TAX UPDATE

For period: October 2024 to December 2024

Prepared by: Johan Kotze

TABLE OF CONTENTS

1. FOREWORD 3

2. NOTICES / REGULATION 4

- **2.1. Additional considerations in respect of which an application for a binding private ruling or a binding class ruling may be rejected** 4
- **2.2. Table of interest** 6

3. TAX CASES 9

- **3.1. ITC 1978 (86 SATC 511)** 9
- **3.2. Usasa Refining (Pty) Ltd v C:SARS (86 SATC 494)** 15
- **3.3. Ueven Metals (Pty) Ltd v C:SARS (86 SATC 474)** 20
- **3.4. BCM (Pvt) Ltd v Zimbabwe Revenue Authority (86 SATC 467)** 29
- **3.5. Bechan and another v SARS Customs Investigation Unit and Others (86 SATC 557)** 31

4. INTERPRETATION NOTES 34

- **4.1. Disposal of assets by deceased person, deceased estate, and transfer of asset between spouses – No. 134** 34
- **4.2. Application of sections 20(7) and 21(5) (VAT) – No. 83 (Issue 3)** 35
- **4.3. Sale and leaseback arrangements – No. 135** 36

5. DRAFT INTERPRETATION NOTES 38

- **5.1. Meaning of 'similar finance charges'** 38
- **5.2. Public Benefit Organisations: Non-professional sport and recreation** 39
- **5.3. Diminution in the value of closing stock** 41

6. BINDING PRIVATE RULING 43

- **6.1. Tax consequences of a deemed input tax deduction under the VAT Act – No. 411** . 43
- **6.2. Tax consequences of the issue of a long-term loan for the issuer and holder – No. 412** 44
- **6.3. Application of proviso to section 8EA(3) – No. 413** 47

7. BINDING CLASS RULING 51

- **7.1. Award of listed shares under share incentive schemes – No. 91** 51

8. BINDING GENERAL RULING 56

- **8.1. Application of section 20(7) and 21(5) of the VAT Act – No. 27 (Issue 2)** 56
- **8.2. VAT treatment of certain supplies of goods or services made by a municipality to a national or provincial government (VAT) – No. 74** 60

9. GUIDES 69

- **9.1. Frequently Asked Questions – Deceased Estates (Issue 4)** 69

10. INDEMNITY 103

1. FOREWORD

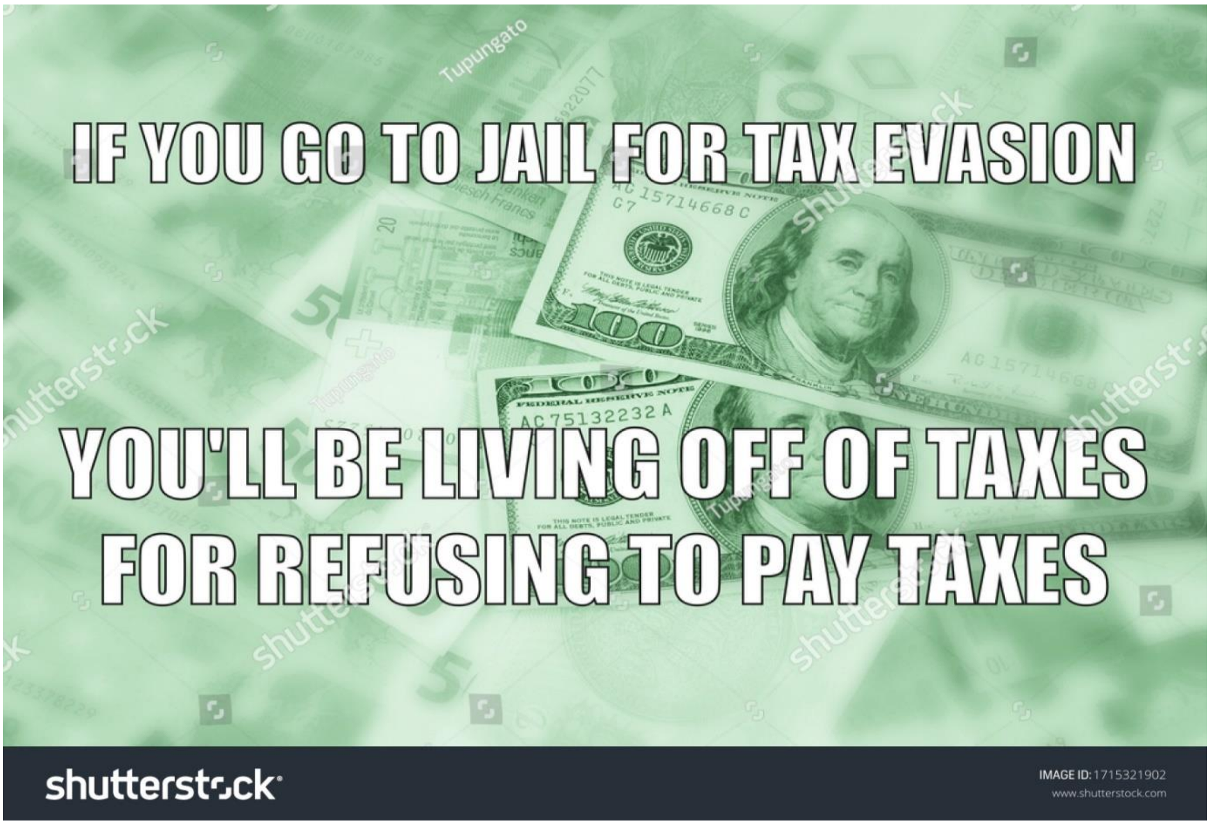
The purpose of this update is to summarise developments that occurred during the fourth quarter of 2024, specifically in relation to Income Tax and VAT. Johan Kotze, a Tax Executive at Shepstone & Wylie Attorneys, has compiled this summary.

The aim of this summary is for readers to be exposed to the latest developments and to consider areas that may be applicable to their circumstances. Readers are invited to contact Johan to discuss their specific concerns and, for that matter, any other tax concerns.

Please take some time and consider the tax cases.

Interpretation notes, rulings and guides are all important aspects of the developments that took place, as they give taxpayers an insight into SARS' application of specific provisions.

Enjoy reading on!



2. NOTICES / REGULATION

2.1. Additional considerations in respect of which an application for a binding private ruling or a binding class ruling may be rejected

1. General

Any term or expression contained in this notice to which a meaning has been assigned in a "tax Act" as defined in section 1 of the Tax Administration Act, 2011, has the meaning so assigned, unless the context indicates otherwise.

2. List of additional considerations in respect of which the Commissioner may reject an application for a binding private ruling or a binding class ruling

The aspects in respect of which SARS may reject an application for a binding private ruling or a binding class ruling, are hereby extended by the following items in respect of the indicated tax Acts:

2.1 Income Tax Act, 1962 (Act No. 58 of 1962)

2.1.1 The determination of the allowance referred to in section 24C(2).

2.1.2 The effect of a salary sacrifice for the purposes of the definition of "remuneration" as defined in paragraph 1 of the Fourth Schedule.

2.1.3 The interpretation and application of the exemption under section 10(1)(c)(v), in relation to any agreement entered into before 1 January 1990.

2.1.4 The deductibility of any expense incurred by an employer in order to transfer or extinguish, in whole or in part, its post-retirement medical aid obligations towards past or present employees (excluding deductions under section 12M), specifically including, but not limited to—

(a) lump sum contributions to pension, provident or benefit funds;

(b) lump sum settlement payments made directly to employees;

(c) premiums paid by the employer to acquire annuity policies.

2.1.5 Applications concerning residency or tax status, which include—

(a) the determination of the place of effective management for purposes of the definition of “resident” in section 1(1);

(b) any determination whether a “foreign business establishment" in relation to a controlled foreign company is in existence for purposes of the definition of that term in section 9D(1);

(c) any determination whether a “permanent establishment” as defined in section 1(1) has been created.

2.1.6 Whether consideration would constitute “fair market value” for purposes of Part V of Chapter II.

2.1.7 Any exercise of the Commissioner’s discretion under section 58(1) to determine whether the consideration given for the disposal of property is adequate.

2.2 Value-Added Tax Act, 1991 (Act No. 89 of 1991)

2.2.1 The liability for tax of a supplier of goods or services that is not a party to the application.

2.2.2 The entitlement to deduct input tax in respect of goods or services acquired by a person who is not a party to the application.

2.2.3 Applications requiring the Commissioner to determine that a person is acting as an agent or principal in respect of a supply of goods or services.

2.2.4 Whether a supply of goods or services constitutes a single supply, composite supply or multiple supplies.

2.2.5 Confirmation that the issuing of a tax invoice, debit or credit note complies with the requirements imposed by any law relating to electronic communications, or that any technical requirements are met in respect of electronic invoicing.

2.2.6 Confirmation whether or not a person that is not a “resident of the Republic” as defined in section 1(1) carries on an “enterprise” as defined, through a permanent establishment in the Republic.

2.2.7 Confirmation whether a person is a “resident of the Republic” as defined in section 1(1) with reference to the place of effective management.

