TAX UPDATE

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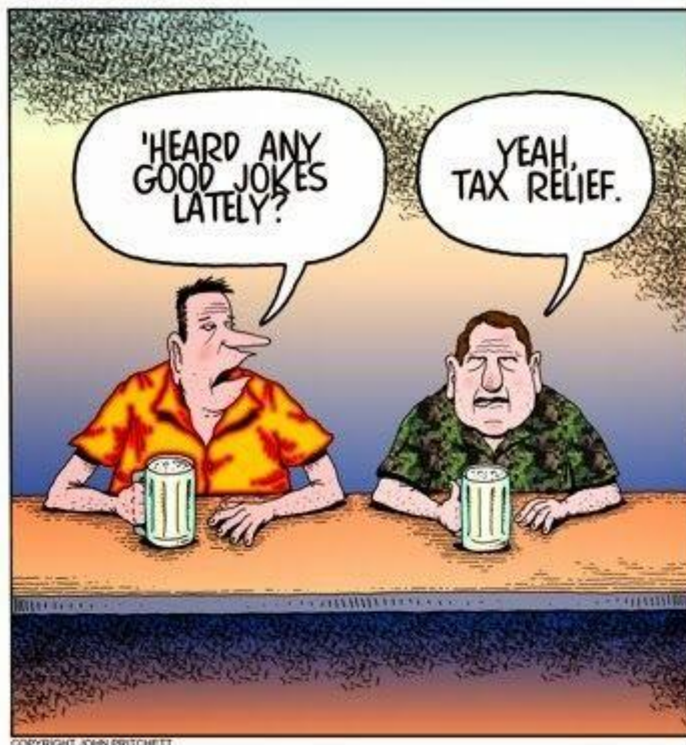
1. INTRODUCTION

The purpose of this update is to summarise developments that occurred during the fourth quarter of 2017, specifically in relation to Income Tax and VAT. Johan Kotze, a Tax Executive at Shepstone & Wylie Attorneys, has compiled this summary.

The aim of this summary is for clients, colleagues and friends alike to be exposed to the latest developments and to consider areas that may be applicable to their circumstances. The reader is invited to contact Johan Kotze to discuss their specific concerns and, for that matter, any other tax concerns.



Enjoy reading on!

2. CASE LAW

2.1. Nondabula v C:SARS

Nondabula was a businessman and sole proprietor of a fuel service station and it was in respect of that business that he was liable to pay taxes to the SARS in these proceedings.

SARS had issued various income tax assessments against Nondabula for the years 2014 and 2015 and the amounts assessed were paid timeously by Nondabula and up to that point the relationship between Nondabula and SARS appeared to have been cordial with assessments being issued and the assessed taxed debt having been paid on time.

The problem which resulted in these proceedings started when SARS, acting within his power and authority, had issued another assessment in terms of which Nondabula allegedly owed SARS a further amount of R1 422 637,83.

Nondabula became aware of the aforementioned debt for the first time by means of a letter dated 29 September 2016 and this notification demanded that the said amount be paid within ten days failing which further action would be taken. This notification had been preceded by a statement of account issued by SARS which had reflected a balance brought forward in the sum of R1 404 517,97, but did not inform Nondabula as to how the amount due had been arrived at and, in any event, how this figure or any of the other figures said to be owing were arrived at did not seem to have been explained to Nondabula.

Nondabula had challenged SARS about his ignorance of how the aforementioned amount had been arrived at and had called on SARS to provide details regarding the additional assessment issued for the 2014 tax year and how the amount was arrived at.

In the affidavits before the court there was no attempt by SARS to give a breakdown of how the amounts in issue or any of them had been arrived at.

Nondabula had objected to the additional assessment through his accountants on 4 April 2016 and SARS had responded to this objection by objecting to the

objection on the basis that Nondabula's objection did not comply with the rules.

On 11 May 2016 SARS issued a letter of demand for payment of the assessed taxes.

Nondabula's accountants wrote another letter to SARS in which further documentation was submitted and a request was made for SARS to reconsider the assessment and note the objection. All these objections were not responded to and even where there was a response it was not a substantive response but an objection to the Nondabula's objection.

Communication was exchanged between the parties but at no stage did the SARS attempt to justify the amount claimed in the additional assessment through some form of a breakdown and SARS had contented himself with raising his own technical objection to the Nondabula's objections.

Nondabula, on 29 September 2016, had received a final demand advising that unless he paid R1 422 637,83 within ten days, further action would be taken.

SARS thereafter issued a notice in terms of section 179 of the Tax Administration Act requiring the Nondabulas bankers to freeze his account and make payment of the assessed taxes to SARS.

Thereby SARS had issued a Third Party notice under section 179(1) of the Act directing that the party had to pay whatever funds it held on behalf of Nondabula to SARS in satisfaction of Nondabula's outstanding tax debt.

Nondabula then applied for an interdict in the Eastern Cape High Court preventing SARS from invoking the provisions of section 179 of the Tax Administration Act pending the final determination of the Nondabula's objection to the additional assessment of his income tax and he further sought an order withdrawing a Third Party Notice that had been issued in terms of the Act and other ancillary relief.

The issues before the court were whether SARS had complied with the requirements of section 96 of the Act and, in particular whether he had provided a statement of the grounds for the assessment and consequently SARS could be interdicted from invoking the provisions of section 179(1) of the Act in the circumstances outlined.

Judge Jolwana held the following:

(i) That SARS was a creature of statute and as such it must operate within the four corners of the statutory provisions which empower it. SARS is governed by and operates in terms of the Act and it therefore cannot do anything not specifically provided for in the Act or some other legislation nor can it conduct itself contrary to the provisions of the Act.

(ii) That SARS was required to comply with section 96 of the Act, i.e. comply with the requirements for a notice of assessment, but did not disclose in the notice of an additional assessment to Nondabula or in any communication with Nondabula, the legal basis on which the additional assessment was made and, most importantly, a statement of the grounds for the assessment as required in terms of section 96(2)(*a*) was not given to the person assessed, i.e. Nondabula.

(iii) That it was also clear that section 96 was not complied with in certain other respects: For instance, the date for paying the amount assessed was not reflected as well as the summary of the procedures for lodging an objection to the assessment as required in terms of section 96(1) of the Act. Notably, no *ITA34* was issued to Nondabula reflecting the additional assessment but the reason why section 96 was not complied with has not been explained by SARS nor has he claimed to have complied with it.

(iv) That a proper construction of the Tax Administration Act revealed that the trigger for the additional assessment was provided for in section 95 and this led to the conclusion provided for in section 92 and at both those instances there was no interaction with the person assessed. Once the stage provided for in section 92 is reached then SARS is required to comply with the provisions of section 96 by issuing a notice of assessment with all the information required and provided for in section 96. Moreover, the whole of section 96 is couched in peremptory terms, meaning that SARS had no discretion when it came to section 96 and, in any event, it was not SARS' case that it did have a legal basis for not complying with section 96.

(iv) That, having failed to comply with section 96, SARS jumped to the provisions of section 179(1) and issued the impugned Third Party Notice and thus effectively closing down Nondabula's business. This was not only unlawful but a complete disregard of the doctrine of legality which is a requirement of the rule of law in a constitutional democracy.

(v) That SARS was an organ of state and section 239 of the Constitution defined an organ of state and was obviously exercising a public power or performing a public function in terms of the Act and as part of the public administration must be accountable and the only way of ensuring its accountability was by ensuring that it complied with the Act.

(vi) That there was no doubt that SARS had dealt with Nondabula in an arbitrary manner contrary not only to the Act but most importantly the values enshrined in the Constitution were not observed by Nondabula.

(vii) That the least that is expected of Nondabula is to comply with its own legislation and, most importantly, promote the values of our Constitution in the exercise of its public power. This Nondabula failed to do. In failing to provide Nondabula with all the information prescribed in terms of section 96 which Nondabula was obliged to provide Nondabula, it acted unlawfully and unconstitutionally.

Rule Nisi confirmed and Nondabula was ordered to pay the costs.

2.2. ITC 1900

The taxpayer had entered into 25 transactions for the sale of certain stands of immovable property sold by it in the course of its trade.

The purchase prices were payable in each of the aforementioned transactions against transfer of the property into the purchasers' names and the right to payment thus vested in the taxpayer, and had a value in its hands, as soon as it was in a position to be able to tender transfer to the purchasers in terms of the agreements of sale.

In some cases the agreements in question included a suspensive condition in respect of the obtaining by the purchaser of mortgage bond finance and, obviously, an entitlement to payment in those matters could not vest in the taxpayer before such conditions had been fulfilled.

Moreover, various statutory requirements had to be satisfied after the deeds of alienation had been entered into before the taxpayer was legally able to give transfer and in all cases the conveyancing attorneys appointed by the taxpayer were legally able to deal with the funds paid by the purchasers in terms of the agreements only after they had been satisfied that there had been compliance with the requirements of the Financial Intelligence Centre Act 38 of 2001 ('FICA').

The purchase price due in terms of the contracts had to be paid to the conveyancing attorneys or adequately secured by guarantees provided by a financial institution, or by way of a cash payment by the purchaser, before lodgement of the transfer documents at the deeds office.

As the land units in question were first transfers out of subdivided land, the taxpayer was able to effect transfer of them to a purchaser only after the requirements of section 31 of the Land Use Planning Ordinance 15 of 1985 (Cape) ('LUPO') had been complied with.

Furthermore, transfer could not be effected until the local authority had given rates clearance in terms of section 118 of the Local Government: Municipal Systems Act 32 of 2000 ('the Systems Act').

The relevant dates concerning the fulfilment of suspensive conditions – where applicable – and clearance in terms of section 31 of LUPO and section 118 of the Systems Act, respectively, were summarised in a schedule compiled by the taxpayer's conveyancing attorneys in respect of 24 of the 25 transactions concerned.

It was not in dispute that the section 31 of LUPO certificate in respect of the 25th transaction in issue had been given by the City only in April 2013 and the proceeds of that transaction therefore did not actually accrue to the taxpayer before 31 March 2013.

SARS had assessed the taxpayer for income tax on the basis that the amounts in issue had accrued in the 2013 tax year on the grounds that the taxpayer had become entitled to the proceeds of the sales during the 2013 tax year and, in the alternative, SARS contended that the proceeds were, in any event, deemed in terms of section 24(1) of the Income Tax Act, to have accrued to the taxpayer during its 2013 tax year.

SARS contended that the proceeds of all 25 transactions were deemed to have accrued to the taxpayer by virtue of section 24(1) of the Act and relied on the construction of the provision applied by the Appellate Division in *SIR* v *Silverglen Investments (Pty) Ltd* 30 SATC 199.

