in this VAT ruling bears the meaning ascribed to it in the VAT Act.

This VAT ruling concerns the interpretation and application of the following provisions of the VAT Act:

- Section 1(1): Consideration
- Section 21(1)(a)
- Section 7(1)(a)
- Section 9(1)

Parties to the application

The Applicant is a private company incorporated in and a resident of South Africa, operating in the Tourism and Hospitality sector.

Background and facts

The Applicant is a game reserve and offers an extensive range of services, including accommodation. As per the reservation terms and conditions, a percentage-based, non-refundable deposit is payable within 10 days of a reservation confirmation.

Cancellation or part cancellation of a confirmed reservation will result in the forfeiture of the specific percentage of the deposit.

A number of deposits have been forfeited in previous periods, and output tax has always been declared and paid on the forfeited deposits by the Applicant.

When a guest makes a booking, the Applicant provides a reservation summary specifying that a deposit must be paid within 10 days, with the remaining balance due within a specified number of days before arrival. The summary explains that cancelling or partially cancelling a reservation results in forfeiting the deposit and cancellations made within specified days of arrival incur a cancellation fee. The deposit secures the booking and compensates the Applicant for potential losses if the reservation is cancelled and the room cannot be re-sold.

After a guest pays the deposit, it is set off against the total payment for the booking.

In the event that the space is re-sold after a cancellation, the deposit may be refunded. Alternatively, at the Applicant's discretion, the deposit can be applied to a future booking if the guest rebooks. Deposits are recorded as liabilities in the Balance Sheet or the Statement of Financial Position until the deposit is applied towards the accommodation supplied by the Applicant. The total value of deposits held are included in the taxable income of the Applicant in full. At the point of travel, the deposit is settled against the accommodation invoice. If the guest does not travel to the Applicant, a cancellation fee applies.

Ruling

The binding private ruling issued to the Applicant is as follows:

- The deposit paid by the guest constitutes consideration as defined in section 1(1), for the supply of accommodation provided by the Applicant to the guest. As a result, the Applicant must account for and declare output tax in the tax period during which the deposit is set off as payment against the total payment required for the booking, in accordance with section 7(1)(a) and section 9(1).
- The cancellation or part cancellation of the confirmed reservation by the guest that results in the forfeited deposit or amount paid, does not constitute a

cancellation as envisaged in section 21(1)(a), since the supply of accommodation is still provided to the guest irrespective of whether the guest utilises it.

10. BINDING PRIVATE RULINGS

10.1. Rehabilitation of mining property – No. 425

This ruling determines the income, donations and VAT consequences arising from the development of a sporting and recreational facility as part of the ongoing rehabilitation of mining property by the Applicant.

In this ruling references to sections are to sections of the IT Act and the VAT Act applicable as at 26 January 2026. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the IT Act and the VAT Act.

This is a ruling on the interpretation and application of:

- the IT Act:
  - section 11(a);
  - section 23(g);
  - section 54;
  - section 55; and
  - section 58.
- the VAT Act:
  - section 1(1) – definition of 'enterprise' and 'entertainment'; and
  - section 17(2)(a).

<u>Description of the proposed transaction</u>

The Applicant conducts opencast mining consisting of multiple operational pits and several mined out pits are at various stages of rehabilitation.

The Applicant previously operated a public recreational facility located on its mining property. The facility was demolished to allow access to underlying mineral reserves. Mining activities are now taking place where the former facility once was.

Prior to demolition, the Applicant undertook an environmental impact assessment and conducted a formal public participation process with affected local communities. Through this engagement, and as part of its revised Environmental Management Plan approved by the Department of Mineral Resources, the Applicant committed to constructing a new recreational facility as part of the rehabilitation of a portion of the land that has reached the end of its mining life cycle.

The proposed rehabilitation involves developing a new recreational facility on a mined-out portion of land. The facility will include sporting fields and supporting structures. This development will be undertaken concurrently with ongoing mining operations and other rehabilitation activities across the Applicant's mining area.

The Applicant intends to lease the completed facility to an independent operator for a variable lease rental determined on an arm's-length basis. The rental income will constitute non-mining income and be included in the Applicant's gross income for tax purposes.

After the initial lease period of nine years and eleven months, the Applicant may renegotiate the lease or, alternatively, dispose of the property.