2.2.8 Applications involving transactions in respect of which material facts cannot be established at the time of the application.

2.3 Employment Tax Incentive Act, 2013 (Act No. 26 of 2013)

2.3.1 Applications relating to an employer's eligibility to receive the "Employee Tax Incentive" under the provisions of the Employment Tax Incentive Act, 2013 (Act No. 26 of 2013).

2.4 Other considerations

2.4.1 Applications for directives or certificates in terms of the laws administered by the Commissioner if other mechanisms have been established by which those directives or certificates may be obtained.

2.4.2 Applications concerning the attribution, allocation or apportionment of expenditure or input tax for income tax or value-added tax purposes. A request for the approval of an alternative apportionment method may be made in terms of section 41B of the Value-Added Tax Act, 1991.

2.4.3 Applications pertaining to the tax consequences of transactions contained in agreements which have already been concluded, except requests for—

(a) rulings or class rulings in terms of section 41B of the Value-Added Tax Act, 1991; or

(b) the extension of the validity of a ruling prior to its expiry date, if the facts (including all the terms of the transaction), the applicable provisions of the relevant legislation and the applicable legal principles remained the same.

2.4.4 Applications in respect of which the applicant or co-applicant has not rendered all tax returns or paid any tax by the due date, unless arrangements acceptable to SARS have been made

2.2. Table of interest

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

DATE FROM	DATE TO	RATE
1 November 2020	28 February 2022	7,00%
1 March 2022	30 April 2022	7,25%
1 May 2022	30 June 2022	7,50%
1 July 2022	31 August 2022	7,75%
1 September 2022	31 October 2022	8,25%
1 November 2022	31 December 2022	9,00%
1 January 2023	28 February 2023	9,75%
1 March 2023	30 April 2023	10,50%
1 May 2023	30 June 2023	10,75%
1 July 2023	31 August 2023	11,25%
1 September 2023	31 December 2024	11,75%
1 January 2025	Until change in the Public Finance Management Act rate	11,50%

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

DATE FROM	DATE TO	RATE
1 September 2020	31 October 2020	3,25%
1 November 2020	28 February 2022	3,00%
1 March 2022	30 April 2022	3,25%
1 May 2022	30 June 2022	3,50%
1 July 2022	31 August 2022	3,75%
1 September 2022	31 October 2022	4,25%

1 November 2022	31 December 2022	5,00%
1 January 2023	28 February 2023	5,75%
1 March 2023	30 April 2023	6,50%
1 May 2023	30 June 2023	6,75%
1 July 2023	31 August 2023	7,25%
1 September 2023	31 December 2024	7,75%
1 January 2025	Until change in the Public Finance Management Act rate	7,50%

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

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

DATE FROM	DATE TO	RATE
1 August 2020	30 November 2021	4,50%
1 December 2021	31 January 2022	4,75%
1 February 2022	31 March 2022	5,00%
1 April 2022	31 May 2022	5,25%
1 June 2022	31 July 2022	5,75%

1 August 2022	30 September 2022	6,50%
1 October 2022	30 November 2022	7,25%
1 December 2022	31 January 2023	8,00%
1 February 2023	31 March 2023	8,25%
1 April 2023	31 May 2023	8,75%
1 June 2023	30 September 2024	9,25%
1 October 2024	30 November 2024	9,00%
1 December 2024	Until change in the Repurchase rate as announced by the Reserve Bank	8,75%

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

3. TAX CASES

3.1. ITC 1978 (86 SATC 511)

The taxpayer was a close corporation and registered VAT vendor whose VAT liability was governed by the provisions of the Value-Added Tax Act 89 of 1991 (the VAT Act).

The taxpayer was founded by Mr and Mrs Clean as a destination management company (‘DMC’) which was a recognised actor in the international tourist industry and was essentially an entity situate in the target country (i.e. the destination) for tour packages which the foreign tour operator (FTO) intended creating and offering. An FTO relied on the DMC to serve as its ‘eyes and ears on the ground’ and to manage its requests for information and act as a conduit for securing bookings of services on behalf of the FTO. A DMC was also referred to as a ‘ground operator’ for an FTO and essentially it provided the service of a ‘connector’ with knowledge of the destination country.

The taxpayer, since 1997, has consistently performed this role by providing a single supply, i.e. tourism package assembly services to FTOs which were outside South Africa when the service was rendered.

The taxpayer contended that its services were zero-rated in terms of section 11(2)(l) of the VAT Act and maintained that it did not supply either the FTOs or the foreign tourists with any of the accommodation, transport, guides, excursions or greeting services (‘the tourism services) which made up the tour packages and in accordance with this approach it levied output VAT only on the commissions that it charged, as zero-rated, and not on the costs of the tourism services paid by the FTOs and during the disputed VAT periods it had submitted its VAT returns on that basis.

SARS had issued additional VAT assessments (‘the disputed assessments’) to the taxpayer in respect of its November 2013 to August 2018 VAT periods (‘the disputed VAT periods’) and it duly objected to the aforementioned assessments under Chapter 9 of the Tax Administration Act 28 of 2011 (TA Act) but the objection was disallowed and the taxpayer thereafter appealed to the Tax Court in terms of section 133 of the TA Act.

SARS contended that the taxpayer had provided a ‘supply of tour packages and related goods or services to non-resident tourists and/or foreign tour operators’, i.e. that the taxpayer had supplied the actual tourism services rendered to the foreign tourists when they were in South Africa and on that basis SARS contended that subs 11(2)(l)(iii) of the VAT Act operated to exclude the zero-rating and accordingly maintained that output VAT, at the standard rate, should have been levied on both the commissions which the taxpayer charged the FTOs and the costs of the tourism services paid, where applicable, by the FTOs and the disputed assessments were raised on that basis.

The main ground of appeal turned on what the taxpayer actually did in the conduct of its enterprise and if the grounds demonstrated that the taxpayer’s services were limited to travel package assembly services supplied to FTOs, and that the tourism services were merely booked or secured on behalf of the FTOs, the parties agreed that the main ground of appeal should succeed and that the disputed assessments should be set aside.

The evidence revealed that FTOs were entities incorporated outside of South Africa and had no presence in the country and whose clients were the foreign tourists who purchased tour packages from them.

The taxpayer's function was triggered by an FTO's request to assist in assembling a tour package for the FTO to market to its clients and throughout this process the taxpayer had no contact with the foreign tourists, who were the FTO's clients, and did not sell or market any tour packages, accommodation, or services to them and it also had no sales website, marketing arm or other mechanism for foreign tourists or outsiders to contact it.

The evidence revealed that the taxpayer had no contractual nexus with the foreign tourists who were clients of the FTOs and it also did not have any contact with them whilst they were in South Africa.

Moreover, the taxpayer's contractual arrangements with the FTOs provide that it will secure the necessary bookings on the FTO's behalf and in its Co-operation Agreements with FTOs it provided that the FTO 'hereby appoints [the taxpayer] as its exclusive representative in Southern Africa' to 'carry out the purchase of tourist products and related bookings/reservations and payments in Southern Africa on behalf of the tour operator. The Co-operation Agreement also details what this representation encompasses which was essentially to execute the FTO's instructions and requirements.

The taxpayer did not decide which local suppliers were to be included in a tour package and it merely advised on the suitable options available and the FTO selected the suppliers and instructed the taxpayer to book with these suppliers on its behalf.

In addition, all the local service providers knew that the taxpayer was an agent for FTOs and the documents routinely issued to them by the taxpayer expressly and routinely stated this.

Judge Dickerson held the following:

(i) That it was common cause that the taxpayer, in the pursuit of its VAT enterprise, provided a supply of services to foreign tour operators and what was in dispute was the nature of that supply and whether it also constituted in part a supply to the foreign tourists who subscribed to the foreign tour operators' tours.

(ii) That section 11(2)(l) of the VAT Act provided that the supply of services, which would otherwise be charged with tax at the standard rate, is charged with tax at the rate of zero percent if: (1) the services are supplied to a non-resident; and (2) the services are not supplied directly to a person in the Republic at the time they were rendered.

(iii) That section 102 of the TA Act provided that a taxpayer bore the burden of proving inter alia that an amount, transaction, event or item was exempt or otherwise not taxable; the rate of tax applicable to a transaction, event, item or class of taxpayer; and/or whether a 'decision' that was subject to objection and appeal under a tax Act, was incorrect. It followed that the taxpayer bore the onus of establishing – on a balance of probabilities – the disputed facts which were material to its appeal, and that the decision on objection and appeal were incorrect.

(iv) That the central decisive issue in this case was whether the taxpayer was an agent or principal when it supplied its services. SARS contended that the taxpayer was not an agent but was a principal selling tourist packages to FTOs who, in turn, re-sold the same to individual foreign tourists in their respective countries and that was the nature of the transaction or, rather, the nature of the supply that the taxpayer was engaged in.

(v) That SARS' contentions, in the light of the evidence outlined in the judgment, were untenable: the evidence plainly demonstrated that the taxpayer's role was confined to (1) assisting the FTOs with their tour assembly and (2) providing assembly acting as a conduit between the FTOs and the local supplier, for which it received commission.