Section 24(1) of the Act (Credit agreements and debtors allowance) provided at the relevant time that if any taxpayer has entered into any agreement with any other person in respect of any property the effect of which is that, in the case of immovable property, transfer shall be passed from the taxpayer to that other person, upon or after the receipt by the taxpayer of the whole or a certain portion of the amount payable to the taxpayer under the agreement, the whole of that amount shall for the purposes of the Act be deemed to have accrued to the taxpayer on the day on which the agreement was entered into.

The taxpayer relied on the established meaning of the phrase ‘received by or accrued to’ in par. (i) of the definition of ‘gross income’ in section 1 of the Act and it contended that the amounts in issue accrued only when it became entitled to receive payment after transfer of the properties to the purchaser and in each case transfer had been given during the taxpayer’s 2014 tax year, i.e. after 31 March 2013 and, furthermore, the taxpayer disputed that section 24(1) of the Act was applicable in respect of the transactions.

The taxpayer submitted that section 24(1) was applicable only in respect of ‘credit agreements’ and it contended that it was of no application in the current matter because the transactions in issue had not involved ‘credit agreements’.

The issue before the court was whether the amounts of the purchase price consideration in respect of certain stands of immovable property sold by the taxpayer in the course of trade, in terms of deeds of alienation entered into during

the 2013 tax year, had accrued to the taxpayer in that tax year notwithstanding that the taxpayer had received payment against transfer of the properties to the purchasers only in the 2014 tax year.

Judge Binns-Ward held the following:

(i) That the import of the word ‘accrued’ in the relevant part of the definition of ‘gross income’ in section 1 of the Act was for a long time contentious and the question was eventually authoritatively settled by the Appellate Division in *CIR* v *People’s Stores (Walvis Bay) (Pty) Ltd* 52 SATC 9 where it endorsed the so-called ‘*Lategan* principle’ – a term coined from the construction given to the word in *Lategan* v *CIR* 2 SATC 16, i.e. that the words ‘accrued to’ meant ‘to which he has become entitled and hence it was plain, if regard is had to the facts of *Lategan*’s case, that an entitlement (i.e. right) to payment can accrue before the payment is payable and in *People’s Stores* it was held that in cases in which the right to a future payment had vested in, and therefore accrued to, the taxpayer, the accrued amount for the purposes of the taxpayer's gross income was the present value of the future payment to which it was entitled.

(ii) That in the current matter the purchase prices were payable in each of the transactions against transfer of the property into the purchasers’ names and the right to payment thus vested in the taxpayer, and had a value in its hands, as soon as it was in a position to be able to tender transfer to the purchasers in terms of the agreements.

(iii) That it was not necessary to deal with the transactions involved individually and it sufficed for present purposes to mention that in some cases the agreements included a suspensive condition in respect of the obtaining by the purchaser of mortgage bond finance and, obviously, an entitlement to payment in those matters could not vest in the taxpayer before such conditions were fulfilled.

(iv) That the taxpayer had contended that it only became entitled to payment after it had given transfer and that registration and payment were consecutive acts but the court’s understanding of the evidence was

different: payment and registration of transfer occurred *simul et semel* (together and at one time), the guarantees being accepted as notional payment in lieu of cash.

(iv) That the timing of the transfers and actual making of the payments, and the order in which they happen do not determine when the taxpayer became 'entitled to payment' within the meaning of the *Lategan* principle. The taxpayer's entitlement to payment vested at the date of the fulfilment (including fictitious fulfilment in a case in which the purchaser frustrated the actual fulfilment of the condition) of any suspensive conditions to which the agreement was subject, or the date upon which the taxpayer obtained (or, acting reasonably, could have obtained) the statutory permissions necessary to enable it to tender transfer, whichever occurred later. In other words, the entitlement to payment vested in the taxpayer as soon as the contract became enforceable at the instance of either party.

(v) That, on the aforementioned approach, the taxpayer became entitled to payment under the contracts in respect of 24 of the 25 transactions before 31 March 2013 and in accordance with the *Lategan* principle the proceeds of the sales in those transactions therefore actually accrued to the taxpayer as part of its gross income for the 2013 tax year.

(vi) That SARS contended, however, that the proceeds of all 25 transactions were deemed to have accrued to the taxpayer by virtue of section 24(1) of the Income Tax Act, i.e. section 24(1) deemed the entire proceeds to accrue on the date the transactions were entered into and if that contention was well-founded, the conclusion stated in the preceding two paragraphs of the judgment, and the reasoning in support of it, would be academic.

(vii) That, moreover, the Commissioner contended that the import of section 24(1) of the Act contended for by the taxpayer was inconsistent with the construction of the provision applied by the Appellate Division in *SIR* v *Silverglen Investments (Pty) Ltd* 30 SATC 199. Any determination by the Appeal Court of the meaning of section 24(1) was, of course, binding on this court, whatever merit the court might otherwise have been inclined to

find in the taxpayer's argument.

(ix) That the following question presented itself for determination in *Silverglen*: the court had to determine in which tax year, i.e. 1963 or 1964, the proceeds of the alienation of the taxpayer's immovable property had accrued as part of the taxpayer's gross income, i.e. whether the proceeds fell to be included in income in the 1963 year of assessment, when the sales were agreed, or in 1964, when transfer was effected and payment was made.

(x) That in *Silverglen* the Appellate Division recognised that neither the purchase price nor the depreciation contributions could have been claimed before the transfers took place on 7 August 1963 and they did not, therefore, become payable during the year ended 30 June 1963 and cannot be said to have 'accrued' in the ordinary sense to the taxpayer during that year but the court then referred to section 24 of the Income Tax Act and considered the effect of section 24(1) on the given facts.

(xi) That in the *Silverglen* case the court rejected the argument that section 24(1) did not apply according to the ordinary tenor of its wording but only to a category of agreement under which the passing of ownership is suspended notwithstanding that credit is given to the purchaser. The Appellate Division then proceeded on an application of the wording of the provision according to its ordinary tenor unaffected by the heading and, in the result, it applied section 24(1) to a cash sale, in which transfer of the property occurred against payment of the purchase price, as in the current matter.

(xii) That the present court was bound by the manner in which the Appeal Court had construed and applied section 24(1) in *Silverglen* and hence in the circumstances of this case the income in respect of all of the sales of immovable property was held to have accrued on the dates on which the agreements of sale had been concluded and there was therefore no purpose to be served by the court in the instant case entering into the interesting contesting arguments by the parties concerning the extent to

which the heading to section 24 could be taken into account in construing it.

Appeal dismissed and there was no order in respect of costs.

2.3. *Commissioners for Her Majesty's Revenue and Customs v M Fowler*

Respondent and taxpayer, Mr Fowler, was a qualified diver resident in the Republic of South Africa and during the 2011/2012 and 2012/2013 tax years undertook diving engagements in the UK Continental Shelf waters.

Mr Fowler was a resident of the Republic for the purposes of the Convention between the Government of the United Kingdom and the Government of South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains (*GG* 24335 of 31 January 2003), with date of entry into force being 17 December 2002 (the 'Double Tax Treaty').

The Double Tax Treaty had been incorporated into English law by the Double Taxation Relief (Taxes on Income) (South Africa) Order 2002, S.I.2002 No 3138.

The Commissioners for Her Majesty's Revenue and Customs (HMRC) had sought to tax Mr Fowler's income from his diving activities in the relevant tax years on the ground that this income was from employment within Article 14 of the Double Tax Treaty ('Income from Employment') rather than business profit within Article 7 of the Double Tax Treaty ('Business Profits').

It was common ground that if Mr Fowler was self-employed in the relevant tax years, then his diving income was not taxable as he had no permanent establishment within the UK. What was not common ground was Mr Fowler's self-employed status.

Mr Fowler contended that he was self-employed in the relevant tax years, but that was disputed by HMRC who contended that he was an employee.

In the UK section 15 of the Income Tax (Trading and Other Income) Act 2005

(ITTOIA 2005) provided ('Divers and diving supervisors') that the section applied if a person performed the duties of employment as a diver or diving supervisor in the United Kingdom or in any area designated by Order in Council under s 1(7) of the Continental Shelf Act 1964 and the duties consisted wholly or mainly of seabed diving activities and the performance of the duties of employment was treated for income tax purposes as the carrying on of a trade in the United Kingdom.

Mr Fowler's primary contention was that he was self-employed and so exempt from tax.

His alternative case was that, even if he was an employee for the relevant tax years, section 15 of ITTOIA 2005 treated the performance of the duties of his employment for income tax purposes as the carrying on of a trade in the UK and he contended that the effect of section 15 was to bring his income within Article 7 of the Double Tax Treaty, even if that income was otherwise from employment within Article 14.

The First-tier Tribunal (Tax Chamber) (FTT) decided that the question of the effect of section 15 of ITTOIA 2005 should be determined as a preliminary issue and the question, therefore, was whether Mr Fowler's income from his diving activities was governed by Article 7 or by Article 14 of the Double Tax Treaty.

In a decision handed down by the FTT on 9 March 2016 (the 'Decision') Judge Guy Brannan held that the preliminary issue should be decided in favour of Mr Fowler and he held that, for the reasons given in the Decision, Mr Fowler's income from his diving activities in the UK or UK Continental Shelf for the years in question fell within Article 7 of the Double Tax Treaty.

With the permission of the Judge, HMRC then appealed to the Upper Tribunal and the determination of that appeal is dealt with here.

The Upper Tribunal set out the relevant provisions of the Double Tax Treaty which included Article 3 (General Definitions), eg. definitions of 'enterprise' and of 'business', Article 3(2) which sets out a general rule of interpretation for undefined terms, Article 7 entitled 'Business Profits' and Article 14 entitled 'Income from Employment.'

Article 3(2) provided at the relevant time:

> 'As regards the application of the provisions of this Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which this Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.'

Judge Smith held the following:

(i) That, as regards the general approach to the interpretation of Double Tax Treaties, the UK-SA Double Tax Treaty was to be interpreted in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969 (the Vienna Convention) and the court then referred to statements of the law in *Anson* v *Commissioners for HM Revenue and Customs* [2015] UKSC 44 at [54] and *HMRC* v *Smallwood* [2010] EWCA Civ 778 which both concerned different double tax treaties.

(ii) That in *Smallwood* Patten LJ stated at [26] that the language of an international convention had not been chosen by an English parliamentary draftsman and it was neither couched in the conventional English legislation idiom nor designed to be construed exclusively by English judges. It was addressed to a much wider and more varied judicial audience than was an Act of Parliament which dealt with purely domestic law.