The Applicant holds funds in a rehabilitation trust which are specifically allocated for mining rehabilitation expenditure. It is not permissible for the funds in the trust to be applied in the proposed rehabilitation as the rehabilitation constitutes rehabilitation which occurs concurrently with the continued mining operations conducted at the mine. The proposed rehabilitation is not undertaken as part of premature closing, decommissioning, final closure or post closure coverage of any latent and residual environmental impacts as required in terms of the rehabilitation trust deed. All costs associated with the proposed rehabilitation will be incurred by the Applicant directly as part of its ongoing rehabilitation activities.

<u>Conditions and assumptions</u>

This binding private ruling is subject to the additional condition and assumption that the Applicant and the operator of the recreational facility are not connected persons as defined in section 1(1).

<u>Ruling</u>

The ruling made in connection with the proposed transaction is as follows:

- The expenditure to be incurred by the Applicant to develop and construct the recreational facility as part of ongoing rehabilitation will qualify for a deduction under section 11(a), read with section 23(g) of the IT Act
- Entering into the lease agreement in respect of the recreational facility, for a variable rental, will not give rise to a donation or deemed donation for the Applicant, as contemplated in sections 55 and 58 of the IT Act.

- The Applicant will not be prohibited by section 17(2)(a) of the VAT Act from claiming any VAT incurred on the goods or services acquired by it for purposes of developing and constructing the recreational facility as an input tax deduction in the determination of its VAT liability in terms of section 16 of the VAT Act.

10.2. Residential Accommodation – No. 426

This ruling considers the application of paragraph 9(7) of the Seventh Schedule to residential accommodation to be provided by the Applicant to qualifying employees.

In this ruling, references to sections and paragraphs are to sections of the IT Act and paragraphs of the Fourth and Seventh Schedule to the IT Act applicable as at 18 February 2026. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the IT Act.

This is a ruling on the interpretation and application of:

- section 1(1) — paragraph (i) of the definition of 'gross income';
- definition of 'remuneration' and 'employer' in the Fourth Schedule; and
- paragraphs 2(d), 9(3), 9(3C), and 9(7) of the Seventh Schedule.

<u>Parties to the proposed transaction</u>

The Applicant: A resident company.

Qualifying employees: Eligible employees of the Applicant.

<u>Description of the proposed transaction</u>

The Applicant conducts operations across South Africa and has agreed to secure residential accommodation for qualifying employees whose primary residence is more than 150 kilometres away from the work site where they are required to perform their employment duties. In certain circumstances, qualifying employees residing within 150 kilometres are also provided with residential accommodation by the Applicant, depending on operational requirements.

Each qualifying employee is employed by the Applicant on a permanent basis, which requires the employees to work from Monday to Friday on the work site. Such arrangement reflects a permanent and uniform mode of life for all qualifying employees, rather than a temporary or exceptional circumstance. The Applicant will conclude lease agreements with third parties in respect of furnished residential properties for a period of 12-months, which will continue on a month-to-month basis if not cancelled before expiry of the initial 12-month period. The qualifying employees may request an extension of the agreement for another 12-months if so required.

The Applicant will be responsible for the payment of all rental amounts under these lease agreements. The qualifying employees who are allocated accommodation by the Applicant will maintain separate primary residences in other towns or cities, which remain their family homes. While actively rendering employment services at the work site, the qualifying employees will reside in the accommodation arranged by the Applicant and may return to their primary residences over weekends or during periods of leave.

The proposed accommodation arrangement will operate as follows:

- The qualifying employees will spend the majority of each month residing in the accommodation provided by the Applicant.
- Family members of the qualifying employees may accompany such employees and reside with them in the accommodation to be provided.
- The accommodation to be provided will typically comprise of at least four rooms, fully furnished, and include electricity, the cost of which will be paid for by the Applicant.
- The qualifying employees may keep personal belongings and effects at the accommodation for the duration of their stay.

<u>Conditions and assumptions</u>

This binding private ruling is subject to the additional condition and assumption that the accommodation provided to the qualifying employees is obtained by the Applicant in terms of transactions at arm's length with persons that are not connected persons in relation to the Applicant or associated institution, and full ownership does not vest in the Applicant or associated institution, as contemplated in paragraph 9(3C) of the Seventh Schedule

<u>Ruling</u>

The ruling made in connection with the proposed transaction is as follows:

- The residential accommodation provided to each qualifying employee will be a taxable benefit as contemplated in paragraph 2(d) of the Seventh Schedule.
- The cash equivalent of the value of the taxable benefit must be determined in accordance with the provisions of paragraph 9(3C) of the Seventh Schedule.
- The provisions of paragraph 9(7) of the Seventh Schedule do not apply.