(vi) That the taxpayer did not sell tourist packages either to FTOs, as SARS contended, or to foreign tourists. It undertook no personal or principal liability to local suppliers (all of whom were aware that it acted on behalf of FTOs) and it plainly could not and did not take any decisions as to the constituent parts of tour packages, whether they were to be cancelled or the consequences of cancellation and those were all matters decided and determined solely by the FTOs who were consequently the principals.

(vii) That SARS' Interpretation Note No 42 (IN42), pertaining to the VAT principles in relation to the supply of goods and/or services by the travel and tourism industry, identified the circumstances under which local entrepreneurs supplying services in the tourism industry will be viewed as acting as an agent and when they will be viewed as a principal for VAT purposes and this was reflected in a table setting out the differences between an agent and principal from a VAT perspective.

(viii) That on the application of the criteria set out in the aforementioned table to the facts revealed by the evidence in this case, it was plain that the taxpayer was not a principal. Consequently, the taxpayer met all the requirements of an 'agent' for VAT purposes as set out in the Interpretation Note. There was thus no factual or evidential basis for SARS to treat the taxpayer as if it were the principal in supplying the actual tourism services to the FTOs and, on the evidence, the taxpayer merely provided an arranging service and acted as a conduit between FTOs and local suppliers.

(ix) That SARS' reliance on XO Africa Safaris CC v C:SARS 79 SATC 1 was misplaced because it was completely distinguishable on the facts. XO Africa's books of account reflected the full amounts invoiced to the FTOs as its own sales and the invoices from local suppliers as its own expenses. Secondly, its contracts with FTOs required it to provide the local services listed in the itinerary which the FTO purchased from it. Thirdly, XO Africa was accordingly responsible for delivery of the local services during the tours. Fourthly, the letter of agreement, standard terms of conditions of contract and the itinerary attached to the letter of agreement proclaimed unequivocally that XO was providing materials and services consisting of accommodation, meals, entertainment, gifts, transport and the like as specified in the itinerary.

(x) That, in short, the approach adopted by SARS in relation to the assessments forming the subject-matter of this appeal was inconsistent with (1) the approach adopted in 2005 in which it approved the manner of invoicing based on an accurate description provided by the taxpayer of the nature of its business (2) the agency criteria set out in Interpretation Note No 42 (3) the evidence provided by the taxpayer in this case and (4) the true import of XO Africa, supra, to this case. Indeed, SARS' misplaced reliance on the XO Africa case displayed a careless disregard of the particular nature and modus operandi of the taxpayer's business, which emerged from even a rudimentary consideration of the various documents outlined in the judgment.

(xi) That a 'trade usage' denoted 'a custom having the force of law' which was relied on to import an implied term of the agreement. The taxpayer's evidence merely sought to, and did, establish that it was common practice in the industry to keep the amount of commissions confidential: not that this was a custom having the force of law, or as importing an implied term into the taxpayer's contracts. There was no need to do the latter because it was an express term of the taxpayer's contracts that a commission will be paid but was confidential. Consequently, the evidential requirements for establishing a trade usage in the legal sense of that term of art, did not apply.

(xii) That SARS' further argument that the taxpayer was not an agent, but rather a principal, vis a vis its FTOs because it did not disclose the amount of its commission was similarly specious. While it was generally correct that an agent who receives commission will or may be required to disclose the amount of such commission, that was not one of the essentialia of agency. It was perfectly permissible for an agent and a principal to explicitly agree that commission will be paid, but that the amount may not have to be disclosed.

(xiii) That, accordingly, the taxpayer had correctly determined in terms of section 11(2)(l) of the VAT Act that during the VAT periods forming the subject matter of the above assessments, it had zero-rated its supply of services to foreign tour operators and the VAT 217 notices of additional assessment for the taxpayer's 2013/11 to 2018/08 VAT periods were set aside.

(xiv) That, in regard to awarding costs, SARS was grossly unreasonable in adopting the stance it did, both in relation to the challenged assessments and the stance that it adopted throughout these proceedings. SARS disregarded both the facts of how the taxpayer's business was conducted which stood in stark contrast to the facts in the XO Africa case, supra, on which SARS placed great reliance and the criteria in SARS' own Interpretation Note No 42, which was evidently formulated and issued by SARS in the light of the XO Africa case.

(xv) That no evidence was adduced by SARS in an attempt to explain or justify the stance which it adopted in the light of the known and objective facts, most if not all – of which were apparent from the documents in the Bundle.

(xvi) That in terms of section 130(1)(a) of the TA Act the costs will only be awarded against a party if the court is satisfied that the grounds relied upon by that party were unreasonable. In consequence, in this case, it was appropriate that SARS bear the costs of these appeal proceedings, including the costs of two counsel.

The taxpayer's appeal upheld.

Respondent to pay the taxpayer's costs of this appeal on the scale as between attorney-and-client, including the costs of two counsel.

3.2. *Usasa Refining (Pty) Ltd v C:SARS*[1] *(86 SATC 494)*

SARS had commenced an audit in respect of Usasa's VAT returns on 31 July 2020.

Usasa Refining (Pty) Ltd (Usasa), on 9 September 2020, had submitted all requested information and documents in terms of SARS' request of 31 July 2020 and by 10 November 2020 Usasa had submitted all requested information and documents pursuant to requests by SARS auditors during a field audit conducted from 2–6 November 2020.

SARS made various requests for further information pursuant to having extended the scope of the audit to include additional tax periods and Usasa duly provided all information and documents sought by SARS.

No further questions were put to Usasa's representatives by the SARS auditors after 7 June 2021.

After 22 June 2021 and until the present application was instituted on 11 November 2021, no further information, documents or records were sought by SARS from Usasa.

Despite requests on 13 September 2021 and 21 October 2021 by Usasa to finalise the audit, SARS had failed to do so and had failed to provide any feedback or progress of the audit.

The delay in the finalisation of the audit resulted in VAT refunds of Usasa not being timeously paid to it and this prejudiced Usasa's ability to secure financing of its VAT obligations from its VAT loan financier.

Usasa, consequently, brought the present application in terms of section 8(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), alternatively on the principle of legality, for review of SARS' failure to take a decision to finalise the audit and it was submitted that such failure affected Usasa's rights and had already severely prejudiced Usasa.

It was SARS' failure to take a decision to finalise the audit which Usasa in these proceedings sought to have reviewed and set aside.

Usasa submitted that SARS' failure to provide progress on the finalisation of the audit was in conflict with section 42(2) of the Tax Administration Act 28 of 2011 (TA Act).

[1] Gauteng Division, Pretoria

Usasa submitted that failure to make a decision on the finalisation of the audit was administrative action contemplated by section 1 read together with sections 6(2)(g), 6(3)(a) and 8(2) of PAJA.

Usasa submitted that the failure by SARS to take a decision on the finalisation of the audit within a reasonable time was an administrative decision as contemplated in the definition of 'decision' in PAJA.

Moreover, this failure to take the decision had the capacity to affect Usasa's rights and had already severely prejudiced Usasa's rights in that, in delaying his decision on the finalisation of the audit, SARS had unlawfully withheld Usasa's VAT refunds of R164 354 650.20 for a period of six months until February 2021.

Usasa submitted that it had a right to have certainty regarding its tax position and continue its business and the unreasonable delays by SARS in failing to take a decision to finalise the audit had materially and adversely affected Usasa's rights.

SARS contended that Usasa could only seek a finalisation of the audit in terms of the TA Act and therefore the current application before the court was circumventing the judicial position that a decision to conduct an audit in terms of section 40 of the TA Act did not constitute administrative action and it therefore raised a point *in limine* that the relief sought was incompetent. It stated that there was no administrative action to be reviewed by the court as SARS was empowered to select a person for audit on any relevant basis and the power and manner given to SARS was broad and not limited.

SARS submitted further that a decision to conduct an audit was not administrative action as there was no decision that was taken that adversely affected the rights of the taxpayer which had a direct external effect.

SARS further submitted that even if he was statutorily obliged to make a decision whether or not to finalise the present audit, the remedy was not to review the non-decision but to compel SARS to make a decision through a mandamus and on that the basis on which the relief sought was incompetent.

SARS also submitted that there were valid grounds to continue with the audit and that a reasonable period to do so had not yet expired.

The court had to consider whether SARS' failure to take a decision to finalise the audit could be reviewed and set aside by it in these proceedings.

Judge Sardiwalla held the following:

(i) That section 42 of the TA Act required that a SARS official involved in or responsible for an audit must, in the prescribed form and manner, provide the taxpayer with a notice of commencement of an audit and, thereafter, a report indicating the stage of completion of the audit.

(ii) That section 6(1) of PAJA provided that any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action. Section 6(2)(g) provided that a court or tribunal has the power to judicially review an administrative action if, inter alia, the action concerned consisted of a failure to take a decision. Section 8(2) provided that the court or tribunal, in proceedings for judicial review in terms of section 6(3) may grant any order that is just and equitable, including orders directing the taking of the decision and declaring the rights of the parties in relation to the taking of the decision.