(iii) That, as was further stated by Patten LJ, the general principle of international law, now embodied in Article 31(1) of the Vienna Convention on the Law of Treaties was that 'a treaty should be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

(iv) That in *Anson*, the Supreme Court stated at [56] *per* Lord Reed that the aim of interpretation of a treaty was therefore to establish, by objective and rational means, the common intention which can be ascribed to the parties. That intention is ascertained by considering the ordinary meaning of the

terms of the treaty in their context and in the light of the treaty's object and purpose.

(iv) That there was some suggestion from the respective counsel that the aforementioned two decisions, *Smallwood* and *Anson*, represented different approaches to the construction of treaties but the court stated that the approach it must follow was laid down in the Vienna Convention and that both *Smallwood* and *Anson* assisted the court to understand that approach and it did not need to choose between them.

(v) That the purpose of a double taxation agreement between two states was to ensure that a person does not pay tax twice on the same income and such agreements will, typically, and as the Double Tax Treaty does here, identify different classes of income and then allocate taxing rights to those classes of income as between the states party to the treaty.

(vi) That Articles 6 to 20 of the Double Tax Treaty list various kinds of income, whether 'income', 'profits', 'dividends', 'interest', 'royalties', to name but a few of the terms used in the Double Tax Treaty.

(vii) That this case was concerned with two particular types of income, 'business profits' in Article 7 and 'income from employment' in Article 14.

(ix) That the purpose of each of the Articles setting out the various classes of income captured by the Double Tax Treaty was to define a particular class of income and then to lay down a rule or rules saying which state has the right to tax that particular class of income and, obviously, these two questions must be asked and answered in this order and it must be ascertained which was the operative Article, before determining which state had the right to tax pursuant to that particular Article.

(x) That in some cases the income captured by a particular Article was defined in the Article itself, thus, by way of example, Article 11(2) defines 'interest' but in other cases the income captured by an Article is not specifically defined in that Article and the term 'employment' used in Article 14 is an example. There were a number of terms in Article 7 and in Article 14 that

were not specifically defined by the Double Tax Treaty.

(xi) That it was common ground that the correct approach – following the provisions of the Vienna Convention and indeed the *schema* of the Double Tax Treaty itself – to construing the Double Tax Treaty was as follows:

- If a term was defined in the Treaty, then the Treaty definition was to be applied;
- If a term was undefined in the Treaty, the general rule of interpretation contained in Article 3(2) of the Treaty applied, 'unless the context otherwise requires';
- Where 'the context otherwise requires', the definition would be the autonomous treaty meaning determined in accordance with the rules of the Vienna Convention.

(xii) That there was no provision in the Double Tax Treaty specifically regulating the relationship between Article 7 and Article 14 and that was because there was a well-understood distinction, in both South Africa and the United Kingdom, between income derived from a contract of employment or service and income derived from a contract for services.

(xiii) That given that this was a treaty between South Africa and the United Kingdom, and only between these states, the court would approach the construction of Articles 7 and 14 on the basis that they embodied this distinction and one consequence of this was that Articles 7 and 14 must be mutually exclusive. Income can either derive from a contract of service or from a contract for services. It cannot derive from both, but must come from one or the other. If, as the court found, Article 7 regulated the taxation of income from contracts for services and Article 14 regulated the taxation of income from contracts of service, then that must be right.

(xiv) That Article 14 referred to 'salaries, wages and other similar remuneration derived . . . in respect of an employment.' 'Employment' was not defined in the Double Tax Treaty, nor for that matter were the terms 'salaries', 'wages', or 'derived . . . in respect of' and it was therefore necessary to

have resort to Article 3(2) of the Double Tax Treaty, although an important question would be the extent of that resort.

(xv) That Article 3(2) of the DTA dealt with the interpretation of any term not specifically defined in the DTA and provided that 'as regards the application of the provisions of this Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which this Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.'

(xvi) That, in other words, when considering the applicable United Kingdom law, the applicable tax laws prevail over any other meaning that might pertain under other laws of the United Kingdom.

(xvii) That the court then turned to English tax legislation for appropriate definitions and found that 'employment' was defined as including any employment under a contract of service and noted that the applicable legislation draws a clear distinction between a status, namely 'employment', the fruits derived from that status namely 'employment income', 'general earnings' and 'specific employment income' and the charge to tax on those fruits described in the legislation.

(xviii) That, in effect, the contention advanced on behalf of Mr Fowler was that the *nexus* between 'employment' and 'employment income' was so close that the two terms had to be read together and together had to supply the meaning of the term 'an employment' in Article 14.

(xix) That, in the result, the court preferred the contentions of HMRC, namely that the distinction between 'status' and 'fruits' derived from that status was a critical one and it reflected the similar distinction drawn in Article 14 between 'an employment' and the 'salaries, wages and other similar remuneration derived . . . in respect of' that employment and the only term that needed to be defined was 'an employment'.

(xx) That the term defining the scope of Article 14 was the term 'employment', i.e. the status rather than the 'salaries, wages and other similar remuneration derived . . . in respect of' it.

Moreover, when considering the taxing right as between the two Contracting States, it was 'employment' that was determinative. The taxing right is allocated according to where the employment is exercised and the fruits of that employment play no role in delimiting the scope of Article 14.

(xxi) That the court also examined Article 7 of the DTA in order to cross-check the soundness of its conclusion against the result that would pertain in the case of Article 7. Article 7 referred to the 'profits of an enterprise' and 'enterprise' as noted was defined as 'the carrying on of any business'. The profits of an enterprise of a Contracting State are taxable 'only in that State' unless the enterprise carried on business in the other Contracting State through a permanent establishment situated therein. In that eventuality, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.

(xxii) That the court was of the view that it was the term 'enterprise' that defined the scope of Article 7 and not the term 'profits of an enterprise.' Once again, therefore, there was a distinction drawn between the status and the fruits of the status and only the former was relevant to ascertaining the scope of Article 7.

(xxiii) That, in the result, the appeal was allowed and the court determined the preliminary issue as follows: On the assumption that Mr Fowler was employed and not self-employed, his diving engagements in the UK Continental Shelf waters fell within Article 14 of the Double Tax Treaty and not under Article 7.

The matter was referred back to the First-tier Tribunal for evidence and decision.

3. INTERPRETATION NOTES

3.1. Loss on disposal of qualifying depreciable assets – No. 60 (issue 2)

This Note gives guidance on the interpretation and application of section 11(*o*), which grants a deduction for a loss on disposal of a qualifying depreciable asset as a result of alienation, loss or destruction.

Section 11(*o*) provides for the deduction of an allowance on the alienation, loss or destruction of an asset used by a taxpayer in the carrying on of a trade. The allowance is subject to the following requirements:

- the taxpayer must make an election to claim the allowance as a revenue loss;
- the asset must be a qualifying depreciable asset, that is, it must have qualified for an allowance or deduction under specified sections of the Act;
- the expected useful life of the asset must not exceed 10 years as determined on the date of the original acquisition of the asset; and
- the cost of the asset must exceed the sum of any amount received or accrued from the alienation, loss or destruction of the asset and the amount of any allowance or deduction claimed or claimable against the asset.

A taxpayer may elect to claim a deduction under section 11(*o*) for the alienation, loss or destruction of a qualifying depreciable asset if the expected useful life of the asset does not exceed 10 years. An apportionment will be required to the extent the section 11(*o*) allowance was not incurred in the course of the taxpayer's trade.

If a taxpayer is entitled to, but does not elect to claim a deduction under section 11(*o*), a capital loss will be determined under the Eighth Schedule.

The amount of the section 11(*o*) allowance is generally equal to the excess of the cost of the asset over the sum of any amount received or accrued from the alienation, loss or destruction of the asset and the amount of any allowance or deduction claimed or claimable against the asset. Otherwise stated, the section

11(*o*) allowance is equal to the amount by which the consideration received or accrued on disposal of the asset is less than its tax value. Tax value for this purpose means the actual cost of the asset (as opposed to the value of the asset) less the qualifying capital allowances.

Depending on the facts of the case, certain restrictions may apply to the determination of proceeds, cost or the amount of the section 11(*o*) allowance itself.

3.2. Additional deduction for learnership allowance – No. 20 (issue 7)

This Note provides clarity on the interpretation and application of section 12H which provides deductions for registered learnership agreements.

The amendments to section 12H by the Taxation Laws Amendment Act 15 of 2016 have been taken into account in this Note and are effective from 1 October 2016 and applicable to all learnership agreements entered into on or after that date. This Note deals with learnership agreements entered into from 1 October 2016. The relevant previous issue of Interpretation Note 20 should be consulted for learnership agreements entered into before that date.

Section 12H provides additional deductions to employers for qualifying learnership agreements. These additional deductions are intended as an incentive for employers to train employees in a regulated environment in order to encourage skills development and job creation. Training contracts qualifying for these deductions are learnership agreements and apprenticeships registered with a SETA. These additional deductions consist of an annual allowance and a completion allowance. Effective from 1 October 2016, the amount of the allowance will depend on the NQF level held by the learner before entering into the learnership agreement.

Section 12H provides an annual allowance and a completion allowance to employers that are a party to a qualifying learnership agreement with an employee.

The amendments to section 12H by the Taxation Laws Amendment Act 15 of 2016 are effective from 1 October 2016 and apply to all learnership agreements entered

into on or after that date. As a result, all learnership agreements entered into before 1 October 2016 are subject to the previous legislation even if the learnership agreement continues beyond 1 October 2016.

The amended section now distinguishes between learners holding NQF levels 1 to 6 and NQF levels 7 to 10 qualifications. The pre-existing qualifications of the learner entering the learnership agreement will determine the value of the claim.

3.3. Produce held by nursery operators – No. 79 (Issue 2)

This Note provides guidance on the valuation of produce held and not disposed of by nursery operators at the beginning and at the end of each year of assessment. It also examines the capital gains tax consequences of the disposal of produce.

Section 26(1) stipulates that the taxable income of any person carrying on pastoral, agricultural or other farming operations shall, in so far as the income is derived from such operations, be determined in accordance with the Act but subject to the First Schedule. The First Schedule deals with the computation of taxable income derived from pastoral, agricultural or other farming operations.

The taxable income from farming operations is combined with the taxable income from other sources to arrive at the taxpayer's taxable income for the year of assessment.

The First Schedule applies regardless of whether a taxpayer derives an assessed loss or a taxable income from farming operations. The Schedule may further apply even after farming operations have been discontinued [section 26(2)].

