

TAX UPDATE

For period: July 2026 to September 2026

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Tax Executive: Tax Dispute Resolution



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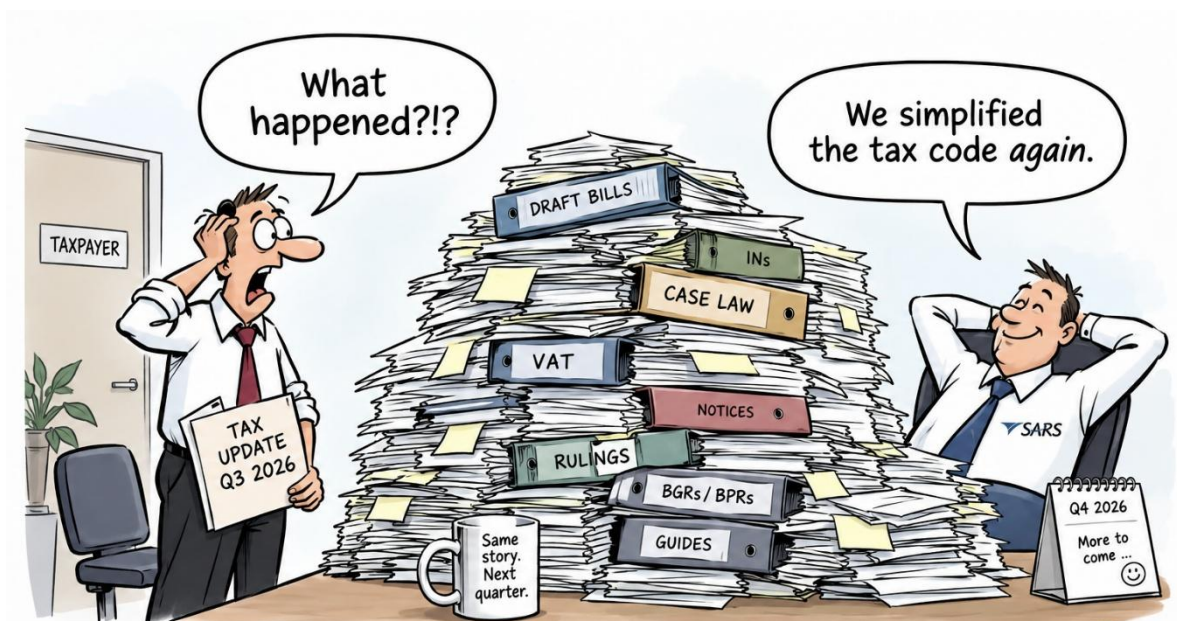
1. FOREWORD

If there is one constant in tax, it is that there is seldom much time to digest one development before the next arrives. I trust that this update will provide a useful reference point when some of these issues arise in practice.

The third quarter of 2026 has again been a busy one on the South African tax front. Apart from the annual round of draft tax legislation, the quarter produced a substantial body of case law, SARS guidance, rulings and administrative developments.

As always, not every development will be relevant to every taxpayer. This update therefore seeks not merely to record what has changed, but to identify the developments which may have practical significance and to provide a useful reference point when the issue eventually arises in practice.

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.



2. MEDIA STATEMENTS

2.1. *Publication of the 2206 Draft Tax Bills for Comment*

The National Treasury and SARS published, for public comment, the 2026 draft Taxation Laws Amendment Bill (2026 draft TLAB) and the 2026 draft Tax Administration Laws Amendment Bill (2026 draft TALAB). These draft tax bills contain the tax proposals that were made in the 2026 Budget on 25 February 2026.

2026 Draft TLAB

The 2026 draft TLAB provides the necessary legislative amendments required to implement the tax announcements made in Chapter 4 and Annexure C of the 2026 Budget Review, as well as technical corrections. Key tax proposals contained in the 2026 draft TLAB include the following:

- **Determining the application of the de minimis limit for multiple living annuities**
To expressly provide that the prescribed de minimis limit must be determined on a cumulative basis where an annuitant holds multiple living annuities with the same insurer or fund. This ensures consistent application of the rule and supports the broader policy objective of protecting retirement income.
- **Limiting the donations tax exemption rules where a spouse is a non-resident**
It is proposed that a limitation be introduced on the inter-spousal donations tax exemption. Specifically, the exemption will apply only to donations made to a spouse who is a South African tax resident. This proposal aims to stop spouses from deliberately staggering their cessation of tax residence to avoid paying donations and CGT.
- **Special economic zones: introduction of domestic transfer pricing rules**
It is proposed that the anti-profit shifting rule be replaced with the arm's length principle in respect of domestic transactions between SEZ companies qualifying for the 15% CIT rate and related companies outside the SEZ.
- **Leasehold improvements**
It is proposed that the VAT Act be amended to extend the claw-back mechanism to lessors who are not registered vendors. This would be achieved through a specific declaration process designed to close the current gap that arises when a landlord is not registered for VAT.

- Refunds for carbon budget compliance

It is proposed that the current reference to the immediately preceding tax period be deleted. To add clarity, it is proposed that refunds for the first two tax periods can be claimed in the third year. For the remaining tax periods (years three to five), a refund can be claimed in the sixth year, which will also accommodate any technical adjustments needed for the initial two tax periods.

2026 Draft TALAB

The 2026 draft TALAB provides legislative amendments dealing with tax administration announcements made in Annexure C of the 2026 Budget Review, as well as technical corrections. Key tax proposals contained in the 2026 draft TALAB include the following:

- Providing an enabling provision relating to Admission Temporaire/Temporary Admission carnets (ATA Carnets)

The ATA Carnet system, established under the ATA and Istanbul Conventions, enables the temporary admission of certain goods without the payment of duties or taxes. The World Customs Organisation and the International Chamber of Commerce launched an electronic ATA Carnet Project which mandates fully digitised carnets. Carnets were historically issued in paper format and manually processed at border posts. This amendment is proposed to ensure that South Africa can implement the new electronic requirements.

- Expanding documentary requirements for second-hand goods

To mitigate the risk of fraudulent notional input tax claims, it is proposed that the documentation requirements for second-hand goods vendors be extended to align to those prescribed under the Second-Hand Goods Act and its regulations.

- Permitting pre- or post-deposit screening of refunds by banks

Banks are required to report suspicious tax refunds to SARS and hold the refunds for up to two business days while SARS investigates. The proposed amendment aims to explicitly permit pre- or post-deposit screening of refunds by banks to enable a smoother refund process.

- Interest relief on defaults disclosed during voluntary disclosure application

To assist potential applicants, it is proposed that provision be made to specifically permit applicants for voluntary disclosure relief to simultaneously

apply for the separate remission of interest in respect of the defaults disclosed in the voluntary disclosure application.

Proposals listed in Annexure C but excluded from the 2026 Draft Tax Bills

The proposal relating to the 'Supply of gold to banks', as announced in the 2026 Budget Review, has not been included in the 2026 draft TLAB as it requires further consultation and consideration.

Locating the 2026 draft tax bills and accompanying draft explanatory memoranda

The 2026 draft tax bills and the accompanying draft explanatory memoranda containing a comprehensive description of the proposed tax amendments contained in the draft tax bills can be found on the National Treasury (www.treasury.gov.za) and SARS (www.sars.gov.za) websites. More general information underlying the changes in rates, thresholds or any other tax amendments can be found in the 2026 Budget Review, available on the National Treasury website.

3. DRAFT EXPLANATORY MEMORANDUM ON THE TAXATION LAWS AMENDMENT BILL, 2026

3.1. Determinating the application of the de minimis limit for multiple living annuities

[Applicable provision: Paragraph (c) of the definition of 'living annuity' and par (b)(x)(cc) of the proviso to the definition of 'retirement annuity fund' in section 1(1) of the IT Act]

Background

Living Annuities

The IT Act currently allows a living annuity to be commuted and paid out as a lump sum when the value of the underlying assets falls below the prescribed de minimis limit.

This limit is currently set at R150,000, as prescribed by the Minister of Finance in Government Gazette No. 54399 dated 23 March 2026, with effect from 1 March 2026.

The underlying policy intent is that the limit applies on a per-insurer or per-fund basis. Accordingly, where an annuitant holds multiple living annuities with the same insurer or fund, the aggregate value of those annuities should be taken into account in determining whether the de minimis limit is met.

Retirement Annuity Funds

Prior to 1 September 2024, the definition of 'retirement annuity fund' allowed a member who had discontinued contributions (i.e. where the policy had effectively become paid up) to access their full interest in the fund before retirement where that interest did not exceed R15,000. In such cases, the amount was treated as a retirement fund lump sum withdrawal benefit and taxed accordingly.

From 1 September 2024, under the two-pot system, a member who has discontinued contributions to a retirement annuity fund may access the full value of their interest in the vested and retirement components before retirement as a retirement fund lump sum withdrawal benefit, where the combined value of these components does not exceed R15,000. This threshold applies at fund level and requires the aggregation of all policy contracts held by the member within the same retirement annuity fund.

Reasons for change

Living Annuities

Different interpretations have arisen regarding whether the de minimis limit applies on a per-policy basis or cumulatively per insurer or fund. Application on a per-policy basis may undermine retirement income preservation by allowing the early commutation of multiple small annuities with a total value in excess of the allowable limit and facilitating tax-motivated restructuring of retirement benefits.

Retirement Annuity Funds

Notwithstanding the policy intent, uncertainty may arise as to whether the R15,000 threshold applies at policy level or fund level in circumstances where a member has discontinued contributions in respect of multiple policy contracts within the same retirement annuity fund. If applied on a per-policy basis, members could structure their affairs by maintaining multiple paid up policy contracts to access several

lump sum payments below the threshold. This would undermine the objective of preserving retirement savings.

Proposal

Living Annuities

It is proposed that the definition of 'living annuity' in section 1(1) of the IT Act be amended to expressly provide that the prescribed de minimis limit must be determined on a cumulative basis where an annuitant holds multiple living annuities with the same insurer or fund. This clarification will ensure consistent application of the law and support the policy objective of preserving retirement savings to provide sustainable income in retirement.

Retirement Annuity Funds

It is therefore proposed that the legislation expressly clarify that, where a member has discontinued contributions to a retirement annuity fund, the R15,000 de minimis threshold must be applied at fund level. Accordingly, where a member holds multiple paid up policy contracts within the same retirement annuity fund, the value of the member's interest in the vested and retirement components must be determined on an aggregated basis across all such policy contracts within the same retirement annuity fund to assess whether the threshold is met.

Effective date

The proposed amendment will come into effect on the date of promulgation of the Second Taxation Laws Amendment Act of 2026.

3.2. *Extending eligibility for both the medical scheme fees tax credit and additional medical expenses tax credit to members of restricted medical schemes*

[Applicable provisions: New definition of 'restricted medical scheme' in section 1(1), paragraphs (a) and (b)(i)(aa) of section 6A(2), subsections (1)(d), (2) and (3) of section 6B, section 12M and paragraphs 2 and 12A of the Seventh Schedule of the IT Act]

Background

Section 6A of the IT Act provides for a medical scheme fees tax credit in respect of contributions made by taxpayers to a medical scheme or fund. Currently, eligibility for the credit is limited to contributions made to a medical scheme that is registered and regulated under the Medical Schemes Act, No. 131 of 1998 ('the Medical Schemes Act'), and thus subject to the oversight of the Council for Medical Schemes (CMS), or to a fund registered under any similar provision contained in the laws of any other country in which that fund is registered.

Reasons for change

Certain statutory medical schemes fall outside the regulatory oversight of the CMS due to a legislative exclusion. Consequently, members of these schemes do not qualify for the medical scheme fees tax credit under section 6A of the IT Act. As a result, these taxpayers are excluded from relief that is otherwise available to members of medical schemes registered under the Medical Schemes Act, despite making regular contributions towards healthcare cover. This position arises from the unique statutory framework governing their employer and results in an unintended tax disadvantage for affected members.

Proposal

It is proposed that the IT Act introduce a definition of 'restricted medical scheme' for tax purposes to accommodate certain statutory medical schemes that fall outside the regulatory oversight of the CMS due to legislative exclusion. The term will refer to an arrangement that provides healthcare cover or medical benefits to a defined and limited group of employees, where the arrangement is established under the Intelligence Services Act, No. 65 of 2002, and where benefits offered are no less favourable than the prescribed minimum benefits required under the Medical Schemes Act.

Effective date

3The proposed amendment is deemed to have come into operation on 1 March 2026 and applies in respect of years of assessment commencing on or after that date.

3.3. *Allowing rollover treatment of capital allowances on allowance assets transferred between spouses*

[Applicable provision: Section 9HB of the IT Act]

Background

Section 9HB of the IT Act governs the tax treatment of assets disposed of between spouses and gives effect to rollover relief intended to ensure that such transfers are tax neutral. Under the current framework, the transferor disregards any capital gain or capital loss on disposal. While the disposal constitutes a CGT event, the tax consequences are deferred until the transferee disposes of the asset outside the matrimonial unit.

In relation to trading stock, livestock and produce, the transferor is deemed to have disposed of the asset at an amount equal to deductions previously allowed. The transferee assumes the transferor's acquisition history, including the original date of acquisition and associated expenditure as contemplated in section 11(a) and section 22 of the IT Act.

For capital assets, the transferee similarly inherits the transferor's base cost and acquisition date, thereby preserving the CGT position and deferring tax consequences until a subsequent disposal to a third party

Legislative integration and alignment

Historically, inter-spousal asset transfer rules were fragmented across the legislation, including paragraph 67 of the Eighth Schedule to the IT Act, which was repealed by section 85 of the Taxation Laws Amendment Act, No. 23 of 2018. Section 9HB has since been used to consolidate these rules into a single provision that governs the transfer of all asset classes between spouses.

Rollover of the recoupment component for allowance assets

Notwithstanding the above, section 9HB does not currently provide for the rollover of the recoupment component relating to allowance assets. As a result, the transferee does not inherit the transferor's accumulated allowances, and the recoupment provisions of section 8(4)(k) of the IT Act apply.

This results in the transferor being deemed to dispose of the asset at market value, triggering an immediate recoupment of allowances previously claimed. This outcome undermines the policy objective of tax neutrality for inter-spousal transfers, as it accelerates taxation rather than deferring it.

In addition, the current treatment resets the tax profile of the asset in the hands of the transferee, which is inconsistent with section 25(4) of the IT Act, where both allowances and recoupments roll over to a surviving spouse upon death. Policy alignment is therefore required to extend similar treatment to transfers between living spouses by providing for the deferral of recoupments and the rollover of accumulated allowances

Proposal

It is proposed that section 9HB be amended to provide for the comprehensive, tax-neutral rollover of capital allowances in respect of allowance assets transferred between spouses.

Under the proposed amendment, the transferor spouse must disregard any amount that would otherwise be included in income under section 8(4)(k) at the time of disposal. The transferee spouse must be treated as having acquired the asset at the same cost and on the same date as the transferor, and as having been allowed the same allowances or deductions previously allowed for the transferor in respect of that asset.

This approach ensures that the incidence of tax, including any recoupment and capital gain or capital loss, is deferred until the transferee spouse disposes of the asset to a person outside the matrimonial unit.

Effective date

The proposed amendment will come into operation on 1 March 2027 and applies in respect of disposals on or after that date

3.4. Limiting the donations tax exemption rules where a spouse is a non- resident

[Applicable provision: New proviso to section 56(1)(a) and (b) of the IT Act]

Background

Section 56 of the IT Act provides for various exemptions from donations tax, including a full exemption for donations made by a person to or for the benefit of their spouse. This exemption is based on the policy principle that spouses constitute a single economic unit, thereby allowing the free movement of assets within the matrimonial unit without triggering donations tax.

Section 9H of the IT Act governs the tax consequences arising when a person ceases to be a South African tax resident. In terms of this provision, a person is deemed to have disposed of their worldwide assets (subject to certain exclusions, including immovable property situated in South Africa) at market value on the day before cessation of residence. This deemed disposal may trigger IT consequences.

Reasons for change

Government has identified avoidance arrangements that have the effect of circumventing both donations tax and CGT under section 9H. This arrangement relies on the deliberate, staggered cessation of tax residence by spouses.

Under this arrangement, one spouse first ceases to be a South African tax resident. The remaining resident spouse subsequently transfers substantial assets to the now non-resident spouse. As the parties are married, the donation qualifies for a full exemption under section 56(1)(a) and (b) of the IT Act, with the result that no donations tax is payable.

Thereafter, the remaining spouse ceases to be a South African tax resident. At that point, the asset base of that spouse has been significantly reduced as a result of the prior tax-free donation. Consequently, the deemed disposal under section 9H gives rise to a substantially reduced, or zero tax liability.

This avoidance arrangement enables the tax-free transfer of wealth offshore, undermining the policy intent of both the inter-spousal exemption and the CGT regime, and resulting in an erosion of the South African tax base.

Proposal

It is proposed that section 56 be amended to introduce a limitation on the inter-spousal donations tax exemption. Specifically, the exemption will apply only to donations made to a spouse who is a South African tax resident. As a result, donations made to a non-resident spouse will no longer qualify for the exemption and will instead be subject to donations tax in the ordinary course. This will ensure that transfers of wealth to a non-resident spouse prior to cessation of residence give rise to an immediate tax liability, thereby neutralising the identified avoidance arrangement and protecting the integrity of the South African tax base.

Effective date

The proposed amendment is deemed to have come into operation on 25 February 2026 and applies in respect of donations made on or after that date.

3.5. *Withdrawing the 2024 alignment between the formulae in section 23N and section 23M of the IT Act*

[Applicable provision: Section 23N of the IT Act] .

Background

The IT Act has two sets of interest limitation rules. Section 23M of the IT Act seeks to limit the deduction of interest expenses when there is a direct or indirect relationship between the debtor and creditor, and the interest income is not fully taxed in the hands of the creditor. Section 23N of the IT Act restricts the deductibility of interest on loans used to fund reorganisation or acquisition transactions.

The latter aims to prevent ‘debt push-down transactions’ where debt used to acquire a company is loaded onto the target company, creating excessive interest deductions. The restriction applies to the year of the acquisition and the five immediately succeeding years of assessment.

Prior to years of assessment commencing on or after 1 April 2022, both interest limitation rules applied the same formula to determine the extent of tainted interest deductibility.

Following the OECD/G20 Base Erosion and Profit Shifting Project’s recommendations, the rules targeting interest deductions where: (i) a direct/indirect controlling relationship exists between a debtor and creditor, and (ii) the interest income is not taxed, were reviewed and the formula was changed from a flexible to a fixed-rate design to reflect international best practice.

In policy discussions that followed, it was considered that the rules contained in section 23N should follow this design. This led to the amendment in the Taxation Laws Amendment Act, No. 42 of 2024 (the TLAA 2024) to align the formula with section 23M.

Reasons for change

In subsequent policy discussions and upon reviewing this proposal, it is recognised that the two sets of rules are applied in different circumstances, so it is not necessary that the formulae be aligned. Rather, each of the formulae should be tailored to the policy objective of each set of rules.

The section 23N rules pertain to transactions that are funded locally by banks or within a group of companies where the creditor is subject to tax.

Proposal

To ensure the policy objectives of the interest limitation rules remain appropriately targeted (and to ensure stability for existing transactions) – it is proposed that section 23N(3)(b) of the IT Act remain as it was prior to the amendments in section 19(1)(c) to (f) of the TLAA 2024 taking effect on 1 January 2027.

Effective date

The proposed amendment is deemed to have come into operation on 24 December 2024.

3.6. *Alignment of short-term insurance taxation with International Financial Reporting Standards (IFRS) 17 Terminology*

[Applicable provision: Section 28(3B) of the IT Act]

Background

Section 28(3B)(a) of the IT Act currently refers to amounts of insurance liabilities relating to premiums and claims. It does not explicitly refer to the liability for incurred claims (LIC) (section 28(3)(a)) or the liability for remaining coverage (LRC) (section 28(3A)).

The LIC component of the liabilities reflects the incurred portion of claims, while the LRC component represents the anticipated future liability that an insurer may have. The absence of explicit reference to these components creates a misalignment with the revised accounting framework under IFRS 17 and may lead to inconsistencies in the determination of allowable deductions.

Reasons for change

While most of section 28 was updated to reflect IFRS 17, section 28(3B)(a) was inadvertently omitted from these consequential amendments.

Currently, this subsection continues to refer to ‘insurance liabilities relating to premiums and claims’ using outdated terminology.

Since section 28(3B)(a) does not explicitly reference the LIC and LRC components, it creates a technical misalignment with the rest of the section.

This lack of harmony between the reporting buckets used for general insurance deductions (subsections 3 and 3A) and the specific inclusions or deductions in

subsection 3B(a) of the IT Act creates uncertainty for insurers when determining the exact quantum of deductible liabilities.

Proposal

It is proposed that section 28(3B)(a) be amended to align the deduction with the amounts deducted under subsections (3)(3A) and included under subsection (4) of the IT Act. This amendment will ensure that both LIC and LRC components are appropriately recognised, thereby harmonising the tax treatment of insurance liabilities with the requirements of IFRS 17.

Effective date

The proposed amendment will come into operation on 1 January 2027 and will apply in respect of years of assessment commencing on or after that date.

3.7. *Extending the rehabilitation fund regime*

[Applicable provision: Section 37A of the IT Act]

Background

With effect from years of assessment commencing on or after 2 November 2006, government introduced a unified regime for the tax treatment of mining environmental rehabilitation funds with the objective of applying their assets solely for rehabilitation on premature closure, decommissioning, final closure and post-closure coverage of any latent and residual environmental impacts.

As a result, under certain conditions, all cash contributions to the mining rehabilitation fund are tax deductible and the growth in the fund is exempt from tax.

Reasons for change

Like mining operations, nuclear operators, including applicants and authorisation holders for the construction or operation of a nuclear facility or for related activities, are subject to strict legislative requirements for environmental rehabilitation and decommissioning, supported by adequate financial provision for the preservation of the relevant nuclear facility.

In 2024, government further enhanced environmental preservation requirements for any nuclear operator through the addition of section 26A of the National Nuclear Regulator Act, No. 47 of 1999 (the NNRA), which specifically requires a nuclear

operator to make adequate financial provisions for the rehabilitation or decommissioning of a nuclear facility upon closure.

Proposal

It is proposed that the rehabilitation fund regime, as an environmental preservation mechanism, be extended to nuclear facilities to ensure that licensed nuclear operators, rather than ordinary taxpayers in general, bear the cost of long-term rehabilitation.

Scope

The rehabilitation fund regime will be extended to allow for a holder of a nuclear license issued by the National Nuclear Regulator in terms of the NNRA, to deduct for purposes of determining its taxable income, an amount of cash paid to a company or trust whose sole object is to use its property for the rehabilitation and decommissioning of a nuclear facility (i.e. an area covered in terms of a nuclear license).

Similarly, the receipts or accrual of that company or trust whose sole object is to use its property for the rehabilitation and decommissioning of the nuclear facility in terms of section 37A of the IT Act will be exempt from normal tax.

To ensure that all contributions and withdrawals cater solely for the nuclear facility rehabilitation upon closure, all other aspects of section 37A will also find application. These include administrative responsibilities, holding of permissible financial instruments, allowable distribution or use of property and security, relevant penalty provisions and related reporting responsibilities.

Exclusion

Section 26A of the NNRA also includes the management of resulting radio-active waste as part of the cost of safe rehabilitation or decommissioning.

The financial provisioning and funding for the short- to long-term management of radio-active waste is regarded as a distinct and separate (i) charge; and (ii) responsibility through the polluter-pays principle, forming part of a wider policy development initiative by government and various relevant stakeholders.

As such, the extension of the rehabilitation fund regime for a nuclear facility will exclude any nuclear facility with a nuclear license for the short- to long-term management of radio-active waste produced at any other nuclear facility from the ambit of section 37A.

Effective date

The proposed amendment will come into effect on 1 January 2027 and applies to years of assessment commencing on or after that date.

3.8. *Special Economic Zones (SEZ): Introduction of domestic transfer pricing rules*

[Applicable provisions: Section 12R and new section 31B of the IT Act]

Background

A reduced CIT rate of 15% is available for qualifying companies operating in approved SEZs.

In 2016, an anti-avoidance rule was introduced into section 12R of the IT Act to mitigate the risk of profit shifting from fully taxable connected persons to SEZ qualifying companies.

Under this rule, a company is disqualified from benefiting from the 15% reduced CIT rate if more than 20% of its deductible expenditure or income arises from transactions with a connected person that is a resident or has a permanent establishment in South Africa.

Reasons for change

Over the years taxpayers have raised concerns that the anti-avoidance rule is not business friendly, requesting that it be reviewed.

It has been raised that the rule is not well-suited to prevailing business models:

- It is common for business models to have manufacturing and marketing activities in separate companies and the current anti-avoidance rule makes it hard for these entities to transact without being disqualified.
- It is difficult for large foreign companies to locate their entire operations within an SEZ as they operate in long supply chains – often making it viable to locate only a portion of the supply chain in an SEZ. As a result, the anti-avoidance rule has the effect of disqualifying investors already operating in SEZs as well as potential investors who buy or sell to related entities in their supply chain.

An international comparison of 14 countries with SEZ regimes that offer generous tax incentives shows that countries generally rely on OECD/UN-aligned transfer pricing frameworks and substance requirements to safeguard their tax base. Profit-shifting

risks are addressed through arm's-length pricing adjustments rather than by excluding qualifying companies from the incentives altogether.

Proposal

To safeguard the tax base while supporting investment in SEZs, Government proposes replacing the anti-profit shifting rule in section 12R(4)(c) with a new section 31B.

The proposed section 31B seeks to apply the arm's length principle to domestic transactions between a qualifying company operating in an approved SEZ and another company that is not a qualifying company, but which is a connected person, operating outside the SEZ.

Who are affected

The proposed section 31B will apply when the following conditions are met:

- there is a transaction between two resident companies (instances where one party is not tax resident are covered by section 31);
- the companies are connected persons in relation to one another;
- one of the companies is a qualifying company operating within an SEZ approved by the Minister of Finance (SEZ that qualifies for the reduced 15% rate); and
- the other company operates outside the SEZ or is not a qualifying company operating within an approved SEZ.

Which transactions will be affected

The proposed section 31B will apply only to domestic transactions in respect of goods and services.

The provision is intended to capture not only transactions in tangible goods, but also intra-group services and other similar arrangements that may result in profits being shifted to the SEZ qualifying company without any physical transfer of goods.

Adjustment trigger

An adjustment will be required where the price or any other term or condition of the transaction differs from those that would have been agreed between independent parties dealing at arm's length, including if neither party had been operating in an approved SEZ.

In addition, that difference must result in a tax benefit for any of the companies that is a party to the transaction. This is to ensure that the transaction between a qualifying company operating in an approved SEZ and another company operating outside the SEZ does not erode the corporate tax base.

To ensure that the rules dissuade profit shifting to a qualifying company (located in an approved SEZ) taxed at a lower rate, the company that is not a qualifying company (and taxed at the standard 27% CIT rate) must calculate its taxable income as if the transaction had been entered into on arm's length terms and conditions. A secondary adjustment mechanism will not be included since inter-company dividends are exempt from dividends tax.

The proposed section 31B is intended to operate in line with the arm's length principle as set out in the OECD Transfer Pricing Guidelines and the United Nations Practical Manual on Transfer Pricing.

Effective date

The proposed amendment will come into effect on 1 January 2027 and applies to years of assessment commencing on or after that date.

3.9. *Aligning the interaction between Controlled Foreign Company (CFC) and Domestic Treasury Management Company (DTMC) currency translation rules*

[Applicable provisions: Section 9D(6) of the IT Act]

Background

A CFC is required to determine its net income in its functional currency for the purpose of including a proportional share of this income in the hands of a South African shareholder.

Section 9D(6) of the IT Act requires this amount to be translated into Rand (ZAR) using the average exchange rate for the CFC's foreign tax year.

Furthermore, a DTMC is permitted to use a functional currency other than the Rand (e.g. USD) for tax purposes.