(iii) That section 34 of the Constitution guarantees the right to a fair trial which included affording parties to the litigation a fair opportunity to adequately address material issues in the papers, by evidence or during argument. A basic rule of fairness is that a person who will be adversely affected by an act or a decision of the administration or authority shall be granted a hearing before he suffered detriment, i.e. the audi alteram partem rule implied that a person must be given the opportunity to argue his case.

(iv) That the requirement that in certain circumstances decision-makers must act in accordance with the principles of natural justice or procedural fairness has ancient origins and inherent is the hearing rule which requires decision-makers to hear a person before adverse decisions against them are taken. The rules of natural justice help to ensure objectivity and impartiality and facilitate the treatment of like cases alike.

(v) That the challenge is always how to strike the right balance between public and private interest. Whilst this court, in the circumstances of this matter seems compelled to respond to the vulnerability of Usasa facing the pervasive power of SARS, the court was at the same time aware that it had to avoid a situation where the unconstrained expansion of the duty to act fairly threatened to paralyse its effective administration.

(vi) That, in the court’s view, the public interest necessarily comprehended an element of justice to the individual. The competing values of fairness and individual justice on the one hand and administrative efficiency on the other hand constituted the public and the private aspects of the public interest.

(vii) That it seemed plain that the principles of natural justice were intended to promote individual trust and confidence in the administration. They encouraged certainty, predictability and reliability in government interactions with members of the public, irrespective of their stations in life and this is a fundamental aspect of the rule of law.

(viii) That, in a delicate balancing act, it is the duty of the courts to uphold and vindicate the constitutional rights of Usasa to its good name and cannot have the effect of precluding SARS from discharging duties and responsibilities exclusively assigned to it by the relevant legislation. However, such an inquiry may only proceed in a manner which strictly recognises the right of Usasa to have the inquiry conducted in accordance with natural justice and fair procedures.

(ix) That it was clear from the reading of section 42 of the TA Act that it was the legislature's intention to keep a taxpayer informed of the process. In particular, there was a statutory duty in terms of section 42(1) that the SARS official involved in or responsible for an audit must provide the taxpayer with a report indicating the stage of completion of the audit, yet SARS has offered no explanation as to why progress on the audit was not provided to Usasa.

(x) That Usasa was clear that the review was on the grounds of failure to take a decision by SARS and not to steer the decision in a particular direction, as the failure to finalise the audit report led to financial prejudice being suffered by SARS withholding Usasa's VAT refunds. The fact that the VAT refunds were subsequently released did not, in the court's opinion, remedy the action taken.

(xi) That, in regard to the question whether the failure to take the decision to finalise the audit constituted administrative action for the purposes of PAJA, the court was mindful that the ground of review was not related to the decision to audit Usasa, but rather the failure to provide feedback on the audit and/or to finalise the audit.

(xii) That SARS was misguided as to which decision or failure to take a decision was under review in this case. SARS' version was that the decision to audit a person under section 40 of the TA Act was not regarded as administrative action as had been decided on various occasions in the past. However, that was not the action that Usasa sought to review as it was in fact SARS' failure to arrive at a decision in terms of section 6(2)(g) of PAJA where no decision had been taken and there was no prescribed period in law that dictated the period in which such a decision must be made.

(xiii) That, whilst SARS in this application had set out the reasons for the delay in finalising the audit, this was not communicated to Usasa as it should have been through a progress report contemplated in terms of section 42(1) of the TA Act. Had SARS provided such a report it would not have been necessary to bring the present application.

(xiv) That whilst SARS was entitled to conduct investigations in the manner in which it may find appropriate, it was undisputed that there was a delay in the finalisation of the audit and SARS had failed to advise Usasa accordingly.

(xv) That, in the circumstances, the court found no reason why the present application did not fall under section 42(1) on the grounds of an unreasonable delay.

(xvi) That in the present matter SARS did not at any stage of its investigation find it necessary to engage with Usasa until the institution of this application. This goes against the principles of natural justice and fair procedure. At this stage the court was satisfied that this failure to do so on the part of SARS rendered the conduct administrative action.

(xvii) That it could not be denied that the decision adversely affected Usasa in having its VAT refunds suspended and that if Usasa was not granted the relief that it sought the finalisation of the audit could continue for a protracted period and the results of which would interfere with the rights of Usasa in the future.

(xviii) That the court had already found that the failure to take a decision on the finalisation of the audit was unlawful administrative action and therefore there was no need to consider the principle of legality.

(xix) That, accordingly, the failure to take a decision as to whether or not to finalise Usasa's VAT audit was reviewed and set aside and SARS was ordered to take such a decision whether or not to finalise the audit within ten days of the order.

(xx) That SARS was ordered to pay the costs of the application including the costs of counsel.

3.3. Ueven Metals (Pty) Ltd v C:SARS[2] (86 SATC 474)

Ueven Metals (Pty) Ltd (Ueven) was engaged in the business of the trade and refining of precious metals, such as gold as well as the silver by-product derived from the gold refining process and was a registered Category C vendor in terms of the Value-Added Tax Act (the VAT Act).

Ueven purchased lesser purity gold in manufactured form (such as scrap jewellery) or in unwrought form (such as gold bars) from certain pre-approved suppliers. The gold sourced by Ueven was invariably of a lesser purity than pure gold because the latter was usually too soft, susceptible to scratches and thus not suited for everyday use as jewellery. Hence, gold was alloyed with other metals to manufacture jewellery. The alloying of gold with other metals (such as copper and silver) reduced the special characteristics and quality of gold, i.e. the colour changes and the density and purity reduces.

Ueven had contracted with ABSA Bank Limited (ABSA) to supply pure gold bars, after such gold had been refined to a purity level of at least 99.5%, namely pure or fine gold.

According to Ueven, the gold-containing material sourced by it (in its lesser state of purity) was not acceptable to ABSA who required pure (fine) gold refined by a refinery accredited by the London Bullion Market Association (LBMA). The gold-containing material was therefore melted and refined on behalf of Ueven for supply to ABSA.

As Ueven was not accredited to refine the gold-containing material to meet the standards of the LBMA required by ABSA, it deposited its lesser purity gold bars with Rand Refinery, who was so accredited. All gold-containing material deposited with Rand Refinery for further refining had to comply with certain specifications. Where these specifications are not met, Rand Refinery will either reject the deposit or impose penalties or additional fees.

Ueven therefore refined and processed all gold-containing material in-house to remove deleterious elements to enable it to deposit the gold with Rand Refinery in bar form.

Ueven generally refined the gold-containing material to a purity level of between 80 to 90%, to maximise the yield and minimise the penalties or additional fees.

The lesser purity gold bars (refined and produced by Ueven from the gold-containing material) were transported from Ueven's premises to Rand Refinery where they were

[2] Supreme Court of Appeal

deposited. Rand Refinery required large quantities to operate effectively and efficiently, which no single depositor could satisfy. When Rand Refinery received Ueven's lesser purity gold bars, they were melted and refined together with (co-mingled with) the gold of other depositors. Rand Refinery refined the gold received from the various depositors to a purity level of at least 99.5% to produce gold bars that met the minimum LBMA standard in conformity with ABSA's requirements and Rand Refinery thereafter delivered the gold bars to ABSA.

During Ueven's 2018 to 2020 tax periods, it supplied gold bars to ABSA and zero-rated such supplies in terms of section 11(1)(f) of the VAT Act. As matters then stood, according to Ueven, refunds in the total amount of R51 036 867.34, together with interest thereon, was due to it by SARS.

SARS, on 27 March 2020, acting in terms of section 40 of the Tax Administration Act (the TA Act), notified Ueven of a VAT verification for the relevant period pursuant to section 40 of the TA Act. After an exchange of correspondence on 19 June 2020, SARS notified Ueven of a VAT and Income Tax audit. SARS then requested Ueven to submit relevant material in terms of section 46. On 10 March 2021 Ueven was requested to attend in person on 18 March 2021 in terms of section 47 of the TA Act, to enable SARS to obtain further clarification and to expedite the audit. Following the interview, on 30 March 2021, SARS sought an extension until 8 April 2021 for the issuance of a letter of audit findings.

On 8 April 2021 SARS issued an 'outcome of the audit conducted as envisaged in terms of section 42(2)(b) of the TA Act' (the letter of audit findings). SARS indicated that the audit findings did not concern the 2019 tax period and that further findings in that regard would issue in due course.

According to SARS, the VAT declarations and tax invoices provided by Ueven reflected that, in total, zero-rated supplies of R4 059 018 550 had been made to ABSA and Rand Refinery. SARS stated that it had reviewed the nature of the goods provided by suppliers to Ueven and had determined that the gold purchased by it had previously been subjected to a manufacturing process.

SARS took the view that section 11(1)(f) of the VAT Act prohibited the supply at a zero-rate to the South African Reserve Bank (SARB), the South African Mint Company (Pty) Ltd (Mintco) or any Bank registered under the Banks Act, of gold in any form that had undergone any manufacturing process 'other than the refining thereof or production of such bars.'