Both section 26 and the First Schedule apply to farming operations conducted by a nursery operator. Some nursery operators have in the past, however, failed to comply with paragraph 2 of the First Schedule to the Act. Paragraph 2 requires a nursery operator carrying on farming operations to include in that operator's return of income the value of all produce held and not disposed of at the beginning and at the end of each year of assessment.

Persons conducting the business of a nursery in the course of which plants or trees

are grown for sale are regarded as carrying on farming operations. Persons in this category are taxed in accordance with section 26 subject to the First Schedule. The same tests used to determine whether a person carries on farming operations apply to these nursery operators.

The produce held at the beginning and at the end of the year of assessment of a nursery operator carrying on farming operations is specifically excluded from section 22 and must be dealt with under the First Schedule. The value of the produce held and not disposed of must be brought into account at the beginning and end of the year of assessment. The value to be placed upon the produce on hand is its fair and reasonable value under paragraph 9. The plants or trees grown by a nursery, which are not ready for sale, will fall into the category of growing crops and must not be brought into account when the taxable income from farming operations is determined.

Any trading stock purchased from outside sources and offered for sale is not attributable to farming operations and must be dealt with under section 22.

Special rules apply for income tax and CGT purposes upon the death or sequestration of a nursery operator carrying on farming operations.

3.4. Game Farming – No. 69 (Issue 2)

This Note provides guidance on the application of selected sections of the Act and paragraphs of the First Schedule to persons carrying on game-farming operations, with its primary focus being the provisions applicable to livestock. It is not intended to deal with farming in general.

The changes in this note focus mainly on the legislative amendments affecting deceased persons and deceased estates which came into operation on 1 March 2016 and apply to persons dying on or after that date.

Section 26(1) stipulates that the taxable income of any person carrying on pastoral, agricultural or other farming operations shall, in so far as the income is derived from such operations, be determined in accordance with the Act but subject to the

First Schedule. The First Schedule deals with the computation of taxable income derived from pastoral, agricultural or other farming operations.

The taxable income from farming operations is combined with the taxable income from other sources to arrive at the taxpayer's taxable income for the year of assessment.

The First Schedule applies regardless of whether a taxpayer derives an assessed loss or a taxable income from farming operations. The Schedule may also apply even after farming operations have been discontinued.

Section 26 and the First Schedule apply to game farming, since it comprises farming operations.

The same principles used to determine whether a person carries on farming operations apply to game farmers. The test for this purpose is based on the taxpayer's intention.

Income from the sale of game, game meat, carcasses and skins and fees related to hunting constitutes farming income. However, income from accommodation, catering and admission charges is not farming income. Income not constituting farming income will be relevant when applying the ring-fencing provisions of paragraph 8 to game livestock. Game viewing fees may or may not constitute farming income depending on the facts and circumstances.

The rules governing the deduction of expenditure, including capital development expenditure, are similar to those applying to normal farming operations.

A farmer is required to bring to account the value of game livestock in opening and closing stock. No standard values have been prescribed by regulation for game livestock, but the Commissioner accepts that game livestock may be allocated a standard value of nil. Game livestock acquired by donation is included in opening stock in the year of acquisition at market value under paragraph 4.

The deduction under section 11(*a*) for the cost of livestock is ring-fenced under paragraph 8, while an assessed loss or balance of assessed loss from farming is subject to potential ring-fencing under section 20A.

A farmer ceasing to carry on game-farming operations must generally continue to deal with any game livestock under the First Schedule.

Special rules apply for income tax and CGT purposes upon the death or sequestration of a farmer.

4. BINDING PRIVATE RULINGS

4.1. BPR 280 – Debt reduction, capital losses and corporate rules

This ruling determines the income tax consequences for the debtors and creditor that form part of the same group of companies, following the forgiving of a loan and subsequent liquidation of the debtors.

In this ruling references to sections and paragraphs are to sections of the Act and paragraphs of the Eighth Schedule to the Act applicable as at 27 June 2017. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the Act.

This is a ruling on the interpretation and application of:

- section 8(4)(*a*);
- section 19;
- section 47; and
- paragraph 56.

<u>Parties to the proposed transaction</u>

The applicant: A private company incorporated in and a resident of South Africa

Company A: A listed company incorporated in and a resident of South Africa and the ultimate indirect holder of 91% of the applicant’s shares

Operating Companies: Several private companies incorporated in and residents of South Africa that are wholly-owned subsidiaries of the applicant

Description of the proposed transaction

The applicant is the holding company of the various operating companies. Each operating company received on loan, start-up funding from the applicant, which was used to acquire allowance assets, initial trading stock and for associated expenditure. Most of the operating companies have assessed losses.

The trading stock that was acquired using the loan funding has since either been sold or scrapped. Not all allowance assets would be fully depreciated for tax purposes by all operating companies at the time of the proposed transaction.

The steps to implement the proposed transaction will be as follows:

- Company A will advance an amount equal to the debt owed by each Operating Company to the Applicant (step 1 loans).
- Each of the operating companies will use that advance to repay its shareholder loan to the applicant.
- Company A will waive the Step 1 loans for the benefit of the operating companies.
- Each operating company will transfer all of its assets (other than assets it elects to use to settle any debts incurred in the ordinary course of its trade) to the applicant, in anticipation of or in the course of its liquidation, winding up or deregistration, under section 47.

Conditions and assumptions

This binding private ruling is subject to the following additional conditions:

- The operating companies must comply with the steps contemplated in section 41(4) within 36 months from the date of each of the liquidation distributions, or within any further period that the Commissioner may allow under section 47(6)(*c*)(i).
- Each operating company must carry on a trade during the year of assessment during which the Step 1 loans are waived.

Ruling

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

- In relation to each operating company:
  - To the extent that a deduction or allowance was granted to that operating company, the waived amount will be deemed to be recouped for purposes of section 8(4)(*a*), under section 19(5) or (6), as the case may require;
  - that recouped amount will be deemed to be income under section 8(4)(*a*); and
  - any assessed loss of any operating company will be reduced by the amount deemed to be income under section 8(4)(*a*), read with section 19(5) or (6).
- So much of Company A's capital loss that arises upon the waiver of the Step 1 loans as the Operating Companies are deemed to have recouped under section 19(5) or (6), read with section 8(4)(*a*), will not be disregarded under paragraph 56(1), in consequence of the application of paragraph 56(2)(*c*) of the Eighth Schedule.
- The transfer of all of the assets of each operating company to the applicant will constitute a 'liquidation distribution' as defined in section 47(1)(*a*) and therefore, the tax consequences contained in section 47(2) to (5) will be applicable to the operating companies or the applicant, as the context requires.
- Under section 19(7) the applicant (deemed to be one and the same person as each operating company following the application of section 47(3)(*a*)(ii) in relation to allowance assets not fully written off for tax purposes by that operating company at the time of the proposed transaction) will not be entitled to claim any further allowances in relation to those allowance assets.

4.2. BPR 281 – Disposal of a portion of land owned by a recreational club

This ruling determines the availability of roll-over relief under paragraph 65B to a recreational club which sub-divides and disposes of part of its land and utilises the proceeds to effect improvements to the remaining portion of the land.

In this ruling references to paragraphs are to paragraphs of the Eighth Schedule to the Income Tax Act applicable as at 14 August 2017. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the Act.

This is a ruling on the interpretation and application of paragraph 65B.

Parties to the proposed transaction

The applicant: A recreational club established in and a resident of South Africa

Club B: A recreational club established in and a resident of South Africa

Description of the proposed transaction

Historically, an agreement was concluded between the applicant and Club B, in terms of which Club B disposed of a sports club enterprise to the applicant, who acquired the sole and exclusive rights to it (the 'Separation Agreement').

Included in the sports club enterprise acquired by the applicant are three adjoining separately registered portions of land, (the property). The applicant became the registered owner of the property.

The consideration due to Club B is payable by way of annual instalments. The applicant is not permitted to sell any portion of the property without the prior written consent of Club B and, in the event that a portion is sold, the proceeds derived from such sale must be apportioned between the parties. The portion of the proceeds payable to Club B depends on the amount of time that has elapsed from the date of the acquisition of the sports club enterprise.

The applicant experienced difficulties meeting its payment obligations towards Club B. In order to settle the remaining balance of the consideration owing to Club B, the

applicant raised funding by issuing debentures on the basis, amongst others, that the debenture holders will be repaid on the earlier of five years from their issue date or the disposal of any portion of the property.

It was resolved by the MEC for the Department of Economic Development that a township had to be established on the property. Having consulted with the relevant municipal officials, it was agreed that it was not necessary that a township be established on the whole of the property.

The applicant will consolidate the three portions comprising the property into one portion and thereafter will effect a division of the property in order to facilitate the disposal of a portion of the property. The property will be divided in such a manner as to ensure the following:

- The applicant will retain control of so much of the land that will be required by it to continue with its activities as a recreational club with a complete sports facility and related recreation facilities. This will necessitate a redesign of the sports field to accommodate the loss of certain land and the relocation of other club facilities.
- The applicant will be able to alienate the balance of the land which will have been subdivided into various portions to approved third parties.

The applicant will enter into three separate sale agreements to sell three separate portions of the land to three unrelated persons (the first, second and third disposals). The proceeds of the first and second disposals will be apportioned on a 50:50 basis, whilst the proceeds from the third disposal will be apportioned so that the applicant will receive between 35% and 50%, once the amount has been determined finally. The proceeds from the disposals are earmarked to be utilised as follows:

- The first disposal – the portion not payable to Club B will be applied to settle the amounts owing to debenture holders.
- The second disposal – the portion not payable to Club B will be utilised to settle the remaining balance owing to the debenture holders.

- The third disposal – the portion not payable to Club B will be used to cover costs of the redesign of the sports facilities, the installation of a new irrigation system and the construction of new recreational facilities.

The redesign of the sports facilities requires that the entire irrigation system is to be replaced. The existing irrigation system is no longer effective and based on outdated technologies incompatible with the new system.

The existing clubhouse straddles a portion of the property to be sold and that portion of the property to be retained by the applicant. It follows that the construction of the Clubhouse will replace the existing clubhouse in its entirety.

The budgeted expenses in respect of the redesign, irrigation system and club facilities will be equal to or exceed the expected proceeds from the third disposal available to the applicant.

Conditions and assumptions

This binding private ruling is subject to the following additional conditions and assumptions:

- The contracts for the acquisition of the replacement assets have been or will be concluded within 12 months after the date of the disposal of the relevant portions of the property.
- The replacement assets will be brought into use within three years of the disposal of the relevant portions of the property.
- The actual costs to acquire the replacement assets will be equal to or exceed the proceeds, excluding the portion payable to Club B, in respect of the third disposal and the proceeds received by the applicant will be used to replace facilities lost by the applicant as a result of the third disposal.