Section 25D(5) of the IT Act provides that any amount received by a DTMC in a currency other than its functional currency must first be determined in that functional

currency and subsequently translated into rand using the average exchange rate for the DTMC's year of assessment.

Reasons for change

A technical anomaly arises where a DTMC holds shares in a CFC.

In this scenario, the CFC's net income is first translated from its functional currency to rand (per section 9D(6) of the IT Act). However, because the shareholder is a DTMC with a USD functional currency, section 25D(5) requires this 'Rand amount' to be translated back into USD, and then once more into Rand at the DTMC's average exchange rate.

This 'circular' translation process creates a currency mismatch. Because the average exchange rate for the CFC's foreign tax year and the DTMC's year of assessment often differ, the resulting rand inclusion in the DTMC's taxable income is distorted by phantom exchange gains or losses that do not reflect the underlying economic reality.

Proposal

To resolve this anomaly, it is proposed that the legislation be amended to ensure that where a DTMC is the shareholder of a CFC, and both entities share the same functional currency, the net income of the CFC should be determined in that functional currency without the intermediate translation to rand. This will align the tax treatment with the economic substance of the transaction and eliminate the administrative burden of multiple currency conversions.

Effective date

The proposed amendment comes into operation on 1 January 2027 and applies in respect of foreign tax years of CFCs ending on or after that date.

3.10. Services rendered to a Customs Controlled Area Enterprise or Special Economic Zone Operator

[Applicable provision: Section 11(2)(k) of the VAT Act]

Background

Section 11(2)(k) of the VAT Act provides that VAT must be charged at 0% on the supply of services that are physically rendered elsewhere than in South Africa or to a customs controlled area enterprise (CCAEE) or a Special Economic Zone (SEZ) operator in a customs controlled area (CCA).

In terms of section 1(1) of the VAT Act, the definition of the 'Republic' in the geographical sense, means the territory of South Africa of South Africa and includes the territorial waters, the contiguous zone and the continental shelf referred to respectively in sections 4, 5 and 8 of the Maritime Zones Act, No. 15 of 1994. SEZ is defined in section 21A of the C&E Act as a geographically designated area of a country set aside for specifically targeted economic activities, which are then supported through special arrangements and support systems to promote industrial development.

Categories of SEZs that may be designated as such by the Department of Trade and Industry (DTI) (currently known as the Department of Trade, Industry and Competition (DTIC)) may include:

- Free ports;
- Free Trade Zones (FTZs);
- Industrial Development Zones (IDZs); and
- Sector Development Zones (SDZs).

Section 21A of the C&E Act defines a SEZ operator as a holder of a valid SEZ operator permit granted by the Minister of Trade and Industry and includes personnel of the SEZ operator who are authorised by the SEZ operator to perform duties and functions specified in that section. Within the area of the IDZ there will be areas designated by the SARS in concurrence with DTIC which will be called Customs Controlled Areas (CCA), and as the name indicates, these areas will be under the control of Customs. In terms of section 21A of the C&E Act, CCAE means any person permanently located in a CCA and who is registered or licensed as contemplated in the rules of that section.

Several amendments were made to the VAT Act when the original Industrial Development Zone programme (which was later converted to the SEZ programme) was introduced.

As stated in the Explanatory Memorandum of the Revenue Laws Amendment Bill, No. 45 of 2003:

'The supply of goods by a registered vendor in terms of a sale or instalment credit agreement to a registered vendor in a CCA will be zero-rated if the supplier consigns or delivers the goods [the goods] to the vendor in that area. It is proposed that services physically rendered to a registered vendor in a CCA will also be zero-rated. The effect of the proposed provisions is that a vendor in a CCA is afforded VAT treatment similar to that which is afforded to a vendor operating a bonded warehouse.'

Reasons for change

It has come to the Government's attention that there is confusion about whether all services rendered to a CCAE or an SEZ operator in a CCA are required to be physically rendered therein to qualify for the zero-rating.

To some extent, the interpretation is that as long as the services are rendered to a CCAE or an SEZ operator situated in a CCA, those services would still qualify for zero-rating irrespective where those services are physically rendered, e.g. auditing and information technology services.

Accordingly, taxpayers requested that section 11(2)(k) of the VAT Act be amended to clarify the policy position on services rendered in terms of the zero-rating provisions of section 11(2)(k). As indicated above, it has always been the intention of section 11(2)(k) to zero-rate the supply of services physically rendered to a CCAE or SEZ operator in a CCA.

Proposal

It is proposed that section 11(2)(k) be reformulated for ease of reference. The proposed amendment does not change the policy intent or substantive effect of the provision.

Effective Date

The proposed amendment will come into effect on the date of promulgation of the Second Taxation Laws Amendment Act of 2026.

3.11. Electronic services and intermediaries

[Applicable provision: section 54(2B) of the VAT Act]

Background

With effect from 1 April 2025, section 54(2B) of the VAT Act makes provision for an intermediary (who is a vendor) to account for VAT, where the intermediary supplies electronic services on behalf of a foreign electronic services supplier (the principal) who is not a resident of South Africa, to a person in South Africa, subject to the intermediary and the principal (the parties) agreeing in writing that such supply be treated as if supplied by the intermediary.

Furthermore, the parties shall be held jointly and severally liable in respect of the taxable supplies made under such agreement.

Based on the above, the intention is to hold the intermediary liable to account for the VAT on electronic services provided through the intermediary's platform, on behalf of the principal. However, in the absence of a concluded agreement between the parties, the principal remains liable to register and account for the VAT on its taxable supplies. Section 54(2B) was further amended from 1 April 2026 for the intermediary provisions to be widened to also include supplies facilitated by intermediaries on behalf of local suppliers.

This was due to the fact that limiting the application of the intermediary provisions to only apply to non-residents created complexities and administrative burdens for intermediaries who also act as agents on behalf of local suppliers.

Reasons for change

It has come to Government's attention that the required agreement as mentioned above poses compliance risks for SARS in that SARS must engage the principal to recover the VAT, and intermediaries may have difficulty in entering into agreements with smaller foreign electronic suppliers, to account on their behalf.

Proposal

The definition of 'intermediary' is defined in section 1(1) of the VAT Act as: 'a person who facilitates the supply of electronic services supplied by the electronic services supplier and who is responsible for issuing the invoices and collecting payment for the supply'.

Therefore, there is a specific requirement that the intermediary collects the payment for the supply. The intermediary is thus in control of collecting the VAT, and it thus makes sense to hold the intermediary primarily liable for the accounting of supplies of electronic services by foreign principals.

It is thus proposed that the default situation be rather that the intermediary, being the person in control of the collection of the VAT and the invoicing, accounts for the VAT, unless there is an agreement to the contrary.

This will also make it easier for intermediaries to account for all supplies that go through their platform, excluding the exceptions where the principal prefers to account and the parties agree to this in writing.

Effective Date

The proposed amendment will come into operation on 1 April 2027.

3.12. Leasehold improvements

[Applicable provision: section 18C of the VAT Act]

Background

Prior to 1 April 2018, the VAT Act did not contain specific provisions dealing with the consequences for the parties when a **lessee** effects leasehold improvements for no consideration to the lessor's property during the period of the lease.

In order to address this situation, section 8(29) of the VAT Act was introduced with effect from 1 April 2018, and it provides that where a vendor, being a lessee, supplies leasehold improvements for no consideration, the lessee is deemed to make a taxable supply of goods to the lessor, unless the lessee effects the improvements wholly for non-taxable purposes.

Simultaneously, section 18C of the VAT Act was also introduced with effect from 1 April 2018 and it requires the lessor, being vendor, to account for output tax on the leasehold improvements in section 8(29), **to the extent that the lessor, at the time of completion of the leasehold improvements, uses the fixed property otherwise than for purposes of making taxable supplies.**

Furthermore, section 10(28) of the VAT Act also came into operation from 1 April 2018 whereby it deems the value of the leasehold improvements as contemplated under section 8(29) to be nil and as such, the lessee is not required to account for output tax on effecting the leasehold improvements.

The effect of these provisions is that the lessor is in the same position had the lessor effected the leasehold improvements itself and the use thereof were for purposes other than to make taxable supplies.

Reasons for change

A problem arises where leasehold improvements are supplied for no consideration to a lessor who is not a vendor (e.g. below the VAT registration threshold or only making exempt supplies).

The adjustment under section 18C must be made by a lessor who is a vendor where leasehold improvements are applied for non-taxable purposes.

Based on the current wording of the provision, if the lessor is not a vendor, section 18C does not find application.

This means that the lessor will get the benefit of leasehold improvements in respect of which VAT was effectively not paid to SARS, as the lessee would have been entitled

to a full deduction of VAT incurred by him as input tax (section 8(29) read with the definition of 'input tax').

Put differently, the claw back mechanism in section 18C will not be triggered where the lessor is not a vendor.

There will be no claw back of the input tax claimable by the lessee. Whilst section 18C refers to the supply contemplated in section 8(29), section 8(29) only addresses the lessee and refers to the lessee being a vendor. This provision does not make any reference to the lessor or that such lessor must be a vendor.

Section 18C itself only refers to lessors that are vendors.

It is important to bear in mind the reasons for introducing the leasehold improvements amendments from 1 April 2018. In this regard, the Explanatory Memorandum on the Taxation Laws Amendment Act, No. 17 of 2017 (the 2017 EM) states as follow:

'Currently, the VAT Act does not provide guidelines in respect of the VAT treatment of leasehold improvements effected by the lessee to the leasehold property during the period of a lease agreement. Concerns have been raised that lessee and lessor vendors are uncertain of how to treat these leasehold improvements for VAT purposes. The lack of clarity in the VAT Act has led to inconsistencies in the VAT treatment.'

At the time of the 2017 EM and what it sought to address, the policy intention was that the provisions apply where the lessee and lessor are both vendors.

Furthermore, section 8(29) and section 18C must be read together based on the use of words 'contemplated in section 8(29)' in section 18C.

This means that where a vendor is of the view that section 8(29) applies to the transaction, then concomitantly section 18C must also be applied to the transaction.

However, it has now come to government's attention that there is a VAT leakage where the lessor is not a vendor.

Proposal

It is proposed that the VAT Act be amended so that the claw back mechanism is effectively extended to lessors who are not vendors by means of a specific declaration channel. Vendors will continue to make the adjustment in their VAT 201 returns, whereas non-vendors will do so by way of a self-declaration and payment to SARS.

Effective Date

The proposed amendment will come into operation on 1 April 2027.

4. NOTICES / REGULATIONS

4.1. *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 August 2025	11,00%
1 September 2025	31 October 2025	10,75%
1 November 2025	28 February 2026	10,50%
1 March 2026	31 August 2026	10,25%
1 September 2026	Until change in the Public Finance Management Act rate	10,50%

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	31 August 2026	6,25%

1 September 2026	Until change in the Public Finance Management Act rate	6,50%
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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.

4.2. Notice in terms of section 187(2) of the TA Act prescribing the date from which the method of determining interest in terms of this section will apply to a tax type

The notice prescribes that any interest imposed under section 7 of the Global Minimum Tax Administration Act, 2024 (Act No. 47 of 2024) read with Chapter 12 of the TA Act, must be calculated on the daily balance owing and compounded monthly, with effect from 30 June 2026.

4.3. Notice of address of service specified by SARS in terms of section 11(5) of the TA Act with regard to any notice or process by which legal proceedings are instituted

1. GENERAL

In this notice, unless the context indicates otherwise, any word or expression to which a meaning has been assigned in section 1 of the TA Act, has the meaning so assigned.

2. THE NOTICE OR ANY PROCESS BY WHICH LEGAL PROCEEDINGS ARE INSTITUTED IN TERMS OF THE TA ACT

2.1 Service of notices of intention to institute legal proceedings or subsequent legal process other than liquidations or sequestrations

Any notice of the intention to institute legal proceedings in terms of section 11(4) of the TA Act, and any process subsequently instituted, other than liquidations and sequestrations, must be served on SARS in the following manner:

2.1.1 Electronically to the following address:

Email: HighCourtLitigation@sars.gov.za , alternatively

2.1.2 Physically to the following address:

SARS: Centralised Litigation

Landbank Building

271 Veale Street

Nieuw Muckleneuk

Pretoria

3. SERVICE OF NOTICE OR PROCESS IN RELATION TO LIQUIDATIONS OR SEQUESTRATIONS

Service of notices and applications in relation to liquidations or sequestrations, will also be accepted by SARS in the following manner:

3.1 Electronically to the following address:

Email: Liquidations@sars.gov.za, alternatively

3.2 Physically to the following address:

SARS: Debt Management

Khanyisa Building

271 Bronkhorst Street

Nieuw Muckleneuk

Pretoria

4. EXCLUSIONS

This notice does not apply to the delivery of any notice or court proceeding made in respect of:

- 4.1 customs and excise legislation. Any notice of the intention to institute legal proceedings in terms of the customs and excise legislation should be given in strict compliance with the provisions of section 96 read with rule 96 to the C&E Act.
- 4.2 any cause of action against SARS that does not arise from the administration of any tax Act.

4.4. Notice of addresses at which a document, notice or request is to be delivered or made for purposes of rule 2(1)(c)(ii) or rule 3(1) read together with rule 2(1)(c)(iii) of the Rules

1. GENERAL

- 1.1 In this notice, unless the context indicates otherwise, any word or expression to which a meaning has been assigned in section 1 of the TAA Act, or the Rules, has the meaning so assigned.
- 1.2 In terms of rule 2(1)(c)(ii) and rule 3(1) read together with rule 2(1)(c)(iii) of the Rules this notice provides for the prescribed manner for delivery of documents, notices or requests made relating to the dispute process as determined by Chapter 9 of the TAA Act and the Rules.

2. DISPUTE PROCESS

Delivery of any document, notice or request made with regards to requests for reasons, objections and appeals, must be made in the following manner:

- 2.1 To the taxpayer's electronic filing page through www.sarsefiling.co.za; or
- 2.2 In the event that the request for reasons, objection or appeal relates to—
 - 2.2.1 estate duty,
 - 2.2.2 donations tax,
 - 2.2.3 imported services supplied to non-vendors,
 - 2.2.4 rejection of a VAT registration application, or
 - 2.2.5 paragraph 13(1) of the First Schedule to the IT Act,
 delivery of the relevant document being a letter for a request for reasons, ADR1 form for an objection and ADR2 form for an appeal, must be sent to contactus@sars.gov.za .
- 2.3 If www.sarsefiling.co.za or contactus@sars.gov.za is unavailable, the delivery of any document, notice or request can be arranged at a SARS branch office after making an appointment through www.sars.gov.za/contact-us/make-an-appointment.

3. TAX BOARD APPEALS

After delivery of a notice of appeal, delivery of any document, notice or request relating to that appeal, must be made in the following manner:

- 3.1 Electronically to the address listed for the applicable area closest to the residence or place of business of the taxpayer, alternatively to the clerk of the tax board at the physical address listed for the applicable area namely:

Applicable Area:	Electronic Address:	Physical Address:
KwaZulu-Natal: Durban, Umhlanga, Pinetown, Newcastle, Pietermaritzburg, Port Shepstone, Richards Bay	LegalKZN@sars.gov.za	The clerk of the tax board at: 61/62 Margaret Mncadi Avenue Durban
Free State & Northern Cape: Bloemfontein, Bethlehem, Kroonstad, Welkom, Kimberley, Upington	LegalFS@sars.gov.za	The clerk of the tax board at: SARS Building 88 Zastron Street Bloemfontein
Eastern Cape: East London, Gqeberha, Mthatha, Uitenhage	LegalEC@sars.gov.za	The clerk of the tax board: SARS Main Revenue Building Corner Govan Mbeki Avenue and John Kani Road St Mary's Terrace Gqeberha

Western Cape: Beaufort West, Bellville, Cape Town, Mitchells Plain, Paarl, Worcester, George	LegalWC@sars.gov.za	The clerk of the tax board at: SARS Sanlam P166 Building 22 Hans Strydom Avenue Cape Town
Gauteng South: Springs, Vereeniging, Germiston, Alberton, Benoni, Boksburg, Standerton, Brakpan, Nigel, Randfontein, Krugersdorp	LegalGS1@sars.gov.za	The clerk of the tax board at: SARS Alberton Campus 28 St Austell Street McKinnon Crescent New Redruth Alberton
Gauteng North: Pretoria	LegalGN@sars.gov.za	The clerk of the tax board at: SARS 7 Protea Street Doringkloof Centurion Pretoria
Gauteng South - (JHB): Johannesburg, Roodepoort	LegalGS2@sars.gov.za	The clerk of the tax board at: SARS 25 Hill Street Ferndale Randburg

Mpumalanga: Mbombela, Witbank	LegalPNWMP@sars.gov.za	The clerk of the tax board at: SARS Old Game Building 31 Citrus Crescent Mbombela
Limpopo: Sibasa, Lebowakgomo, Giyani, Polokwane	LegalLPNWMP@sars.gov.za	The clerk of the tax board at: SARS 40 Landdros Maree Street Old Government Building Polokwane
Northwest: Klerksdorp, Rustenburg, Mabatho	LegalLPNWMP@sars.gov.za	The clerk of the tax board at: SARS 39 Heysek Avenue Rustenburg

- 3.2 Notwithstanding the provisions of paragraph 3.1, if the taxpayer is a taxpayer registered with the SARS Large Business and International unit or the High Net-Worth Individuals unit, the document, notice or request, must be made electronically to the applicable addresses below, alternatively to the physical address listed:

Electronic Address:	Physical Address:
lbqueries@sars.gov.za	The clerk of the tax board at: Woodmead North Office Park

	54 Maxwell Drive Johannesburg
hnwqueries@sars.gov.za	The clerk of the tax board at: Woodmead North Office Park 54 Maxwell Drive Johannesburg

4. NOTICES TO SARS AND APPLICATIONS TO THE TAX COURT

Notices to SARS and applications to the tax court in terms of rule 52 or rule 56 of Part F of the Rules must be made electronically to the applicable address below, alternatively at the physical address listed, upon both SARS and the registrar of the tax court:

SARS:	Registrar of the tax court:
Electronic Address: PartF.TaxCourt.Applications@sars.gov.za	Electronic Address: RegistrarTaxCourt@sars.gov.za
Physical Address: SARS, Landbank Building, 271 Veale Street, Nieuw Muckleneuk, Pretoria	Physical Address: Registrar of the tax court, Landbank Building, 271 Veale Street, Nieuw Muckleneuk, Pretoria

5. TAX COURT APPEALS

After delivery of a notice of appeal, delivery of any document, notice or request made relating to that appeal, must be made electronically to the applicable address below, alternatively at the physical address listed, upon both SARS and the registrar of the tax court:

SARS:	Registrar of the tax court:
Electronic Address: taxcourtlitigation@sars.gov.za	Electronic Address: RegistrarTaxCourt@sars.gov.za
Physical Address: SARS, Landbank Building, 271 Veale Street, Nieuw Muckleneuk, Pretoria	Physical Address: Registrar of the tax court, Landbank Building, 271 Veale Street, Nieuw Muckleneuk, Pretoria

6. REGISTRAR OF THE TAX COURT

Any document or notice required to be delivered or any request required to be made to the registrar of the tax court must be delivered or made in the following manner:

6.1 Electronically to the following address:

Email: RegistrarTaxCourt@sars.gov.za

6.2 Alternatively, to the following physical address:

Registrar of the tax court, Landbank Building, 271 Veale Street, Nieuw Muckleneuk, Pretoria

7. EXCLUSIONS

This notice does not apply to the delivery of any notice or court proceeding made in respect of:

- 7.1 customs and excise legislation. Any notice of the intention to institute legal proceedings in terms of customs and excise legislation should be given in strict compliance with the provisions of section 96 read with rule 96 to the C&E Act.
- 7.2 any cause of action against SARS that does not arise from the administration of any tax Act.

5. TAX CASES

5.1. *Lion Match Co (Pty) Ltd v C:SARS (88 SATC 299)*¹

Lion Match, had owned shares in Kimberley-Clark Southern Africa (Pty) Ltd (KCSA) and Kimberley-Clark Southern Africa Holdings (Pty) Ltd (KCSA Holdings). These shares were acquired before the introduction of CGT into South African tax law on 1 October 2001. The shares were therefore 'pre – valuation date shares.' During the 2008 year of assessment, Lion Match disposed of 3 788 250 shares in KCSA and 85 329 shares in KCSA Holdings. The proceeds from these disposals amounted to R453 153 223.

Lion Match computed its taxable capital gain by calculating the base cost of sold assets(shares) with reference to their market value as at 1 October 2001. It did so based on a KPMG report that was completed in September 2001.

SARS on 30 April 2012, issued an additional assessment in respect of Lion Match's 2008 year of assessment (the additional assessment), inter alia, in relation to the base cost of the shares disposed of by Lion Match used in calculating the CGT.

SARS determined the market value of Lion Match's shares in KCSA as being R135 450 709 and in KCSA Holdings at R146 990 209 (the adjusted base cost).

Lion Match then objected to the increased additional assessment and SARS thereafter disallowed the objection in respect of, inter alia, the adjusted base cost and on 16 May 2014 Lion Match filed a notice of appeal to the Tax Court which was followed by the filing of all necessary pleadings.

The attorneys acting for Lion Match withdrew from the case on 17 October 2019. Lion Match did not notify SARS of its new legal representatives, nor did any attorney enter appearance on its behalf. Lion Match also did not give notice of its intention to call an expert witness, nor did it file a summary of any expert evidence that it intended to lead.

On 18 November 2019 when the appeal was set to begin in the Tax Court, Mr Morland, on behalf of Lion Match, informed the court that he held a brief from attorneys Nourse and Nourse Inc to apply for a postponement only.

The Tax Court, in an *ex tempore* judgment, considered the principles applicable to the grant or refusal of a postponement and refused the postponement on the grounds that

¹ SCA

Lion Match had not proffered sufficient reasons for warranting postponement, specifically that no good cause had been shown and then proceeded with the appeal.

Two matters arose from proceedings in the Tax Court and a subsequent appeal and cross – appeal to the Gauteng Division of the High Court (the full court), delivered on 6 September 2023.

Before the full court Lion Match sought to appeal the Tax Court’s refusal of its application to postpone the tax proceedings (the postponement appeal).

SARS cross – appealed the Tax Court’s finding that it could not entertain SARS’ case to have the assessment upwardly adjusted in Lion Match’s absence once Lion Match’s appeal had been ‘withdrawn.’

The full court, on 29 May 2023, in a unanimous judgment, dismissed Lion Match’s appeal with costs. The full court agreed with the Tax Court on the reasoning for refusing the postponement and upheld SARS’ cross – appeal.

SARS then petitioned the SCA and it refused special leave in respect of the postponement appeal but granted special leave in respect of the full court’s upholding of the cross – appeal.

Subsequently, Lion Match applied to the President of the SCA in terms of section 17(2)(f) of the Superior Courts Act for a reconsideration of the decision to refuse special leave regarding the postponement appeal and the application was referred by the President for hearing before that court.

Consequently, this judgment dealt, firstly, with the reconsideration application and, second, the appeal against the full court’s decision to uphold SARS’ cross – appeal.

SARS opposed both the reconsideration application and the appeal.

Judge Meyer held the following in the majority judgment:

As to the reconsideration application

- (i) That the binding jurisprudence of the SCA established that it was for the court to which the President’s referral was made to decide, as a jurisdictional requirement, whether exceptional circumstances existed. Section 17(2)(f) was intended to be restricted to matters that were truly exceptional.
- (ii) That section 17(2)(f) outlined a deviation from the standard appeal process. Section 17(2)(f) allowed litigants to request reconsideration of a refusal of leave to appeal in ‘exceptional circumstances’ and this they did by way of application

to the President of the SCA. The case law showed that what was typically contemplated by the words 'exceptional circumstances' was something out of the ordinary, markedly unusual, rare or different, and to which the general rule did not apply. This court had held that the 'overall interests of justice will be the determinative feature' for the exercise of the President's discretion.

- (iii) That section 17(2)(f) should be linked to either the probability of grave individual injustice or a situation where, even if grave individual injustice might not follow, the administration of justice might be brought into disrepute if no reconsideration occurs. It was intended to enable the President to deal with a situation where otherwise injustice might result and did not afford litigants a parallel appeal process in order to pursue additional bites at the proverbial appeal cherry.
- (iv) That the question was, were there any factors, other than those already advanced before the Tax Court, the full court and this court on petition, that show the presence of exceptional circumstances in this case? No case has been made out by Lion Match that it would suffer a grave injustice, or that the interests of justice dictate, or that the administration of justice would be brought into disrepute, unless it be granted leave to appeal the dismissal of its application for a postponement in the Tax Court. It simply failed to demonstrate grounds which, in law, might entitle it to a postponement. It followed that there were no exceptional circumstances to justify a re-examination of the High Court's dismissal of Lion Match's appeal against the refusal by the Tax Court to grant it a postponement of the tax appeal.
- (v) That a postponement cannot be claimed as of right. The party applying for postponement must demonstrate good cause why it should be granted. The factors to be taken into account include: whether the application was timeously made; the reason for the lateness if it was not timeously made; whether the explanation given by the applicant for postponement is full and satisfactory; whether there is prejudice to any of the parties; whether the application is opposed; the broader public interest; the prospects of success on the merits; the conduct of counsel; the costs involved in the postponement; the potential prejudice to other interested parties; the consequences of not granting a postponement; and the scope of the issues that must ultimately be decided. The list is not exhaustive.

- (vi) That this court agreed with the finding of the Tax Court and that of the full court that the averments contained in Lion Match's affidavit in support of the postponement '...did not address the most basic and fundamental requirements meriting a postponement.'
- (vii) That a postponement was not simply for the asking. Had the Tax Court approved the postponement, it would have brought the judiciary into disrepute. That would evidently be against the interests of justice. Lion Match dismally failed to make out a case in support of its application for a postponement. No exceptional circumstances had been established as contemplated in section 17(2)(f). There was no probability of grave individual injustice to Lion Match. It was rather a situation where the administration of justice would be brought into disrepute if the reconsideration application were to be granted. As a result, the application for reconsideration should be struck from the roll together with an appropriate order as to costs.

As to the jurisdiction of the Tax Court after Lion Match withdrew

- (viii) That once the Tax Court had refused the application for a postponement, the tax court hearing continued, as it should, in the absence of Lion Match. The effect was that SARS sought an upward adjustment of the market price of the shares indicated in the assessment.
- (ix) That the Tax Court had held that once Lion Match's legal representatives had withdrawn from the proceedings, the appeal was 'effectively' withdrawn by Lion Match and the Tax Court lacked jurisdiction to determine SARS' case to have the assessment altered. According to the Tax Court, section 107(1) of the TA Act only allowed for appeals by the taxpayer, not SARS. Due to the withdrawal of Lion Match's legal representatives, and the consequent withdrawal of the tax appeal, the Tax Court found that it had no jurisdiction to exercise these powers.
- (x) That the Tax Court had clearly interpreted the pertinent TA Act provisions incorrectly. Section 107 and ss 129(1) and (2) were simply not open to such interpretation. By no stretch of the imagination could it be said that Lion Match's appeal was withdrawn once its legal representatives had withdrawn from the proceedings. Rule 44(7) of the Tax Court Rules provided that if a party or person authorised to appear on the party's behalf failed to appear before the Tax Court at the time and place appointed for the hearing of the tax appeal, the Tax Court may decide the appeal under section 129(2) upon the request of the party who does appear and proof that the prescribed notice of the sitting of the

Tax Court has been delivered to the absent party or absent party's representative.

- (xi) That in *Africa Cash and Carry (Pty) Ltd v C: SARS 82 SATC 73* the court held further that the Tax Court can order the assessment to be adjusted, upwards or downwards, within the powers conferred upon it in terms of section 129(2)(b) of the TA Act and it may do so if the evidence before the Tax Court does not support the amount determined in an assessment of a taxpayer's liability, and subject to constitutional principles and compliance with audi alteram partem and fairness.
- (xii) That the evidence before the court plainly showed that the methodology and assumptions used by SARS to recalculate the additional assessment remained largely the same as those used when it made the first additional assessment. The full court accepted their testimony, but the Tax Court did not analyse it.
- (xiii) That, accordingly, the Tax Court had erred in finding that it lacked jurisdiction once Lion Match's representatives had withdrawn.