SARS accordingly expressed an intention to re-classify the zero-rated sales to ABSA as standard-rated sales with VAT of 15% in terms of section 7(1)(a), read with section 11(1) and section 64 of the VAT Act. SARS also intimated that it was considering imposing an understatement penalty and raising interest on Ueven's outstanding VAT liability.

Ueven responded to SARS' letter of audit findings by invoking section 9(1) of the TA Act and requesting that it be withdrawn.

Ueven also contended that its gold sales to ABSA during the relevant tax periods were correctly zero-rated in terms of section 11(1)(f) of the VAT Act and, accordingly, the intended VAT assessments should not be raised.

Ueven's response to the letter of audit findings was dated 2 June 2021 and on the same day it gave notice in terms of section 11(4) of the TA Act of its intention to institute legal proceedings against SARS.

Ueven, on 24 June 2021, issued the application which formed the subject of this appeal out of the High Court and sought the following relief:

'1. Directing (in terms of section 105 of the Tax Administration Act 28 of 2011) insofar as it may be required, that the dispute between the parties be adjudicated by this Court;

2. That a declaratory order be issued in terms whereof it be declared that:

   2.1 The word 'gold' in section 11(1)(f) of the Value-Added Tax Act 89 of 1991 refers to, and only applies to: gold (in any of the eight unwrought forms permitted in the subsection) refined to the grade of purity required for acquisition by the South African Reserve Bank (SARB), the South African Mint Company (Proprietary) Limited (Mintco) or any bank registered under the Bank Act 94 of 1990 (bank).

   2.2 'Gold' in the form of 'bars' supplied to the SARB, Mintco or a bank, in terms of section 11(1)(f) of the VAT Act, refers to gold of a purity equal to or greater than 99.5%;'

The declaratory order applied for by Ueven also requested that the proviso to section 11(1)(f) of the VAT Act did not refer to any process(es) to which gold may have been subjected to historically, prior to being refined to the grade of purity required for acquisition by the listed entities.

The High Court held (see Lueven Metals (Pty) Ltd v C:SARS 84 SATC 447 per Davis J) that the supply of gold which was derived from gold which had previously been refined and subsequently undergone any manufacturing process before being refined or manufactured in the prescribed eight unwrought forms for purposes of supply to the listed recipients was therefore excluded from zero-rating.

In the result Ueven's application failed before the High Court where it was dismissed with costs, but the court granted leave to Ueven to appeal to the Supreme Court of Appeal.

Before the Supreme Court of Appeal the issue to be determined was whether the granting of declaratory relief by the High Court was appropriate in the circumstances and whether the High Court ought to have exercised its discretion against the hearing of the application.

Section 105 of the TA Act provided at the relevant time:

'A taxpayer may only dispute an assessment or 'decision' as described in section 104 in proceedings under this Chapter, unless a High Court otherwise directs.'

Judge Ponnan held the following:

(i) That section 21(1)(c) of the Superior Courts Act 10 of 2013 provided a statutory basis for the grant of declaratory orders without removing the common law jurisdiction of courts to do so. It was a discretionary remedy. The question whether or not relief should be granted under this section has to be examined in two stages. In the first place, the jurisdictional facts have to be established. When this has been done, the court must decide whether the case was a proper one for the exercise of its discretion. Thus, even if the jurisdictional requirements were met, an applicant does not have an entitlement to an order. It is for such applicant to show that the circumstances justified the grant of an order. The court was by no means satisfied that those circumstances were present in this matter and, quite the contrary, there were several considerations that suggested that the High Court ought to have exercised its discretion against the hearing of the application.

(ii) That at the outset of the hearing of the appeal, counsel were required to address whether absent a directive in terms of section 105 of the TA Act, the High Court could enter into and pronounce on the merits of the application for declaratory relief. This, in the light of the relief sought in prayer 1 of the Notice of Motion. At the bar in this court the argument advanced by both counsel was that as there was neither an 'assessment' nor a 'decision as described in section 104', and as the nature of the relief sought was a declaration of rights, the default rule that a taxpayer may only dispute an assessment by the objection and appeal procedure under the TA Act, did not find application.

(iii) That the legislative scheme was designed to ensure that the objection and appeal process and the resolution of tax disputes by means of alternative dispute resolution and then the Tax Board or the Tax Court be exhausted, before the High Court could be approached. It also contemplated that in the ordinary course the Tax Court should deal with the dispute, by way of a trial, as the court of first instance before the High Court could be approached. Nowhere was this clearer than from the language, context, history and purpose of section 105, which made it plain that a taxpayer may only dispute an assessment by the objection and appeal procedure under the TA Act, unless a High Court directed otherwise.

(iv) That what counsel's argument boiled down to was not that section 105 did not find application at all in circumstances where declaratory relief was sought; but, properly construed, reduced itself essentially to one of timing. There seemed to be an acceptance that if Ueven had approached the High Court for precisely the same relief after an assessment had issued, then section 105 would apply. However, because an assessment had not yet been issued, but only a notice of intention to assess, the section did not apply. Why the one taxpayer would be better placed, when both sought precisely the same relief, could not be explained. The illogicality of such a differentiation appeared to be compounded when one considered that a taxpayer (such as Ueven) on the receiving end of a decision that was capable of revision and reconsideration would have a lower bar to surpass as opposed to one with a final decision in the form of an assessment. The latter would have to establish exceptional circumstances for a High Court to authorise a departure from the default rule.

(v) That a survey of the authorities in this judgment illustrated that the High Court has jurisdiction to hear and determine income tax cases turning on legal issues and this could be traced back to the unreasoned conclusion of Henochsberg J in Gillbanks v Sigournay 22 SATC 307, which found uncritical acceptance in Emary NO v CIR 24 SATC 43 and thereafter appears to have taken root in In re Phillip Frame Will Trust v CIR 53 SATC 166.

(vi) That aside, it was important to recognise that the legislative landscape had changed significantly since the decision of the Constitutional Court in Metcash Trading Limited v C:SARS and Another 63 SATC 13. Prior to the amendment of section 105, the taxpayer could elect to take an assessment on review to the High Court instead of following the prescribed procedure. That was no longer the case. The amendment was meant to make clear that the default rule was that a taxpayer had to follow the prescribed procedure, unless a High Court directed otherwise. For the present, it sufficed to say that the judgments relied upon appear to have far too readily and uncritically accepted that a taxpayer could, in general and without more, approach a High Court for declaratory relief. Importantly, those judgments do not lay down that where declaratory orders are sought in tax matters, different principles applied. In fact the question whether a declaratory order was appropriate was not considered by the High Court in this case.

(vii) That, even on the acceptance of counsel's primary contention that section 105 was not implicated because there was neither an 'assessment' nor a 'decision as described in section 104', the purpose of section 105 (which was an innovation introduced by the TA Act from 1 October 2011 and narrowed down by an amendment made in 2015) and, which accorded with the overall scheme of the TA Act, was not wholly irrelevant. At the very least, it represented an important pointer to legislative intent and, read together with the other provisions in the TA Act, set the overall contextual scene. It was thus not a wholly irrelevant consideration in the determination of whether or not the circumstances were such that relief in the form of a declaratory order was appropriate. The enquiry was far more nuanced than one may at first blush apprehend. After all, a declaratory order was not appropriate if there were other specific statutory remedies available.

(viii) That this was not to suggest that there will never be tax disputes for which declaratory orders could rightly be sought and made. However, their occurrence, in my view, is likely to be rare and their circumstances exceptional or at least unusual. In general, and without attempting to lay down any hard and fast rules, the exercise of what after all is a purely discretionary power, should be regarded as a reserve or occasional expedient. No doubt, each case would have to be judged on its own facts and circumstances. The court expressly refrained from formulating a test as the court believed that each such case could confidently be left to the good sense of the judge concerned in the exercise of his or her broad general discretion. On any reckoning, this was certainly not such a case.

(ix) That on the very day that Ueven had written to SARS, with a view to persuading it to reconsider its position as reflected in its letter of audit findings, Ueven gave the requisite notice in terms of section 11(4) of the Act of its intention to institute proceedings before the High Court and some three weeks thereafter proceeded to do so. That Ueven genuinely sought to engage with SARS seemed doubtful because the giving of notice without allowing a reasonable time for a reply, and meaningful engagement, were mutually incompatible.

(x) That in simply ignoring the emphasis placed by the TA Act on alternative dispute resolution and in disregarding the need to exhaust its internal remedies, the High Court became Ueven's first port of call. The danger with such an approach was that High Courts could potentially be flooded with like matters. There was little to commend an approach by a taxpayer to the High Court, without awaiting a response from SARS, including perhaps one that may well be favourable. SARS would be placed in an invidious position if it were forced on a regular basis to defend such matters before the High Court.