Ruling

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

- There is no accrual in favour of the applicant of the portion of the proceeds payable to Club B.

- There is an accrual in favour of the applicant of that portion of the proceeds payable to debenture holders.
- The first and second disposals will result in capital gains.
- Paragraph 65B will apply to the third disposal.

4.3. BPR 282 – Deductibility of socio-economic and enterprise development expenditure

This ruling determines the income tax consequences for the operator of a wind farm incurring expenditure in respect of socio-economic development (SED) and enterprise development (ED) obligations imposed and accordingly undertaken in terms of an electricity generation agreement and licence.

In this ruling references to sections are to sections of the Income Tax Act applicable as at 21 August 2017. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the Act.

This is a ruling on the interpretation and application of:

- Section 11(*a*) read with section 23(*g*);
- Section 55(1) – definition of 'donation'; and
- Section 58.

Parties to the proposed transaction

The applicant: A private company incorporated in and a resident of South Africa

The trust: A trust established in South Africa

Description of the proposed transaction

The applicant is a company that owns and operates a wind farm that generates electricity. In terms of the agreement entered into with the government of the Republic to supply electricity to the national grid and the electricity generation licence issued by the regulator, it must commit funds equal to a specified percentage of its annual revenue to SED and ED expenditure.

Failure to incur the required SED or ED expenditure, or both, will result in the applicant incurring termination points under the agreement's termination point system. However, the maximum termination points that may be incurred for non-compliance are not sufficient to reach the threshold stipulated that will result in the termination of the agreement.

Pursuant to its SED and ED obligations, the Applicant established a trust that will specifically undertake the projects or provide funding to other organisations registered as public benefit organisations as contemplated in section 30(3) which will undertake them. The applicant proposes to contribute amounts to the trust on a quarterly basis based on the specified percentage of its revenue earned in the previous year of assessment.

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 contributions to be made by the applicant to the trust in respect of the SED and ED commitments will be deductible under section 11(*a*) read with section 23(*g*). The total amount incurred in each year of assessment will be equal to the specified percentage of the applicant's revenue, as defined in the agreement, earned by the applicant in that year of assessment.
- The expenditure incurred by the applicant in respect of the SED and ED commitments will not be a donation as defined in section 55(1) nor a deemed donation, as contemplated in section 58.

4.4. BPR 283 – Intra-group disposal of capital asset

This ruling determines that the proposed disposal of an asset by a special purposecorporate vehicle to its Holding Company will constitute an intra-group transaction.

In this ruling references to sections are to sections of the Income TaxcAct applicable as at 19 July 2016. Unless the context indicates otherwise any word or expression inthis ruling bears the meaning ascribed to it in the Act.

This is a ruling on the interpretation and application of section 45.

Parties to the proposed transaction

The applicant: A listed company incorporated in and a resident of South Africa

SPV: A special purpose vehicle, incorporated in and a resident of South Africa that is a wholly-owned subsidiary of the applicant

Description of the proposed transaction

The applicant will establish SPVs, each with the sole purpose of producing oneasset for the applicant. The creation of the asset will be outsourced by the SPV tothe applicant, and the cost will remain outstanding on loan account.

Once the asset is created by the SPV, it will sell the asset to the applicant at coston loan account.

The loan account will be settled in cash. Until settlement, the loan account will beheld by the SPV as an asset.

On settlement of the loan account the SPV will be liquidated.

The steps to implement the proposed transaction are as follows:

- The SPV will create the asset;
- The SPV will dispose of the asset to the applicant, the parties availing themselves of the relief contemplated in section 45.

Conditions and assumptions

This binding private ruling is not subject to any additional condition and assumption.

Ruling

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

- Section 45 will apply to the disposal of the asset. The disposal will be of a

capital asset as between group companies. It will therefore constitute an 'Intra Group Transaction'.

- Section 47 will accordingly not apply to the disposal, because it does not occur in anticipation of the liquidation.

4.5. BPR 284 – Debentures tracking the value of a reference asset

This ruling determines the income tax consequences for a company that issues debentures to investors, the value of which tracks the price of specified quantities of a precious metal as reference assets.

In this ruling references to sections are to sections of the Income Tax Act applicable as at 17 August 2017.

Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the Act.

This is a ruling on the interpretation and application of:

- section 1(1) – the definitions of 'gross income' and 'trading stock';
- section 11(*a*) read with section 23(*g*);
- section 22(1)(*a*);
- section 24J; and
- section 24JB(1) – the definition of 'covered person'.

Parties to the proposed transaction

The applicant: A public company incorporated in and a resident of South Africa

Debenture holders: Holders of debentures to be issued by the applicant

Description of the proposed transaction

The applicant is a special purpose ring-fenced public company, limited by its memorandum of incorporation to conduct any other business or to incur any

liability, other than that permitted, without the prior consent of the JSE and of its debenture holders by special resolution.

The applicant conducts the business of establishing and operating exchange traded funds. It issues various classes of debentures, the values of which track the prices of specified quantities of particular reference assets. The debentures are listed on the JSE and by way of one or more secondary or dual listings on such other exchanges as the applicant may select from time to time.

The debentures will not bear interest. They are unsecured senior obligations of the applicant and rank equally with one another, evidencing the final indebtedness of the applicant to the debenture holders.

The applicant has no employees and is managed in terms of a management agreement by a manager appointed by it from time to time, which manages and administers the business and corporate affairs of the applicant and advises the applicant in relation to the conducting of its business. The applicant is wholly owned by a trust which was established with the sole purpose of beneficially holding its entire issued share capital.

The applicant's debentures may either be subscribed for in cash or *in specie* by way of the relevant reference assets. If the debentures are subscribed for in cash, the applicant uses the proceeds received to acquire the 'initial quantities' of the reference assets. If the debentures are subscribed for *in specie*, the subscriber must own and hold a specified minimum quantity of the relevant reference asset and have the necessary license to buy, own, be in possession of, or to deal in that particular reference asset (qualified holder). The reference assets will be kept on deposit and in segregated accounts with a custodian.

The applicant must from time to time sell appropriate quantities of the reference assets to defray its monthly costs. The reference quantity of the reference asset associated with each debenture reduces over time in terms of a formula that reduces the initial reference quantity by the quantities sold to defray the monthly costs.

Each debenture entitles its holder to receive a cash amount on redemption, equal

to the value of the reference quantity of the reference asset as at the redemption date. The applicant may be obliged, on redemption, to pay either less or more than the subscription price as at the date of issue, depending on the prevailing price of the reference asset.

A debenture holder may on notice redeem the debenture at any time. The applicant, on the other hand, has no right to redeem voluntarily, except in certain narrowly defined circumstances relating, in the main, to performance being or becoming impossible.

A qualified holder will have the right, upon redemption, to require the applicant to sell to it the appropriate quantity of the reference asset associated with the debenture as at the redemption date, provided that the qualified holder must open a nominated account with the custodian into which the applicant can transfer the reference asset on the delivery date.

In that event the obligation of the applicant to pay the redemption value of the debenture to the qualified holder on the redemption date will be off-set against the obligation of the qualified holder to pay the purchase price of the reference asset.

Conditions and assumptions

This binding private ruling is subject to the following additional conditions and assumptions:

- The ruling is based on the terms and conditions set out in the offering circulars relating to the individual classes of debentures.
- The ruling will apply to the issuance and redemption of debentures referencing each class of reference asset, as well as to the acquisition and disposal of the relevant reference assets, after the issue date of this ruling only.

Ruling

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

- Amounts received by the applicant for the debenture subscriptions do not constitute its ‘gross income’, as defined in section 1(1).

- On redemption of the debenture, to the extent that the redemption amount exceeds or is less than the original subscription amount, the excess paid or the reduction not paid will be, respectively, deductible under section 11(*a*), read with section 23(*g*), or included in its 'gross income' by the applicant.
- The reference assets held by the applicant will be regarded as its 'trading stock'. Expenditure incurred to acquire them will be deductible under section 11(*a*) read with sections 23(*g*) and 22(1)(*a*).
- The proceeds from the sale of the reference assets for purposes of both the redemption of debentures, and in order to defray its monthly costs, will be included in the applicant's 'gross income' in the year of sale.
- Expenditure incurred by way of the monthly costs in respect of the applicant's monthly fees and expenses, will be allowed as a deduction under section 11(*a*) read with section 23(*g*), in the year in which such expenditure is incurred.
- Section 24J is not applicable to the debentures.
- The applicant is not a 'covered person' as defined in section 24JB(1).

4.6. BPR 285 – Initial fee paid to franchisor

This ruling determines the deductibility under section 11(*f*) of an initial lump sumpayable in terms of a franchise agreement by a franchisee to a franchisor uponcommencement of the franchise.

In this ruling references to sections are to sections of the Income Tax Act applicable as at 21 September 2017. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the Act.

This is a ruling on the interpretation and application of section 11(*f*).

<u>Parties to the proposed transaction</u>

The franchisee: A company incorporated in and a resident of South Africa and the applicant

The franchisor: A company incorporated in and a resident of South Africa

Description of the proposed transaction

The franchisee intends to open several franchised shops, with the necessary approval from the franchisor for every shop. If a shop is approved, the franchise ewill enter into a franchise agreement with the franchisor. A person who wishes to become a franchisee, initiates an application process and if the franchisor is interested in considering the application, the would-be franchisee is afforded an opportunity to present a business plan for its approval. The franchisee is advised in writing that records that the initial fee is solely for the grant of the right to use the system, the system property and the marks of the franchisor and not for the franchisor's performance of any specific obligations or service. Services provided to the franchisee are charged for in addition.

The process to set up a shop further involves, amongst others, that the franchisee presents to the franchisor's investment committee, for that committee's approval, a document which includes information about the site, namely its location, feasibility studies performed, the business plan showing expected sales and rental and commercial terms, as well as the demographics of the area. Once that approval is obtained, the franchisee is permitted to develop the shop and obliged to do so within a specified time. The shop must be fitted out in accordance with the franchisor's detailed specifications. The shop may open for trading once it has been inspected by the franchisor.

In terms of the franchise agreement, the franchisor will grant to the franchisee the right to use the system, system property and marks of the franchisor, for the term of the franchise arrangement, solely for the purpose of operating the shop. The franchise agreement stipulates that:

- the marks, system property and associated goodwill will remain the exclusive property of the franchisor and the franchisee acquires no right, interest or benefit in it, other than the right of use granted under the agreement;
- the initial fee is not paid for the franchisor's performance of any specific

obligations or services; and

- the franchisee does not enjoy any exclusive territory, protection or other right in the contiguous space, area or market.