Appeal dismissed with costs.

Minority judgment (Norman AJA)

- (i) That it parted ways with the majority judgment of Meyer JA in relation to the findings of the full court relating to the refusal of the postponement by the Tax Court and on whether or not it was in the interests of justice to refuse postponement and to conclude the trial in the absence of Lion Match; and whether a grave injustice would occur if the decision of the full court is not reconsidered or varied.
- (ii) That the crisp issues for determination in this appeal were: whether the full court misdirected itself in finding that the conflict of interest which was the cause of Lion Match's legal representative's withdrawal was a red herring; whether the refusal of the postponement was in the interests of justice; and whether the full court was correct in upholding the Respondent's cross – appeal and its variation of the order of the Tax Court in this respect.
- (iii) That the issue of the refusal of the postponement, if successful, according to Lion Match, would be dispositive of the matter and that was the issue to which the minority judgment directed its views.

- (iv) That the full court found that the conflict of interest was a red herring. It also found that there was no explanation given by Lion Match about how the conflict of interest arose at such a late stage. In the minority judgment's view, the full court, with respect, misconstrued the whole notion of a conflict of interest.
- (v) That the full court misdirected itself in endorsing the consideration of a letter that Lion Match's legal representative, Mr Trikamjee, had delivered directly to the presiding judge of the Tax Court as constituting a version to be compared with the evidence of Ms Mohamed in the application for a postponement. This was accepted in circumstances where the letter was not evidence as it had not been received into evidence by the Tax Court. It was not apparent from the judgment of the full court why it relied on that letter and drew the inference that it did in its judgment. Such reliance constituted a misdirection.
- (vi) That it was apparent that the matter that was before the Tax Court was not a simple matter that a taxpayer could deal with on his own without legal assistance. The full court also found and appreciated that the matter between the parties was complex and warranted the employment of two counsel. The nature of the matter ought to have tilted the scales in favour of Lion Match in the application for a postponement.
- (vii) That a court should be slow to refuse a postponement where the true reason for a party's non – preparedness has been fully explained. Where there is a conflict of interest, an expectation that a party must give details of such a conflict when there is an attorney – client privileged relationship, would be intrusive and not sanctioned by law even in circumstances where one seeks a postponement.
- (viii) That there is only one route for a legal practitioner when there is a conflict of interest and that is to withdraw from the case. A legal practitioner is not only legally bound to do so but has an ethical obligation to do so. Lion Match's unreadiness to proceed was not due to delaying tactics.
- (ix) That justice demanded that where an issue such as the one in this case, involving Lion Match's tax affairs, Lion Match must be heard. Being heard means being fully prepared and legally represented. SARS recognised the complexity of the matter. Most importantly, where the CGT is applicable there are certain elections that must be exercised by the taxpayer, Lion Match in this case, and expert evidence may be necessary. When Lion Match's application for a postponement was refused in a complex matter, it was deprived of that

opportunity. Such a decision is inconsistent with the constitutional imperatives including fairness and the audi alteram partem principle.

- (x) The fact that SARS acknowledged, amongst others, that there were important legal issues, over and above the determination of Lion Match's tax liability and that the issue of the valuation of shares was a matter for expert evidence, qualified this case as one of those where a postponement should have been allowed.
- (xi) That, accordingly, the full court failed to exercise its discretion judiciously and this court was at large to interfere with its decision.

5.2. *Kerbyn Cape2 (Pty) Ltd v C:SARS (88 SATC 323)*²

SARS had selected the taxpayer for an audit and had issued notices in terms of section 40 read with section 42 of the TA Act for both VAT and IT and this became a long, drawn-out process that resulted in a series of disputes.

SARS finalised its audit on 5 February 2016 and issued the taxpayer with additional assessments for both IT and VAT, including USP and interest.

Due to the taxpayer's director being overseas during the relevant periods, critical documents relevant in the lodgement of an objection were not immediately obtained as they were stored in the director's residence in Cape Town. He was the sole director of the taxpayer and no other person had access to his premises. The absence of the taxpayer's director resulted in the taxpayer's inability to file its objection within the 30-day period.

The necessary documents were retrieved upon the director's return and he then sought expert tax advice and thereafter the taxpayer submitted the 'first objection' late on 26 October 2016 relating to the additional assessment raised for VAT, being the first VAT objection.

SARS on 21 February 2017 issued the taxpayer with a notice of invalid objection in respect of the first VAT objection.

The taxpayer filed a 'second objection' (the second VAT objection) on 7 August 2017 and SARS responded with a notice of invalid objection letter.

² Western Cape Division, Cape Town

Similarly, SARS had audited the taxpayer for IT and had issued a letter on 20 October 2015 for the audit of the 2012 to 2014 assessment years. SARS then issued its Finalisation of Audit Letter on 5 February 2016 imposing additional assessments and USP. Again, the taxpayer, beyond the 30-day stipulated period, submitted a notice of objection in respect of the additional assessments for IT.

The taxpayer was of the view that SARS had misdirected itself in relying on section 10(4) of the VAT Act and section 22(8) of the IT Act in its reasons with regard to the assessment and it addressed a letter to SARS providing reasons why an objection was not timeously submitted.

SARS thereafter informed the taxpayer that its objection was invalid as the first objection was lodged outside the prescribed timeframe, but the taxpayer continued to file further objections and SARS rejected them on the basis that no exceptional circumstances were provided.

On SARS' invitation, the taxpayer filed a further objection and it proceeded to file a third objection, reiterating its exceptional circumstances. SARS once more declined this objection. The taxpayer continued to file further objections after further invitations from SARS, but they were declined on the basis that the reasons provided for the condonation of late filing were not exceptional.

The taxpayer then submitted a complaint to the Office of the Tax Ombud in June 2018 for both audits and the Ombud concluded that SARS should be provided 60 business days in which to conclude the taxpayer's objection and in the event of the taxpayer not receiving the response, a complaint be lodged with the SARS Complaints Management Office.

Thereafter on 6 March 2019 the taxpayer submitted the VAT/IT consolidated objection to both additional assessments, but SARS declined the objection on the basis that the exceptional circumstances were not demonstrated and that the assessments had prescribed in terms of section 99(1) of the TA Act.

The taxpayer then approached the Western Cape High Court to initiate review proceedings in terms of PAJA to review SARS' decision to refuse to condone its late filing of VAT and IT assessment objections.

The review application was itself woefully out of time, but it was contended that the court had discretionary authority in terms of section 9(2) of PAJA to extend the 180 – day period prescribed in section 7(1) of PAJA provided that the interest of justice warranted such extension.

Before proceeding to the main issues for determination, the court first dealt with two points in limine that were raised by SARS to the extent that they might have been determinative of the proceedings.

SARS submitted that the Tax Court was reserved for the exclusive jurisdiction of tax matters and it was not open for the taxpayer to choose the court where its dispute has to be determined.

SARS submitted further that any party approaching the High Court for review in terms of PAJA was bound to first exhaust his internal remedies.

The taxpayer contended that the Tax Court was a creature of statute and its jurisdiction was limited to what was expressly provided in the TA Act and the Tax Court Rules and therefore due to lapse of time it was procedurally barred from filing an appeal under section 107 of the TA Act.

Judge Mantame held the following:

As to the High Court's jurisdiction

- (i) That the taxpayer's director merely stated that he was outside South Africa during the periods that the objections were to be filed. On his return he provided his accountants with certain documents that were contained in the safe at home and thereafter sought a tax opinion. No proof or evidence was before the court regarding the director's overseas stay and no specific time was set out.
- (ii) That, importantly, the taxpayer's first objection was filed on 26 October 2016 and SARS issued a notice of invalid objection on 21 February 2017. In the court's view this was the proper time for the taxpayer to escalate the dispute to the next level, i.e. of exhausting internal remedies, rather than filing multiple objections that were inconsequential.
- (iii) That SARS had submitted correctly that it was incumbent upon the taxpayer to challenge the first notice of invalid objection by:
 - (a) objecting to it in terms of section 104(2) of the TA Act; and
 - (b) should the objection be disallowed it was supposed to have lodged an appeal to the Tax Court in terms of section 107(1) of the TA Act;
 - (c) should an appeal be disallowed, it was supposed to proceed to launch an application in terms of the old Tax Court Rules for an order in terms of section 107(2) of the TA Act extending the period within which an

objection had to be lodged by it, and/or generally had to follow the provisions of Chapter 9 of the TAA Act.

- (iv) That it was not permitted or open to the taxpayer to file numerous notices indefinitely from 22 July 2016 to 6 March 2019. The taxpayer seems to be the author of its misfortunes as it allowed time to lapse without achieving any joy with SARS.
- (v) That, in any event, the taxpayer was wrong when it computed the time – frames using the new Tax Court Rules that came into effect on 10 March 2023. The Rules cannot apply retrospectively to include this matter that dates back to October 2015. Surely the old Tax Court Rules apply in this regard, ie the Rules published on 11 July 2014.
- (vi) That to the extent that the taxpayer had relied heavily on section 105 of the TAA Act, the SCA had clarified in *C: SARS v Rappa Resources (Pty) Ltd* that a High Court may not consider a review application without a taxpayer first having applied for the High Court's direction.
- (vii) That the SCA re-enforced that section 105 of the TAA Act was intended to ensure that internal remedies such as the objection and appeal process were exhausted before approaching a Tax Board, Tax Court or a higher court. Moreover, in these disputes the Tax Court dealt with them as a court of first instance, on a trial basis. Most importantly, the High Court's right to direct otherwise remained intact should the specific circumstances of a case require.
- (viii) That in these proceedings the taxpayer suggested that this court had jurisdiction to determine this appeal as the internal remedies and the jurisdiction of the Tax Court was no longer available. First, the taxpayer has failed to even allege that this review application was filed within a reasonable period. However, it made an application for condonation without the satisfaction of this court, or without properly explaining the reasons for the delay, length of the delay, prospects of success on the merits, prejudice to SARS if a condonation was granted, and any other relevant factor.
- (ix) That since the taxpayer had relied on section 105 of the TAA Act, he ought to have asked for this court's directions as stated in *Rappa, supra*.

As to the exhaustion of internal remedies

- (x) That, plainly, the procedure is clearly set out that a taxpayer has to exhaust internal remedies, then approach the Tax Court for appeal or an order in terms of section 107(2) of the TAA Act extending the time in which the objection had to be lodged. A taxpayer was not entitled to bring review proceedings at its peril without exhausting all these procedures and/or without requesting the High Court to 'direct otherwise.'
- (xi) That, absent a court order or a directive in these review proceedings, this court did not have jurisdiction to hear the review application. Correctly put, in the same vein this court was not asked for an order to 'direct otherwise.'
- (xii) That, accordingly, the points in limine raised by SARS should succeed and it would not be necessary to consider the main application as this court had no jurisdiction to do so.

Review application dismissed.

5.3. *C:SARS v Woolworths Holdings Ltd (88 SATC 334)*³

Woolworths had during 2014 acquired all the shares in an Australian entity, David Jones Ltd ('David Jones').

Woolworths, in the course of raising the capital for that acquisition, utilised the underwriting services of resident (South African) and non-resident service providers, and had incurred expenses accordingly. It also incurred expenses in respect of underwriting services obtained from non-resident service providers.

The Tax Court (see ITC 1972 86 SATC 250) upheld an appeal against the disallowance by SARS of Woolworths' input tax deduction claim for the costs of the underwriting services and the VAT levied for the imported services. Additionally, the court remitted the USP to Woolworths.

The appeal by SARS in this court, in terms of section 135(1) read with section 132(b) of the TAA Act was against the judgment of the Tax Court and was with the leave of that court.

³³ SCA

Woolworths was a listed company on the Johannesburg Stock Exchange and it conducted an enterprise whose activities included the supply of management and support services to its subsidiaries. As an active holding investment company, it actively participated and assisted in the management of its subsidiaries, including providing financial services and management of the group's capital (referred to as the treasury function). It charged management fees for these services.

Woolworths, on 1 August 2014, acquired all the shares of David Jones Ltd, an Australian department store, for a purchase price of R21, 4 billion. The acquisition was funded by existing cash, new debt facilities and equity funding raised through a R10 billion fully underwritten renounceable rights offer. For this purpose, Woolworths Holdings secured professional (underwriting) services from local suppliers and non-resident suppliers (imported services) and the services related to arranging and executing the equity bridge facility and the rights offer and, consequently, Woolworths incurred professional fees in relation to these services.

Woolworths had concluded an unsecured syndicated facility agreement with Citibank, NA (London), JP Morgan Limited (Johannesburg), Citi Bank South Africa, and the Standard Bank of South Africa Limited (SBSA), as underwriters and lenders, for provision of a short-term equity bridge facility in the amount of up to R11 billion.

Woolworths had incurred VAT of R18 609 841.21 in respect of SBSA's underwriting fees. When determining its liability for VAT for the period ending in February 2015 it deducted input tax of R8 478 752.06, being a portion (54.44%) of the VAT incurred in relation to the services used in respect of the rights offer taken up by resident shareholders. It declared R15 489 266 in respect of the portion (45.56%) of the VAT incurred for the services supplied by non-resident service providers as 'imported' services and claimed a reduction of a portion (R12 883 990.78) of such costs.

SARS had disallowed the deduction of the VAT input of R8 478 752.06 and had levied a further VAT output tax of R28 373.90 on what it regarded as the correct value of the total imported services in addition to the R15 489 266.12 that had been declared by Woolworths. SARS then imposed a 10% USP of R2 136 274.28 against Woolworths, in terms of sections 222 and 223 of the TA Act, for the amounts that it considered to have been understated.

SARS' basis for disallowing the input tax deduction was that the services relating to the rights offer were not taxable supplies rendered for the purpose of consumption, use or supply in the course or furtherance of an enterprise conducted by Woolworths, as provided in the VAT Act. SARS reasoned that prior to the acquisition of David Jones,

Woolworths had not engaged in the activity of issuing shares in a continuous, unchanged or uninterrupted manner, as an enterprise. It had not traded in the issuing of shares prior to the acquisition and did not do so subsequent to the acquisition. It never conducted an 'enterprise' continuously or regularly as envisaged in section 1 of the VAT Act. Rather, it had conducted the rights offer as an isolated activity. The issuing of the shares was 'not a sufficiently continuous or regular activity so as to constitute an enterprise activity.'

SARS, for the same reason, was of the view that the costs incurred in respect of the services rendered by the foreign suppliers related to a non – enterprise activity (the rights offer). A further additional output liability assessment was raised by SARS in respect of services supplied for due diligence, on the basis that the expenditure was incurred prior to the actual acquisition of David Jones.

Woolworths had lodged an appeal in terms of section 104 of the TA Act, against the additional assessments issued by SARS. Only a portion of the objection relating to the output tax was upheld and Woolworths then approached the Tax Court on appeal.

The Tax Court found that the VAT charged on the underwriting services supplied to Woolworths by resident service providers was deductible input tax. It found that Woolworths had conducted an enterprise as an investment company, which consisted of acquiring and managing investments, including raising capital to acquire subsidiaries and capital management services of the subsidiaries. As such, the expenditure was therefore incurred in the conduct of the enterprise conducted by Woolworths, the court found. It also found that the services supplied in relation to the issuing of shares under the rights offer to non-resident shareholders were not imported services and that Woolworths was not liable for USP.

In the SCA, SARS appealed against the reversal of its disallowance of the input tax deduction together with its levying of VAT on what it considered to be imported services, and the imposition of the USP.

Judge Dambuzza held the following:

As to determining the activities that form the enterprise

- (i) That in the Tax Court it was common ground that Woolworths was a vendor as envisaged in the VAT Act. It was also not in dispute that it was an active investment company that provided management and support services to its subsidiaries. Its main business as described in its memorandum of incorporation, was: 'to carry on the business of an investment holding company,

focusing on direct or indirect investment in retail operations and matters ancillary thereto.’

- (ii) That the Tax Court found accordingly that Woolworths conducted the enterprise of an active investment holding company, which entailed acquiring and managing investments, including capital investments and assisting in the management of such investments.
- (iii) That in C:SARS v De Beers Consolidated Mines Ltd 74 SATC 330 the court held that the first step in determining if goods or services are a taxable supply was to **identify the activity or business of the enterprise and to make factual findings as to what the enterprise was constituted of**. The activities that form the enterprise must first be determined and thereafter an enquiry shall be conducted into whether the goods or services in question were used in the course or furtherance of the enterprise. If they were, then they were a taxable supply in relation to the enterprise and proportionate input tax may be deducted.
- (iv) That the court had difficulty understanding SARS’ argument that Woolworths was not carrying on an enterprise as SARS had ignored a significant portion of the activities conducted by it. No explanation was offered as to why activities relating to the investments and financial management of those investments had to be ignored in the factual determination of the enterprise of Woolworths.
- (v) That it was true that the definition of ‘enterprise’ required, as a basic premise, that the activity of the enterprise be conducted continuously or regularly but that definition made **express provision, by way of the proviso, for activity conducted in connection with the commencement or termination of the continuous activity**, to be deemed to have been performed in the course or furtherance of the enterprise or the continuous activity. The inclusion of the proviso in the definition of ‘enterprise’, demanded a holistic consideration of the activities of the entity under consideration. It included, as part of business operations, transactions that were performed at the start and the end of such business operations.
- (vi) That the contention by SARS that a once-off transaction at the start of a business enterprise did not form part of the enterprise was incorrect. Apart from ignoring the facts relating to the activities of Woolworths, that argument was inconsistent with the textual definition of ‘enterprise’ in the VAT Act, including the proviso. In addition, the distinction sought to be drawn between an

'enterprise' and its 'business' was strained. The reference to the 'activity' of the vendor in the definition of enterprise puts paid to the distinction advanced by SARS.

- (vii) That the courts have held that the words 'any enterprise or activity' in the definition of 'enterprise' in the VAT Act must be given a broad interpretation. In *C:SARS v Tiger Oats Ltd* 65 SATC 281 the SCA had rejected an argument similar to the contention advanced by SARS in this case and that court held that even a business conducted intermittently, with long intervals, met the requirements of an enterprise as defined in the VAT Act.
- (viii) That the similarities in business activities and relationship with subsidiaries between the Tiger Group in Tiger Oats and Woolworths in this case, were immediately apparent. Apart from the description of the business conducted by Woolworths in its certificate of incorporation, the evidence demonstrated that, other than the investments in Woolworths, South Africa and David Jones, Woolworths also held other subsidiaries as investments, including Woolworths Financial Services, Country Road in Australia, Witchery, Mimco, Politix and Woolworths in various other parts of Africa. Woolworths invested in these subsidiaries and earned dividends and interest from loans advanced to them. Woolworths' Board of Directors determined capital management policy and made capital management decisions for its own capital and for its subsidiaries.
- (ix) That the business of Woolworths bore the hallmarks of an active investment holding company. Contrary to SARS' contention, the fact that the rights offer preceded the actual acquisition of David Jones and the relevant management agreement, was immaterial. The sequence of events was a function of the method of nature of raising capital. Equally, the fact that Woolworths had started to earn management fees from David Jones, more than a year after the acquisition, was of no moment.
- (x) That the factual context in this case was different from that in *De Beers*, supra, on which SARS had placed much reliance. In *De Beers* the SCA held that the holding of shares and receipt of dividends did not fall within De Beers' main trading activities, which were the mining and selling of diamonds from South Africa. In dismissing the appeal by De Beers against the disallowance of its input tax claim, this court considered that the expenses incurred related to the then impending take-over, and not to De Beers' enterprise of mining, marketing and selling diamonds. The SCA in *De Beers* acknowledged that investments

held by an investment company could conceivably be regarded, on their own, as an enterprise as envisaged in the VAT Act.

- (xi) That the evidence that Woolworths acquires, holds and manages its investments is beyond dispute. Similarly, the evidence pertaining to the raising of capital or debt for its subsidiaries and itself was supported by minutes and resolutions taken at its Board meetings. All these activities were part of the enterprise of Woolworths as a listed active investment holding company.

As to whether the underwriting services constituted taxable supplies

- (xii) That 'taxable supply' is defined in section 1 of the VAT Act as 'any supply of goods or services which is chargeable with tax under the provisions of section 7(1)(a), including VAT chargeable at zero percent under section 11.' This meant that a supply is 'liable to [VAT] only if it is made in the course or furtherance of an enterprise.' Consequently, in this case, to constitute a taxable supply, the rights offer, and the related underwriting services must have been used in the course or furtherance of the enterprise of Woolworths and the enquiry in this regard turned on the purpose for which the goods or services were supplied.
- (xiii) Woolworths had used the underwriting services to raise capital to expand its business or enterprise. The acquisition affected the totality of Woolworths' operations. It was in the nature of Woolworths' business to invest pooled capital into financial securities and to sell shares to grow itself. Active investment of the nature that Woolworths conducted, entailed raising capital in the course of investing in prospective subsidiaries, management of capital for its subsidiaries and trading in finance. Importantly, in *Capitec Bank Ltd v C:SARS 86 SATC 369* the CC held that even where the financial services were supplied for no consideration, they were a taxable supply if they were supplied by the vendor to advance the interests of the enterprise.
- (xiv) That a comprehensive consideration of the vendor's activities was required, rather than isolating a single or a segregated set of transactions. The inquiry is not narrow or restricted. In this case, instead of examining the enterprise holistically, SARS impermissibly isolated the share offer, ignoring the true extent and nature of the enterprise, and then reasoned that, to qualify as a taxable supply, or as an activity within an enterprise, the share offer (and related expenses) should be a continuous or regular activity on its own. It concluded that because the share offer did not recur, it was not Woolworths' enterprise.

SARS had ignored the impact of raising the capital and the acquisition on Woolworths' business.

- (xv) That the underwriting services were used by Woolworths for the purpose of enhancing the value of its investments. Consequently, they constituted consumption, use or supply in the course or furthering of its enterprise. A consequential relationship or functional link between the rights offer (together with the underwriting services) and the enterprise conducted by Woolworths was established. The services were consumed by Woolworths in the course of making taxable supplies and Woolworths was entitled to input tax deduction in respect of the costs incurred.

As to the payment of VAT on supply of imported services

- (xvi) That, ordinarily, Woolworths would have been obliged to declare and pay VAT on the supply of imported services, as prescribed in terms of section 7(1)(c) of the VAT Act where such services were not used for the making of taxable supplies. However, given the conclusions that the court reached in this case, that the services rendered by foreign suppliers were taxable supplies utilised in the course and furtherance of the enterprise of Woolworths, such services may not be considered to be imported services and no VAT liability was incurred on that portion of supplied services.

As to the USP

- (xvii) That in terms of section 222 of the TA Act, a taxpayer must pay an USP, in addition to the tax payable for the relevant period, in the event of an understatement by it. Again, given the conclusions reached by the courts in the preceding paragraphs, Woolworths did not understate its VAT liability to SARS and hence no basis was established for the imposition of an USP.

As to the late filing of the notice of appeal

- (xviii) That SARS' notice of appeal had been filed out of time by almost four months. The reason for the delay, as explained by SARS, was 'difficulties' experienced with the State Attorney's Bloemfontein office. However, the court was of the view that condonation should be granted. Although the delay was not insignificant, the matter was of great importance to both parties and it was important that the issues arising in this case be determined decisively given the different factual context, compared with the De Beers and Consol Glass cases.

Appeal dismissed with costs, including the costs of two counsel.

5.4. *C:SARS v African Bank Ltd (88 SATC 352)*⁴

Appellant was SARS and the Respondent was African Bank, a registered bank and VAT vendor.

In terms of section 7 of the VAT Act, African Bank as a vendor was, subject to the exemptions, exceptions, deductions and adjustments, liable to pay VAT on the supply of goods and services supplied by it in the course or furtherance of its enterprise calculated at the rate of 15% on the value of the supply concerned.

African Bank was entitled to deduct, as input tax, the VAT incurred by it on goods and services acquired for the purposes of consumption, use or supply in the course of making taxable supplies.

The VAT Act provided in section 17 for the method whereby the deductible 'input tax' is calculated where the goods or services are acquired partly for consumption, use or supply in the course of making taxable supplies and partly for another intended use. It was clear from section 17(1) that it obliged a VAT vendor that acquired supplies for mixed purposes to make permissible deductions of input tax in accordance with an apportionment ruling made by SARS. The ruling that was in place at the relevant time was BGR 16, which SARS had issued on 25 March 2013 and reissued on 30 March 2015 with effect from 1 April 2015, and which authorised the vendors to apply the varied standard turnover-based method of apportionment in determining the ratio contemplated in section 17(1).

What gave rise to the present dispute between the parties was the following: On 21 September 2020 African Bank's representative requested SARS to issue a binding VAT ruling to approve a method to determine the apportionment ratio. It sought confirmation from SARS that African Bank 'may continue to apply transaction count apportionment method as set out in its previous ruling dated 12 August 2019 with the modifications set out in section 5 of [its] application.'

SARS, in a letter dated 23 September 2021, declined the request and instead issued a substantially different ruling, i.e. it imposed a different turnover-based method.

⁴ SCA

African Bank, on 13 October 2021, objected to SARS' ruling and its complaint was that SARS did not approve the alternative method of apportionment for determining the ratio contemplated in section 17(1) of the VAT Act as requested by it. Instead, SARS unilaterally approved another alternative method, not requested by African Bank.

SARS disallowed the objection and advised African Bank to appeal if it was dissatisfied with the decision.

African Bank, as advised, lodged an appeal in the Cape Tax Court (see ITC 1981 87 SATC 90 per Myburgh AJ) wherein it requested that the ruling be altered to one approving the alternative method of apportionment requested by it but SARS opposed the appeal.

SARS, on 3 November 2023, and before the hearing of the appeal, amended its Rule 31 statement, made in terms of the Rules, by introducing a special plea in which it challenged the Tax Court's jurisdiction to hear the appeal on the basis that this decision was not subject to objection and appeal under section 32(1)(a)(iv) of the VAT Act.

In short, SARS' plea was that the Tax Court did not have jurisdiction to determine the appeal against the imposition of the varied standard turnover-based method as opposed to the revised transaction count method, which was requested by African Bank.

The Tax Court dismissed the special plea, holding that SARS' modification of the requested method amounted to a refusal under section 32(1)(a)(iv), which refusal constituted a decision eligible for objection and appeal under the VAT Act.

SARS then appealed the Tax Court's decision with its leave to the SCA.

SARS contended on appeal that the Tax Court lacked jurisdiction to hear and determine the appeal. SARS contended that the refusal on 23 September 2021 to grant the apportionment ratio in the terms sought by African Bank was not a decision which was subject to objection and appeal procedures under section 32(1)(a)(iv). This was because that decision was not a decision 'refusing to approve a method for determining the ratio contemplated in section 17(1).'

SARS contended that the provisions of section 32(1)(a)(iv) were clear and unambiguous. To constitute a decision that was subject to objection and appeal procedures, continued the argument, SARS must have refused to approve any method for determining the ratio. This was so because the word 'refusing' was qualified by the words 'to approve a method for determining the ratio contemplated in section 17(1).'

SARS contended that because it determined an apportionment ratio in this case, albeit not the one requested, there was no refusal decision and that being the case, the jurisdiction of the Tax Court was not engaged.

African Bank contended that a 'refusal' that was contemplated in section 32(1)(a)(iv) was not limited to a refusal to approve a method for determining the apportionment ratio but the section, interpreted purposively, also contemplated a 'refusal' by SARS to approve a method for determining the ratio in the terms as sought by the vendor.

This appeal concerned the interpretation of section 32(1)(a)(iv) read with section 17(1) of the VAT Act and the question before the court was whether a ratio determination made by SARS under section 17(1) of the VAT Act constituted a refusal as contemplated in section 32(1)(a)(iv) of the VAT Act.