10.3. Premium paid for right of use – No. 427

This ruling determines whether an operator of a solar farm qualify for a capital allowance in relation to the payment of a lease premium to secure access to the electricity grid.

In this ruling, references to sections are to sections of the IT Act applicable as at 11 March 2026. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the IT Act.

This is a ruling on the interpretation and application of section 11(f)(i), (ii) and (v).

Parties to the proposed transaction

The Applicant: A resident company; and

Eskom: Eskom SOC Limited.

Description of the proposed transaction

The Applicant conducts a business of generating solar electricity and supplying it to customers. To deliver electricity at the point of consumption at its customers, the Applicant must make use of Eskom's electricity grid.

Under a suite of transaction documents (collectively referred to as the Agreements) Eskom agrees to make available the use of the grid to the Applicant on the basis that the Applicant:

- Constructs and hands over to Eskom for no consideration, other than securing the right of use of the grid, specified assets to connect the Applicant's solar farm to the grid, as well as upgrading the existing grid infrastructure where necessary so it can accommodate the wheeling of the electricity generated by the Applicant's solar farm (collectively referred to as the Grid Infrastructure); and
- Pays to Eskom a once-off connection fee (the Connection Charge) and a recurring tariff.

The obligation to construct the Grid Infrastructure for Eskom's benefit, who is the owner at all relevant times, and the obligation to pay the Connection Charge, are collectively referred to as the Premium.

The Premium represents the total upfront cost incurred by the Applicant to obtain indefinite usage rights of the grid, including the new Grid Infrastructure, for the purposes of wheeling electricity. The obligation to pay the tariffs are ongoing and is excluded and distinct from the Premium. The Premium also excludes the cost of constructing the Applicant's own collector substation, which remains under its ownership and control and does not form part of the Grid Infrastructure, as described.

Collectively, the Agreements govern the construction of the Grid Infrastructure, the handover thereof to Eskom on the specified date (Handover Date), and the Applicant's long-term right to access and use the grid and Grid Infrastructure. The Agreements are contractually interlinked and operate as a single commercial arrangement.

The combined effect of the Agreements is that the Applicant is obliged to construct the Grid Infrastructure on Eskom-controlled land, for Eskom's benefit, but is not allowed to use it without also paying the Connection Charge upfront and, on an ongoing basis, the tariffs.

Conditions and assumptions

This binding private ruling is subject to the additional condition and assumption that that the value of the Grid Infrastructure, together with the Connection Charge, referred to as the Premium, will be included in the income of Eskom for income tax purposes.

Ruling

The ruling made in connection with the proposed transaction is as follows:

a) The Premium, comprising the cost to the Applicant of the Grid Infrastructure and the Connection Charge, qualifies as a 'premium or consideration in the nature of a premium' under section 11(f).

b) The Applicant must determine the probable period of the right of use or occupation under proviso (bb) to section 11(f) and use that period in determining the amount of the annual allowance under proviso (aa) to section 11(f).

c) The Applicant will qualify for the allowance under section 11(f)(i), (ii) and (v) from the Handover Date of the Grid Infrastructure.

General Note

Refer to paragraph 3.2.4 of Interpretation Note 109 (issue 2) Lease Premiums for guidance regarding the apportionment of the deduction under section 11(f).

10.4. Delayed contribution equity investment structure – No. 427

This ruling determines the income tax implications of a share subscription, based on a Delayed Contribution Equity Investment Structure (DCEIS), and the deductibility of expenditure under section 11D.

In this ruling references to sections are to sections of the Act applicable as at 2 April 2026. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the Act.

This is a ruling on the interpretation and application of:

- section 1(1) – definitions of 'contributed tax capital' and 'gross income';
- section 8(4)(a); and
- section 11D.

<u>Parties to the proposed transaction</u>

The Applicant: A resident company.

Company A: A non-resident company.

<u>Description of the proposed transaction</u>

The Applicant is engaged in research and development (R&D) activities.