(xi) That this was not a matter where 'there is a set of clear, sufficient, uncontested, facts.' On Ueven's own showing, the parties had adopted divergent views not only in relation to the law but also the facts. Ueven's response addressed a range of issues and all of those were, in truth, matters for adjudication in accordance with the special machinery created by the TA Act. Nowhere was this more clearly illustrated than in the relief sought. From the range of orders sought in this matter it was clear that unlike, for example In re Phillip Frame Will Trust v CIR, the dispute in this matter was not simply one of law but also involved questions of fact and the orders sought were all thus inextricably linked to the facts and the circumstances here certainly did not favour a piecemeal consideration of the case and, as it transpired, failed to lead to a reasonably prompt resolution of any of the real issues between the parties.

(xii) That it was generally considered inappropriate to allow an appeal when the entire dispute between the parties has yet to be resolved by the court of first instance. In this regard it was important to emphasise that the business of a court, and in particular an appellate court such as this, was generally retrospective; it dealt with situations or problems that have already ripened or crystallised and not with prospective or hypothetical ones. No doubt, if a declaratory declaration avails Ueven now, it will still avail Ueven after the issues have crystallised.

(xiii) That the declaratory action is discretionary and two factors which will influence the court in the exercise of its discretion are the utility of the remedy, if granted, and whether, if it is granted, it will settle the questions at issue between the parties. Here, the declarator failed both tests – it lacked utility and failed to settle the questions at issue between the parties.

(xiv) That, in any event, the court may well be precluded from entering into the substantive merits of the appeal. This was so because the matter was approached as if an appeal lay against the reasons for judgment. It did not. Rather, an appeal lay against the substantive order made by a court.

(xv) That the cumulative consequence of all of the factors that the court had alluded to was that an application for declaratory relief was not appropriate in this matter. The nature of the dispute more properly lent itself to resolution by use of the special machinery of the TA Act set up for that purpose. Thus, although the High Court incorrectly entertained an application for declaratory relief, it was correct in dismissing it. The court added that this court could not interfere with the exercise of the High Court's discretion to deal or not deal with a matter (as should have happened here), unless there was a failure to exercise a judicial discretion.

Appeal dismissed with costs including those of two counsel.

Judge Molemela held the following dissenting judgment:

(i) That, having read the majority judgment of Ponnan JA, I too conclude that the appeal must be dismissed. I, however, respectfully disagree with the majority judgment's finding that the High Court had incorrectly entertained the application for declaratory relief.

(ii) That, as correctly set out in the majority judgment, section 105 of the TA Act made it plain that a taxpayer may only dispute an assessment by the objection and appeal procedure to the Tax Court under the TA Act, unless a High Court directs otherwise. The term 'assessment' means 'the determination of the amount of a tax liability or refund, by way of self-assessment by the taxpayer or assessment by SARS', while 'decision' is defined as 'a decision referred to in section 104(2) of the TA Act, which included the decision not to extend the period for lodging the objection, or a decision not to extend the period for the lodging of the appeal'.

(iii) That in this matter Ueven had specifically pleaded in its founding affidavit that its application was not intended to dispute an assessment or decision as contemplated in section 104 of the TA Act, and went on to assert that the jurisdiction of the High Court was consequently not ousted by the absence of a directive as contemplated in section 105 of the TA Act. SARS took no issue with that assertion in its answering affidavit.

(iv) That, having taken the pleadings and all the circumstances of this case into account, I was satisfied that there was neither an assessment nor decision within the contemplation of section 104 of the TA Act. That being the case, section 105 was not implicated. Put differently, on the facts of this case, the section 105 directive did not find application.

(v) That given the common cause fact that an assessment or decision had not been made by SARS and that the narrow issue presented to the High Court for determination was the interpretation of section 11(1)(f), a fortiori, no directive was required from the High Court for it to exercise its jurisdiction under section 21(1)(c) of the Superior Courts Act. In a nutshell, nothing barred the High Court from entertaining Ueven's application for the declaratory relief.

(vi) That it was evident from the judgments in C:SARS v Langholm Farms (Pty)Ltd 82 SATC 135 and C:SARS v United Manganese of Kalahari (Pty) Ltd 82 SATC 444 that the Supreme Court of Appeal considered the interpretation of legislative provisions to be within the realm of disputes of a legal nature in respect of which a High Court could grant a declarator in tax matters and it followed by parity of reasoning that in the present case, where the only issue for determination was the interpretation of a provision of the VAT Act, the High Court indeed had the jurisdiction to entertain the application for declaratory relief. On that basis, nothing precluded the High Court from entertaining that application for a declaratory order within the contemplation of section 21(1)(c) of the Superior Courts Act.

(vii) That it was evident from the papers that both parties held the view that the declarator pertained to the interpretation of section 11(1)(f) of the VAT Act and believed that the High Court's interpretation would lead to greater certainty for all concerned. The majority judgment correctly asserted that on Ueven's own showing, the parties had adopted divergent views not only in relation to the law but also the facts and I am of the view that given the factual disputes alluded to in the majority judgment, the granting of declaratory relief was not appropriate under those circumstances (even though the court did have the jurisdiction to entertain the application for the declaratory).

(viii) That being the case, it followed that the High Court's dismissal of the application for declaratory relief could not be faulted. On this score, there was no basis for tampering with the High Court's decision to dismiss the application for declaratory relief, precisely because ultimately an appeal lies against an order and not the reasons.

(ix) That, for all the reasons mentioned in this separate concurrence, I agree that the appropriate order was to dismiss the appeal with costs, including those occasioned by the employment of two counsel.

3.4. BCM (Pvt) Ltd v Zimbabwe Revenue Authority[3] (86 SATC 467)

BCM (Pvt) Ltd (BCM) had noted an appeal against part of the judgment of the Special Court for Income Tax Appeals handed down on 28 September 2020, dismissing BCM's appeal against the decision of ZRA in respect of various objections that BCM had raised against ZRA's revised assessments of tax against it.

ZRA, at the commencement of the hearing of the appeal in the Supreme Court, had raised a point *in limine* that there had been no valid appeal before the court because the appeal had been noted without leave contrary to the provisions of section 66(1)(b) of the Income Tax Act [Chapter 23:06].

ZRA submitted that BCM's purported appeal attacked the court *a quo*'s findings of fact and should therefore have been preceded by a grant of leave by the court *a quo*, and if it had been refused, by a judge of the Supreme Court.

ZRA submitted that an appeal noted without leave was a nullity and should be struck off the roll.

BCM submitted that its appeal was against the court *a quo*'s findings on law and was, in terms of section 66(1)(a) properly noted without leave.

[3] Supreme Court of Zimbabwe

The question of whether or not BCM's appeal should have been noted without leave was governed by section 66(1) of the Income Tax Act [Chapter 23:06] which provided as follows:

'(1) On the determination by the High Court or the Special Court of an appeal under section sixty five or other proceedings incidental to or connected therewith, BCM or ZRA, if dissatisfied with the determination–

(a) May appeal to the Supreme Court on any ground of appeal which involves a question of law alone;

(b) May, with the leave of a judge of the High Court or a President of the Special Court, as the case may be, or, if such a judge or President refuses to grant leave, with the leave of a judge of the Supreme Court, appeal to the Supreme Court on any ground of appeal which involves a question of fact alone or a question of mixed law and fact.'

The Supreme Court therefore determined ZRA's point *in limine* before considering and determining the appeal on the merits.

Judge Uchena held the following:

(i) That the determination of whether or not the appeal was a nullity should involve the examination of the grounds of appeal which identified the determination that BCM appealed against. After identifying the determination appealed against the consideration of whether or not leave to appeal should have been sought depended on the basis on which the determination of the Special Court was made.

(ii) That each ground of appeal should be assessed, because section 66(1)(a) provided that the appeal can be on any ground which involved a question of law, and section 66(1)(b) provided that an appeal could be noted with leave on any ground. This meant that where there are several grounds of appeal then the validity of each ground of appeal must be assessed so that the appeal could proceed on the valid grounds while the invalid grounds could be struck out.

(iii) That a careful reading of the judgment to be appealed against with a correct understanding of what a question of law was and what a question of fact was, could guide a party intending to appeal on whether the determination he or she intended to appeal against was based on law, a mixture of law and facts or on facts alone.

(iv) That *in casu* BCM had appealed against the court *a quo*'s decision on seven specified grounds of appeal and it was apparent, after examination, that BCM's grounds of appeal attacked the court *a quo*'s findings of fact and hence the appeal should not have been noted without leave being granted in accordance with section 66(1) of the Act.

(v) That BCM's notice of appeal was therefore fatally defective and it was a nullity which should be struck off the roll with no order as to costs.

3.5. Bechan and another v SARS Customs Investigation Unit and Others (86 SATC 557)

SARS on 28 March 2022 had applied to the High Court without notice to the Appellants for a warrant in terms of section 59 of the TA Act.

The High Court issued the warrant in terms of section 60 of the TA Act on the basis that there was reason to believe that Bullion Star (Pty) Ltd had, amongst others, committed various tax offences. The warrant authorised SARS officials to search the premises identified as 62 Wessels Road, Rivonia, Johannesburg (the premises). It furthermore authorised them, 'in carrying out the search and seizure of the premises, to open or cause to be opened or remove and open, anything which the officials suspected to be relevant material of Bullion Star'.