The franchisee is required to pay the franchisor an upfront initial fee as well as a continuing fee for the right of use of the system, system property and marks. The initial fee is payable on or before the franchisor inspects the new shop and signs it off as ready for trading. If the application for a new shop is unsuccessful, no fee is payable in respect of the application for a new shop.

The system is primarily embodied in computer systems and a central database which contains data gathered daily by the franchisees and transmitted to the franchisor's specialised platform, where the data are processed. The franchisee is afforded limited and temporary access to the processed data, for forecasting and related operational purposes. A key feature of the use of the platform is the ability to forecast, typically on a half-hour forecasting horizon, how much of each product to prepare and how many staff to employ at various times of the day to meet customer demand and to manage the supply chain accordingly.

At the end of the term of the franchise arrangement the franchisee may renew the arrangement for a renewal term subject to meeting the conditions specified in the franchise agreement. Some of the conditions are beyond the control of the franchisee. Upon renewal, a renewal fee will be payable by the franchisee for the granting of the right to use the system, system property and marks for the renewal term.

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 initial fee to be paid by the franchisee in terms of the franchise agreement is fully deductible in terms of section 11(*f*) over the term of the

initial agreement.

- The renewal fee to be paid by the franchisee in terms of the franchise agreement is fully deductible in terms of section 11(*f*) over the renewal term of the renewal agreement.
- No view is expressed on the accuracy of the pricing of the initial fee that pertains to the intellectual property rights contemplated in sections 11(*f*)(iii) and the imparting or undertaking to impart any knowledge directly or indirectly related to such intellectual property rights as contemplated in section 11(*f*)(iv).

4.7. BPR 286 – Settling-in allowance

This ruling determines whether an employer may pay settling-in allowances equal to one month's basic salary to employees who are being relocated.

In this ruling references to sections are to sections of the Act applicable as at 21 August 2017.

Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the Act.

This is a ruling on the interpretation and application of:

- Section 1(1) – definition of 'income';
- Section 10 (1)(*n*B);
- Paragraph 1 – definition of 'remuneration'; and
- Paragraph 2(1)

<u>Parties to the proposed transaction</u>

The applicant: A private company incorporated in and a resident of South Africa

Employees: Employees of the applicant who will receive the once-off allowance for the purposes of relocating to their new place of employment

<u>Description of the proposed transaction</u>

The applicant will close its office in one geographic region and relocate employees to another. Pursuant to the relocation of the employees, the applicant will pay certain benefits to them, in accordance with its existing relocation policy.

The applicant will pay a settling-in allowance equal to one month's basic salary for expenses such as school uniforms, electricity deposits, curtaining and other costs.

The employees will not be required to incur or prove any expenditure at the time that the allowances are paid.

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 exemption in section 10(1)(*n*B) will not be applicable to the payment of the settling-in allowances.
- The settling-in allowances will constitute 'remuneration' as defined and, consequently, the applicant will be required to withhold employees' tax as contemplated in the Fourth Schedule.

4.8. *BPR 287 – Disposal of vacant land in exchange for shares*

This ruling determines the tax consequences of the disposal of vacant land in exchange for shares.

In this ruling references to sections are to sections of the Income Tax Act applicable as at 26 October 2017. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the Act.

This is a ruling on the interpretation and application of section 42(1) – paragraph (*a*) of the definition of "asset-for-share transaction".

Parties to the proposed transaction

The applicant: A private property holding company incorporated in and a resident

of South Africa

The co-applicant: A company incorporated in and a resident of South Africa

Company A: A company incorporated in and a resident of South Africa

Description of the proposed transaction

The applicant will dispose of undeveloped vacant land (the property) to the co-applicant in exchange for 250 shares in the co-applicant. Apart from the property to be disposed of in terms of the proposed transaction, the applicant also owns other undeveloped land. The market value of the property exceeds its base cost. The property will be developed as a convenience retail centre and the development will be managed by Company A. To this end, the applicant and Company A have agreed that the project will be undertaken vesting the property in a separate entity, the co-applicant.

Company A's role will be to:

- design a deal structure based on its knowledge and expertise;
- procure the rezoning of the property for business purposes;
- execute technical and impact studies;
- coordinate a professional team that will include architects, engineers, and quantity surveyors to design "a comprehensive building package";
- market the intended convenience retail centre to potential lessors and secure lessors for it;
- prepare financial feasibility studies and compile a detailed financial plan;
- identify the potential development company that will purchase the property for further development into a convenience retail centre and to secure a purchase agreement in respect of the property and the comprehensive building package with that development company;
- oversee critical negotiations; and
- ensure that the co-applicant can meet the suspensive conditions of the

transaction.

It is the intention that the co-applicant will sell the undeveloped property with a comprehensive building package to a development company after it had been rezoned for such development.

In exchange for its expertise and services to be rendered, the co-applicant will also issue shares to Company A as follows:

- 125 shares at the close of business on the day that the property is transferred from the applicant to the co-applicant; and
- 125 shares on the day the property is transferred from the co-applicant to a development company that will undertake the comprehensive development of the property.

Following the sale of the property to a development company the intention is that:

- the applicant and Company A will be equal shareholders in the co-applicant after the transfer of the property to that development company; and
- the co-applicant will invest in the development company to the extent that it will obtain an estimated 20% of the shares in that development company.

Conditions and assumptions

This binding private ruling is subject to the additional condition and assumption that the property is a capital asset in the hands of the applicant and there has been no change of intention on the part of the applicant that will result in a disposal under any provision of the Eighth Schedule.

Ruling

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

- The disposal of the property by the applicant to the co-applicant in exchange for the issue of equity shares in the co-applicant in terms of the agreement between the parties will constitute an "asset-for-share transaction" as defined in paragraph (*a*) of the definition of that term in section 42(1) of the Act. Consequently:

- The applicant will be deemed to have disposed of the property for an amount equal to its base cost on the date of disposal.
- The applicant will be deemed to have acquired the equity shares in the co-applicant on the date the applicant acquired the property and for a cost equal to the base cost of the property.
- The applicant and co-applicant must, for purposes of determining any taxable income derived by the co-applicant from a trade carried on by the co-applicant, be deemed to be one and the same person with respect to the date of acquisition and base cost of the property for the applicant, or the market value on valuation date for the applicant, which amount must be treated as the amount to be taken into account by the co-applicant for purposes of sections 11(*a*) or 22(1) or (2) as the case may require.
- The amount received by or accrued to the co-applicant for the issue of the shares to the applicant will be deemed to be equal to the base cost of the property at the time of disposal by the applicant.
- If the co-applicant disposes of the property within a period of 18 months after acquiring it, so much of the amount received or accrued in respect of the disposal of that trading stock as does not exceed the market value of that trading stock as at the beginning of that period of 18 months and so much of the amount taken into account in respect of that trading stock in terms of sections 11(*a*) or 22(1) or (2), as the case may require, as is equal to the amount so taken into account in terms of section 42(2)(*b*) must be deemed to be attributable to a separate trade carried on by the co-applicant, the taxable income from which trade may not be set-off against any assessed loss or balance of assessed loss of the co-applicant.

5. BINDING GENERAL RULING

5.1. BGR (Employment Tax Incentive) 44 – Meaning of 160 hours for purposes of section 41(1)(b)

For the purposes of this ruling –

- 'BCEA' means the Basic Conditions of Employment Act 75 of 1997;
- 'ETI' means employment tax incentive;
- 'ETI Act' means the Employment Tax Incentive Act 26 of 2013;
- 'section' means a section of the ETI Act; and
- any other word or expression bears the meaning ascribed to it in the ETI Act.

Purpose

This BGR determines the meaning of the 160 hours stipulated in section 4(1)(b).

Background

Minimum wage requirement

Section 3 sets out the requirements for an employer to be eligible to receive the ETI. Section 4 sets the minimum wage requirement in order to qualify for the ETI. An employer that is thus otherwise an eligible employer is nevertheless not eligible to receive the ETI if the wage paid to a qualifying employee is less than the minimum amounts stipulated in section 4. Section 4(1)(a) applies to an employer that is subject to a wage regulating measure while section 4(1)(b) applies to an employer that is not subject to such a measure.

Section 4(1)(b) distinguishes between an employee who is employed and paid remuneration for at least 160 hours in a month and an employee who is employed and paid remuneration for less than 160 hours in a month.

Although the purpose of section 4(1) is to set a minimum wage requirement, section 4(1)(b)(i) and (ii) refers to 'remuneration' which has a

wider meaning than wage. Some uncertainty, therefore, exists as to whether the 160 hours stipulated in section 4(1)(b) relate to only ordinary hours of work or whether overtime is also included.

Meaning of wage

The term 'wage' is fundamental to the purpose and application of section 4(1). Section 1(1) defines 'wage' with reference to the definition of this term in section 1 of the BCEA. The latter Act defines 'wage' as –

'the amount of money paid or payable to an employee in respect of ordinary hours of work or, if they are shorter, the hours an employee ordinarily works in a day or week;'.

It is clear from this definition that 'wage' relates to ordinary hours of work. The BCEA defines 'ordinary hours of work' as – 'the hours of work permitted in terms of section 9 or in terms of any agreement in terms of sections 11 or 12'.

Section 9 of the BCEA dictates that, subject to certain limited exceptions, an employer may not require or permit an employee to work more than the stipulated hours.

In contrast with the definition 'ordinary hours of work', the BCEA defines 'overtime' as –

'the time that an employee works during a day or a week in excess of ordinary hours of work'.

In order to ensure alignment between the determination of a wage regulating measure under section 4(1)(a), 'remuneration for at least 160 hours in a month' under section 4(1)(b)(i) and 'remuneration for less than 160 hours in a month' under section 4(1)(b)(ii), it is necessary to interpret the 160-hour requirement under section 4(1)(b) as the ordinary hours of work. Overtime must thus be excluded when calculating the 160 hours under section 4(1)(b).

Ruling

The 160 hours stipulated in section 4(1)(b) must consist of only ordinary hours of work and do not include overtime or hours other than ordinary hours of work.

5.2. BGR (VAT) 45 – Supply of potatoes

For the purposes of this ruling, unless the context indicates otherwise:

- 'Part A' means Item 6 of Part A of Schedule 2 to the VAT Act;
- 'Part B' means Item 12 of Part B of Schedule 2 to the VAT Act;
- 'section' means a section of the VAT Act;
- 'seed potatoes' means potatoes which have been certified as seed potatoes under the South African Seed Potato Certification Scheme;
- 'VAT' means value-added tax;
- 'VAT Act' means the Value-Added Tax Act 89 of 1991; and
- any other word or expression bears the meaning ascribed to it in the VAT Act.