Company A is an investment vehicle and maintains a diverse international investor base. All future investors of Company A will not be South African residents.

The Applicant and Company A propose to enter into a share subscription transaction based on a DCEIS as catered for in section 40(5) – (6) of the Companies Act 71 of 2008 (Companies Act).

The proposed transaction will be implemented as follows:

- The Applicant and Company A will enter into a Share Subscription Agreement in terms of which Company A will subscribe for, and the Applicant will issue to Company A, a certain number of ordinary no par value shares. The share subscription will be done on a DCEIS basis in compliance with section 40(5) – (7) of the Companies Act.
- Company A will pay the subscription amount for the issued shares in tranches over multiple years and up to a pre-agreed aggregate monetary cap.
- The Applicant will automatically be entitled to receive an amount equal to a certain percentage of the net proceeds raised by Company A from its fundraising issuances, subject to the pre-agreed aggregate monetary cap.

- Company A will not be contractually obliged to make payment of any fixed amounts to the Applicant nor are there any fixed payment dates for the payment of the subscription amount. The Applicant will have no rights to require Company A to raise any minimum amount of consideration, nor have any remedy if Company A's fundraising efforts prove inadequate other than the right to cancel the subscription shares. Should Company A be unsuccessful in raising investments, the Applicant will not be entitled to demand further payments. There is no guarantee that the Applicant will receive an amount equal to the pre-agreed aggregate monetary cap in subscription proceeds from Company A.
- The Applicant will credit each tranche of the subscription proceeds received from Company A to its stated capital / contributed tax capital (CTC) account on each receipt of payment.
- The issued shares will be held in trust by a stakeholder in accordance with section 40(5)(b) of the Companies Act and shall not be released or transferred to Company A until Company A has fulfilled its obligations under the Share Subscription Agreement.
- Dividends declared in respect of the subscription shares held by the stakeholder shall be retained by the Applicant until such time as the subscription shares are released to Company A.
- The Applicant will use the subscription proceeds it receives from Company A to engage in R&D activities. The Applicant has submitted applications to the Department of Science, Technology and Innovation (DSI) for approval of the R&D as required by section 11D(9).
- The Applicant will retain full and exclusive direction, control and performance of all R&D activities. All intellectual property arising from these activities will vest exclusively in the Applicant. Company A will therefore only acquire shareholder rights.

<u>Conditions and assumptions</u>

This binding private ruling is subject to the following additional conditions and assumptions:

- The Applicant's R&D projects will be approved by the DSI in accordance with section 11(9).
- The proposed share subscription transaction will comply with the requirements of section 40 of the Companies Act.

<u>Ruling</u>

The ruling made in connection with the proposed transaction is as follows:

- The subscription consideration that Company A will pay to the Applicant in respect of the DCEIS share subscription will accrue to the Applicant in each year of assessment in which Company A secures funding. The quantum of each accrual amount will be equal to a percentage of the net proceeds raised by Company A up to the pre-agreed aggregate monetary cap.
- The subscription consideration that will accrue to the Applicant from Company A in respect of the DCEIS share subscription constitutes amounts of a capital nature for the Applicant and not 'gross income' as defined in section 1(1) of the Act.
- Each subscription consideration that will accrue to the Applicant as contemplated above will constitute the Applicant's 'contributed tax capital' as defined in section 1(1) of the Act.
- Section 11D(2) is available to the Applicant to deduct expenditure in respect of its R&D project provided that:
    - the Applicant's R&D does not include items listed in the proviso to the definition of 'scientific or technological research and development' in section 11D(1);
    - the Applicant's R&D expenditure does not include items listed in section 11D(2)(b);
    - the Applicant's expenditure actually incurred will be directly and solely in respect of the carrying on of the R&D project in South Africa;
    - the R&D expenditure contemplated above is incurred in the production of income and in the carrying on of any trade;
    - the expenditure has been or will be incurred within 6 (six) months prior to or on or after the date of receipt of the application by the DSI for approval of the R&D in terms of section 11D(9); and
    - the Applicant's R&D project is approved by the DSI in terms of section 11D(9).
- Any expenditure that is deductible under section 11D(2) will be deducted by the Applicant in the year of assessment that it is incurred.
- The share subscription by Company A in the Applicant on a DCEIS basis will not have any impact on the deductibility of the R&D expenditure by the Applicant in terms of section 11D(2).