Bechan applied to the Gauteng Division of the High Court, Pretoria, for relief (see Bechan and Another v SARS Customs Investigations Unit and Others 84 SATC 413 per Millar J) by way of the mandament van spolie[4] (spoliation), compelling SARS to return certain items seized, purportedly unlawfully, from Bechan's motor vehicle during the execution of a warrant in respect of Bullion Star.

The High Court had held that SARS was entitled to search for and seize items relevant to Bullion Star as the warrant specifically authorised its officials to search anywhere on the premises and this included vehicles parked on the premises. It furthermore held that to interpret the warrant to limit its terms to Bullion Star, the taxpayer referred to in the warrant, would serve to undermine its efficacy.

[4] The mandament van spolie is a remedy available in South African law to protect possession of property. The remedy results in the restoration of possession to persons who have been unlawfully dispossessed of their property.

The High Court accordingly dismissed the application as well as the application for leave to appeal against its dismissal and Bechan subsequently applied to the Supreme Court of Appeal for leave to appeal which was granted.

On appeal it was agreed between the parties that the matter had to be adjudicated on SARS' version of the events as there had been a factual dispute on the papers in relation to the execution of the warrant.

SARS' version of the events in essence was that on 29 March 2022 its officials had arrived at the premises at approximately 11h25, but were granted access only at approximately 11h50. Whilst SARS officials were at the gate awaiting access to the premises, they saw people removing items from the building and placing them in vehicles. They were, however, unable to identify the nature of these items. Upon entering the premises, SARS officials noticed a Toyota Fortuner motor vehicle (the Fortuner) parked on the premises. They saw numerous files and notebooks as well as electronic equipment inside the Fortuner. Upon being informed that Bechan owned the Fortuner, SARS officials requested him to unlock it to enable their search for material relevant to Bullion Star. When the Bechan indicated that he could not find its keys, SARS officials obtained the services of a locksmith to unlock the Fortuner (and other vehicles on the premises). On opening it, they invited the Bechan to participate in, and be present during, the search.

SARS compiled inventories of the items found in the Fortuner and these included 10 laptop computers; 4 cellular phones; and various financial documents pertaining to Bullion Star, including purchase files, and bank statements.

The issue before the Supreme Court of Appeal was ultimately whether a warrant issued in terms of section 60 of the TA Act only applied to the taxpayer, i.e. Bullion Star, and not to third parties such as the Bechan who happened to be on the premises at the time of its execution.

SARS contended that on a reading of the warrant with the provisions of sections 59(1) and 60(1) of the TA Act, it was location specific and not taxpayer specific and hence it could be executed against third parties on the premises.

Judge Kathree-Setiloane held the following:

(i) That whether a warrant issued in terms of section 60 of the TA Act may be executed against third parties depended on the interpretation of the warrant read together with the search and seizure provisions in the TA Act. The warrant largely mirrored the search and seizure provisions in Part D of the TA Act.

(ii) That, properly construed, sections 59(1) and 60(1)(b) of the TA Act are location and not taxpayer specific. They contemplate that persons other than the taxpayer may be present on the premises identified in the warrant and in possession of material relevant to the taxpayer.

(iii) That the phrase ‘to search the premises and any persons present on the premises and seize relevant materials’ in section 59(1) of the TA Act, was a clear indicator that SARS officials may, on the authority of a warrant issued under section 60, search the taxpayer as well as any third parties on the premises, and seize any relevant material in their possession. It was immaterial that the seized items were not in the possession of the taxpayer when seized. If they constituted relevant material as defined, they may be seized from a third party who was on the premises.

(iv) That section 61(3) sets out the powers of a SARS official who executed a warrant issued in terms of section 60 of the TA Act and section 61(3) did not limit the execution of a warrant to the business of the taxpayer. Properly construed, it contemplated that in executing a warrant, SARS officials may search anything on the premises identified in the warrant, if they suspected that it contained relevant material. This was clear from the ordinary grammatical meaning of the word ‘anything’ which is used in section 61(3)(a). This word was broad enough to include a search of vehicles parked on the premises identified in the warrant.

(iv) That, significantly, section 61(3)(a) of the TA Act did not afford a SARS official carte blanche in searching the property of third parties who may be on the premises identified in the warrant. A SARS official may only do so if they suspect that the property of a third party contained material relevant to the taxpayer. This interpretation gives effect to the manifest purpose of the search and seizure provisions of the TA Act, which was to obtain evidence against a taxpayer if there were reasonable grounds to suspect non-compliance with, or tax offences under, a tax Act.

(v) That search and seizure operations on the premises identified in a warrant would be rendered ineffectual if SARS officials were powerless, under the TA Act, to search third parties for relevant material. This would be especially so, in a case such as this, where material relevant to the taxpayer was spirited away and placed in a vehicle belonging to a third party, with impunity.

(vi) That the execution of the warrant was not unlawful as, on the objective facts, SARS officials had reasonable cause to suspect that the Fortuner contained material relevant to Bullion Star. They saw files, notebooks, and electrical equipment inside the Fortuner before searching it. In addition, whilst waiting to gain access to the premises, they saw items being removed from the building and being placed in vehicles parked on the premises.

(vii) That in terms of section 61(3)(a) of the TA Act, SARS was entitled to search and seize material from the Fortuner on the suspicion that it contained material relevant to Bullion Star.

(viii) That, in the context of the facts of this case, SARS had a statutory right to dispossess Bechan of the property found in the Fortuner. They were, therefore, not entitled to the relief sought in the spoliation application and, for these reasons, the appeal must fail.

Appeal dismissed with costs, including those of two counsel.

4. INTERPRETATION NOTES

4.1. Disposal of assets by deceased person, deceased estate, and transfer of asset between spouses – No. 134

This Note provides general guidance1 on the application of the deemed disposal of assets by the deceased, a deceased estate, and the transfer of assets between spouses.

Section 9HA provides for the tax treatment of the assets of a person upon death, including the value that such assets are treated as having disposed of to the deceased's surviving spouse, heirs and legatees. Section 9HA came into operation on 1 March 2016 and applies to a person who dies on or after this date.

Section 25 provides for the tax treatment of the deceased's assets in the deceased estate and also prescribes the values of assets acquired from a deceased estate that should be taken into account by spouses, heirs and legatees. Section 25 came into operation on 1 March 2016 and applies to a person who dies on or after this date. A comprehensive consideration on the taxation of deceased estates under section 25 is outside the scope of this Note. Section 25 is considered in this Note only to the extent that it applies to section 9HA.

Section 9HB provides for the tax treatment of assets transferred between spouses. Section 9HB came into operation on 17 January 2019 and ensures parity of treatment of all disposals of assets between spouses.

The insertion of sections 9HA and 9HB, and the substitution of section 25, was effected with the intention to move some of the rules in paragraphs 40, 41 and 67 of the Eighth Schedule into the main body of the Act.

The deceased is deemed to have disposed of his or her assets at the market value on the date of death, subject to certain exclusions and exceptions. Specific scenarios qualify for roll-over relief of a capital gain or capital loss.

The special rules under section 9HB must be considered to determine the tax implications when a person disposes of an asset to his or her spouse. While providing for a roll-over of a capital gain or capital loss when an asset is transferred between spouses during their lifetimes, it also ensures that a resident spouse to whom an asset is disposed of takes over all aspects of the history of the asset from that person's spouse.

4.2. Application of sections 20(7) and 21(5) (VAT) – No. 83 (Issue 3)

This Note sets out the requirements that must be met for SARS to apply the provisions of sections 20(7) and 21(5) of the VAT Act.

The VAT Act contains certain requirements and prescribes certain particulars that must be contained on a tax invoice, credit- or debit note (as the case may be). However, recognising that in certain industries and for certain transactions it may be challenging to comply with these prescribed particulars, SARS may apply a discretion in approving deviations therefrom in certain circumstances.

To exercise this discretion, SARS must be satisfied that:

- there are, or will be, sufficient records to establish the particulars of a supply or category of supplies; and
- it would be impractical to require that a full tax invoice, debit or credit note (as the case may be), should be issued.

Furthermore, in exercising the discretion, SARS may impose certain conditions deemed necessary.

This Note sets out the requirements that have to be met in order for SARS to apply the provisions of section 20(7) or 21(5). A vendor that satisfies the requirements stipulated in BGR 27 does not have to apply for prior approval from SARS to not issue a tax invoice, credit- or debit note (as the case may be), or to furnish the particulars required on a tax invoice in another manner.

4.3. Sale and leaseback arrangements – No. 135

This Note provides guidance on the application of sections 23D and 23G to certain sale and leaseback arrangements. The Note does not address sale and leaseback arrangements in general.

Taxpayers in need of financing, generally for business equipment and assets, can structure the financing arrangement in different ways. The taxpayer could either obtain loan funding from a financial institution or alternatively could enter into a sale and leaseback arrangement. A sale and leaseback arrangement is a transaction in which the owner of an asset sells the asset to the financier and then enters into a use agreement under which the asset is hired back from the financier. In this way the taxpayer raises the required funding through the proceeds on the sale of the asset and the repayment of the financing takes the form of rent.