Judge Zondi held the following:

- (i) That in terms of section 107 of the TA Act a taxpayer may appeal against an assessment or a decision to the Tax Court. The question therefore was whether SARS' refusal to approve the method requested by the vendor for determining the apportionment ratio contemplated in section 17(1) was a decision that 'may be...appealed against under a Tax Act' in terms of section 104(2)(c) of the TA Act.
- (ii) That the determination of this question involved the interpretation of section 17(1) and section 32(1)(a)(iv) of the VAT Act. That the starting point was the language of section 32(1)(a)(iv) of the VAT Act, understood in the context in which it was used, and having regard to its purpose. The text of section 32(1)(a)(iv) stated that a refusal by SARS to approve a method for determining a ratio is subject to objection and appeal procedures. On a literal reading, the section may be understood to mean that it is only where SARS has refused outright to approve a method to determine a ratio that the taxpayer will be entitled to object to, and appeal against such refusal. In other words, an approval instead of a different ratio to that sought by the taxpayer, was not a 'refusal' within the meaning of the section.
- (iii) That, however, the aforesaid literal interpretation may only be correct if one ignores the context and purpose of the provision of section 32(1)(a)(iv) as read with section 17(1). If regard is had to the context and purpose of section 32(1)(a)(iv), it became clear that this literal interpretation of the section was not

correct. It also impermissibly undermines the ruling request mechanism provided by section 17(1).

- (iv) That the literal interpretation of section 32(1)(a)(iv) contended for by SARS failed to have regard to the context and the purpose of the section. That purpose was to provide remedies to the vendors who were aggrieved by SARS' decision and such remedies may be sought by way of an objection and the appeal procedures. The interpretation of SARS, if followed, would result in vendors being deprived of their rights to seek remedies provided for under section 32(1)(a)(iv).
- (v) That VAT vendors were aggrieved where SARS refused to approve a method for determining the ratio which they considered to be appropriate for their businesses and instead issued a determination which was different from the determination requested. The construction of the section contended for by African Bank must be preferred to the one advanced by SARS as it gave effect to the purpose of the remedies of objection and appeal provided by section 32(1)(a)(iv) of the VAT Act. Legislation must be interpreted purposively. Moreover, the construction of the section contended for by SARS encouraged piecemeal adjudication of disputes which would prolong litigation and lead to wasteful use of judicial resources.
- (vi) That, furthermore, SARS' approach to the Tax Court's jurisdiction was inconsistent with the CC judgment in *United Manganese of Kalahari (Pty) Ltd v C: SARS and four other cases*, 88 SATC 1 in which a similar argument was raised but rejected by the CC.
- (vii) That the Tax Court had been correct therefore in finding that because SARS had made an alternative ruling to the one requested by African Bank, this had amounted to a refusal to approve a method for determining the ratio as contemplated by section 32(1)(a)(iv) of the VAT Act.
- (viii) That the special plea of lack of jurisdiction had been properly dismissed.

Appeal dismissed with costs including the costs of two counsel, where so employed.

5.5. *ITC 1992 (88 SATC 364)*

SARS had issued a letter of findings (LoF) and a notice in terms of section 80J of the IT Act to the taxpayer relating to transactions involving the sale of shares and resulting capital gains for the 2020 year of assessment.

The LoF had set out a primary basis of assessment as well as an alternative basis of assessment, which was the application of the GAAR and only the alternative assessment based on the GAAR was relevant to this matter.

The LoF recorded that the provisions of the GAAR were applicable because the analysis of the impugned transactions showed that the steps and parts thereof constituted an 'arrangement' which resulted in the avoidance of liabilities for dividends tax and/or CGT and was thus an 'avoidance arrangement' as defined in section 80L of the IT Act. Furthermore, the avoidance arrangement appeared to be an 'impermissible avoidance arrangement' as provided for in section 80A.

The taxpayer, on 28 August 2023, had responded to the LoF and the section 80J notice and in a separate letter also dated 28 August 2023 it set out its grounds for disagreeing with the section 80J notice.

Moreover, if the arrangement had occurred within the context of business, then the applicable abnormal circumstances would be that the arrangement 'was entered into or carried out in a manner or by means which would not normally be employed for bona fide business purposes, other than obtaining a tax benefit;'

In addressing the determination of the abnormal circumstances, the letter of 28 August 2023 set out that it was to be objectively determined and that SARS bore the burden to establish that any one of the relevant indicators for abnormality was present and SARS accepted that it bore an evidential burden.

The letter of 28 August 2023 further recorded that it appeared that SARS had applied the 'abnormality' requirements applicable to an arrangement concluded within a business context and the letter, inter alia, concluded that SARS had failed to demonstrate that the arrangement in question had occurred in a business context.

SARS, on 20 November 2023, issued a letter of assessment: sale of shares and capital gain (LoA) for the 2020 year of assessment. Although this letter addressed the application of the GAAR, the dominant effect of the arrangement, and the tax benefit of the arrangement, it did not address the allegation that it had failed to demonstrate that the arrangement had occurred within a business context.

The taxpayer had then requested reasons for the assessment in terms of rule 6 of the Rules and, in particular, why SARS had accepted that the arrangement was concluded in the context of business.

Rule 52(2)(a) of the Tax Court Rules provided that if SARS failed to provide the reasons under rule 6 required to enable the taxpayer to formulate an objection under rule 7, a taxpayer may apply to a Tax Court to compel SARS to provide adequate reasons.

The taxpayer, on 22 March 2024, had instituted the current application in terms of rule 52(2)(a) wherein the Tax Court was asked to determine whether or not SARS had provided an adequate response to the taxpayer's request for reasons pertaining as to why SARS had maintained that the arrangement had occurred within a business context.

SARS, in response, had reiterated that the finalisation of audit letter containing the grounds of assessment were sufficiently detailed to enable the taxpayer to formulate his objections to the assessment and encouraged him to consider the withdrawal of his application and to forthwith lodge his objections.

The taxpayer elected not to withdraw the application and in further correspondence reiterated that he was entitled to understand why SARS had believed that the arrangement had occurred within a business context.

In the Tax Court SARS contended that it had provided the taxpayer with sufficient reasons with which to lodge his objection to the assessment.

Judge Slingers held the following:

- (i) That in accordance with rule 7(2)(b), a taxpayer who lodges an objection to an assessment must set out the grounds of the objection in detail which includes specifying the part or specific amount of the disputed assessment objected to as well as specifying the grounds on which the assessment is disputed. An objection which fails to comply with the requirements of rule 7(2) may be rejected as invalid.
- (ii) That for reasons for the assessment to be adequate, it must constitute more than mere conclusions. It should refer to the relevant facts and law as well as the reasoning processes which resulted in the conclusions. Not only should SARS inform the taxpayer of its decision, but also of the reasons for its decision in a simple manner which did not require the taxpayer to speculate or assume the reasons therefor.

- (iii) That the reasons furnished by SARS enabled the taxpayer to understand why it had alleged the existence of an arrangement that yielded a tax benefit and that the transactions lacked commercial substance. However, in responding to the taxpayer's requests for reasons as to why SARS found the arrangement to have occurred within a business context, it furnished reasons why it believed that the arrangement lacked commercial substance, but this was not the issue that SARS had been asked to provide reasons for.
- (iv) That it was common cause that the term 'business context' had not been defined in the IT Act and this common cause fact would make it all the more important and necessary for the taxpayer to understand which facts and/or legal principles and reasoning caused SARS to conclude that the arrangement occurred within a business context.
- (v) That section 80A of the IT Act distinguished between an avoidance arrangement occurring in the context of business and in a context other than business. It was clear that SARS had found that the arrangement had been entered into or carried out by means or in a manner which would not normally be employed for bona fide purposes, other than obtaining a tax benefit and that it lacked commercial substance. However, before these findings could occur, SARS would have to make a preliminary assessment that the arrangement had occurred within a business context as this followed from the provisions of section 80A(a) of the IT Act.
- (vi) That the reasons and explanations furnished by SARS did not set out why it had accepted that the arrangement occurred within a business context. Therefore, when the reasons furnished were measured against the prerequisites for valid reasons as set out in *Gavric v Refugee Status Determination Officer and Others* 2019 (1) SA 21 (CC) and *C: SARS v Sprigg Investment* 117CC t/a *Global Investment* 73 SATC 114 it was found lacking.
- (vii) That, therefore, it was important that reasons and reasoning for concluding that the arrangement occurred within a business context be set out before the taxpayer is required to object to the assessment and hence SARS had failed to comply with the requirements of rule 6 of the Tax Court Rules and was directed by the court to properly respond to the taxpayer's request for reasons for the assessment in issue.

5.6. *Ditsoane Trading and Project CC v C:SARS (88 SATC 373)*⁵

Ditsoane Trading and Project CC (Ditsoane) had been registered with SARS as a VAT vendor in terms of the VAT Act and as a registered vendor Ditsoane was obliged to submit returns for remittance of VAT on the prescribed form every second uneven month as prescribed by the VAT Act.

SARS conducted an audit into Ditsoane's tax affairs specifically pertaining to VAT and on 28 May 2020 SARS sent its audit findings to Ditsoane, indicating inter alia, that it had failed to declare output tax and was called upon to furnish reasons if it was not in agreement.

Ditsoane had failed to provide any reasons why an USP should not be imposed notwithstanding an opportunity having been provided to him. The Audit Penalty Committee considered all the information provided to them in order to consider the USP and the chairperson, whose responsibility it was, made a determination in respect of the USP and on 26 June 2020 SARS sent its audit letter to Ditsoane informing it that the audit had been finalised and in the same letter informed Ditsoane further that, in addition to the assessment raised by SARS, a 150% USP in terms of section 222 read together with section 223 of the TAAAct would be levied, based on Ditsoane's behaviour of 'intentional tax evasion.'

Ditsoane objected to the assessment and SARS' decision on the objection was communicated to Ditsoane on 25 November 2020.

Ditsoane thereafter approached the High Court on review without seeking leave from that court in terms of section 105 of the TAAAct to hear the matter.

Ditsoane contended that SARS had acted ultra vires the statutory powers conferred on SARS when SARS constituted the Audit Penalty Committee to look into Ditsoane's behaviour and by authorising that Committee to impose the USP.

Ditsoane further contended that section 105 of the TAAAct was not applicable to USP levied in terms of sections 222 and 223 of the TAAAct.

SARS pointed out that the role of the Committee included a failure to pay the correct amount of tax and an incorrect statement in a return.

SARS inter alia raised the following point in limine before the High Court – Since the USP was imposed by way of an assessment, section 105 of the TAAAct provided that

⁵ Free State Division

a taxpayer may only dispute an assessment or decision by way of objection and appeal under Chapter 9 of the TA Act and may not resort to the High Court, unless permitted to do so by an order of that court.

Judge Mbhele held the following:

As to an order of constitutional invalidity

- (i) That Ditsoane had sought an order of constitutional invalidity, but failed to make out a case in its founding affidavit for the order it sought. There were no facts in the founding affidavit that could sustain such an order. The only grounds advanced by Ditsoane were that SARS had acted ultra vires in constituting the Committee since there was no empowering provision and that the procedure followed by the Committee was unlawful, unreasonable and procedurally unfair. Moreover, Ditsoane had failed to demonstrate which provisions of the Constitution were offended by the conduct of SARS.

As to the point in limine pertaining to the jurisdiction of the High Court

- (ii) That it was common cause that a directive issued in terms of section 105 of the TA Act had not been sought by Ditsoane who had contended that section 105 was not applicable to USP levied in terms of sections 222 and 223 of the TA Act and hence the court had jurisdiction to hear this matter.
- (iii) That it was common cause that a directive issued in terms of section 105 of the TA Act had not been sought by Ditsoane who had contended that section 105 was not applicable to USP levied in terms of sections 222 and 223 of the TA Act and hence the court had jurisdiction to hear this matter.
- (iv) That it was well established that where the jurisdiction of the court before which a review application is brought is contested, a ruling on this issue must precede all other orders. This is because a court must be competent to make whatever orders it issues. If a court lacks authority to make an order it grants, that order constitutes a nullity.
- (v) That it was clear that there was no separate regime designed to administer appeals and objections of USP, they are governed under Chapter 9 of the TA Act and hence the argument by Ditsoane that section 105 does not find application in objections or appeals to USP was without merit and fell to be rejected.

- (vi) That section 105 provides that a taxpayer may only dispute an assessment or 'decision' as described in section 104 in proceedings under Chapter 9, unless a High Court otherwise directs. This section makes it clear that a taxpayer must first apply to the High Court and request it to condone the deviation from the normal course prescribed in section 104 of the TA Act and this was a further step which a taxpayer must overcome before a tax dispute may be considered by a High Court. Moreover, objection to any decision taken by SARS officials must be handled in terms of section 104, including the impugned decision by SARS to constitute the Audit Penalty Committee.
- (vii) That the purpose of section 105 of the TA Act was clearly to ensure that, in the ordinary course, tax disputes are taken to the Tax Court and the High Court consequently does not have jurisdiction in tax disputes unless it otherwise directs. A finding that the High Court had no jurisdiction to review the decision of SARS absent compliance with section 105 of the TA Act, was dispositive of the matter.
- (viii) That Ponnan ADP in *C: SARS v Rappa Resources (Pty) Ltd* 85 SATC 517 endorsed the principle that there should be exceptional circumstances before the High Court could deviate from the normal route. He however highlighted that the mere fact that a dispute raises a pure point of law did not, of its own, create exceptional circumstances.
- (ix) That Rappa, *supra*, clarified that the default position in tax disputes was a referral to the Tax Court. Ditsoane must show exceptional circumstances warranting deviation from the normal route and that raising a point of law does not on its own warrant deviation from section 105 of the TA Act. Section 105 is designed to promote alternative dispute resolution and allow taxpayers an opportunity to exhaust all internal remedies in a cheaper environment where they have access to specialized skills before approaching the High Court. It does not take away the right of the taxpayer to approach the High Court; it however allowed the High Court to decide whether exceptional circumstances existed warranting deviation before judicial resources are committed.
- (x) That, in *casu*, Ditsoane did not attempt to make out a case for exceptional circumstances. Ditsoane found no reason to exhaust available internal remedies in terms of the TA Act and, consequently, it had not made out a case for this matter to be heard in the High Court in terms of section 105 of the TA Act and the application must fail.

Application dismissed.

5.7. *Sookoo and Another v C:SARS (88 SATC 382)*⁶

SARS had sought a preservation order in accordance with the provisions of section 163 of the TA Act in respect of the assets of the Applicants based on its on-going investigations which focused on identifying and addressing non-compliance with the Tax Acts administered by SARS and the focus here included the tax compliance of companies and persons who were contracted by the South African government departments to supply Personal Protective Equipment (PPE) in the fight against the Covid-19 pandemic.

SARS had sought to preserve the Applicants' assets in order to secure collection of any VAT, IT and/or any other taxes that may have been payable by the Applicants in respect of the procurement of PPE through tender.

SARS was satisfied on reasonable grounds that there was a substantial amount of tax that may be due and payable by the Applicants and that a preservation order was required in order to prevent the realisable assets of the Applicants or any other person against whom the probable tax liability may be collected, from being disposed of or removed and thereby frustrating the collection of such tax.

On 25 October 2021 the High Court issued a provisional preservation order which was confirmed on 16 January 2023.

Applicants presently before the High Court contended that there was no longer a basis for the preservation order to remain in force and prayed for a declaratory order to this effect.

The declaratory relief granted by the High Court was based on two assessments issued by SARS and the Applicants contended that the assessments went beyond the scope for which the preservation order was obtained and, in the result, the basis on which the preservation order had been obtained had fallen away and the Applicants were entitled to the declaratory relief.

SARS submitted that the preservation order was still required to collect the substantial amount of tax liability owed by the Second Applicant based on the assessments made by it and SARS further stated that it had commenced with audit investigations into the

⁶ Gauteng Division, Pretoria

tax affairs of the First Applicant and that there were reasonable grounds to believe that he too would owe IT when SARS' audit had been completed.

The issue to be determined by the court was whether the scope of the preservation order could extend beyond the original purpose for which it was granted.

Section 163(1) provided at the relevant time:

'(1) A senior SARS official may, in order to prevent any realisable assets from being disposed of or removed which may frustrate the collection of the full amount of tax that is due or payable or the official on reasonable grounds is satisfied may be due or payable, authorise an ex parte application to the High Court for an order for the preservation of any assets of a taxpayer or other person prohibiting any person, subject to the conditions and exceptions as may be specified in the preservation order, from dealing in any manner with the assets to which the order relates.'

Judge Jansen van Rensburg held the following:

- (i) That the question whether the scope of a preservation order is confined to the purpose for which it was sought formed the crux of the dispute between the parties and the parties agreed that the question could only be answered by interpreting section 163 of the Act that provided for a preservation of assets order.
- (ii) That section 163 envisaged two grounds on which an application for a preservation order may be sought:
 - firstly, when the full amount of tax is due and payable, which entailed that the amount is known when the application is brought; and,
 - secondly, when an official on reasonable grounds is satisfied that the full amount of a tax liability may become due and payable.
- (iii) That from the facts it was clear that SARS had relied on the second ground when it applied for the preservation order and the preservation application was made pursuant to preliminary investigations conducted by SARS into the tax compliance of the Applicants in the preservation order. Subsequent to the investigation by SARS it became clear that the Second Applicant did not have a tax liability in respect of one of the transactions and the ground for obtaining the preservation order had therefore ceased to exist.

- (iv) That in the aforesaid circumstances section 163(10)(b) of the Act provided that a preservation order will no longer be in force and effect if the assets subject to the preservation order are no longer required for the purpose of the satisfaction of 'the tax debt.'
- (v) That, having regard to section 163 as a whole, it appeared that 'the tax debt' referred to in section 163(10)(b) was the tax amount that was due and payable or on reasonable grounds may become due and payable as envisaged in subs (1).
- (vi) That section 163 is contained in Chapter 10 of the Act which regulated the payment of tax and only applied in defined circumstances. In order to invoke the provisions of the section, SARS needs to meet the requirements contained in section 163. The purpose of section 163 is manifestly confined to these requirements. In the aforesaid context a 'tax debt' for purposes of section 163, must be interpreted within the confines of the section.
- (vii) That the application was not based on the payment of tax liabilities that fell outside the scope for which the preservation order was obtained. Chapter 11 was applicable to the recovery of tax and should be utilised to recover any tax liability that did not fall within the scope of the investigation for which the preservation order was obtained.
- (viii) That should SARS be of the view that the present tax debt of the Second Applicant or the probable tax debt of the First Applicant met the requirements of a preservation order, SARS would be at liberty to apply for such an order. It is, however, inconceivable that a preservation order that was obtained for a specific purpose would be in force ad infinitum and may be utilised by SARS for any future tax debt that may become due and payable.
- (ix) That, in the result, the court was satisfied that the Applicants were entitled to a declarator on the terms prayed for in the notice of motion, i.e. the preservation order issued on 16 January 2023 was no longer in force in relation to the assets of the Applicants.

5.8. ITC 1993 (88 SATC 389)

The taxpayer was a citrus farming company whose farming activities were focused on the production of oranges, lemons and mandarins and these were primarily destined for export markets, including the European Union.

There were risks inherent in the taxpayer's citrus farming activities which could lead to a loss of product and income. Apart from issues such as drought, frost and wind, there were two particular risks which could lead to the rejection of entire consignments of citrus by the receiving markets, with a corresponding loss of income: a cosmetic fungal disease that appeared on the outside of fruit called Citrus Black Spot (CBS) and a pest called False Codling Moth (FCM) which laid its eggs in citrus.

The taxpayer, prior to June 2017, had used its reserves to absorb such losses as it had not insured externally against such risks but had relied on its accumulated funds to cover any losses.

As a result of the need for tax planning in order to reduce its 2017 tax liability, the taxpayer decided to take out crop insurance in the form of a 'structured self-insurance product' and agreed to take cover for a period of seven months for a premium of R10 million plus VAT, i.e. R11 400 000 which would provide insurance cover of R12 million plus VAT (i.e. R13 680 000).

The policy entered into was administered by way of the 'experience account' in respect of which monthly statements were provided. The value of the premium was credited to the 'experience account' and was reduced by the amount of the underwriting fee and any claims. Amounts of 'notional interest' were added from time to time on the balance of the experience account.

It was common cause that in the short period between the inception of the policy and the end of the taxpayer's year of assessment, the insurer had credited the experience account with an amount of R1 197.52 which was reflected in a statement provided by the insurer for the 2017 calendar year as 'notional interest at 5.75% (effective).'

However, the amount of R1 197.52 in respect of the notional interest in 2017, as well as the interest in later years, was not included in the tax returns.

There was no evidence of any claims ever having been made on the policy.

The taxpayer, on 23 June 2021, gave a notice of cancellation on the policy for the reason given that the taxpayer 'is experiencing an unexpectedly smaller crop and lower prices due to the exchange rate, and needs the funds.' The credit in the experience

account at that time was R11 304 932.01 which was duly paid to it on 9 July 2021 and this amount was incorporated in the taxpayer's taxable income in the 2022 year of assessment, but because the taxpayer was in a tax loss position in that year, no tax was paid on it.

The taxpayer appealed against an additional IT assessment made by SARS, in respect of its 2017 year of assessment.

SARS, in its additional assessment, had adjusted the taxpayer's taxable income in two respects:

- First, it had disallowed the deduction of an amount of R9 600 000 that the taxpayer had claimed under section 11(a) of the IT Act as an insurance premium. The actual amount claimed was R10 000 000 but SARS had conceded the deduction of R400 000 thereof as an 'underwriting fee', and
- Second, it included an amount of R1 197.52 as 'notional interest' accruing to the taxpayer on an 'experience account' in that year under the insurance policy.

SARS had also imposed an understatement penalty of 10% for a 'substantial understatement' in terms of Chapter 16 of the TA Act).

The first issue which arose for determination before the Tax Court was whether SARS was permitted to re-open the taxpayer's 2017 assessment in terms of section 99(1)(a) of the TA Act due to misrepresentation.

SARS had made no adjustment to the taxpayer's tax return for the 2017 tax period until 28 December 2020 when it was alerted to a notification of a CIT audit and this happened 10 days after the expiry of a three-year period from the date of the original assessment for 2017.

The taxpayer, despite the elapse of the aforesaid three-year period, received an additional assessment in May 2021 to which it had objected on the basis that section 99(1) of the TA Act had applied but the objection was disallowed.

SARS, on 28 May 2021, issued a letter of audit findings and in respect of the 2017 year of assessment, it proposed to disallow the R10 million premium deduction and to subject the notional interest component to tax and it proposed to impose an understatement penalty.

SARS had referred to the former amount as 'non-deductible insurance premiums' with regard to section 11(a) of the IT Act read with ss 99(1)(a) and 99(2)(a)(ii) of the TA Act.

SARS had recognized that the 2017 assessment had prescribed, but intended to re-open it 'as the failure to assess the full amount of tax chargeable was due to a misrepresentation by the taxpayer, i.e. failure to declare the notional interest in the 2017 tax return.'

SARS, on 19 July 2021, issued a finalisation of audit letter together with additional assessments in terms of section 92 of the TA Act in respect of the 2017 to 2019 years of assessment.

The taxpayer contended that the 2017 assessment had prescribed and denied that section 99(2) of the TA Act applied. It contended that there should be no adjustment for the insurance premium because 'it is a bona fide insurance taken out for crop insurance against the black spot' and 'an ordinary expense in the course of business and valid deduction according to section 11(a).'

Section 92 of the TA Act provided that 'if at any time SARS is satisfied that an assessment does not reflect the correct application of a tax Act to the prejudice of SARS or the fiscus, SARS must make an additional assessment to correct the prejudice.

Section 99(1)(a) of the TA Act provided statutory immunity from additional IT assessments once three years had expired from the date of the original assessment and is commonly referred to as a 'prescription' provision and, if it applied, the additional assessment must be set aside irrespective of its correctness on the merits.

Section 99(2)(a) of the TA Act provided that subsection (1) did not apply to the extent that, in the case of assessment by SARS, the fact that the full amount of tax chargeable was not assessed, was due to fraud, misrepresentation or non-disclosure of material facts.

The issues to be adjudicated upon by the Tax Court were as follows:

- Whether prescription applied to the additional assessment raised for the 2017 tax year;
- Whether the taxpayer was entitled to claim the full amount of R10 million as alleged insurance policy premiums paid to the insurer in the 2017 tax year as a deduction in terms of section 11(a) of the IT Act;
- Whether notional interest earned in respect of the experience accounts related to the alleged insurance policy was to be deemed to have accrued to the

taxpayer in the 2017 tax year and included in the taxpayer's gross income for each of these periods; and

- Whether SARS was correct in imposing an understatement penalty of 10% on the taxpayer for the 2017 tax year.

Judge Janisch held the following:

As to the issue of prescription

- (i) That it has been authoritatively held that to overcome the statutory immunity or prescription of assessments, SARS must establish two aspects: the existence of conduct in the form of fraud, misrepresentation or non-disclosure of material facts and a causal connection between that conduct and the fact that the full amount of tax was not assessed.
- (ii) That section 99(2) of the TA Act involves a factual enquiry which must be decided on a balance of probabilities. SARS must show that the conduct complained of in fact caused the non-assessment; or put differently, that had it not been for the conduct complained of, the very assessment that is now in dispute would on the probabilities have been made in the three-year period. Since SARS bears the onus in this regard, if at the end of the evidence the court is unable to conclude that this is more probable than not, SARS will fail in its reliance on section 99(2).
- (iii) That as regards the first enquiry into the taxpayer's conduct, the misrepresentation or non-disclosure of material facts need not be the result of fault on the part of the taxpayer. Intentional or negligent behaviour is not required to be established.
- (iv) That SARS contended that the misrepresentation occurred in relation to the taxpayer's 'characterisation of the payment of the amount of R10 million to [the insurer] as a deductible expense in terms of section 11(a) of the IT Act.' SARS stated that this characterization 'misrepresents the nature of the payment'. As regards the notional interest amount, SARS stated that it was 'earned' and should therefore have been declared in the tax return and stated further that the failure to declare the accrued income and to provide a complete statement in respect of such income constituted a non-disclosure of material facts relating to the taxpayer's financial affairs at the time of submission of the return and in both respects the misrepresentation and non-disclosure resulted in the full amount taxable not being assessed.

- (v) That, in the court's view, the sensible, businesslike and purposive interpretation of section 99(2) of the Act was that the causal link between the conduct complained of and the non-assessment of the 'full amount of tax chargeable' must be determined on a 'per item' basis. In other words, for SARS to be able to make a new determination through an additional assessment, it must show a causal link between the conduct and the non-assessment of a particular item or amount. The court, therefore, dealt separately with the application of section 99(2) to the R10 million deduction (misrepresentation) claimed and the R1 197 notional interest amount (non-disclosure of material facts).

A Misrepresentation?

- (vi) That, for the reasons given in the judgment, the court was of the view that it could not be said that the 2017 IT return contained a 'misrepresentation' in relation to the R10 million premium which was claimed as a deduction and the taxpayer did not make a misrepresentation of fact in claiming the amount as an expense item under 'insurance.'
- (vii) That the full amount of the premium was included under 'insurance(excluding section 37A payments)' in the taxpayer's ITR 14 IT return and the taxpayer had thereby indicated that it had paid such an amount and was claiming it as a deduction. SARS had contended that the premium paid was unusual or unconventional for an insurance contract, and that having regard to certain characteristics of the contract, it did not meet the requirements of section 11(a) of the IT Act.
- (viii) That what section 99(2) envisaged by a misrepresentation was one of fact, as opposed to one of law. This was apparent from the immediate context of the section which referred also to a non-disclosure of material facts. Whether an amount factually paid was deductible under the IT Act was a question of law; it is the product of the interpretation and application of the IT Act and to say that an amount incurred is deductible under section 11(a) is in fact to express a legal opinion.
- (ix) That, accordingly, if the taxpayer had claimed the insurance payment as a deduction under the heading 'lease payments' or 'maintenance', there would be no difficulty in concluding that there was a misrepresentation of fact. The same cannot be said of a factually correct disclosure, such as this was, even if SARS is ultimately correct that the insurance payment is not deductible in law.