- The payment of the subscription consideration by Company A to the Applicant will not give rise to a recovery or recoupment under section 8(4)(a) of any deductions that may be available to the Applicant under section 11D of the Act.
- Section 11D(4) will not apply.
- Section 11D(7) will not apply to the Applicant.

General Note:

The individual items of R&D expenditure that the Applicant may incur have not been analysed to determine whether they fall within the ambit of section 11D(2) or any another provision of the Act

11. GUIDES

11.1. Guide to the Voluntary Disclosure Programme – Issue 2

This guide provides general guidance on the voluntary disclosure programme under Chapter 16 of the TA Act.

The VDP was introduced as a permanent measure to increase voluntary compliance in the interest of enhanced tax compliance, good management of the tax system, and the best use of SARS resources. Intended to encourage taxpayers to voluntarily disclose tax defaults, the VDP is administered under Part B of Chapter 16 and contains the requirements for a valid voluntary disclosure and available relief.

The VDP is applicable to all taxes administered by SARS, except for the customs and excise legislation. The Customs and Excise Act has been amended by the inclusion of a specific voluntary disclosure programme for purposes of the customs and excise legislation. This guide will not consider the voluntary disclosure programme applicable to the customs and excise legislation.

Taxpayers qualifying for the VDP will (on the conclusion of a valid voluntary disclosure agreement) be granted relief on applicable USP, qualifying administrative penalties, criminal prosecution in relation to a valid voluntary disclosure at the conclusion of the voluntary disclosure agreement.

When dealing with provisions creating tax privileges, such as the VDP, a strict interpretation is applied to determine whether an applicant meets all the requirements under Part B of Chapter 16 to qualify for voluntary disclosure relief.

11.2. Guide on the Determination of Medical Tax Credits – Issue 18

This guide provides general guidelines regarding the medical scheme fees tax credit and additional medical expenses tax credit for income tax purposes.

Expenditure of a personal nature is generally not taken into account in determining a taxpayer's income tax liability, under South Africa's tax system. One of the notable exceptions relates to medical expenditure. South Africa is aligned with the practice in many other countries of granting tax relief for medical expenditure.

There are a number of reasons that tax systems provide such relief. One of the reasons is that serious injury or illness can present taxpayers with disproportionately high medical bills in relation to income, which can be difficult to meet. The resulting hardship affects a number of economic areas for taxpayers, including the ability to settle obligations to the fiscus, such as a tax bill.

Historically, South Africa utilised a deduction system to facilitate tax relief for medical expenditure. Allowances, subject to certain limits, were permitted to be deducted from income for contributions to medical schemes, as well as for out-of-pocket medical expenditure.

In 2012, tax relief for medical expenditure began a phased-in conversion from a deduction system to a tax credit system. The reason for the change was to eliminate vertical inequity relating to medical contributions: those at higher marginal tax rates received a larger reduction of tax payable than those on lower marginal rates, in respect of the same amount of medical expenditure. The purpose of the change was to spread tax relief more equally across income groups, thus bringing about horizontal equity – those who pay equal values for medical expenditure receive absolute equal tax relief.

The new dispensation consists of a two-tier credit system:

1. A medical scheme fees tax credit (MTC) that applies in respect of qualifying contributions to a medical scheme.
2. An additional medical expenses tax credit (AMTC) that applies in respect of other qualifying medical expenses.

The application of the AMTC system falls into three categories:

- Taxpayers aged 65 years and older.
- Taxpayer, his or her spouse or his or her child is a person with a disability.
- All other taxpayers.

In order to qualify for the AMTC in the '65 years and older' category, the taxpayer must be 65 years or older on the last day of the relevant year of assessment or, had he or she lived, would have been 65 years or older on the last day of the relevant year of assessment.

The two types of credits are dealt with separately in this guide, namely:

- Part A – the MTC, dealing with contributions to a medical scheme; and
- Part B – the AMTC (which replaced the deduction of the medical allowance) dealing with other qualifying medical expenses, including out-of-pocket expenses.

11.3. Schools Exiting the VAT System – VAT Reference Guide

This reference guide provides information and guidelines regarding the VAT implications for schools that cease to be vendors, effective from 1 January 2026, because of the amendments to the VAT Act.