Purpose

This BGR sets out:

- the factors that will be considered by the Commissioner in determining whether potatoes are being supplied:
  - as seed under Part A, to be used or consumed for agricultural, pastoral or other farming purposes, or
  - as vegetables under Part B, that is, the supply consisting of foodstuffs; and;
- the general VAT treatment of the supply of potatoes under Part A and Part B.

Ruling

Factors to consider when distinguishing between potatoes supplied under Part A or Part B

In order to distinguish between potatoes supplied as seed under Part A and potatoes supplied as foodstuffs under Part B, the intention of the vendor supplying the potatoes must be determined at the time of supply. In determining the stated intention of the supplier, the Commissioner may consider, amongst others, the following objective factors:

- The description of the potatoes as contained in the tax invoice issued by the supplier.
- The status of the recipient of the potatoes. For example, is the recipient a VAT-registered vendor carrying on agricultural, pastoral or other farming operations and authorised under Clause 7 on the Notice of Registration to acquire the goods concerned at the zero rate?
- The consideration paid for the potatoes. For example, the price paid for seed potatoes may be significantly higher than potatoes supplied as foodstuffs.
- The labelling or packaging in which the potatoes are supplied. For example, seed potatoes are required, under the South African Seed Potatoes Certification Scheme, to be supplied in containers which are labelled in a specific manner.

Potatoes supplied under Part A

These are potatoes supplied as seed for cultivation under Item 6 of paragraph 1 of Part A. The supply of these potatoes is zero-rated under section 11(1)(*g*) subject to the provisions of paragraph 2 of Part A.

In the event that the vendor does not comply with the statutory requirements set out in paragraph 2 of Part A, the supply of the potatoes must be subject to VAT at the rate of 14% under section 7(1)(*a*). This

includes the supply of potatoes to a trader for on-sale as seed potatoes. Furthermore, the vendor supplying the potatoes may not zero-rate the supply under Part B if the vendor's intention (as determined using the factors above) is to supply the potatoes in question as seed but failed to comply with the requirements of paragraph 2 of Part A.

Potatoes supplied under Part B

These are potatoes supplied as foodstuffs (that is, vegetables) under Item 12 of paragraph 1 of Part B. The supply of these potatoes is zero-rated under section 11(1)(*j*).

Documentary proof

The vendor must, under section 11(3), obtain and retain documentary proof substantiating the vendor's entitlement to apply the zero rate under section 11(1)(*g*) or (*j*).

Specifically with regard to section 11(1)(*g*), paragraph 2 of Part A requires the recipient to have been issued with a Notice of Registration in which authorisation is granted for goods to be acquired at the zero rate. The recipient must be in possession of a valid copy of such a Notice of Registration at the time of supply, a tax invoice must be issued containing the particulars required under section 20(4) and the supply of the goods must not be prohibited under section 7*bis* of the Fertilizers, Farm Feed, Agricultural Remedies and Stock Remedies Act 36 of 1947.

5.3. BGR (VAT) 46 – Supply of brown bread

For the purposes of this ruling, unless the context indicates otherwise:

- 'Item 1' means Item 1 of Part B of Schedule 2 to the VAT Act;
- 'Practice Note' means VAT Practice Note 12 issued on 24 November 1993;
- 'relevant regulations' or 'regulations' refers to the 1991 Regulation, the 2008 Regulation and/or the 2017 Regulation;

- ‘section’ means a section of the VAT Act;
- ‘VAT’ means value-added tax;
- ‘VAT Act’ means the Value-Added Tax Act 89 of 1991;
- ‘1991 Regulation’ means regulations in terms of Government Notice R.577 published in *Government Gazette* 13074 of 15 March 1991; and
- any other word or expression bears the meaning ascribed to it in the VAT Act.

Purpose

The purpose of this BGR is to make an arrangement under section 72 relating to the VAT treatment of the supply of brown bread.

Background

Section 11(1)(*j*) zero-rates the supply of certain foodstuffs set forth in Part B of Schedule 2 to the VAT Act, subject to certain conditions. Item 1 refers to ‘brown bread’. The term ‘brown bread’ is defined with reference to relevant regulations. Since inception of the VAT Act, the said item made reference to the 1991 Regulation.

A Practice Note was issued in 1993 to clarify the interpretation in relation to the provisions of section 11(1)(*j*) read with Item 1. It provided the following guidelines:

- The supply of any type of brown bread shall be zero-rated provided –
  - it is marketed and sold under the description ‘brown bread’;
  - the meal content of the dough consists of at least 50% brown bread meal; and
  - the mass of the loaf exceeds 100 grams.

Under the Practice Note, products such as ‘whole-wheat brown bread’, ‘high fibre brown bread’, ‘high protein brown bread’ and ‘brown health bread’ that satisfy the above requirements, were subject to the zero rate.

The requirements above were based on those contained in the 1991 Regulation,

which Regulation was subsequently repealed and replaced by the 2008 Regulation. Under section 12(1) of the Interpretation Act 33 of 1957, where a law repeals and re-enacts any provision of a former law, any references in another law to the provision so repealed, shall be construed as references to the provision so re-enacted. Therefore, even though Item 1 was not amended in the past to refer to the updated regulation, references to the 1991 Regulation in Item 1, are therefore (in law) interpreted to be references to the subsequent regulations which replaced the 1991 Regulation.

The Practice Note was withdrawn on 1 April 2016 on the basis that 'brown bread' is defined in the relevant regulation, and the 1991 Regulation had been repealed and replaced by the 2008 Regulation.

Following the withdrawal of the Practice Note, and the introduction of the 2017 Regulation, it transpired that the industry viewed the requirements in the Practice Note as being less onerous as those in the relevant regulations. There was also uncertainty in understanding how to apply the relevant regulations in zero-rating the supply of brown bread for VAT purposes. Industry therefore continued to rely on the Practice Note as a policy statement, in determining which supplies of brown bread qualify to be supplied at the zero rate under section 11(1)(*j*), despite the amendments in the relevant regulations, and the withdrawal of the Practice Note.

Based on the above, and the changes to the definitions and classes of 'brown bread' in the relevant regulations, Industry had experienced and continues to experience difficulties in determining when a supply of 'brown bread' qualifies for the zero rate.

Ruling

Following from the discussion above, an arrangement is hereby made under section 72 that, in addition to 'brown bread' as defined in the relevant regulations, the following types of bread, including the breads referred to in the Practice Note that was withdrawn, may be supplied at the zero rate under section 11(1)(*j*):

- Whole-wheat brown bread
- High fibre brown bread

- High protein brown bread
- Brown health bread

The arrangement above applies provided all the following conditions are met:

- The bread is marketed and sold under the description 'brown bread', which includes the designations above.
- The meal content of the dough consists of at least 50% brown bread wheat flour.
- The mass of the loaf exceeds 100 grams.
- The supply of the bread is not supplied in the course of carrying out any agreement for the furnishing or serving of any meal, refreshment, cooked or prepared food, so to be ready for immediate consumption when so supplied.
- The documentary requirements under section 11(3) are met.

6. BINDING CLASS RULING

6.1. BCR 59 – Asset for share transaction involving a foreign collective investment scheme

This ruling determines the tax consequences of an asset for share transaction involving a collective investment scheme carried on outside the Republic.

In this ruling references to sections are to sections of the Act applicable as at 29 August 2017.

Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the Act.

This is a ruling on the interpretation and application of:

- section 1(1) – definition of 'company'; and
- section 42.

Class

The class members to whom this ruling will apply are the unit holders referred to hereunder.

Parties to the proposed transaction

The applicant: A company incorporated in and a resident of South Africa

Company A An open-ended investment fund incorporated as a *société d'investissement à capital variable* (SICAV) in a foreign country and licensed there as, and carrying on there, a collective investment scheme

Company B An open-ended investment fund incorporated as a SICAV in the foreign country and licensed there as, and carrying on there, a collective investment scheme

Unit holders: South African holders of participatory interests in portfolio A

Description of the proposed transaction

The applicant is an investment fund manager conducting its business from South Africa. It is the investment manager of portfolio A, offered to investors in the foreign country. Portfolio A is one of several funds administered by Company A.

The applicant wishes to change the administrators of portfolio A and this required the registration of a new SICAV. To this end, the promotor has registered Company B, which has been approved as a collective investment scheme in the foreign country.

The applicant wishes to transfer the assets of portfolio A to portfolio B, a portfolio of Company B, to be offered at its inception to investors in the foreign country.

The proposed transaction will be implemented by way of the following transaction steps:

Step 1 – swap transaction

a) The unit holders of portfolio A will transfer all their units in portfolio A to portfolio B.

b) Portfolio B's units will be issued by Company B to the unit holders of

portfolio A as consideration for the acquisition of the units in portfolio A.

- o The unit price of portfolio A units, as at closure date, will be reflected as the initial offer price of portfolio B units.

The above steps will constitute the 'asset-for-share transaction' contemplated in section 42 in respect of which the ruling is requested.

Step 2 – *in specie* redemption transaction

c) Company B, as the sole investor in portfolio A units, will request an *in specie* redemption of all of its units in portfolio A.

d) Company A will accede to this redemption request by assigning all of the portfolio A underlying investments to Company B, and particularly in favour of portfolio B.

Step 1 and step 2 will take place on the same day.

Step 3 – deregistration transaction

e) Portfolio A will thereafter be deregistered and closed within three years of the above transactions.

Portfolio B will be managed by the applicant in terms of a management agreement and the investment mandate is to manage the day-to-day investments of the portfolio. The investment objectives of portfolio B will be identical to those of portfolio A and it will continue to invest in the same assets as portfolio A. Portfolio B units will be offered in the foreign country.

After the implementation of the proposed transaction the applicant plans to register portfolio B with the Financial Services Board (FSB) under section 65 of the Collective Investment Schemes Control Act 45 of 2002 (CISCA), to be classified as a collective investment scheme in securities.

<u>Conditions and assumptions</u>

This binding class ruling is subject to the following additional conditions and assumptions:

- Portfolio A and portfolio B are foreign collective investment schemes

effectively managed in South Africa by the applicant.

- Portfolio B is comparable to a portfolio of a collective investment scheme in securities contemplated in Part VII of the CISCA and will be classified as such by the FSB when portfolio B is registered with the FSB under section 65 of the CISCA.
- The market values of the units in portfolio A held by the unit holders are greater or equal to either their base costs or the costs taken into account under section 11(*a*) read with section 22, as the case may require.
- None of the items set out in section 42(8A) applies in respect of the proposed transaction.