A non-disclosure of material facts?

- (x) That, on the other hand, on the assumption that the amount of R1 197 in respect of notional interest was an amount to which the taxpayer factually became entitled, the failure to include that amount in the return did constitute a non-disclosure of that fact. However, given the extremely small quantum of the amount, it could not be considered that this could be treated as a non-disclosure of a material fact.
- (xi) That the question of materiality of non-disclosure of an amount received or accrued, for purposes of justifying the significant step of overcoming prescription, must have regard to the relative amount involved. In accordance with the maxim *de minimis non curat lex*, an amount may be so small as to be legally insignificant. In the present case the amount of notional interest is equal to 0.02% of the gross profit of the taxpayer before tax in the 2017 year.
- (xii) That the court had little doubt that, if this were the only item in issue between the parties, there is no prospect that SARS would have attempted to re-open the 2017 year for that amount, and that this court would have regarded this as a matter not warranting the application of judicial resources.
- (xiii) That, in keeping with the approach in *ABC (Pty) Ltd (in liquidation) v C: SARS* (Tax Court unreported case no IT 12951) the court did not think that the non-disclosure of the minuscule amount of notional interest in the 2017 year could be treated as a non-disclosure of a material fact.
- (xiv) That even if the court was wrong in concluding that the present facts do not reveal a misrepresentation or non-disclosure of material facts, it considered that SARS had not discharged the onus of demonstrating that any misrepresentation or non-disclosure caused the non-assessment of the full amount of tax in the three-year period.
- (xv) That in the present case no evidence was led to assist the court in determining that the taxpayer's conduct in completing its IT return on the probabilities caused the non-assessment of the two disputed amounts in the three-year period. The issue of prescription, and particularly the existence of the necessary causal link, was in issue on the pleadings and SARS therefore had to discharge its onus.
- (xvi) That every case where prescription is sought to be overcome involved a decision by SARS to assess outside the three-year period. A court cannot

without more conclude that the mere fact that SARS was ultimately persuaded to assess meant that the conduct complained of caused a non-assessment in the three years. Not only was there no evidence from SARS in support of the causal link, but there were objective facts which pointed to a contrary conclusion.

- (xvii) That the facts supported the inference that what caused the non-assessment in the three-year period was not the claiming of the deduction in the return, or the non-inclusion of a small amount of notional interest, but a decision by a duly authorized SARS official, responsible for enquiring into the nature of the unusual deduction claimed, not to pursue the matter further.
- (xviii) That on the present facts, to discharge the onus SARS had to produce evidence establishing the necessary causal link between the tax return and the earlier non-assessment. It had done so and discharged its onus in *C: SARS v Spur Group (Pty) Ltd* 84 SATC 1 but it did not do so here.
- (xix) That, in the circumstances, the court was, at the very least, left uncertain as to whether the reason for non-assessment of the amounts in the three-year period was the taxpayer's disclosure or non-disclosure in its tax returns. In terms of the rules of onus, if at the end of the case the court is not certain as to whether a fact has been established or not, the party that bears the onus loses and the absence of evidence to establish the causal link was by itself fatal to SARS' attempt to invoke section 99(2)(a) of the TA Act.
- (xx) That, in the circumstances, the appeal must succeed on the ground that the additional assessment was out of time and that section 99(2) does not overcome the statutory immunity granted by section 99(1) of the TA Act.

As to the merits of the appeal

- (xxi) That, as regards the deduction of the insurance premium in terms of section 11(a) of the IT Act, despite the conclusion of the court that section 99 of the TA Act precluded SARS from issuing the additional assessment for the 2017 year, it was appropriate nonetheless to address the merits of the matter as a court of appeal may conceivably be called upon to consider both the question of prescription and the merits of the appeal.
- (xxii) That, as regards the notional interest of R1 197, it seemed correct that the amount of R1 197 had accrued to the taxpayer in the 2017 year of assessment and that the taxpayer would always have received that amount from the insurer,

either in the form of an insurance claim or as part of the payment owing on expiry or cancellation of the policy and that sufficed to treat it as an amount forming part of gross income.

- (xxiii) That it was apparent from the case as pleaded by SARS that its only substantive reason for denying the applicability of section 11(a) was that the premium amount had not actually been incurred. It stated that it had disallowed the claim 'on the basis, inter alia, that the taxpayer has failed to meet the burden upon it to prove that the alleged expense in question was actually incurred.' At no stage did SARS indicate that the amount was not incurred in the production of income or was of a capital nature. SARS went on to plead reliance on section 23L(2) of the IT Act which disqualified the deduction of an insurance premium in certain circumstances. SARS averred that the IFRS definition of an expense was not met and that therefore section 23L(2) warranted the disallowance of the deduction. SARS also contended that the experience account constituted a reserve fund as contemplated in section 23(e) of the IT Act.
- (xxiv) That the court was in respectful agreement with the approach to the issue of the deductibility of the insurance premium as was adopted in ITC 1985 87 SATC 447 (the Boerdery case). There was, as was found in ITC 1985, supra, an actual parting with money in exchange for different contractual rights and in that case, as in this, there was a single payment of a premium, a portion of which was reflected as an underwriting fee or risk fee, but the entire premium was in fact exchanged for rights and obligations that were based upon insurance-related events occurring. The fact that the contract contemplated the potential return of similar amounts in certain circumstances, including on termination, would therefore not by itself result in the amount not being treated as expenditure incurred.
- (xxv) That the court could not regard the insurance premium on the present facts as being expenditure of a capital nature and the proper approach was to identify the role and purpose of the expenditure in the context of the taxpayer's concern or business as a whole. The insurance aimed to protect the taxpayer against losses in fruit sales as a result of the insured events occurring. Its purpose was therefore to fill a hole in the taxpayer's income earning stream as a result of one of the protected risks eventuating, and not to compensate it for the loss of a capital asset.

- (xxvi) That even if the taxpayer had demonstrated that the expenditure in issue met the requirements of section 11(a) of the IT Act, the deduction would be disallowed if section 23L(2) of the IT Act applied. SARS had specifically pleaded that the amount of the premium would not be regarded as an expense for purposes of IFRS financial reporting and that was therefore an issue in the appeal, assuming no prescription) and in terms of section 102(1)(b) of the TA Act, the taxpayer bore the overall onus of establishing that the amount was deductible and this included proving that the amount was an expense for IFRS purposes.
- (xxvii) That in the court's view, where the IT Act assigns tax consequences based on accounting standards, it envisaged the correct application of those standards. In other words, it was irrelevant how the taxpayer in fact accounted for the item in its financial statements but what mattered was the correct accounting treatment and the question as to whether an amount constituted an expense for IFRS financial reporting purposes was therefore one of fact, capable of objective determination.
- (xxviii) That the fact that neither party put up expert evidence as to how the premiums should be classified for IFRS purposes, meant that the court was unable, at the end of the evidence, to determine whether the facts envisaged in section 23L(2) were or were not present. Applying the law as to the onus of proof, it was the taxpayer who bore the overall onus, that would fail.
- (xxix) That, accordingly, if the conclusion had been that SARS could rely on section 99(2) of the TA Act, the taxpayer's appeal would have failed on the ground of its not having demonstrated that section 23L(2) did not apply and, that being so, it was not necessary to consider the other SARS argument based on section 23(e) of the IT Act.
- (xxx) That since the court concluded that the additional assessment could not stand, the understatement penalty imposed likewise fell away.

Appeal upheld.

5.9. ITC 1994 (88 SATC 420)

The taxpayer had appealed to the Cape Town Tax Court in terms of section 107 of the TA Act against SARS' assessment in respect of his income for the tax periods from

2008 to 2014 and these assessments were in respect of the years of assessment 2008, and 2010 to 2014, and totalled R46 664 500.

The aforementioned assessments followed an investigation that culminated in an audit by SARS and led to the issue by SARS of a notice in terms of section 80J(1) (the 80J notice) of the IT Act which, inter alia, empowered SARS to re-characterise any steps in, or parts of, an impermissible avoidance arrangement where the provisions of the GAAR were met.

SARS contended that the taxpayer had engaged in a complicated tax-driven scheme, the purpose of which was to create a pool of STC credits. The STC credits could be used to offset anticipated STC liabilities arising on future dividend declarations by third-party South African companies that received the dividends from the scheme and were not subject to STC. The scheme, if successful, so SARS contended, could be used to create a potentially endless pool of STC credits that could be 'sold' (transferred in return for a fee) to South African entities by way of receiving dividends.

The purchasers, in turn, would be able to use the STC credits to reduce their anticipated liabilities for STC when in turn declaring dividends to their shareholders, thus reducing their true tax liability.

SARS, furthermore, noted that the taxpayer had earned substantial compensation for his efforts (totalling the aforementioned R46 664 500) but that he did not receive the compensation as taxable income (as would be the case in the ordinary course). Instead, he had structured the compensation to be in the form of dividends declared (which created amounts received by him) and received by him in the form of payments made against claims that had been transferred tax-free to him.

The scheme that the taxpayer had created and implemented as a whole (and the part of the scheme from which he had derived the R46 664 500) thus, according to SARS, fell within the web of the provisions of the GAAR as contained in Part 11A of Chapter 111 of the IT Act.

In the light of the tax regime in operation at the relevant time in respect of STC credits (STC was replaced on 1 April 2012 by the DWT), the taxpayer had created a structure that would enable Teea Investments (Pty) Ltd (Teea) to acquire reserves or companies that had further distributable reserves.

The taxpayer contended that the main objective of the schemes was to create distributable reserves in a readily saleable form because Teea would be selling distributable reserves and had to be able to do so fairly easily.

In order to sell distributable reserves fairly easily, the structures that the taxpayer created had to meet certain criteria and the manner in which the taxpayer achieved the necessary prerequisites was 'to start afresh with a new company'. The reason for this was that, should a new company only ever receive an incoming dividend and nothing else, there could be no undisclosed liabilities, since there would be no trading history.

The taxpayer had created three schemes (collectively 'the schemes'), they being the Moonsun scheme, the Amber scheme and the Amazonite scheme and they had the following general features: they had to be foreign companies in a tax-exempt jurisdiction with large reserves and a loan receivable from a holding company so that they were not liable for STC on dividends that they declared; dividends were to be declared in the course of winding up or deregistration of the companies declaring the dividends (failing which they would not qualify for the STC exemption); the shares in Moonsun, Amber or Amazonite had to be acquired by South African companies for no consideration in real terms. This would create reserves in these companies from which dividends could be declared (i.e. distributable reserves) and this meant that the dividends received from Moonsun, Amber or Amazonite could, in turn, be on-declared to their shareholders and so create the STC credits.

The taxpayer contended that what was termed the Teea arrangements, did not result in any 'tax benefits' and for that reason alone, did not constitute avoidance arrangements as defined in section 80L of the IT Act.

The taxpayer contended that the Teea arrangements did not have, as their sole or main purpose, the obtaining of a tax benefit or benefits and, therefore, did not constitute impermissible tax avoidance arrangements within the meaning of section 80A of the IT Act.

Furthermore the taxpayer contended that the Teea arrangements were not entered into or carried out by means or in a manner which would not normally be employed for bona fide business purposes, other than obtaining a tax benefit and they did not lack commercial substance, in whole or in part and did not create rights or obligations that would not normally be created between persons dealing at arm's length and therefore they were not susceptible to the application of the GAAR.

SARS contended that the taxpayer was not only party to, but the creator of, several impermissible avoidance arrangements as contemplated in section 80A of the IT Act.

SARS contended that all of the transactions, their constituent parts and the cash flows described in the evidence constituted an impermissible avoidance arrangement for the purposes of Part 11A of the IT Act.

Furthermore, SARS contended that each arrangement was entered into to obtain a tax benefit for the taxpayer and factually resulted in a tax 'benefit' in that the fee amounts paid by the counterparties flowed in part to the taxpayer without South African IT or STC being levied at any stage.

The avoidance arrangements, as contemplated by section 80A of the IT Act were, in the context of business, entered or carried out by means or in a manner that would not normally be employed for bona fide business purposes, other than obtaining a tax benefit.

SARS added that the avoidance arrangements in fact gave rise to tax benefits in the hands of the above referred external companies and in the hands of the taxpayer and their sole or main purpose was to obtain a tax benefit, both in the hands of the external companies (Teea's customers) and in the taxpayer's hands. Moreover, the avoidance arrangements lacked commercial substance, taking into account the provisions of section 80C of the IT Act.

In respect of the taxpayer specifically, SARS advanced the view that he had received payments from Teea of amounts that gave rise to the tax benefit because he structured the schemes in such a way that he was due to be remunerated in the form of tax-exempt dividends rather than taxable income.

Judge Loots held the following:

As to the application of the GAAR

- (i) That the GAAR addresses taxpayer arrangements that have the effect of conferring a tax benefit to the taxpayer through the impermissible avoidance of a tax liability that would otherwise accrue.
- (ii) That it was with the impermissible avoidance of tax with which the GAAR concerned itself. Thus, within the confines of the provisions of sections 80A to 80L of the IT Act, the provisions of the GAAR confer upon SARS the authority to investigate transactions and to raise additional assessments to counteract the consequences of impermissible avoidance arrangements.

As to the presence of an 'arrangement'

- (iii) That the court was satisfied that the schemes and their steps as identified by SARS in its section 80J notice constituted arrangements as defined by section 80L of the IT Act.

As to whether the taxpayer obtained a tax benefit

- (iv) That section 1 of the IT Act defines a 'tax benefit' to include 'any avoidance, postponement or reduction of any liability for tax', with section 80L of the IT Act defining an avoidance arrangement as 'any arrangement that, but for this Part, results in a tax benefit.'
- (v) That the taxpayer argued that a tax benefit exists only if an anticipated tax liability before a transaction (which will not be affected if the transaction is not implemented) is postponed, reduced or avoided by the transaction in question. In support of that contention the taxpayer cited the case of Sasol Oil Proprietary Ltd v C: SARS 81 SATC 117 and argued that because the Moonson and Amazonite schemes were offered to Teea on a 'take it or leave it' basis, he could not anticipate, and did not face, a tax liability before the transactions were entered into. Under these circumstances the taxpayer argued that there could be no avoidance, postponement or reduction of a liability for tax that never existed and, therefore, no tax benefit.
- (vi) That the test that the taxpayer, therefore, championed in the present instance was one where the transaction which took place was compared to no transaction at all. If this test is compared to Sasol Oil, supra, one sees that Sasol Oil was not authority for the taxpayer's proposition. Sasol Oil is authority for the proposition that, when a taxpayer is faced with a choice between changing its modus operandi in achieving its aim, or continuing on its present course to achieve its aim, and none of these choices leads to any anticipated avoidance, postponement or reduction of any liability for tax, then the taxpayer can say that there was no benefit.
- (vii) That contrary to what appeared from the extract from Sasol Oil, where no course adopted to achieve Sasol Oil's aims would have resulted in an anticipated tax liability for Sasol Oil, in the present instance the taxpayer does not postulate two ways of achieving his aim to derive compensation from the implementation of the scheme he had created.'

- (viii) That what the taxpayer postulates is that he would rather have shelved the scheme and not have been compensated for his efforts at all, than considering an alternative to the present method of him deriving compensation for his time, expertise, and efforts in the form of tax-exempt dividends. Not only did the court find this inherently improbable, but if one were to compare the impugned transaction to the comparator of no transaction at all, as the taxpayer contended, most tax avoidance transactions would escape the reach of the GAAR and this would not only lead to an incorrect, but also an absurd result.
- (ix) That, therefore, the court agreed with counsel for SARS that this extreme 'but for' test that the taxpayer had postulated was the wrong test to determine, for purposes of the GAAR, whether or not an impugned transaction resulted in the avoidance of tax.
- (x) That the correct question to ask when considering whether a taxpayer has had a tax benefit, in the court's view, was that: But for the transaction being structured in a way which avoids the imposition of tax, would the taxpayer have incurred a tax liability? If the taxpayer would have incurred a tax liability, then, quite clearly, it achieved a tax benefit as a result of the transaction.
- (xi) That in the present case, therefore, the 'tax benefit' enquiry requires a comparison, on the one hand of the tax liability that the taxpayer would have faced if the amounts were paid to him directly as a fee, commission, or sale price and, on the other hand, of the tax liability that the taxpayer faced under the present arrangement in terms of which he received tax-exempt dividends (and subsequent tax-exempt payments in terms of the aforementioned 2008 and 2011 Agreements).

As to the purpose test

- (xii) That having established that the taxpayer did receive a tax benefit and, because section 80A of the IT Act required that the avoidance arrangement must, as a sine qua non, have as its sole or main purpose the obtaining of a tax benefit, in the absence of which the GAAR will not be applicable (irrespective of whether the arrangement gave rise to a tax benefit), the focus of the enquiry next turned to whether the Moonson and Amazonite schemes (or any part thereof) had as their sole or main purpose the obtaining of the tax benefit the taxpayer had derived from their implementation.

- (xiii) That in terms of the purpose test contained in section 80G of the IT Act, an avoidance arrangement is, therefore, presumed to have been entered into or carried out for the sole or main purpose of obtaining a tax benefit, unless the party obtaining a tax benefit proved otherwise. The party obtaining that tax benefit may rebut that presumption by proving that 'reasonably considered in light of the relevant facts and circumstances' obtaining a tax benefit was not the sole or main purpose of the avoidance arrangement.
- (xiv) That the taxpayer, therefore, bore the onus of proving that the sole or main purpose of the arrangement was not to obtain a tax benefit.
- (xv) That since the advent of what has come to be termed the new GAAR, there has been much debate about whether the purpose test is subjective or objective. In the premises, while in the present matter, for the reasons set out in the judgment, a shift in emphasis in respect of the purpose test, would not alter the outcome. The court agreed with the parties that it did appear that there had been a shift to a more objective purpose test to determine the sole or main purpose of the avoidance arrangement. It would therefore, appear that the correct way to determine the purpose of the arrangement was to view the arrangement holistically, taking all relevant facts and circumstances into account. Thus to include a definite shift in the weight afforded to the factors previously considered under section 103, and a definite shift away from the subjective purpose of the taxpayer being paramount to the objective purpose of the arrangement (while retaining, as one of the factors, the stated subjective purpose of the taxpayer).
- (xvi) That SARS' contentions in regard to whether the sole or main purpose of the arrangement was to obtain a tax benefit rested on two legs: First, SARS advanced that the real (or at least the main) purpose of the schemes was to create and sell STC credits and, secondly, advanced that the taxpayer had dressed up his fee (which would otherwise have been subject to IT) as the proceeds of a tax-exempt dividend.
- (xvii) That it would appear that the steps in the implementation of the structure of the Moonsun, Amber and Amazonite schemes did show that it was tax driven and the schemes as a whole were factors to be taken into account when, holistically, assessing the question of the arrangements involving the taxpayer as a taxpayer, the manner of their implementation was not irrelevant.

- (xviii) That, applied to the taxpayer in respect of the question of whether the sole or main purpose of the arrangement was for him to obtain a tax benefit, CIR v Conhage (Pty) Ltd 61 SATC 391, on which the taxpayer relied for the proposition that the arrangements involving the payments to him did not have as their sole or main purpose the obtaining of a tax benefit, did not assist him. This, with the necessary contextual changes to take into account the stage of the enquiry, is for much the same reasons as discussed in respect of the determination of whether the taxpayer obtained a tax benefit (with reference to Sasol Oil, supra) read together with the taxpayer's unsatisfactory answers as to the payment structure as it applied to him.
- (xix) That, therefore, the sole or main purpose of the arrangements involving the taxpayer was for him to obtain a tax benefit in the form of tax-exempt benefits as against taxable income.

As to abnormal means, lacking commercial substance

- (xx) That whether the avoidance arrangement had been entered into or carried out by means or in a manner which would not normally be employed for bona fide business purposes other than obtaining a tax benefit, required an objective determination of whether the method employed was normal in a business context.
- (xxi) That, referencing this requirement, the court drew attention to various features that demonstrated that the arrangement was carried out by means or in a manner which would not normally be employed for bona fide business purposes, other than obtaining a tax benefit.
- (xxii) That, as in this case, the court found that the facts underpinning the question of whether the avoidance arrangement was entered into or carried out by means or in a manner which would not normally be employed for bona fide business purposes, other than obtaining a tax benefit (although it is a separate enquiry) also answered whether an arrangement had created rights or obligations that would not normally be created between persons dealing at arm's length.
- (xxiii) That the court found that the avoidance arrangements through the Moonsun and Amazonite schemes, insofar as they related to the taxpayer, also lacked commercial substance.

- (xxiv) That, in the premises, SARS' re-characterising of 'compensation' payments received by the taxpayer as taxable income was justified. By his own admission, the taxpayer structured the scheme and spent time, skill, and effort doing so. It would also appear that he did assist in the implementation of the Moonsun, Amazonite and Amber schemes, being at least involved in the drafting of certain agreements and, in so doing, he had structured his compensation in the form of dividends and he was not otherwise compensated for his efforts.
- (xxv) That, accordingly, structuring the receipt of compensation as tax-exempt dividend income constituted an impermissible avoidance arrangement and was correctly identified as such by SARS.

Appeal dismissed.

5.10. ITC 1995 (88 SATC 451)

Appellant, being 'the Fund', was established in terms of section 8 of the Attorneys Admission Amendment and Legal Practitioners Fidelity Fund Act 19 of 1941 and after the repeal of that Act, the Fund continued to exist as a juristic person in terms of section 25 of the Attorneys Act 53 of 1979 as the Attorneys Fidelity Fund. After the repeal of the Attorneys Act, the Fund continued to exist as a juristic person in terms of section 53 of the Legal Practice Act 28 of 2014(LPA) as the Legal Practitioners Fidelity Fund.

One of the principal purposes of the Fund under both the Attorneys Act and the LPA (the Acts) was to reimburse members of the public who suffered pecuniary loss as a result of theft by practitioners of money or property given in trust in the course of their practice.

The Fund was also empowered in terms of the Acts to collect contributions from practitioners and to arrange group professional indemnity insurance cover (insurance) for them, and for purposes thereof to enter into a contract with an insurer. The Fund was also empowered by the Acts to pay the premiums payable under any such contract of insurance.

In terms of the Acts, practitioners conducting a trust account practice were required to be in possession of Fidelity Fund certificates (FFCs) in order to practise and to receive or hold funds or property in trust (practitioners).

During the periods under review, when the Attorneys Act was in force, the practitioners were only required by the Law Society to pay initial contributions, and no annual contributions were levied or paid. The initial contribution was a once off fee payable by practitioners for FFCs for the first time and, apart from the initial contributions and the annual contributions payable under the LPA, practitioners were not required to pay anything further for the benefits received from the Fund.

The payment of the contributions was a prerequisite for all practitioners to receive FFCs, without which they could not validly practise as attorneys, nor access the other benefits (including the insurance cover) arranged by the Fund.

The initial contributions constituted 'consideration' in terms of the VAT Act and output tax was declared thereon and fully paid by the Fund to SARS.

SARS, pleaded in its Rule 31 statement that the VAT on the premiums were not deductible as input tax on the bases that:

- The Insurer rendered no services to the Fund as it rendered the provision of indemnity insurance directly to the practitioners. Input tax could not be claimed if no service (as a quid pro quo for the premium) was consumed, used or supplied to the Fund, in the course of making taxable supplies.
- The VAT on the premiums paid by the Fund were not deductible as input tax, because they were not consideration for the supply of goods or services by the Insurer to the Fund. Alternatively, the premiums were not incurred whilst making taxable supplies. There was no supply of a service by the Fund to the practitioners for which consideration was received.
- The Fund, notwithstanding section 16(2) of the VAT Act, could not produce any documentary proof that any service was supplied to the practitioners by the Fund. The Fund never provided any supporting documentation (including tax invoices and section 54(3) statements), apart from schedules containing figures extracted from annual financial statements of amounts ostensibly paid over as premiums, nor tax invoices issued to the practitioners.

Appellant, the Fund, pleaded essentially that:

- The Fund had supplied 'services' (as defined) to the practitioners, by what it did in relation to the insurance procured by it and by making payment of the premiums for the benefit of the practitioners, and the issuing of FFCs to them. In so doing, the Fund carried on an 'enterprise' (as defined). The contributions

paid to the Fund by the practitioners constituted 'consideration' for the 'services' supplied by the Fund. The interest which accrued to the Fund, was not 'consideration' for any service provided by the Fund to the practitioners.

- The premiums (which included VAT) paid by the Fund to the Insurer in respect and for the inducement of the provision of the insurance cover by the Insurer to the practitioners, constituted 'consideration' paid by the Fund for the 'services' provided by the insurer to the Fund. These 'services' included the provision of insurance cover by the Insurer to the persons nominated by the Fund under the policy (i.e. the practitioners), at the request of the Fund and in compliance with the Insurer's obligation to the Fund to do so, and as quid pro quo for the premiums paid. This enabled the Fund to provide the practitioners with insurance cover as quid pro quo for their contributions and, as such, the VAT paid on the premiums fell within the definition of 'input tax' in terms of the VAT Act.

The main issues for determination in the Tax Court were:

- Whether the insurer, in the providing of indemnity insurance in terms of the policy, was rendering 'services' to the Fund, in respect of which the Fund was entitled to deduct, as 'input tax', the VAT component of the premiums paid to the Insurer. Subsumed herein was the question whether or not the Fund, in so doing, was acting as principal, or merely as the agent of the practitioners (agency argument).
- Whether SARS' ultra vires argument had any merit. SARS, in its heads of argument, submitted that the Fund's failure to act within the confines of the powers expressly granted to it in the Acts, by not recovering (or waiving) contributions from practitioners in respect of the costs of the insurance as provided for in section 43(1)(a)(i) of the Attorneys Act or section 74(1)(a)(i) of the LPA and, instead, paying the indemnity insurance from its interest income, constituted conduct ultra vires the Acts which was a nullity, and that no rights and obligations could flow from such conduct (ultra vires argument).
- Whether SARS' 'invoices' argument had any merit. This was the argument by SARS, made in its heads of argument and in oral argument, and which was crystallised in its supplementary submissions, that the Fund had failed to comply with the requirements of section 16(2)(a) of the VAT Act, therein that it had also not furnished SARS with any invoices issued by the Insurer to the

Fund at the time of submitting the returns and the Fund was thus prohibited from claiming the input tax deduction (invoices argument).

Judge Steenkamp held the following:

As to 'services' and 'input tax'

- (i) That the Fund was clearly empowered in terms of the Acts to collect the contributions from the practitioners and to arrange indemnity insurance cover for them with the Insurer. The fund was also expressly empowered by the Acts to pay the premiums in that regard.
- (ii) That it was common cause that the Fund, as a matter of fact and in terms of the Acts, in the period under consideration, did so, and to that end had contracted with the Insurer for the providing of such insurance on the terms stated in the relevant policy, and that the Fund had paid the premiums (including VAT) to the Insurer.
- (iii) That the parties were agreed that (as it was stated in C: SARS v Respublica (Pty) Ltd 81 SATC 175) the general principle to be applied, was that the VAT consequences of a supply and the characterisation of the attendant relationships must be assessed by reference, first and foremost, to the contractual arrangements under which the supply was made, and then one has to consider whether that assessment was vitiated by any relevant facts.
- (iv) That, in the preamble to the policy, it is expressly stated that the 'Fund, as permitted by the Act, has contracted with the Insurer.' As such, ex facie the policy, the contractual arrangement in question and the main legal relationship was between the Fund and the Insurer, acting as principals.
- (v) That, on the pleadings, it was common cause between the parties that the contract of insurance was concluded between the Fund and the Insurer and SARS also pleaded that 'The premiums for the indemnity cover are paid by the Fund.'
- (vi) That the applicable provisions of the Attorneys Act and the LPA empowering the Board of the Fund to enter into the contract of insurance do not bear out the 'principal-agency arrangement.' Quite the opposite. They rather affirm that the intention of the legislator was that the Fund enter into the contract of insurance as principal.