Various amendments were made to the VAT Act in the Taxation Laws Amendment Act 5 of 2026. These amendments provide clarity and certainty regarding the scope of section 12(h) as it applies to schools, and also relieve schools of the administrative burden associated with being a registered vendor.

Therefore, with effect from 1 January 2026, any supply of goods or services by a school, is exempt from VAT under section 12(h)(iv). The only exclusion to this exemption applies to supplies made by a school that is a 'welfare organisation' as defined in section 1(1), to the extent of its welfare activities. As a result, most schools will no longer carry on an enterprise and will cease to be a vendor.

Although a school that is no longer conducting an enterprise is required to deregister as a vendor and account for output tax on assets held for its enterprise activities prior to such school ceasing to be a vendor, relief is afforded for the payment of such output tax to SARS. A school is also allowed a deduction of VAT on those assets, to the extent that input tax has not previously been deducted thereon.

<u>Focus of this guide</u>

This guide provides clarity on the application and interaction of the various sections relating to schools that cease to be vendors from 1 January 2026, following the recent legislative amendments. The main focus is on explaining the application of section 8(2) in the context of a school and providing guidance on how to determine the school's liability under this section. This guide does not deal with the detailed operational aspects such as the process to deregister, declaration of the liability under section 8(2), and making payment arrangements. Operational aspects and questions not covered in this guide will be included in the Frequently Asked Questions: Schools Exiting the VAT System, published on the SARS website, as and when necessary.

Scope, approach and limitations of this guide

As indicated, the main purpose of the guide is to provide guidance to schools on calculating the Exit VAT. This guide does not deal with the classification of supplies made by schools as taxable, exempt, out-of-scope or non-supplies. Furthermore, this Guide does not deal with the VAT consequences for third parties such as governing bodies or suppliers of goods or services to schools.

Although certain concepts such as 'adjusted cost' and 'open market value (OMV)' are defined in the VAT Act, SARS can only provide limited guidance on how to determine these, and what resources to use. The valuation of assets or rights is beyond the scope of the VAT Act, and SARS cannot provide examples of calculations in this regard.

Chapter 2 provides an overview of the main principles, concepts and implications of the legislative amendments, whilst Chapter 3 provides more detail including the relevant legal concepts and background.

The approach of this guide in dealing with the topics mentioned above is set out below:

Chapter 1 – Introduces the topic, and outlines the focus, scope, approach, and limitations of this guide.

Chapter 2 – Provides a plain-language overview of the main principles, concepts, and implications of the legislative amendments. This includes what it means for a school to exit the VAT system, the definition of an 'enterprise asset', and the broad approach to determining liability under section 8(2).

Chapter 3 – Explains when a school ceases to be a vendor, which goods and rights may be subject to section 8(2), the main exclusions from that section, the rules for time and value of supply, and the deduction available under section 16(3)(h).

Chapter 4 – Explains the deductions that may still be claimed before deregistration. This covers apportionment, deductions made in a later tax period, prescribed documentation, and the consequences of incorrectly deducted input tax.

Chapter 5 – Deals with miscellaneous issues such as transitional rules, welfare organisations, payment arrangements, and VAT charged or deductions made in respect of supplies on or

after 1 January 2026.

12. GLOSSARY OF TERMS

For purposes of this update the terms listed hereunder bear the following meanings:

C:SARS – Commissioner for South African Revenue Service

CC – Constitutional Court

DTA – Double taxation agreement

IN – Interpretation Note issued by SARS

IT – Income Tax

IT Act – Income Tax Act, No. 58 of 1962 (as amended)

PAJA – Promotion of Administrative Justice Act, No. 3 of 2000 (as amended)

SARS – South African Revenue Service

SCA – Supreme Court of Appeal

TA Act – Tax Administration Act, No. 28 of 2011 (as amended)

VAT – Value-Added Tax

VAT Act – Value-Added Tax Act, No. 89 of 1991 (as amended)

VR – VAT Ruling issued by SARS

USP – Understatement Penalties

13. INDEMNITY / DISCLAIMER

This update is provided for general information purposes only and does not constitute legal or tax advice.

While every effort has been made to ensure the accuracy of the information contained herein, no responsibility is accepted for any loss or damage arising from reliance on its contents.

Readers are advised to seek professional advice tailored to their specific circumstances before taking any action based on this update.