Ruling

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

- The share swap transaction described in step 1 of the proposed transaction will comply with paragraph (*a*) of the definition of 'asset-for-share transaction' in section 42(1) and will qualify for relief under section 42(2)(*a*). Consequently, the unit holders will not realise either capital gains or taxable income from the proposed transaction.

7. GUIDES

7.1. Comprehensive Guide to Dividends Tax (Issue 2)

Contents:

Chapter 1 Introduction to dividends tax

- Methods of taxing dividends
    - The imputation system
    - The classical system
    - The corporate level system

- Replacement of STC with dividends tax
- Reasons for the change from STC to dividends tax
  - Change from a company-level tax to a tax on holders of shares
  - A change in the tax base
- Differences between STC and dividends tax
- Implementation of dividends tax
- Dividends tax vs normal tax
- Provisions of the Act that combat tax avoidance relating to dividends

Chapter 2 Scope and definitions (sections 1(1) and 64D)

- Introduction
- Definitions [section 1(1)]
  - Definition – 'company'
  - Definition – 'contributed tax capital'
  - Definition – 'dividend'
  - Definition – 'equity share'
  - Definition – 'foreign dividend'
  - Definition – 'JSE Limited Listings Requirements'
  - Definition – 'listed company'
  - Definition – 'listed share'
  - Definition – 'return of capital'
  - Definition – 'share'
- Definitions (section 64D
  - Definition – 'beneficial owner'
  - Definition – 'dividend'

- Definition – 'dividend cycle'
- Definition – 'effective date'
- Definition – 'regulated intermediary'
- Definition – 'STC credit'

Chapter 3 Levy of dividends tax, liability for dividends tax and transitional arrangements (sections 8F(2)(*a*), 8FA(2)(*a*), 9H(3), 12Q(3), 24BA(3)(*b*), 25BB(6), 26B(2), 31(3), 64E, 64EA and 64EB)

- Application and rate of dividends tax [ss 12Q(3), 25BB(6), 26B(2) and 64E(1)]
    - Companies liable to pay dividends tax
    - Dividends paid by headquarter companies [section 64E(1)]
    - Dividends paid by oil and gas companies [section 26B(2)]
    - Dividends or interest paid by a REIT or a controlled company [section 25BB(6)(*a*) and (*b*)]
    - Dividends paid by international shipping companies [section 12Q(3)]
- Date on which a dividend is deemed to be paid [section 64E(2)]
    - A dividend that does not consist of a distribution of an asset *in specie* [section 64E(2)(*a*)]
    - A dividend that consists of a distribution of an asset *in specie* declared by a listed company or a company that is not listed [section 64E(2)(*b*)]
- Amount of distribution of an asset *in specie* [section 64E(3)]
    - A financial instrument listed on a recognised exchange [section 64E(3)(*a*)]
    - Other assets [section 64E(3)(*b*)]
- Company deemed to have paid a dividend – Amount owing on a debt [section 64E(4)]

    - Company deemed to have paid a dividend – Amount owing on a debt [section 64E(4)(*a*)]
    - Nature and amount of dividend deemed to have been paid [section 64E(4)(*b*)]
    - Deemed date of payment of deemed dividend [section 64E(4)(*c*)]
    - Meaning of 'market-related interest' [section 64E(4)(*d*)]
    - Debt owing previously subject to STC [section 64E(4)(*e*)]
- Amount of dividend denominated in a currency other than the currency of South Africa [section 64E(5)]
- Company and regulated intermediary deemed to have paid the amount of dividends tax withheld to the beneficial owner [section 64E(6)]
    - Company deemed to have paid the amount of dividends tax withheld to the beneficial owner [section 64E(6)(*a*)]
    - Regulated intermediary deemed to have paid the amount of dividends tax withheld to the beneficial owner [section 64E(6)(*b*)]
- Liability for dividends tax (ss 8F(2), 8FA(2), 9H(3)(*c*)(iii), 24BA(3)(*b*), 31(3), 64E(4)(*b*)(i) and 64EA)
    - Dividend in cash – Beneficial owner liable for dividends tax [section 64EA(*a*)]
    - Dividends *in specie* – Company declaring and paying dividend liable for dividends tax [ss 8F(2), 8FA(2), 9H(3)(*d*)(iii), 24BA(3)(*b*), 31(3), 64E(4)(*b*)(i) and 64EA(*b*)]
- Deemed dividends (section 64EB)
    - Cession of a dividend [section 64EB(1)]
    - Amount paid for a borrowed share in a listed company [section 64EB(2)]
    - The purchase of a share cum dividend [section 64EB(3)]

- Transitional arrangements: Replacement of STC with dividends tax

Chapter 4 Exemption from dividends tax and relief from double taxation (sections 64F, 64FA and 108)

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    - The government in the national, provincial or local sphere [section 64F(1)(*b*)]
    - A public benefit organisation [section 64F(1)(*c*)]
    - An environmental rehabilitation trust [section 64F(1)(*d*)]
    - Certain institutions, boards or bodies exempt from normal tax [section 64F(1)(*e*)]
    - Certain funds exempt from normal tax [section 64F(1)(*f*)]
    - Certain persons exempt from normal tax [section 64F(1)(*g*)]
    - A holder of shares in a registered micro business [section 64F(1)(*h*)]
    - A small business funding entity [section 64F(1)(*i*)]
    - Dividend paid by a foreign company to a person that is not a resident [section 64F(1)(*j*)]
    - A portfolio of a collective investment scheme in securities [section 64F(1)(*k*)]
    - Any person to the extent that the dividend constitutes income of that person [section 64F(1)(*l*)]
    - Any person to the extent that the dividend was subject to STC [section 64F(1)(*m*)]
    - A fidelity or indemnity fund [section 64F(1)(*n*)]
    - A natural person in respect of a dividend paid on a tax-free investment [section 64F(1)(*o*)]

- Exemption from dividends tax for dividends paid by a 'REIT' or a controlled company [section 64F(2)]
- Exemption from and reduction of dividends tax for dividends *in specie* (section 64FA)
  - Exemption from dividends tax for dividends *in specie* [section 64FA(1)]
  - Reduced rate of dividends tax [section 64FA(2)]
  - Application of section 64FA(1) and (2) if an amount is deemed to be a dividend consisting of a distribution of an asset *in specie*
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Chapter 5 Withholding of dividends tax (sections 64G, 64H and 64I)

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  - No withholding requirement for a company that declares and pays a dividend [section 64G(2)]
  - Reduced rate of tax – Application of a tax treaty [section 64G(3)]
- Withholding of dividends tax by regulated intermediaries (section 64H)
  - General rule [section 64H(1)]
  - No withholding requirement for a regulated intermediary [section 64H(2)]
  - Reduced rate of tax – Application of a tax treaty [section 64H(3)]
- Withholding of dividends tax by a portfolio of a collective investment

scheme in securities and a portfolio of a hedge fund collective investment scheme

- Withholding of dividends tax by long-term insurers (section 64I)
  - Withholding of dividends tax by long-term insurers on cash dividends (section 64I)
  - Dividends *in specie* paid to a long-term insurer

Chapter 6 STC credit (section 64J)

- STC credit (section 64J)
  - Dividend not subject to dividends tax as a result of an STC credit [section 64J(1)]
  - Calculation of STC credit [section 64J(2)]
  - Amount by which the STC credit is reduced [section 64J(3)]
  - STC credit of a long-term insurer [section 64J(4)]
  - Termination of STC credit [section 64J(5)]
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Chapter 7 Payment and recovery of dividends tax and record-keeping (section 64K; and sections 25, 29, 91(2) and (4), 92, 95(1), 99(1), 157, 180, 189, 210 and 222 of the TA Act)

- Payment and recovery of dividends tax (section 64K; and ss 25, 91(2) and (4), 92, 95(1), 99(1), 157, 180, 189, 210 and 222 of the TA Act)
  - Liability of a beneficial owner to pay dividends tax [section 64K(1)(*a*)]
  - Liability of a company that declares and pays a dividend consisting of a distribution of an asset *in specie* to pay dividends tax [section 64K(1)(*b*)]
  - Liability of person withholding dividends tax [section 64K(1)(*c*)]

- Liability to submit a return / Third party returns [section 64K(1)(*d*) and (1A); and section 25 of the TA Act)]
- Personal liability of withholding agent (section 157 of the TA Act)
- Declarations to be submitted to the Commissioner [section 64K(4)]
- Estimation of assessments (ss 91(4) and 95(1) of the TA Act)
- Interest on late payment of dividends tax (section 64K(6); and Chapter 12 of the TA Act)
- Assessment and recovery of tax; and understatement and administrative penalties (ss 91(2), 92, 95(1), 99(1), 210 and 222 of the TA Act)
- Liability of financial management for dividends tax debt (section 180 of the TA Act)

- Duty to keep records (section 29 of the TA Act)

Chapter 8 Refund of dividends tax (sections 64L, 64LA and 64M; and section 190 of the TA Act)

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  - Introduction to refund of dividends tax withheld from the payment of a cash dividend
  - Introduction to refund of dividends tax paid by a company on a dividend *in specie*
- Refund of dividends tax on cash dividends declared and paid by companies (section 64L)
  - Refund of dividends tax withheld by a company that declared and paid a cash dividend [section 64L(1) and section 64L(1A)]
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[section 64L(3)]

- Expiry date for recovery of dividends tax from the Commissioner [section 64L(4)]

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- Refund of dividends tax on dividends *in specie* in circumstances other than those referred to in section 64LA (section 190 of the TA Act)

Chapter 9 Rebate against normal tax or dividends tax in respect of foreign taxes on dividends (sections 6*quat* and 64N)

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  - Rebate for foreign taxes on dividends paid by a foreign company [section 64N(1)]
  - Amount of rebate for foreign taxes on dividends [section 64N(2)]
  - Limitation on amount of rebate for foreign taxes on dividends [section 64N(3)]
  - Translation of amounts of foreign taxes on dividends [section 64N(4)]
  - Proof of foreign taxes on dividends [section 64N(5)]
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Chapter 10 Company reorganisation rules – CTC and dividends tax [sections 42(3A), 44(4A), 44(6)(*c*), 44(6)(*e*), 44(9)(*a*), 44(10), 46(3A) and 46(5)]

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- CTC and asset-for-share transactions [section 42(3A)]
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- Unbundling transactions [ss 46(3A) and 46(5)]
    - CTC and unbundling transactions [section 46(3A)]
    - Dividends tax and unbundling transactions [section 46(5)]

8. INDEMNITY

Whilst every reasonable care has gone into the preparation and production of this update, no responsibility for the consequences of any inaccuracies contained herein or for any action undertaken or refrained from taken as a consequence of this update will be accepted.