- (vii) That there was no suggestion in the language of any of the provisions in the Attorneys Act and the LPA that the Fund was empowered or required to enter into the contracts as an agent for the practitioners and there was nothing in their provisions to support SARS' argument that a 'principal-agency arrangement is created and established' in terms of the Acts.
- (viii) That on the facts and evidence before the court, the court was satisfied that the contract of insurance was concluded between the Fund and the Insurer as principals, and that SARS' agency argument to the contrary must fail, not least because the conclusion of the contract in that manner has always been, and still was, SARS' pleaded case.
- (ix) That it was conceded by SARS, that the Insurer made a supply of insurance. Given that the contract of insurance was entered into between the Fund and the Insurer as principals, it must follow that in the making of such supply, the Insurer was rendering some sort of 'services' (as defined) to the Fund, as principal.
- (x) That the definition of 'services' was in any event sufficiently broad – 'anything done or to be done, including the granting, assignment, cession or surrender of any right or the making available of any facility or advantage' – to envelop what the Insurer undertook to or did under the policy such as the providing of insurance cover to the practitioners in terms of the policy, at the behest of the Fund and as quid pro quo for the Fund's payment of the attendant premiums from time to time.
- (xi) That it was common cause that, in respect of the contributions paid by the practitioners during the relevant period, output tax was adjusted retrospectively per the relevant VAT returns, and which output tax was fully paid by the Fund to SARS. That VAT was, in terms of section 7(1)(a) of the VAT Act, levied and paid as taxable supplies in the course or furtherance of the Fund's related VAT enterprise (enterprise).
- (xii) That there could be little doubt that the Fund, inter alia, in its collecting of contributions from the practitioners for the issuance to them of FFCs, and in the arranging of the indemnity insurance with the Insurer and the payment of the attendant premiums, was carrying on an 'enterprise.'
- (xiii) That the payment of such contributions was a prerequisite and quid pro quo for the obtaining by the practitioners of FFCs. The FFCs were a prerequisite to

such practitioners being permitted to practice, or to qualify for insurance cover under the policy. SARS accepted in its heads of argument that the Fund, as one of its statutory functions in terms of the Acts, was enjoined to collect contributions from practitioners and to arrange the insurance.

- (xiv) That in the court's view the services acquired were functionally related or linked to the Fund's making of taxable supplies, and as such, the VAT component of the premiums paid, qualified as input tax in the hands of the Fund.

As to the ultra vires argument

- (xv) That SARS' formulation of the ultra vires argument had, as an element, the submission that the Fund had, as a matter of fact, paid the premiums from its interest income, and that this was ultra vires. On the facts before the court, however, the payment of the premiums was not only from interest income. However, the Fund's revenue was diverse and consisted of, inter alia, the interest and the contributions. In terms of the Acts, the purposes for which the Fund's revenue was to be applied, were equally diverse, making no distinction between, nor placing any constraints upon, which sources of revenue were to be utilised for the funding of which purposes or expenses of the Fund.
- (xvi) That it cannot therefore ever be suggested that, as a matter of fact, the premiums were paid exclusively from interest income. They were paid from the Fund's general mixed revenue including interest.
- (xvii) That it could not be said that the Fund's paying of the premiums in the manner in which it was paid over the period in question, was in any way contrary to or ultra vires the attendant provisions of the Acts.
- (xviii) That, as regards the Fund not recovering (or waiving) the premium contributions from the practitioners being itself ultra vires the Acts, SARS contended that the Fund, as a creature of statute, was legally obliged by the Acts to levy premium contributions in terms of the attendant provisions, in such a way that its neglecting to do so, amounted to ultra vires conduct, and which in turn disentitled the claim for input tax.
- (xix) That on a plain reading of the four legislative provisions in issue or prima facie, the power to levy premium contributions was entirely discretionary and permissive, and not compulsory. In the court's view there was nothing in the nature of the thing empowered to be done (the fixing of an amount as a

premium contribution), in the object for which it was done or in the conditions under which it was to be done indicating a compulsory intention.

- (xx) That the court agreed with the Fund that the fact that the legislator also used the word 'may' in the levying provisions in respect of the levying of 'premiums and fees' for the provision of insurance, was an indicator against a compulsory intention as was the fact that the making of the payment of the premiums were clearly compulsory, whilst making their recovery permissive in all four of the related sections of the Acts. The discretionary power to fix the amount of the FFC contributions, was a further indicator against a compulsory intention in the fixing provisions.
- (xxi) That, accordingly, the court found that in the attendant legislative provisions cited in the judgment, there was no compulsory intention, and to the extent that a burden rested on SARS to show otherwise, it had failed, and as such, the ultra vires argument also in this respect cannot succeed.
- (xxii) That whether SARS was correct on its invoices argument, and whether on that basis alone the court can or should find that the Fund's input tax claims were disentitled, or the appeal must fail, was to be considered in the next section of the judgment.

As to SARS' invoices argument

- (xxiii) That SARS' invoices argument was to the effect that the Fund had failed to comply with the requirements of section 16(2)(a) of the VAT Act, therein that it had not furnished SARS with any invoices issued by the Insurer to it in respect of the Fund's premium payments to the Insurer, at the time of the submitting of the VAT returns and the Fund was thus prohibited from claiming the related input tax deduction.
- (xxiv) That, as the SCA held in C: SARS v Pretoria East Motors (Pty) Ltd 76 SATC 293, SARS was under an obligation throughout the assessment process leading up to and in the appeal, to indicate clearly what matters and which documents were in dispute, so that the taxpayer knew what was needed to present its case. Any other approach would make litigation in the Tax Court unmanageable, as the taxpayer would be left in the dark as to the level of detail required of it in the presentation of its case.
- (xxv) That given that the input tax claims were previously vetted and approved by SARS, only to be reversed in later updated assessments, without the apparent

need or call for the production by the Fund of the Insurer premium invoices, the obligation on SARS to call for them and call for them clearly in these proceedings (in the pleadings and/or in the evidence) was, respectfully, even more pronounced.

(xxvi) That SARS' reliance on section 16(2)(a) of the VAT Act was new and featured for the first time in its heads of argument and that was not the basis on which it was pleaded by SARS, that the additional assessments were raised and the deductions were disallowed.

(xxvii) That the Fund had succeeded in showing on a preponderance of probability that the decisions of SARS against which it appealed were wrong, and hence the appeal must succeed, and the assessments must be set aside.

Appeal upheld.

6. INTERPRETATION NOTES

6.1. *Documentary proof required for the zero-rating of goods or services – No. 31 (Issue 4)*

This Note sets out the documentary proof that is acceptable to SARS as contemplated in section 11(3), in instances that goods or services are supplied at the zero rate.

A fundamental principle of VAT is that goods or services supplied by a vendor in the course or furtherance of the vendor's enterprise should generally be subject to VAT at the standard rate.¹ Section 11(1) and (2) respectively make provision for a vendor to supply certain goods or services at the zero rate. To zero-rate these supplies, a vendor must comply with section 11(3), which requires a vendor to obtain and retain sufficient documentation to substantiate the zero-rating of such supplies.

Issue 5 is a substantial rewrite, not merely an update for legislative references.

It materially expands both the documentary requirements and the consequences of not obtaining documents within 90 days.

The most important changes

1. The 90-day rule has been substantially rewritten

Issue 4 dealt with the 90-day requirement rather briefly. It said that a vendor without the required documents after 90 days must account for output tax, but

could later reverse the adjustment if the documents were obtained within five years. It also allowed a vendor to apply for approval of alternative documentary proof, including a late application within 30 days after expiry of the 90-day period.

Issue 5 creates an elaborate new regime in paragraph 6:

- output tax must be accounted for in Block 12 when the 90-day period expires;
- a later adjustment may be claimed in Block 18, subject to the vendor proving that it originally zero-rated the supply, submitted the relevant return and properly accounted for the corrective output tax;
- the rate applicable remains the rate in force when the original tax invoice was or should have been issued;
- special rules now apply where only proof of payment is outstanding;
- the Commissioner may extend the period only where the delay arose from narrowly defined circumstances beyond the vendor's control.

This is probably the most commercially important amendment.

2. New concessions where payment is received after 90 days

Issue 5 recognises that payment is not always due within 90 days. A vendor need not immediately reverse the zero-rating merely because proof of full payment is unavailable where:

- a written agreement allows payment after 90 days, but within 12 months;
- a contractual retention may remain unpaid for more than five years;
- foreign-exchange restrictions prevent payment; or
- the consideration has been written off as irrecoverable.

Where the extended payment period expires without full payment, output tax must be accounted for only to the extent of the unpaid consideration. Curiously, where there is a contractual retention contemplated in paragraph 6(d)(ii), Issue 5 ultimately says proof of payment of the retention need not be obtained at all.

That is considerably more nuanced than Issue 4.

3. The extension mechanism is much narrower

Issue 4 permitted an application for approval of alternative documentary proof and contemplated a late application within 30 days after the original 90-day period.

Issue 5 no longer expresses the mechanism that broadly. It allows an extension where documents could not be obtained because of circumstances beyond the vendor's control. Those circumstances are stated to mean:

- a natural or human-made disaster;
- civil disturbance or disruption in services; or
- serious illness or an accident involving the recipient or its authorised representative.

The application should ordinarily be made before expiry of the 90-day or extended period. A further 30-day period is allowed only where the vendor explains both the underlying circumstances and why the application itself could not be made timeously.

This appears materially more restrictive than Issue 4. It may become important where SARS previously accepted other practical reasons for late documentation.

Expanded documentary requirements

4. Foreign-going ships and aircraft

Issue 4 generally required the invoice, proof of delivery, proof of export and proof of payment. For repairs and related services, written confirmation of the vessel or aircraft particulars was often enough.

Issue 5 adds an extensive list of supporting documents, depending on the statutory category of ship or aircraft. These include:

- DA 1, DA 2 or DA 3 documents;
- confirmation of the export destination;
- trading licences or registration certificates;
- proof that the vessel or aircraft operates internationally;
- proof of foreign registration;

- confirmation that a commercial or fishing concern is conducted outside South Africa;
- confirmation that the relevant operator is neither resident nor a vendor; and
- documents establishing that the vessel is a foreign naval ship or aircraft or a foreign military aircraft.

This is a significant increase in the compliance burden.

5. Recurring supplies to non-residents

Issue 5 introduces a useful concession: for several recurring supplies, the required confirmation of non-residence, non-vendor status or absence from South Africa may be obtained by way of an annual declaration by a 'key office bearer'.

A key office bearer is newly defined to include the head of tax, public officer, chief financial officer or a similarly designated officer. This concession appears repeatedly in the services table, including transport and ancillary services, arranging services, services to non-residents, vocational training and warranty-related services.

Issue 4 required written confirmations but contained no equivalent general annual-declaration mechanism.

6. International transport documentation has been modernised

For international transport and related local transport, Issue 5 now recognises a processed goods declaration in the country of origin or destination as an alternative to a signed delivery or goods-received note.

The local leg under section 11(2)(c) is also expressed more flexibly. Issue 4 specifically required the transport contract, house bill of lading and ocean or air waybill. Issue 5 refers more broadly to the transport contract and relevant international transport document identifying collection and delivery addresses and the points of origin and destination.

This may assist freight and logistics operators, although the proof-of-delivery requirement remains.

7. Additional proof for rented movable goods

For goods used exclusively in an export country under section 11(1)(c), Issue 5 adds a written agreement or similar document confirming that the goods are intended for exclusive use in the export country.

For goods used exclusively in a business conducted in an export country under section 11(1)(d), Issue 5 now also requires a trading licence or equivalent document confirming that the recipient conducts business there.

Neither requirement appeared in Issue 4.

8. Crude oil supplies

Issue 4 required only a tax invoice for crude supplied for refining into fuel levy goods.

Issue 5 additionally requires:

- the recipient's valid manufacturer's licence under the Petroleum Products Act; and
- written confirmation that the crude was acquired for refining into fuel levy goods.

9. Customs-controlled areas

References to **IDZ operators** have generally been updated to **SEZ operators**, and Issue 5 repeatedly requires proof that the recipient is properly registered or licensed under the C&E Act—not merely proof that it is a CCAE or operator.

For services physically rendered in a customs-controlled area, Issue 5 also adds explicit proof that the recipient is a registered or licensed CCAE or SEZ operator.

New statutory zero-rating categories

Issue 5 has been brought up to date with amendments made since 2016. New table entries include:

- sanitary towels under section 11(1)(w);
- consumable goods used in testing services under section 11(1)(x);
- international telecommunications services under section 11(2)(y);
- testing services supplied to a non-resident under section 11(2)(z); and
- deemed airtime-distribution services under sections 8(31) and 11(2)(zA).

Issue 5 prescribes detailed evidence for each, including contracts, costing records, telecoms licences, service-level agreements, confirmation that non-roaming services are not supplied for South African use, and records of airtime purchase and selling prices.

Other notable changes

Issue 5 also:

- adds definitions of BGR, Constitution, Regulations, non-resident and key office bearer;
- incorporates BGR 69 for supplies of qualifying gold and exports made through an agent under section 54(2C);
- requires the Customs licence for an inbound duty- and tax-free shop;
- tightens the foreign donor-funded project documentation, including a National Treasury confirmation letter with a unique reference number;
- expands the railway-train provision to require a contract identifying the nature of the services;
- allows documentation concerning securities to establish their location outside South Africa;
- updates the abridged tax-invoice threshold in the quoted legislation from **R3,000 to R5,000**; and
- expands the meaning of proof of payment to include reciprocal intercompany loan-account entries and SWIFT or similar settlement messages.

6.2. *Meaning of ‘employee’ for purposes of the ETI Act – No. 145*

This Note provides clarity on the interpretation and application of the definition of ‘employee’ read together with the proviso to section 6.

The scope of this Note is limited to arrangements entered into by parties, typically as part of a composite arrangement, in an attempt to claim the ETI for persons not meeting the definition of ‘employee’, specifically arrangements involving learning institutions. The Note therefore does not consider other scenarios in which the definition of ‘employee’ is critical for purposes of claiming the ETI.

No IT or PAYE implications such as fringe benefits are considered in this Note.

The ETI Act was introduced to provide an incentive to encourage employment creation. The Explanatory Memorandum on the Employment Tax Incentive Bill, 2013, states that:

‘In response to the high rate of youth unemployment, Government wishes to implement an incentive mainly aimed at encouraging employers to hire young and less experienced work seekers. ...

Government’s aim is that the incentive should assist in the generation of sustainable employment opportunities that enjoy protection under labour law legislation.’

The aim of the incentive is to encourage employers to generate sustainable employment opportunities for young persons between the ages of 18 and 29, as well as for persons of any age in special economic zones, and in any industry identified by the Minister by notice in the Government Gazette. Government’s aim is the generation of sustainable employment opportunities that enjoy protection under labour law legislation. The ETI is not intended to be an incentive for training unskilled workers, but rather to ensure sustainable employment.

The incentive provided for under the ETI Act is fundamentally based on an employer-employee relationship. The ETI Act does not define ‘employer’. Section 3 is, however, unambiguous as to who are eligible employers. An employer is eligible to receive the ETI only if the employer is registered for purposes of withholding and paying over to SARS the PAYE under paragraph 15 of the Fourth Schedule. The ETI Act, however, defines ‘employee’. Besides the requirements contained in this definition, a number of criteria must be met before a person will be considered to be an employee for purposes of the ETI Act.

In some instances, taxpayers become party to composite arrangements which are arguably aimed at abusing the incentive. These composite arrangements typically involve a learning institution, an organisation, and a person for a limited period of either 12 or 24 months. Under the arrangement, the organisation is responsible for paying an agreed-upon training fee to the learning institution, on behalf of that person. Contractually the parties refer to this training fee as the person’s basic remuneration. The learning institution is responsible for providing the person with training, mostly in the form of an accredited SETA training course, as well as all the lectures, and training facilities for the duration of the arrangement. In some cases, practical field training is included. Notwithstanding that an employment contract may have been entered into under this composite arrangement, no work is carried out by the person for the

organisation and the person is not assisting in carrying on or conducting the business of the organisation.

Under these arrangements, the person generally does not render any services to the organisation and does not obtain practical work experience. The person receives accredited education in the form of training courses through an accredited learning institution. Under some arrangements, the person may be exposed to work-based exercises and activities by another organisation (not the primary organisation) which pays only a fixed monthly fee. These fees are paid to the learning institution and not to the person. The number of persons contracted are often more than what is reasonably necessary to conduct the organisation's business.

In an attempt to curb the apparent abuse of the ETI a number of amendments were introduced to the ETI Act,⁷ namely:

- an amendment to the definition of 'employee' by inserting additional requirements;
- the inclusion of the proviso to the definition of 'monthly remuneration'; and
- the inclusion of the proviso to section 6.

Under the definition of 'employee', the person must:

- be a natural person;
- work for another person and in any other manner directly or indirectly assist in carrying on or conducting the business of that other person;
- receive or be entitled to receive remuneration from that person;
- be documented in the records of that other person as envisaged in the record keeping provisions in section 31 of the Basic Conditions of Employment Act; and
- not be an independent contractor.

In addition to the abovementioned requirements, the person must not, in fulfilling the conditions of their employment contract during any month, mainly be involved in the activity of studying.

In the context of the ETI Act, a mere contractual relationship between two parties involving the payment of an amount by one party to the other is insufficient to meet the definition of 'employee'. The person must also work for the organisation that pays the remuneration for the work performed. The facts and circumstances of each case will

be considered to determine whether the nature and extent of any work performed by the person is such that it does assist the organisation in carrying on and conducting its business and is an integral part of the organisation. The onus of proving that the requirements of the ETI Act are met, rests on the taxpayer claiming the incentive.

6.3. *Deductions not allowed – corrupt activities, fines and penalties, and fruitless and wasteful expenditure – No. 54 (Issue 3)*

This Note provides guidance on the meaning and scope of section 23(o), which prohibits the deduction of expenditure incurred:

- if the payment of that expenditure, or the agreement, or offer to make that payment constitutes an activity contemplated in Chapter 2 of the PCCA Act,
- which constitutes a fine charged or penalty imposed as a result of an unlawful activity carried out in South Africa or in any other country if that activity would be unlawful had it been carried out in South Africa; or
- which constitutes fruitless and wasteful expenditure as defined in section 1 of the PFMA and determined in accordance with that Act.

The Constitution enshrines the rights of all people in South Africa and affirms the democratic values of equality, human dignity and freedom. It requires the state to respect, protect, promote and fulfil these fundamental rights. The Constitution also requires that the public administration must be governed by, amongst others, efficient, economic and effective use of resources. The Constitution further requires that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

Corruption affects the above constitutional values and requirements, limits the government's ability to fight poverty, negatively affects economic development, damages social and ethical values, prevents fair business practices, and undermines good governance and democracy. The PCCA Act was introduced in South Africa in 2004 in an effort to strengthen measures to prevent and combat corruption and corrupt activities. The PCCA Act applies to the private and public sectors, including the government, parliament, and the judiciary.

From a policy perspective the deduction for IT purposes of bribes, fines and penalties relating to unlawful activities, and fruitless and wasteful expenditure cannot be justified. For example, the granting of a deduction for fines and penalties would reduce the burden of the fine or penalty and be contrary to the rationale of the law under which it is imposed.

Section 11 deals with general deductions allowable in the determination of taxable income. Section 23 deals with deductions not allowable in the determination of taxable income. These two sections must be read together in determining a taxpayer's entitlement to a deduction.

Generally, in cases involving expenditure incurred in respect of corrupt activities, fines and penalties, and fruitless and wasteful expenditure, section 11(a) is the section that is applicable in determining whether the amount initially qualifies for a deduction. In context, one of the contentious requirements in this regard is often whether the expenditure has been incurred in the production of income. Section 23(o) is relevant and, if applicable, will serve to deny a deduction for an amount of expenditure which met the requirements for a deduction under section 11(a) or another section.

Section 23(o) was initially introduced into the Act⁶ to specifically prohibit the deduction of expenditure incurred on specified corrupt activities and a fine or penalty imposed as a result of an unlawful activity. ⁸ In order to encourage accountability, subparagraph (iii)⁹ was added to section 23(o) to provide that any expenditure incurred by a person subject to the PFMA that constitutes fruitless and wasteful expenditure under the PFMA is not allowed as a deduction in the determination of that person's taxable income.

Section 23(o) is solely concerned with expenditure and is not concerned with whether income has been derived by a taxpayer through legal or illegal means.

Corruption limits the government's ability to fight poverty, negatively affects economic development, damages social and ethical values, prevents fair business practices, and undermines good governance and democracy. To contribute to the government's anticorruption drive and to ensure proper governance, section 23(o) was introduced. The section prohibits the deduction of expenditure incurred in respect of activities contemplated in Chapter 2 of the PCCA Act, fines or penalties imposed owing to unlawful activity or any expenditure constituting 'fruitless and wasteful expenditure', as defined in section 1 of the PFMA.

The deductibility of bona fide commercial penalties remains unaffected by the provision. Such commercial penalties are subject to the normal tests for deductibility

under section 11(a) taking into account section 23(g) and would not be denied as a deduction under section 23(o) if the requirements of those sections were met.

6.4. *Meaning of ‘deemed to be one and the same person’ for determining the entitlement to the wear-and-tear allowance under an amalgamation transaction – No. 145*

This Note provides guidance on the interpretation and application of the phrase ‘deemed to be one and the same person’ as it appears in section 44(3)(a) to determine which party to an amalgamation transaction may be entitled to the wear-and-tear allowance in the year of assessment when an allowance asset is disposed of.

This Note does not consider the corporate rules or the requirements for the wear-and-tear allowances in detail.

The corporate rules establish special provisions for corporate restructuring transactions. The purpose of these rules is to facilitate specific transactions between companies⁴ on a tax-neutral basis by providing roll-over relief, which defers IT on asset transfer until those assets are eventually disposed of. To qualify for the roll-over relief, the transaction must satisfy the relevant requirements under sections 41 to 47, depending on its nature or type. If roll-over relief applies, and the transferor company disposes of an allowance asset while the transferee company acquires that asset as an allowance asset, the corporate rules deem the transferor and transferee companies to be ‘deemed to be one and the same person’ for purposes of determining the amount of any allowance to be claimed, recovered, recouped, or included in income regarding that asset.

Section 41(2) provides that, subject to section 41(3), the corporate rules in sections 42 to 47 apply to transactions set out in those sections, and these sections take precedence over other provisions in the Act, except for the specific sections mentioned in section 41(2).

To be eligible to claim an allowance, the requirements of the relevant section under which the allowance is sought must be met. In some cases, the allowance must be apportioned if the asset is used for only part of a year of assessment. In other cases no apportionment is required if a qualifying asset is acquired or disposed of during the year of assessment. The non-apportionment of the allowance may result from the asset’s nature, which is used for a specific purpose or trade.

Uncertainty exists regarding whether the transferor or transferee is entitled to claim the wear-and-tear allowance on an allowance asset that is not subject to apportionment in the year of assessment when that asset is disposed of under an amalgamation transaction.

The corporate rules provide corporate roll-over relief, amongst other things, for the disposal or transfer of allowance assets between taxpayers.

Section 44(3)(a) provides that if the amalgamated company transfers an allowance asset and the resultant company acquires that asset as an allowance asset, both companies are 'deemed to be one and the same person' for the purpose of determining the amount of any allowance to which the resultant company may be entitled, and which is to be recovered, recouped, or included in the resultant company's income regarding that asset.

The phrase 'deemed to be one and the same person' creates for a situation that results in a tax-neutral position for both the amalgamated and resultant companies upon the transfer of an allowance asset. Unlike section 11(e), section 12C does not provide for the apportionment of the deduction if the asset is used for only part of the year of assessment. Therefore, if the amalgamated company meets the requirements of section 12C to claim the allowance in the year of assessment during which the transfer of the asset occurs, the amalgamated company, not the resultant company, may claim the full allowance for that year, even if the resultant company meets the requirements for the allowance after the transfer. The resultant company may claim the section 12C allowance in the year of assessment following the year in which the amalgamation occurred, provided that the requirements of section 12C are satisfied.

The accumulated deductions claimed under section 12C by the amalgamated company are rolled over to the resultant company and may be subject to recoupment in the resultant company when the asset is eventually disposed of. The principles considered in this Note will also apply to an 'asset-for-share transaction', 'intra-group transaction' and 'transactions relating to liquidation, winding-up and deregistration'.

7. VAT RULINGS

7.1. *VAT treatment of donor funds – 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): 'grant'
- Section 8(5A)
- Section 11(2)(t)
- 7(1)(a)
- 16(2)(a)
- 16(3)(a)(i)

Parties to the application

The Applicant is a Public Higher Educational Institution.

Background and facts

The Applicant is a juristic person established in terms of the Higher Education Act 101 of 1997.

The SETA is established in terms of the Skills Development Act 97 of 1998 (SDA), and a public entity listed in schedule 3A to the Public Finance Management Act 1 of 1999 (PFMA), whose activities and programmes are based on the National Development Plan, its five-year Strategic Plan and its Sector Skills Plan (SSP). The SETA is governed by, amongst others, the SDA and the Skills Development Levies Act 9 of 1999.

The SETA calls for discretionary grant applications from its stakeholders on an annual basis to meet the requirements of its Annual Performance Plan, and broader Strategic Plan.

The Applicant responded to a call by a registered SETA for discretionary grant funding related to the design, implementation, and evaluation of a postgraduate fellowship initiative that seeks to provide new product manufacturing opportunities in South Africa.

The Memorandum of Agreement (MoA) sets out the terms for the discretionary grant funding provided by the SETA to the Applicant, which is aimed at covering the costs related to the bursaries and project running costs of the post graduate students participating in the aforementioned initiative.

The parties' respective responsibilities are set out in the MoA as follows:

The SETA will fund all costs listed in the MoA. SETA must make timely payments to the Applicant. SETA will take part in committee activities. It will also share project outcomes with stakeholders in education, training, and skills development.

The Applicant must manage milestones and deliverables as set out in Annexure A to the MoA and the approved implementation plan. The Applicant must participate in committee activities and is required to submit quarterly reports in the SETA's prescribed format. The Applicant should contribute to evaluation studies and publications if needed. Funds must be used only for the project. The Applicant must complete all outstanding work according to the National Skills Development Plan and the SETA's Strategic Plan.

The MoA contains a breakdown of the purposes for which the Applicant will use the grant from a SETA, as well as the initiative's milestones (referred to as 'workstreams') at which a registered SETA will disburse specific amounts. The workstreams are summarised as follows:

- Program Management, Stakeholder Management, Events and Fellowship Solution Integration (inc. University Levy).
- Student Recruitment and Registration.
- Review of existing four courses and development of one new course (credentials).
- Development of bespoke wrap-around support system aimed to guide students in the technology readiness levels leading to successful industrialisation.
- Delivery of five courses (credentials) over the period of the project across all students.

Conditions and assumptions

This VAT ruling is subject to the Standard Terms, Conditions and Assumptions issued by the Commissioner for SARS, and the provisions of Chapter 7 of the TA Act, excluding sections 79(4)(f), (k), (6) and 81(1)(b).

Ruling

- The discretionary grant funding allocated to Milestone 2 and Milestone 5 constitute consideration for exempt educational services provided by the Applicant under section 12(h)(i)(bb). The Applicant is not entitled to deduct input tax on expenditure directly attributable to these milestones.
- The discretionary grant funding allocated to Milestone 1, Milestone 3, and Milestone 4 constitute consideration for the supply of services. The payments do not constitute a 'grant' as defined in section 1(1). It follows that section 8(5A) read with section 11(2)(t) does not apply. The services supplied to a registered SETA can therefore not be zero-rated and are subject to output tax at the standard rate under section 7(1)(a). All expenditure incurred that is directly attributable to these milestones may be deducted by the Applicant as 'input tax' as defined in section 1(1) under section 16(3), subject to sections 16(2), 17 and 20.

7.2. Enterprise – VR 022

This ruling confirms that, at the time of its voluntary registration, the Applicant satisfied the definition of 'enterprise' for VAT purposes, despite not having commenced making taxable supplies.

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): 'enterprise'
- Section 8(2)
- Section 18(2)

- Section 23(3)(c)
- Section 41B

Parties to the application

The Applicant is a South African resident private company.

Background and facts

The Applicant is a company incorporated in the South Africa and forms part of a multinational group whose ultimate holding company is situated and managed outside South Africa.

The Applicant was specifically created and setup for the purpose of acquiring the target business in South Africa. The Applicant applied for and obtained voluntary VAT registration under section 23(3)(c), on the basis that the target business will be supplied to the applicant as a going concern.

The sale agreement to acquire the target business was concluded. However, it contained a suspensive condition which required approval by the Competition Commission before the sale could be completed. The proposed transaction was not approved by the Competition Commission. The Applicant was awaiting the written reasons for the prohibition. After receiving the reasons, the Applicant would consider whether to appeal the decision or place the project on hold.

The Applicant has not made any other taxable supplies. However, various costs have been incurred to set up the entity to pursue the acquisition and commencement of the target business.

Should the acquisition not proceed, the Applicant is considering alternative business opportunities in South Africa. The Applicant is also in the process of appointing employees. These employees are expected to render services to other group entities for a fee imminently.

Against this background, the Commissioner is requested to issue a VAT ruling under section 41B, confirming whether the Applicant met the definition of 'enterprise' at the time of its registration for VAT.

Conditions and assumptions

This VAT ruling is subject to the Standard Terms, Conditions and Assumptions issued by the Commissioner for 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:

- Based on the facts set out above and having regard to proviso (i) to the definition of 'enterprise', the Applicant's activities in connection with the intended acquisition of the target business are carried on in relation to the commencement of an enterprise and are therefore deemed to be carried on in the course or furtherance of such enterprise.
- No view is expressed regarding the Applicant's entitlement to deduct input tax in relation to the intended acquisition of the target business. If the Applicant deducts input tax in relation to the intended acquisition and the initial costs of establishing the business in South Africa were capitalised, the Applicant must consider whether a change-in-use adjustment under section 18(2) and/or a deemed supply under section 8(2) may arise, depending on the subsequent application of the relevant goods or services.

7.3. VAT treatment of educational services – VR 023

The ruling confirms the VAT treatment of the supply of educational services by an accredited further education services supplier that is not registered under the CET Act.

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 7(1)(a)
- Section 12(h)(i)(aa)

Parties to the application

The Applicant is a private company operating in the further education and training industry in South Africa.

Background and facts

The Applicant is a supplier of further education services. It holds accreditation from a Sector Education and Training Authority (SETA). The Applicant is therefore permitted, from an education regulatory perspective, to provide the relevant training services for which it is accredited.

In recent years, the statutory registration framework for certain education providers has changed in practice. With effect from 7 February 2020, Government Gazette 43007 recorded changes relating to the registration of private education and training providers that offer qualifications and part-qualifications on the Occupational Qualifications Sub-Framework. Under that position, certain institutions that hold the required SETA accreditation are exempt from registration with the Department of Higher Education and Training (DHET). Therefore, the Registrar does not require and does not accept

registration applications from institutions that fall within the SETA-accredited category.

They are nevertheless regarded as operating lawfully within the education regulatory framework.

From a VAT perspective, the issue is whether the exemption in section 12(h)(i)(aa) can apply to a SETA-accredited institution that is lawfully permitted to provide educational services, but is not registered under the CET Act because such registration is no longer required for institutions in this category.

Conditions and assumptions

This VAT ruling is subject to the Standard Terms, Conditions and Assumptions issued by the Commissioner, 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 Applicant's supplies of educational services do not qualify for exemption under section 12(h)(i)(aa) as the Applicant is not established, declared, registered or provisionally registered under the CET Act.

- The Applicant is required to account for VAT at the standard rate on the supply of such services under section 7(1)(a).

8. BINDING PRIVATE RULINGS

8.1. *Cash grant to an employee incentive trust and the vesting of shares in qualifying employees – No. 429*

This ruling determines the IT and CGT consequences arising from cash grants made by an employer to an employee share incentive trust, the receipt thereof by the share incentive trust, and the vesting of shares in qualifying employees.

In this ruling references to sections and paragraphs are to sections of the IT Act and paragraphs of the Eighth Schedule to the Act applicable as at 31 July 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), definition of ‘gross income’;
- section 11(a);
- section 23H;
- paragraph 11(1)(d);
- paragraph 13(1)(a)(iiB);
- paragraph 20(3)(b);
- paragraph 38; and
- paragraph 39.

Parties to the proposed transaction

The Applicant: A resident company

Co-Applicants 1 to 8: Resident subsidiaries of the Applicant

Co-Applicant 9 (the Trust): A resident discretionary trust

Qualifying employees: Senior management employees of the Applicant and Co-Applicants 1 to 8

Description of the proposed transaction

The Applicant implemented a long-term share incentive scheme (the Scheme) and settled the Trust during 2014. The Scheme is a forfeitable share award scheme which entails the granting of shares by the Trust to qualifying employees on the grant date, to be held by the Trust until the respective vesting dates. The shares are subject to risk of forfeiture, if the performance targets of the companies and those of the qualifying employees are not met over the predetermined vesting periods.

The transaction steps described below are proposed in respect of the Scheme.

- The Applicant will annually, from 2026 to 2031, make a cash grant to the Trust in respect of qualifying employees of the Applicant and those of Co-Applicants 1 to 8.
- The Applicant will annually recover from Co-Applicants 1 to 8 the contributions made to the Trust in respect of qualifying employees of Co-Applicants 1 to 8.
- The Trust will annually use the total cash grant received to purchase shares in the Applicant on the open market, or the Applicant will issue new shares to the Trust at current market value.
- In terms of the rules of the Scheme, the Trust will annually, from 2026 to 2031, make share awards to qualifying employees of the Applicant and those of Co-Applicants 1 to 8.
- The Trust will from 2029 to 2034, at the respective vesting dates, transfer shares to the qualifying employees for nil consideration.

Conditions and assumptions

This binding private ruling is not subject to any additional conditions and assumptions.

Ruling

The ruling made in connection with the proposed transaction is as follows:

In respect of the Applicant and Co-Applicants 1 to 8

- The Applicant will be allowed to deduct the portion of the total cash grant made to the Trust, that relates to its own qualifying employees, under section 11(a).
- Co-Applicants 1 to 8 will be allowed to deduct the portion of the total cash grant made to the Trust, that relates to their own respective qualifying employees, under section 11(a).

- The provisions of section 23H will be applicable to the section 11(a) deductions referred to in the two bullets above.

In respect of Co-Applicant 9 (the Trust)

- The cash grant received by the Trust must not be included in the gross income of the Trust.
- The granting of the shares by the Trust to qualifying employees will be a disposal under paragraph 11(1)(d) and the time of disposal will, under paragraph 13(1)(a)(iiB), be when the shares vest in the qualifying employees as contemplated in section 8C.
- Paragraph 20(3)(b) will not apply to the expenditure incurred by the Trust to acquire the shares.
- Paragraph 38(1) will not apply to the disposal of the shares by the Trust to qualifying employees.
- Any capital losses determined by the Trust will not be subject to paragraph 39(1) by reason of paragraph 39(4).

8.2. *Distribution of a loan claim – No. 430*

This ruling determines the tax consequences of the distribution of a loan claim by a resident trust to a foreign trust.

In this ruling, references to sections and paragraphs are to sections of the IT Act and paragraphs of the Eighth Schedule to the IT Act applicable as at 6 August 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 7(8);
- sections 54, 55 and 56; and
- paragraph 72 of the Eighth Schedule

Parties to the proposed transaction

The Applicant: A resident discretionary trust of South Africa

Co-Applicant 1: A resident natural person of South Africa

Co-Applicant 2: A non-resident trust

Description of the proposed transaction

The Applicant advanced an interest-free loan to Co-Applicant 1 (Interest-Free Loan) during 2022.

On receipt of the interest free loan Co-Applicant 1 submitted an application to the South African Reserve Bank (SARB) to obtain approval to advance an interest-bearing loan to Co-Applicant 2 (Interest-Bearing Loan). The SARB approved the foreign direct investment in May of 2024. The loan bears interest at an arm's length rate, supported by a transfer pricing benchmark study. The loan agreement became effective later in the year in which the SARB approved the Interest-Bearing Loan.

Co-Applicant 2 on-lent the funds, on an interest-bearing basis, to a foreign company wholly owned by Co-Applicant 2. That company invested the funds in traditional asset classes, as well as venture capital, private equity and private credit opportunities. The assets generate both capital appreciation and interest income.

The proposed transaction comprises the following steps:

Step 1: The Applicant distributes part of its Interest-Free Loan claim against CoApplicant 1 to Co-Applicant 2. The amount distributed equals the current outstanding capital balance of the Interest-Bearing Loan owed by Co-Applicant 2 to Co-Applicant 1. As a result, Co-Applicant 2 will hold a loan claim against Co-Applicant 1, and Co-Applicant 1 will hold a loan claim against Co-Applicant 2.

The Applicant's Trust Deed authorises the distribution of the Interest-Free Loan to Co-Applicant 2. The trustees may distribute or vest income or capital allocated to a beneficiary to any trust, corporation or company in which that beneficiary has a beneficial interest. For this purpose, a beneficiary has a beneficial interest in a trust, corporation or company if that beneficiary is entitled to receive capital or income under its provisions or through the exercise of discretionary powers.

Co-Applicant 1 is a beneficiary of both the Applicant and Co-Applicant 2. Accordingly, the distribution of the Interest-Free Loan for the benefit of Co-Applicant 1 is permitted.

Step 2: The capital portion of the Interest-Bearing Loan held by Co-Applicant 1 against Co-Applicant 2, and the Interest-Free Loan held by Co-Applicant 2 against Co-Applicant 1, will be extinguished by set-off.

Co-Applicant 1 and Co-Applicant 2 will agree in writing to the set-off. As the two loan claims are equal in value, they will be settled in full on a value-for-value basis.

To date, Co-Applicant 1 has included all accrued interest on the Interest-Bearing Loan as income in his South African IT returns under section 24J. The interest has not yet been remitted to South Africa. The capitalised interest will be remitted when Co-Applicant 1 requires funds.

Conditions and assumptions

This binding private ruling is not subject to any additional conditions and assumptions.

Ruling

The ruling made in connection with the proposed transaction is as follows:

- The distribution of the Interest-Free Loan by the Applicant to Co-Applicant 2 will constitute a 'donation, settlement, or other disposition' for purposes of section 7(8) and paragraph 72 of the Eighth Schedule.
- Neither section 7(8) nor paragraph 72 will apply to the distribution, as no amount would have constituted income for Co-Applicant 2 if it were a resident, by reason of or in consequence of this donation and no capital gain will be attributable to the donation of the Interest-Free Loan.
- The donation will be exempt from donations tax in terms of section 56(1)(l).

Additional notes

- No view is expressed on the interpretation and application of the general anti-avoidance provisions or doctrine in the context of the proposed transaction.
- No view is expressed on whether the proposed transaction is permissible under the exchange control regulations

9. BINDING GENERAL RULINGS

9.1. VAT treatment of ambulance services – No. 75

Purpose

This BGR clarifies the VAT treatment of the provision of ambulance services and whether section 12(g) applies to these services.

Background

When VAT was introduced in 1991, one of the main concerns was whether it would increase the price of supplies of transport services. As public passenger transportation was used mainly by low-income consumers, such supplies were extremely price sensitive. In this regard, VATCOM noted that the bus, rail, and taxi transportation industries were vital to South Africa and were heavily subsidised. At that time, the decision was taken to exempt public passenger transportation within South Africa by road or rail. The purpose of this exemption was to place low-income commuters using public transport in the same position they had occupied under the General Sales Tax, thereby limiting any increase in the price of passenger transportation.

There has been no material change in the relationship between public passenger transport and low-income consumers since the inception of VAT, that is, public passenger transportation is still used mainly by low-income consumers and remains extremely price sensitive. It is evident, therefore, that the purpose of the exemption in section 12(g) is still to provide relief to low-income commuters.

Discussion

The supply of services by a person in the course or furtherance of its enterprise is subject to VAT at the standard rate of 15% under section 7(1)(a), unless an exemption or exception applies to such supply.

Section 12(g) provides such an exemption, stating that:

‘the supply by any person in the course of a transport business of any service comprising the transport by that person in a vehicle (other than a game viewing vehicle contemplated in paragraph (e) of the definition of ‘motor car’ in section 1) operated by him of fare paying passengers and their personal effects by road or railway (excluding a funicular railway), not being a supply of any such service which, but for this paragraph, would be charged with tax at the rate of zero per cent under section 11(2)(a)’.

An analysis of the section reveals the following key requirements:

- There must be a supply of a service.
- The supplier must make the supply in the course of a transport business.
- The service must comprise the transport by that person.
- The transport must be in a qualifying vehicle, by road or railway, excluding a funicular railway.

- The passengers must be fare-paying passengers.
- The exemption does not apply if the supply would otherwise be zero-rated under section 11(2)(a).

For the purposes of ambulance services and whether these services meet the requirements of section 12(g), the key interpretive issue being considered in this BGR is the meaning and scope of 'fare-paying passengers'.

Exemptions and zero-ratings should be narrowly interpreted in a VAT system, with due regard to context, text, and purposive approach.

Fare-paying passenger

The ordinary meaning of a 'fare' is –

'money paid for a journey on public transport'.

The Oxford Dictionary defines 'public transport' as –

'buses, trains, and other forms of transport that are available to the public, charge set fares and run on fixed routes'.

The Road Transportation Act regulates the provision of public transport in South Africa and states the following:

'(1) In this Act, unless the context otherwise indicates—

'road transportation' means, subject to the provisions of subsection (2)—

- (a) the conveyance of persons or goods on a public road by means of a motor vehicle for reward;
- (b) the conveyance of persons or goods on a public road by means of a motor vehicle in the course of any industry or trade or business;

'road transportation service' means a transportation service operated over a public road, by means of a motor vehicle and for reward, under a public permit;

(2) For the purposes of this Act, the conveyance of persons or goods contemplated in the definition of 'road transportation' in subsection (1) shall be deemed not to include the following, namely—

- (e) the conveyance, by means of a motor vehicle, of a patient to any place where he is to receive medical treatment from a person authorized to administer such treatment in terms of any law relating to the medical profession, or from any place where he has received such treatment;'

It is evident from the above that the Road Transportation Act excludes transportation in an ambulance from its definition of 'road transportation'. This exclusion refers to the person being transported as a 'patient' and not as a 'passenger'. Furthermore, an ambulance service provider is required to apply to the provincial Minister of Health for registration as an ambulance service provider. The Department of Health, as opposed to the Department of Transport, is the regulator of ambulance services.

Emergency Medical Services

Under section 27 of the Constitution everyone has the right of access to health. The Department of Health is mandated to provide emergency medical services.

The Regulations relating to the standards for emergency medical services, which are published under the National Health Act, define in Regulation 1 an 'ambulance' to mean an appropriately equipped vehicle which is either airborne or land-based, and designed or adapted for the purpose of providing emergency care and the transportation of patients, which is owned by an Emergency Medical Service, registered as an ambulance in terms of the National Road Traffic Act⁶ staffed and equipped under the Emergency Medical Services Regulations, published in the Government Gazette of 1 December 2017.

Regulation 1 further defines 'Critically ill or injured' to mean a patient who has an actual or potentially life-threatening health problem which requires an immediate response.

Ambulance services are a vital component of the healthcare system, providing rapid response and transportation for individuals experiencing medical emergencies or traumatic injuries. The role of ambulance services can be summarised as follows:

- Emergency response and medical transport:

Ambulance services are equipped to respond quickly to emergency calls, often dispatched through emergency communication centres. Ambulances serve as mobile medical units, capable of transporting patients safely and efficiently to medical facilities.

- Basic life support (BLS):

Most ambulance services provide basic life support, staffed by emergency medical technicians equipped to handle a wide range of medical emergencies, including administering oxygen, bandaging wounds, and providing assistance with basic life support interventions.

- Advanced life support (ALS):

Some ambulance services offer advanced life support units, staffed by paramedics with additional training and certification to perform more advanced medical interventions, such as advanced airway management, cardiac monitoring, and administration of intravenous medications.

- Trauma care:

Ambulance services play a crucial role in the management of traumatic injuries, such as those sustained in motor vehicle accidents, falls, or acts of violence. Paramedics are trained to assess and stabilise trauma patients, providing life-saving interventions before transport to a trauma centre or hospital.

- Interfacility transfers:

Ambulance services facilitate the transfer of patients between healthcare facilities, ensuring continuity of care for individuals requiring specialised treatment or higher levels of medical intervention. This may include transfers between hospitals, nursing homes, or long-term care facilities.

- Specialised care:

Some ambulance services offer specialised care for specific patient populations, such as neonatal transport for premature infants or critical care transport for patients requiring intensive medical monitoring and interventions during transport.

In light of the above, it is submitted that the supply of an ambulance service does not constitute the supply of transporting fare-paying passengers but rather the supply of a specialised emergency service. The dominant service is the medical service of stabilising the patient while taking them to the nearest medical facility for trauma care, or from one treatment facility to another. Therefore, the provisions of section 12(g) do not apply to ambulance services.

It would be pretentious to separate the transport and medical elements in respect of ambulance services. While it is possible to distinguish between the two elements,

should either the transport or the medical service be supplied separately from the other, either service would no longer constitute an ‘ambulance service’.

Ruling

The transport of persons in an ambulance constitutes the transport of patients rather than fare-paying passengers, and as such, section 12(g) does not apply. The transport of patients in an ambulance is a taxable supply under section 7(1)(a) unless the supply of the ambulance services is provided across or outside the borders of South Africa and is therefore subject to the zero rate under section 11(2)(a).

9.2. *Apportionment methodology to be applied by a municipality – No. 4 (Issue 5)*

For the purposes of this ruling:

- ‘capital asset’ means the asset described in E3 in the Annexure;
- ‘extraordinary income’ means the income defined in E4 in the Annexure;
- ‘JIBAR’ means the Johannesburg Interbank Average Rate, and includes reference to ZARONIA where applicable (see N3);
- ‘mixed expenses’ means goods or services acquired partly for the purpose of consumption, use or supply in the course of making taxable supplies and partly for another intended use;
- ‘MFMA’ means the Municipal Finance Management Act 56 of 2003;
- ‘MSA’ means the Municipal Systems Act 32 of 2000;
- ‘municipality’ means any municipality falling within any of the categories of municipalities described in section 155 of the Constitution;

Purpose

This BGR prescribes the apportionment method that a municipality must use to determine the ratio contemplated in section 17(1) to calculate the amount of VAT that may be deducted as input tax on mixed expenses. This ruling does not extend to municipal entities or any other entity or organisation in which municipalities have invested in or have entered into agreements with.

Background

Municipalities receive several different types of income to finance their operations.

Some income streams result from supplies made by the municipality whilst others are received due to statutory requirements placed on, for instance, residents. The VAT treatment of each income stream must be evaluated separately, determined based on either special rules contained in the VAT Act (such as grants) or general VAT principles.

The VAT incurred on expenses to earn the aforementioned income may only be deducted to the extent that it constitutes 'input tax' as defined in section 1(1), more specifically, that the goods or services must be acquired for consumption, use, or supply in the course of making its taxable supplies. A municipality is therefore required to directly attribute the VAT on goods or services acquired to the intended purpose for which the goods or services will be consumed, used, or supplied.

The income streams, with subsequent input tax deductions based on direct attribution, can be categorised as follows for VAT purposes:

- Taxable supplies

Supplies subject to VAT at either the standard or zero rate and in relation to which the municipality can deduct input tax on expenses incurred. Examples include grants, municipal property rates, and the supply of water, or electricity.

- Exempt supplies

Supplies made that are not subject to VAT, and the municipality is also not entitled to deduct any VAT on expenses incurred for this purpose. Examples include the earning of interest, transportation of passengers in a bus, and rental of dwellings.

- Out-of-scope income streams

Income that does not result from any supplies made by the municipality. These income streams are not subject to VAT and no VAT may be deducted on expenses incurred to earn the income. Examples include dividends, statutory fines, and penalties.

It is accepted, however, that municipalities incur operating and capital expenses that cannot be directly attributed to a specific purpose, also referred to as mixed expenses. In these instances, municipalities are required to apportion the VAT incurred on such expenses to determine the extent to which such VAT relates to the making of taxable supplies, and which therefore may be deducted as input tax.

Discussion

Section 17(1) provides that the extent to which a municipality may deduct input tax in respect of mixed expenses is determined by means of a ratio determined by SARS in terms of a ruling contemplated in Chapter 7 of the TA Act (that is, a BGR) or a ruling under section 41B (that is, a VAT class ruling, or a VAT ruling).

Ruling

The formula set out below, being the default method of apportionment to be applied by all municipalities in the absence of an alternative method approved by SARS in terms of a ruling as described above, constitutes a BGR under section 89 of the TA Act.

Formula:

$$y = a / (a + b + c) \times 100$$

Where, having regard to the exclusions, adjustments and notes listed below:

- 'y' = the apportionment ratio or percentage;
- 'a' = the value of all taxable supplies (including deemed supplies) made during the period;
- 'b' = the value of all exempt supplies made during the period; and
- 'c' = the sum of any other amounts of income not included in 'a' or 'b' that was received or accrued during the period, whether in respect of a supply or not.

The following are excluded from the formula set out above:

E1	Foreign exchange differences that do not form part of any hedging activities
E2	Accounting entries, such as fair value adjustments, resulting in income reflected in the Annual Financial Statements ² to ensure compliance with relevant Regulatory Frameworks
E3	The supply of capital assets
E4	Extraordinary income
E5	The value of any goods or services supplied if input tax on those goods or services was specifically denied under section 17(2)
E6	Change-in-use adjustments under sections 18, 18A, 18C, and 18D

E7	Indemnity payments received as envisaged under section 8(8) to the extent that the indemnity payments relate to extraordinary income or capital assets
E8	The value of municipal bonds issued as a manner of raising funds
E9	Interest earned from: - the municipality's current account (meaning, the account used for day-to-day business operations); and - the SARS

Adjustments to the value of certain income streams included in the formula set out above:

A1	Interest, other than the interest excluded from the formula in E9, from any investments, including but not limited to savings, call, fixed deposit and money market accounts, must be included as follows: Interest received for the year $\times$ (prime rate – JIBAR)
A2	Foreign exchange differences resulting from hedging transactions must be included in the formula as follows: 3-year moving average of the gross trading margin (selling value – buying value)
A3	Dividends The amount to be included in the formula on dividends received from investment activities (including investments held in municipal entities, publicprivate partnerships and ad-hoc or minority investments) must be determined using the following formula: 3-year moving average of dividends received/accrued during the year $\times$ (prime rate – JIBAR)

General notes for using the formula set out above:

N1	The exclusions and adjustments to the formula are subject to the further explanations and discussions as outlined in the Annexure.
N2	'c' in the formula will typically include, but is not limited to, items such as statutory fines, penalties, dividends etc. However, traffic fines are only included in 'c' to the extent that payment has actually been received by the municipality.
N3	The prime rate to be used for all the adjustments listed above is the applicable prime rate at the end of the financial year. The JIBAR rate to be used for all adjustments listed above is the 12-month term rate quoted on the last day of the financial year. If more appropriate for the municipality, or should the JIBAR no longer be applicable, the ZARONIA may be used; the rate being the equivalent to the above stated JIBAR. For ease of reference, the reference to JIBAR in this document includes reference to the ZARONIA.
N4	The term 'value' excludes the VAT component of the supply.
N5	The apportionment ratio must be rounded off to two decimal places.
N6	If the formula yields an apportionment ratio of 95% or more, the full amount of VAT incurred on mixed expenses may be deducted [referred to as the de minimis rule and effected under proviso (i) to section 17(1)] as input tax.
N7	Municipalities using their previous year's turnover to determine the current year's apportionment ratio are required to make an adjustment (that is, the difference in the ratio when applying the current and previous year's turnover) within nine months after the end of the financial year, that is, the adjustment must be made in the VAT201 return submitted at the latest nine months after the financial year-end. For example, if the municipality's financial year end is June, the adjustment must be made in the VAT return due to be submitted by no later than March the following calendar year
N8	This formula may only be used in the following circumstances: If the method is fair and reasonable to the municipality's business activities, it is the municipality's responsibility to first determine this. If the method is not fair and reasonable, it is the municipality's further responsibility to approach SARS for an alternative method.³ SARS is unable to approve an alternative apportionment method

	retrospectively and will only approve the method from a prospective date or such other date falling within the limitations set out in proviso (iii) to section 17(1). • The municipality submits to VATRulings@sars.gov.za the following information on an annual basis, generally at the time the annual adjustment referred to in N7 is reflected in the VAT201 return: ○ The municipality's name ○ VAT registration number ○ Apportionment method and formula used ○ Apportionment ratio for the year. The first time that this formula is applied, the method and apportionment ratio for the past three (3) years must be submitted.
N9	A grant that is received partly for taxable purposes and partly for non-taxable purposes must be attributed accordingly. For example, if 70% of a grant is for subsidising the taxable supply of water and electricity to customers, and 30% is for subsidising the municipality's exempt public transport business, the grant amount will have to be split into its respective taxable and non-taxable components in accordance with section 10(22). In this example, 70% of the grant amount will be subject to VAT at the zero rate and will be included in 'a' in the formula. The remaining 30% of the grant will be applied for exempt purposes and will be included in 'b' in the formula.
N10	Notwithstanding any permission which may have been granted by SARS to allow a municipality to account for VAT on the payments basis under section 15(2)(a)(v), the amounts to be included in 'a', 'b', and 'c' in the formula for each tax period and for the annual adjustment contemplated in N7 are to be calculated on the invoice basis and in accordance with the principles set out in the Accounting Standards Board's Standard of Generally Recognised Accounting Practice (GRAP) on Revenue from Non-exchange Transactions (Taxes and Transfers), commonly referred to as GRAP 23. In terms of GRAP 23, income from government grants and subsidies is only recognised when the conditions (if any) are met. Grant income and other income from supplies (including deemed supplies and foreign exchange income) will therefore only be included in the formula to the extent that such funds are

	reflected in the statement of financial performance of the municipality for the financial year concerned.
N11	It is the responsibility of a municipality to determine whether the supplies made by it are as principal or agent: • If functions have been formally assigned to a national or provincial municipality, the municipality makes these supplies as principal. As a result, these supplies fall within the ambit of the 'enterprise' activities carried on by a municipality, provided the activity does not fall within the ambit of section 12 or is an out-of-scope activity. Any consideration charged, must be included in 'a' in the formula if it relates to a taxable supply, 'b' in the formula if it relates to an exempt supply, and 'c' if it relates to an out-of-scope activity. • If a municipality is appointed as agent by provincial government, only the amount charged for the taxable supply of such agency service to the provincial government must be included in 'a' in the formula. Any payment received as a result of the national or provincial government providing financial assistance to enable the municipality to carry out the formally assigned activity is regarded as a 'grant' as defined. The inclusion in the formula will depend on whether the grant relates to the enterprise activities of the municipality (to be included in 'a' in the formula) or otherwise (to be included in either 'b' or 'c' in the formula).
N12	The deduction of input tax in all cases (including on mixed expenses) is subject to the documentary and other requirements set out in sections 16(2), 16(3), 17, and 20 being met.

Period for which this ruling is valid

This BGR applies with effect from all financial years commencing on or after 1 July 2025, and will apply until it is withdrawn, amended or the relevant legislation is amended. The apportionment formula as set out in Issue 3 of this BGR (the Issue 3 formula) is withdrawn effective from the aforementioned date.

Transitional rules

The Issue 3 formula applies to all financial years preceding those financial years commencing on or after 1 July 2025. If an alternative apportionment method has been

approved for use by a municipality in a VAT ruling or VAT class ruling and the municipality regards the apportionment formula set out in this BGR to be fair and reasonable, that municipality can approach SARS to have the VAT ruling or VAT class ruling withdrawn from the financial year commencing on or after 1 July 2025. The request for withdrawal must be submitted to VATRulings@sars.gov.za before the end of the financial year commencing on or after 1 July 2025.

The provisional ratio to be applied for the financial year commencing on or after 1 July 2025 may be based on the actual financial results of the preceding financial year using the Issue 3 formula. The adjustment to be made in the tax period, which ends no later than nine months after the end of the financial year that commenced on or after 1 July 2025, must be based on the actual financial results of such financial year using the apportionment formula set out in this BGR. The provisional ratio to be applied for the financial year commencing on or after 1 July 2026 must be the apportionment ratio as calculated for the preceding year based on the formula as contained in this BGR. In the event that a municipality determines its apportionment on a monthly basis, the municipality must apply the apportionment formula set out in this BGR from the first month of its financial year commencing on or after 1 July 2025. No adjustment after year-end is required.

Annexure – Application of the exclusions and amendments to the apportionment formula as set out in the Ruling

E1	<u>Foreign exchange differences that do not form part of any hedging activities</u> Municipalities may trade with customers or suppliers in currencies other than the South African Rand (ZAR). Due to the differing currencies used by the relevant parties for purposes of accounting records and financial transacting, foreign exchange differences must be accounted for to ensure that the accounting records of a municipality reflect the correct value of each transaction entered into. In these circumstances, the foreign exchange difference that is reflected is merely an accounting entry (refer also to the discussion in E2 below) to properly reflect the sale transaction and does not arise of any further activity by the municipality. As such, these foreign exchange differences must be excluded from the apportionment formula.
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	The exclusion above is limited to a foreign exchange difference that is a natural consequence of a transaction and requires no additional effort from a municipality. Should a municipality decide to hedge its risk against foreign currency exposure, such decision would require the municipality to enter into another transaction and apply resources in developing the most effective hedging strategy whilst continuously developing and ensuring proper implementation of said strategy. Hedging foreign exchange transactions are used to address various risks identified (such as the risk of future or short-term cash flows, or the risk of income) and could take many forms, including forward contracts or options. In order to ensure that the use of resources and all transactions are properly reflected in the apportionment formula, any foreign exchange differences that result from a hedging transaction must be included in the formula. If a foreign exchange is hedged, the profit or loss on the underlying foreign exchange may not be set off against the profit or loss on the hedge as these are separate and distinct transactions from a VAT perspective, as explained above.
E2	<u>Accounting entries, such as fair value adjustments, resulting in income reflected in the AFS to ensure compliance with relevant Regulatory Frameworks</u> The GRAP requires certain value adjustments to be made in the accounting records of a person to ensure the true economic value of assets or liabilities is reflected in that person's AFS. From a VAT apportionment perspective, the value adjustments made are not income intended to be included in the formula – no actual income will be received by the municipality as the adjustment is merely a revaluation of an asset or liability at a specific point in time and not consideration for any activity as a result of a separate supply of goods or services. For this reason, any value adjustment made for GRAP purposes is excluded from the apportionment formula. Examples of accounting entries are: • revaluation of a transaction in foreign currency (also refer to E1 above, (excluding hedges); and

	• fair value adjustment of fixed and/or intangible assets.
E3	<u>The supply of a capital asset</u> The VAT incurred on capital expenditure is generally deducted as a once-off at the time when a municipality acquires the said asset (if a municipality is registered on a payments basis, deduction of the asset is made to the extent of payment). Although the asset is used throughout the municipality's operations, it is not one of the resources that, on an on-going basis, and forms part of the pool of expenses that are subject to the apportionment ratio. It is also accepted that municipalities are not in the business of selling off their capital assets on an on-going basis, as that would be un-business like and would severely influence the ability of the municipality to continue its operations. Therefore, the sale of capital assets is generally an extraordinary event that is not expected to occur continuously. Having regard to the extraordinary nature of the supply (such as a sale) of capital assets together with the possible substantial values attached to them, the inclusion of the income earned on the sale of capital assets in the apportionment formula would distort the apportionment ratio in that it would not fairly reflect the use of those resources to which the apportionment ratio is applied. It is worth highlighting that, due to the significant costs involved in acquiring capital assets, it may be necessary for municipalities to determine whether an alternative apportionment method is required for specific capital assets. The municipality must evaluate the specific circumstances and intended use of the capital asset to determine the most appropriate method for the specific asset and, if need be, apply for an alternative method. What is a capital asset? In short, a capital asset is an asset that enables a municipality to operate but is not the operation itself. Consider a municipality selling office furniture. To this municipality, the furniture enables the municipality to conduct its operations as it is not the mandate or purpose of a municipality to buy and sell office furniture for a profit. To the municipality, the office equipment is a capital asset.

	The circumstances of each case must be evaluated to determine the nature of a specific asset. The most important factor to consider is the intention of the municipality when acquiring and subsequently using the asset. As intention is a very subjective test, various factors must be used to determine and substantiate that intention. Some factors that may assist in determining whether an asset is capital in nature, is as follows: • Trading stock or consumables are not capital assets. • The asset is held with a certain degree of permanency. • Linked to the above, the asset is held for a lengthy period of time. Although this test is not conclusive on its own, it could be convincing when deliberated with other factors. • The type of asset is not commonly bought and sold by the municipality on a regular basis. • An asset which stays mostly intact, and which is rather used to produce wealth. The distinction between trading income and income of a capital nature is not a new concept in tax and has been the subject of various disputes and court cases over the years. Chapter 2 of the Comprehensive Guide to CGT provides in-depth examples and discussions on how to distinguish between income and capital. These principles can also be applied as guidance in determining whether an asset is capital in nature for VAT apportionment purposes.
E4	<u>Extraordinary income</u> Extraordinary income is non-recurring income received due to exceptional circumstances that are unlikely to be repeated. From a VAT apportionment perspective, extraordinary income would have a significant impact on the quantum of income received by a municipality without affecting the normal expenses incurred year-on-year. The inclusion of such income in the apportionment formula would therefore severely distort the apportionment ratio as there would be a material fluctuation from one year to another whilst the mixed expenses, and the use these mixed expenses in the municipality's operation, would have remained unchanged.

	Based on the above, extraordinary income should be excluded from the apportionment formula. In order to give effect to this, 'extraordinary income' is defined for VAT apportionment purposes as non-recurring income received due to exceptional circumstances that are unlikely to be repeated. An example of extraordinary income is dividends received as a result of a liquidation of a municipal entity (see also the discussion on dividends in A2 below). Examples of income that are NOT regarded as being extraordinary in the hands of a municipality: • Grant income • Dividends received from investments not as a result of the liquidation of a municipal entity • Development charge. A development charge is a one-off charge levied by a municipality on the landowner as a condition for approving a land development application. Should a municipality receive a development charge during a financial year, it needs to approach SARS for a VAT ruling to determine the rate of inclusion in the formula for that year. The application must comply with the time limitations set out in the proviso to section 17(1), that is, the application must be submitted in the financial year that the development charge was received.
E5	<u>The value of any goods or services supplied if input tax on those goods or services was specifically denied under section 17(2)</u> A municipality is prohibited from deducting input tax on certain items listed in section 17(2). These include, amongst others: • goods or services acquired for purposes of entertainment; and • the acquisition of a 'motor car' as defined in section 1(1). In both instances above, municipalities would generally not supply entertainment or a 'motor car' as defined (and are therefore allowed the deduction), and would therefore not normally buy and sell the items on a regular basis. The goods or services purchased would be of a capital nature and the subsequent supply of these goods or services would automatically be excluded from the apportionment formula as a result of

	their capital nature. In addition, it would be inequitable to include the income on the sale of such goods or services (or any indemnity payment received from such sale) if the municipality was originally disallowed (by legislation) any input tax deduction in relation to the sale.
E6	<u>Change-in-use adjustments under sections 18, 18A, 18C and 18D</u> A change-in-use adjustment adjusts the input tax deducted to reflect the actual use of goods or services as opposed to their intended use. Change-in-use adjustments should be excluded from the apportionment formula.
E7	<u>Indemnity payments received as envisaged under section 8(8) to the extent that the indemnity payments relate to extraordinary income or capital assets</u> Subject to certain exceptions, a municipality is deemed to make a supply of services upon receipt of an indemnity payment (or indemnification of a loss paid to a third party) from an insurer.⁵ Section 8(8) further deems that supply to be made in the furtherance of the municipality's enterprise. Any indemnity payment received as a result of a capital asset (such as an office building), or extraordinary income should not be included in the formula in keeping with the exclusions in E3 and E4.
E8	<u>The value of municipal bonds issued as a manner of raising funds</u> One of the methods of raising funds available to a municipality is to issue municipal bonds. Although this is not a very common method for municipalities to raise long-term debt, certain municipalities have opted in recent years to issue municipal bonds for special projects, such as the acquisition of capital assets. Under section 2, the issuance of these instruments is deemed to be financial services, being an exempt supply under section 12(a). As this is regarded as being extraordinary, the income derived from the issuing of municipal bonds should not be included in the apportionment formula.
E9	<u>Interest</u> • Earned from the municipality's current account(s) (meaning, the account used for day-to-day business operations)

	It would be hard for any municipality to function without a bank account used every day to both receive and make payments. The municipality's intention when opening a transactional bank account is therefore never to earn the interest thereon, but rather to facilitate transactions within its business. The income in this account is generally as a result of payments received from third parties or customers as a result of trading activities and not investment activities by the municipality. As the interest rates on a transactional account is very low, businesses rarely hold money in a transactional bank account to earn interest. A municipality would rather transfer any excess funds to a call, fixed deposit, money market or similar account where the interest rates are much higher. The business decision to effect such transfer reflects a municipality's purpose of earning investment income in the form of interest. It is for this reason that any interest earned from a call or other investment account is included in the apportionment formula (refer also to A1). • SARS Interest.
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Adjustments to the value of certain income streams included in the formula set out above:

A1	<u>Interest, other than the interest excluded from the formula in E9</u> Investment activities are more often than not conducted by a municipality on a continuous basis, even though it might not be a municipality's main purpose. This often happens when a grant is received by a municipality for activities to be conducted over a certain period. The excess funds not to be used immediately are held in a savings account for later use, whilst also maximising the investment benefit from these excess funds. To ensure that the purpose for which the VAT incurred on goods or services is fairly reflected in the apportionment formula, one must have cognisance of the wholistic purpose of the entity, and all activities associated in achieving that purpose. For this reason, interest must be included in the formula.
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	It is however accepted that interest received is dependent on external factors, such as external interest rates. These external factors can result in material fluctuations in interest received from year to year even though a municipality's expenses in earning that interest have not significantly changed. For this reason, the interest to be included in the formula must be determined using the guidelines below: • Investment interest All investment activities of a municipality, whether investing in cash, equities or other instruments, must be appropriately reflected in the apportionment formula. As previously mentioned, it is acknowledged that the gross interest received is not reflective of how a municipality applies its resources. For this reason, any interest received from investments not otherwise specifically mentioned in the formula, must be included as follows: Interest received for the year × (prime rate – JIBAR) The interest received includes interest on any cash investment placed by a municipality, such as a savings, cash management or fixed deposit account. • Debtor interest Any municipality that has outstanding debtor accounts in their accounting records, have included the full value of the original supply in their apportionment formula. In order to ensure equity in the manner of which these income streams are included in the formula, the gross interest levied on the debtors' accounts must be included in the formula. This extends further to any 'penalty interest' charged to a customer that does not fall under section 2(1)(f), to be included in 'c' of the formula.
A2	<u>Foreign exchange difference resulting from hedging</u> Hedging is in essence a form of trading in financial assets, the activity which should be fairly reflected in the formula. 'Gross trading margin' refers to the gross profit of buying and selling financial assets, being the selling value less the buying value of the said assets, as recorded in the accounting records as being realised (if the

	municipality is unable to determine the realised gross trading margin, the values may include both realised and unrealised profit or loss for the year). No other expenses may be deducted from the said margin. Furthermore, any income received on the financial assets while held in trading stock (such as dividends or interest) must be regarded as a separate transaction and be included in the apportionment formula based on the principles set out in A1 and A3. The objective of a vendor that trades in financial assets is to make the highest profit possible. Due to the fact that there is a continuous sale of financial assets, and the value of those supplies will be significant in comparison to the activities of trading, the purpose of the vendor will not be fairly reflected should the gross selling amount of all the trades be included in the formula. For this reason, the gross trading margin must be included in the formula. Furthermore, the value of financial assets is significantly influenced by external factors such as market value, economics etc. In order to address a possible significant fluctuation in the value of the gross trading profit from year to year (which could adversely affect the apportionment ratio of a vendor), a 3-year moving average of the gross trading margin must be included in the formula. This means that the gross trading margin for the current year and two previous years must be calculated individually and then averaged to determine the value to be included in the formula. Negative gross trading margin Should a municipality's gross trading margin for any of the 3 years be a loss, the absolute value of that loss must be included in the calculation of the 3-year moving average.
A3	<u>Dividends</u> The MSA allows municipalities to provide services through other entities, referred to as municipal entities. These entities are generally owned by one or more municipality. Furthermore, to ensure financial security, municipalities may also invest in various instruments both for the yield and financial growth associated with certain markets. Dividends, including dividends in specie, are the yield paid on investments in equity and similar instruments. In keeping with the principle of reflecting all investment activities in the formula as set out in A1, dividends received must be

included in the formula to reflect the investment activity in said instruments (even though dividends are not consideration for any supply made by a municipality).

The investment activity associated with the holding of investments (such as shareholdings held through an asset manager), must be fairly reflected in the formula. Having regard to the fact that an entity declares and pays dividends based on various requirements and factors (such as a group's dividend policy or economic and market conditions), it is accepted that the quantum of dividends does not fairly reflect the investment activity of holding the investments as capital assets. In addition, significant fluctuations may be experienced in the value of dividends declared from year to year.

In order to appropriately reflect a municipality's investment activity in the formula, the value of dividends to be included in the formula must be determined as follows:

3-year moving average of dividends received $\times$ (prime rate – JIBAR)

- The 3-year moving average is determined by calculating the average of dividends received during the current financial year and two immediately preceding financial years.
- If a municipality does not receive dividends during the current financial year, a 3-year moving average of the 3 preceding years may be used as proxy.
- If a municipality receives no dividends for at least 2 out of the 3 years, a 5-year moving average must be used instead of the 3-year moving average where dividends were received for at least 2 of the 5 years.
- The moving average to be applied to (prime rate – JIBAR), must be determined as an average limited to the years that the municipality has held investments, limited to 3 (or 5) years. For example, if the municipality has made its first investment in this financial year, the average to be applied is the amount of dividends received divided by 1.
- If a municipality has not received dividends for 2 out of the 5 years as required above, the municipality must approach SARS for an alternative manner of determining a value to be included in the

	formula that appropriately reflects its investment activities. The application must comply with the time limitations set out in the proviso to section 17(1).
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10. DRAFT BINDING GENERAL RULING

10.1. Filing date of a return in case of a company's change in financial year and year of assessment

For the purposes of this ruling:

- 'CIPC' means the Companies and Intellectual Property Commission;
- 'mineral royalties' means a royalty imposed under the Mineral and Petroleum Resources Royalty Act 28 of 2008 and administered under the MPRRA Act;
- 'MPRRA Act' means the Mineral and Petroleum Resources Royalty (Administration) Act 29 of 2008;

The guide and INs referred to in this BGR are available on the SARS website at www.sars.gov.za. Unless indicated otherwise, the latest version of these documents should be consulted.

Purpose

This BGR provides clarity on the date for filing various returns when a company changes its financial year for purposes of the Companies Act and when approval of a change in financial year and corresponding year of assessment is granted for IT purposes.

Background

Companies may change their financial year for various practical, commercial, or regulatory reasons. The reasons may include, but are not limited to, aligning the financial year-end with a parent company or group, business or operational cycle alignment, accounting and audit practicality, or a change in ownership or restructuring.

The change in financial year must first be made for Companies Act purposes. SARS may then approve a corresponding change in the financial year for IT purposes.

Section 25(1) of the TAA provides that a person required to submit a return, must do so by the date specified in the tax Act, or in its absence, by the date specified by SARS in the public notice requiring the submission.

Uncertainty exists regarding the periods for the submission of returns and payment dates for IT, provisional tax, mineral royalties, and VAT subsequent to a change in financial year and year of assessment.

Application of the law

The term 'year of assessment' as defined in section 1(1) provides that a company's year of assessment is its financial year. Under section 5(1)(d), a company shall pay IT annually on the taxable income received by, accrued to, or in favour of it during every financial year.

The term 'financial year' is defined in section 1(1). In the case of:

- a newly incorporated company:
 - the financial year is the period (whether of 12 months or not) commencing on the date of incorporation and ending on the last day of February immediately succeeding that date, or on any other date approved by SARS, having regard to the circumstances of the case; and
- any other company
 - any period subsequent to the period referred to above (whether of 12 months or not) commencing immediately after the last day of the immediately preceding financial year of that company and ending upon the first anniversary of such last day, or upon such other date as SARS may approve, having regard to the circumstances of the case.

The definition of 'financial year' under section 1(1), refers to the period as 'whether of 12 months or not'. Therefore, a company's year of assessment may be more or less than 12 months.

Section 27(5) of the Companies Act states that the 'financial year of the company is its annual accounting period.'

The Companies Act does not specify a minimum period for a financial year. A company incorporated on 1 February which adopts a financial year-end of the last day of February would thus have a first financial year of one month. However, section 27 of the Companies Act provides that a company's financial year may not exceed 15 months (this applies to its first financial year and any subsequent financial year which is longer than 12 months as a result of a change in financial year).

Section 1(1) defines 'year of assessment' as:

'any year or other period in respect of which any tax or duty leviable under this Act is chargeable, and any reference in this Act to any year of assessment ending the last or the twenty-eighth or the twenty ninth day of February shall, unless the context otherwise indicates, in the case of a company or a portfolio of a collective investment scheme in securities be construed as a reference to any financial year of that company or portfolio ending during the calendar year in question.'

For a company, the year of assessment is, by definition, the same as the financial year for IT purposes.

A change in financial year and year of assessment will therefore impact the submission dates for the company's IT return, provisional tax payments and returns, and mineral royalties estimate payments and returns.

IT

Section 66(13)(b), which provides for the submission of a tax return for IT purposes for a company, states:

'(13) The return for normal tax to be made by any person in respect of any year of assessment shall be a return—

(b) in the case of a company, for the whole period of the relevant financial year of that company comprising the year of assessment: Provided that where a company ceases to be a resident, a return shall be made for the period commencing on the first day of that financial year and ending on the day preceding the date that the company ceases to be a resident.'

(Emphasis added)

Accordingly, following a change in financial year and year of assessment, the company must determine whether the IT return should cover a shorter period or an extended period. SARS' IT system does not permit the submission of more than one IT return for a single year of assessment, for example, a company may not submit two IT returns for the 2026 year of assessment. If a change in the financial year results in two accounting periods falling into what would otherwise be one year of assessment, these periods must be combined into a single return, leading to either an extended or a shortened year of assessment, depending on the nature of the change.

A shortened year of assessment typically occurs when a company brings its financial year-end forward, for example, from 30 June to 28 February. An extended (combined) year of assessment arises when a company defers its financial year-end, for example, from 28 February to 30 June.

Provisional tax

Any company, except those excluded under the definition 'provisional taxpayer' in paragraph 1, is a provisional taxpayer. Under paragraph 23(1), a company must make its first provisional tax payment within six months of the commencement of its year of assessment, and the second provisional tax payment no later than the last day of its year of assessment. An optional additional payment (third payment) can be made within seven months of the end of the company's year of assessment for companies with a financial year ending on the last day of February, or in any other case, within six months of the end of the year of assessment. This third payment will reduce any interest liability that may become payable for the relevant year of assessment.

If the year of assessment is six months or less, a taxpayer is not required to submit a first provisional tax return.

Provisional tax is an advance payment of normal tax for a specific year of assessment. Since the end of a company's year of assessment is determined by the approved financial year-end, the provisional tax cycle realigns with the new year of assessment. The 'six-month' and 'year-end' provisional payments are thus measured from the start of the revised year of assessment, not the previous year of assessment.

The third provisional or voluntary payment remains available and is calculated with reference to the new year of assessment.

In the context of provisional tax, it is particularly important to note that if:

- a day specified by SARS or in the IT Act for payment, submission, or other action; or
- the last day of a period within which payment, submission, or other action under the IT Act must be made,

falls on a Saturday, Sunday, or public holiday, the action must be completed no later than the last business day before that Saturday, Sunday, or public holiday.

Mineral and Petroleum Resources Royalty (Administration)

Section 1 of the MPRRA Act defines 'financial year' as 'a financial year as defined in section 1 of the IT Act'. The return cycle for mineral royalties is therefore aligned with the company's IT year of assessment and is not independently determined. Accordingly, any approved change to a company's financial year-end automatically affects the year of assessment for mineral royalties and, in turn, the due dates for mineral royalties estimates, payments, and the annual MPR3 return. This means there is no separate or special cycle for mineral royalties, and their administration; rather it mirrors the IT cycle.

The financial year-end for mineral royalties is updated automatically, and no separate approval is required for the mineral royalties system. If a year of assessment for mineral royalties has already been assessed, the change applies only prospectively from the following year of assessment.

Section 5(1) of the MPRRA Act provides that, for a year of assessment, a company must submit an estimated return and make a first payment no later than six months after the first day of that year of assessment. Section 5(2) of the MPRRA Act provides that, for a year of assessment, a company must submit an estimated return and make a second payment by the last day of that year of assessment.

Section 6(2) of the MPRRA Act provides that if the royalty payable for a year of assessment exceeds the sum of the first and second payments made, the registered person must submit a return of that excess and pay it no later than six months after the last day of that year of assessment.

Section 6(3) of the MPRRA Act provides that a company must submit a final return (MPR3) for the royalty payable for a year of assessment no later than 12 months after the last day of that year of assessment.

VAT

A vendor is required, under section 28 of the VAT Act, to submit VAT201 returns and account for VAT according to the tax periods allocated to the vendor by SARS.

A change in the company's financial year does not alter the tax periods allocated to a vendor and will generally have no impact on the due date for submitting VAT201 returns. Accordingly, if a company changes its financial year-end, the due date for submitting VAT201 returns must continue to be

calculated with reference to the end of the relevant tax period. This principle is particularly relevant to Category E 12 vendors whose tax period is aligned with the vendor's year of assessment. If SARS approves a change in the company's financial year-end and corresponding year of assessment, the Category E tax period will similarly adjust to align with the revised year of assessment. In such instances, the vendor may have a tax period of a shorter or longer duration, depending on the effective date of the approved change. The VAT201 return for such period must be submitted on the applicable due date prescribed under section 28 of the VAT Act, calculated from the end of the adjusted Category E tax period, that is, the new financial year-end.

Ruling

Section 25(1) of the TA Act provides that a person required to submit a return must do so by the date specified in the tax Act, or in its absence, by the date specified by SARS in the public notice requiring the submission.

After a change in the end of the financial year and year of assessment, the company must determine if the IT return must be for a shorter or an extended period, as the SARS IT system does not allow for the submission of more than one IT return for a year of assessment.

Since a company's year of assessment is determined by the approved financial year-end, the provisional tax cycle realigns to the new year of assessment. The 'six-month' and 'year-end' provisional payments are thus measured from the start of the revised year of assessment, not the previous year of assessment.

The return cycle for mineral royalties is aligned with the company's IT year of assessment and is not independently determined. Accordingly, any approved change to a company's financial year-end automatically affects the year of assessment for mineral royalties and, in turn, the due dates for royalty estimates, payments, and the annual MPR3 return.

A change in the financial year of a company does not have any impact on its VAT liability for any tax period.

This ruling constitutes a BGR issued under section 89 of the TA Act.

11. GUIDES

11.1. *Guide to the ETI – Issue 5*

The ETI Act was introduced to provide an incentive in order to encourage employment creation. The Explanatory Memorandum on the Employment Tax Incentive Bill, 2013, states that:

‘In response to the high rate of youth unemployment, Government wishes to implement an incentive mainly aimed at encouraging employers to hire young and less experienced work seekers. ... Government’s aim is that the incentive should assist in the generation of sustainable employment opportunities that enjoy protection under labour law legislation.’

The ETI is an incentive that may be claimed by eligible employers and is aimed at encouraging such employers to employ young employees between the ages of 18 and 29, and employees of any age in SEZs and in any industry identified by the Minister by notice in the Government Gazette. The ETI commenced on 1 January 2014 and will end on 28 February 2029. The purpose of the ETI is to assist in the generation of sustainable employment opportunities and is not intended to be an incentive for training unskilled workers to make them more employable.

Payment of the incentive is effected by eligible employers being able to reduce the PAYE due by them by the amount of the ETI that they may claim – provided of course they meet the requirements of the ETI Act. The ETI is administered by SARS through the PAYE system that is deducted and withheld and accounted for to SARS (usually monthly) via PAYE system. During this period an eligible employer may claim the ETI for a maximum of 24 months per qualifying employee.

The ETI Act has since promulgation been amended on a number of occasions. One such amendment is the introduction of section 7A with retrospective effect to enable the Minister, by way of an announcement in the national annual budget, to alter the:

- amount in respect of the minimum wage requirement;
- penalty imposed in the case an employee is displaced;
- maximum monthly remuneration; and
- amount of ETI that an eligible employer may claim in respect of a qualifying employee

with effect from a date or dates mentioned in that announcement. These amendments will apply for a period of 12 months provided Parliament pass the necessary legislation giving effect to that announcement within that period of 12 months.

In order to curb apparent abuse of the ETI, amendments to the definition of ‘employee’, ‘monthly remuneration’ and section 6 (qualifying employees) were introduced by the Taxation Laws Amendment Act 20 of 2021. These amendments are effective from 1 March 2022 and applicable in respect of years of assessment commencing on or after that date. Subsequent to these amendments, a penalty was introduced under section 5(3) to curb any abuse of the ETI specifically aimed at the monthly remuneration paid. This provision came into operation on 1 March 2025 and applies in respect of years of assessment commencing on or after that date.

12. DRAFT GUIDES

12.1. Draft Guide to the Taxation of Crypto Assets

This guide provides guidance on some of the IT and CGT consequences that may arise for persons transacting in or holding crypto assets. The guidance is based on currently available information on crypto assets. Given the constant innovation and development in this technology, the principles considered in this guide are designed to be foundational, rather than overly specific. It is therefore incumbent upon the reader to always consider the detailed characteristics of the particular crypto asset and the particular transaction in question. These characteristics could fundamentally impact the IT (including CGT) consequences.

This guide considers selected provisions of the IT Act that are particularly relevant to crypto assets. It does not cover all the sections applicable to crypto assets and persons dealing with crypto assets, which, while not specifically referring to crypto assets or persons dealing in them, are nevertheless applicable.

The IT system in South Africa is residence-based. This means that South African residents are, but for certain exclusions, subject to IT on their worldwide income. This includes income derived both within and outside South Africa including income and capital gains from crypto assets listed on foreign trade exchanges.

Non-residents are potentially liable for IT if South Africa is the source of proceeds which are of a revenue nature, or if the disposed asset meets the requirements of paragraph 2(1)(b)(i).

This guide focuses on the position of a South African tax resident taxpayer. However, the same principles apply to non-residents if the source- or paragraph 2 requirements are met.

13. GLOSSARY OF TERMS

For purposes of this update the terms listed hereunder bear the following meanings:

BGR – Binding General Ruling

CC – Constitutional Court

C&E Act – Customs and Excise Act, No. 91 of 1964 (as amended)

CGT – Capital Gains Tax

CTI – Corporate Income Tax

C:SARS – Commissioner for South African Revenue Service

DTA – Double Taxation Agreement

DWT – Dividend Withholding Tax

ETI – Employment Tax Incentive

ETI Act – Employment Tax Incentive Act, No. 26 of 2013 (as amended)

GAAR – General Anti-Avoidance Rule

IN – Interpretation Note

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)

PAYE – Employees' Tax

Rules – the rules promulgated in terms of section 103 of the TA Act

SARS – South African Revenue Service

SCA – Supreme Court of Appeal

STC – Secondary Tax on Companies

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

14. 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.