The perceived benefits of entering into a sale and leaseback arrangement are that one party is generally entitled to deduct the full rental expenditure associated with the lease (both interest and capital portions), while the second party, usually a financial institution, is entitled to claim an allowances on the asset, and so shield the gross income arising from the receipt of the rentals. Financial institutions may in some cases utilise this “tax benefit” created through the claiming of the capital allowances to offer a lower interest rate, reflected in the rentals to the client, on the funding made available. By contrast, under a loan, only the interest is deductible by the borrower and only the interest is taxable in the hands of the financier.

In CIR v Conhage (Pty) Ltd the taxpayer had entered into two sale and leaseback transactions in respect of some of its manufacturing plant and equipment with a bank. The taxpayer had required capital to expand its business and the bank was prepared to make the funds available. Both parties had been aware of the tax advantages of sale and leaseback arrangements. The Commissioner had refused to allow the rental payments as deductions on the basis that the true nature of the transactions was a loan and alternatively that the transactions fell foul of the general anti-avoidance provisions of section 103. Hefer JA noted the following:

> "Within the bounds of any anti-avoidance provisions in the relevant legislation, a taxpayer may minimise his tax liability by arranging his affairs in a suitable manner. If eg the same commercial result can be achieved in different ways, he may enter into the type of transaction which does not attract tax or attracts less tax. But, when it comes to considering whether by doing so he has succeeded in avoiding or reducing the tax, the court will give effect to the true nature and substance of the transaction and will not be deceived by its form (Erf 3183/1 Ladysmith (Pty) Ltd and Another v Commissioner for Inland Revenue 1996 (3) SA 942 (A) at 950I-952C).

In the result, the court held that the transactions made perfectly good business sense and their true nature and substance were those of authentic sale and leaseback agreements. The court was also not persuaded that section 103 applied. This case highlighted the need for specific anti avoidance legislation to address sale and leaseback arrangements.

The Act contains two sections that deal with specified sale and leaseback arrangements, namely, sections 23D and 23G.

Section 23D is aimed at arrangements in which an asset, which has substantially increased in value owing to currency depreciation or inflation, is sold at market value to another party, such as a financial institution, which then in turn lets or licences the asset back to the seller. In this way, the seller is able to claim a deduction for the lease rentals determined on the increased value of the asset. Section 23D is aimed at restricting the allowance which the lessor may claim on the leased asset.

Section 23G treats specified sale and leaseback transactions as financial arrangements. The objective of section 23G is to prevent one entity from using the tax base of another to obtain a tax benefit.6 This situation can arise, for example, when a tax-exempt person or institution is introduced as lessor or lessee.

Sections 23D and 23G are applicable to genuine sale and leaseback transactions that meet the requirements of those sections and, if applicable, alter the tax treatment of transactions that would otherwise have applied under other provisions of the Act. There are many genuine sale and leaseback transactions. However, there may be certain transactions which take the legal form of a sale and leaseback but that form is not genuine and was undertaken to conceal or disguise the real character of a transaction, or vice versa. If that is the case, the ostensible form of the stimulated transaction is disregarded, and effect is given to the real transaction with the appropriate provisions of the Act being applied to the real transaction. If the real transaction is not a genuine sale and leaseback, the provisions of section 23D and section 23G will not apply.

Section 23D limits the allowances that a lessor may claim under a sale and leaseback arrangement should the asset be held within a two-year period before the commencement of the lease or licence by the lessee or licensee or by any sublessee or sublicensee in relation to that asset or by a person that was a connected person in that time period to the lessee, licensee, sublessee, or sublicensee.

Before the introduction of section 23G, parties to a sale and leaseback arrangement made use of the tax benefit that arose should one party be tax exempt. For example, since the lessor buying an asset from a tax-exempt lessee was entitled to allowances on the asset purchased, the lessor could effectively provide financing at a lower rate to the lessee. As these arrangements are effectively financing arrangements, section 23G serves to treat them as loan arrangements with no tax allowances granted on the asset and the finance component covered under section 24J. Section 23G(2) applies when the receipts and accruals of whatever nature received by or accrued to a lessee or sublessee do not constitute income, while section 23G(3) applies when the receipts and accruals of any lessor arising from the sale and leaseback arrangement do not constitute income.

5. DRAFT INTERPRETATION NOTES

5.1. Meaning of 'similar finance charges'

This Note considers the meaning of "similar finance charges" and whether various finance charges payable under a financial arrangement fall within the ambit of "similar finance charges".

The meaning is considered from the perspective of the borrower, however, the same principles apply when considering the term from the perspective of the lender.

Taxpayers are often party to financial arrangements when obtaining or granting loan or debt funding. Under these arrangements, the lender normally advances an amount to the borrower who is obliged to repay an amount that includes the amount advanced and interest (often calculated as a percentage of the loaned amount). Various finance charges, such as loan application fees, service fees, administration fees, structure fees and front-end or raising fees are often also payable by a borrower to the lender.

Broadly, section 24J(2) deems a taxpayer to have incurred an amount of interest equal to the relevant accrual amounts in the particular year of assessment in respect of an instrument, or determined according to the alternative method, to be deductible from the income of a taxpayer if certain definitions, provisions and requirements are met.

Interest for purposes of section 24J includes, amongst others, amounts constituting “interest“ and “similar finance charges”.

Uncertainty exists as to whether the finance charges referred to above qualify as “similar finance charges” in section 24J(1).

In interpreting the phrase “similar finance charges” one has to have regard to the wording used, its context, and its purpose. The phrase must therefore be interpreted to mean charges similar to “interest”. Furthermore, paragraph (a) stipulates that the charges contemplated must be “in terms of or in respect of a financial arrangement”. The charges therefore need to be part of the financial arrangement itself. The term “similar finance charges” is not a catch-all for all forms of costs associated with a financial arrangement.

Finance charges relating to a financial arrangement that do not qualify for a deduction under section 24J(2), may be deductible under section 11(a) depending on the facts of the case and whether the requirements of section 11(a), read with section 23(g) are met.

5.2. Public Benefit Organisations: Non-professional sport and recreation

This Note provides guidance on the interpretation and application of PBA 9 that provides for the administration, development, co-ordination or promotion of sport or recreation in which the participants take part on a non-professional basis as a pastime.

The National Sport and Recreation Act was promulgated2 to provide for the promotion and development of sport and recreation and the co-ordination of the relationships between:

- Sport and Recreation South Africa;
- Sports Confederation
- national federations; and
- other agencies.

The National Sport and Recreation Act also provides for measures aimed at correcting imbalances in sport and recreation, to promote equity and democracy in sport and recreation and to provide for dispute resolution mechanisms in sport and recreation. The Minister is empowered by that Act to make regulations, and to provide for matters connected with sport and recreation.

The National Sport and Recreation Plan assists in the implementation of policies and specifies programmes, projects, and activities to be undertaken by the various role-players within the sport and recreation sector in South Africa.

The Constitution provides that sport is a provincial and local competence. However, the three spheres of government, namely, the national, provincial and local sphere, must plan and deliver services in an integrated manner.

Provincial sport and recreation entities are very important to the promotion and development of sport and recreation because they are closest to their communities, and therefore provide ideal platforms to encourage greater participation in sport and recreation in general. The focus of sport and recreation at provincial level is generally on provincial teams comprised largely of non-elite athletes, to ensure the highest number of athletes competing in intra-provincial competition from which interprovincial teams can be chosen.

The local sphere of government, comprising municipalities, has the right to govern on its own initiative the affairs of its community such as local amenities, sports facilities and municipal parks and recreation subject to national and provincial legislation.

Sport and Recreation South Africa is required to encourage the provincial sport and recreation departments and municipalities to form partnerships, with other related organisations having an interest in sport and recreation to procure financial assistance and exchange ideas.

From the above it is clear that the roles and responsibilities of government in sport and recreation in South Africa is reliant on many diverse levels, namely, national, provincial, local levels, and several types of organisations on those levels. This consolidated approach has justified the inclusion of PBA 9 for purposes of an exemption from income tax for qualifying organisations.

An organisation carrying on PBA 9 must be approved by SARS as a PBO and must on application, and after obtaining such approval on submission of its annual income tax return (IT12EI), satisfy SARS that:

- its sole or principal object is the carrying on of the administration, development, co-ordination or promotion of sport or recreation in which the participants take part on a non-professional basis as a pastime; and
- the receipts and accruals derived by the organisation carrying on PBA 9 meet the requirements of section 10(1)(cN).

An organisation bears the onus of proving that it complies with the requirements relative to the approval as a PBO carrying on PBA 9 as discussed in this Note, and must retain the necessary evidence to support the view taken. The burden may be discharged by way of supporting evidence submitted by the organisation, provided such evidence is reasonable.

Whether an organisation complies with the requirements of PBA 9 will be a factual enquiry, and since the facts and circumstances pertaining to each organisation may differ, each case will be considered on its own merits.

5.3. Diminution in the value of closing stock

This Note provides guidance on the determination of the diminution in the value of closing stock, which is deducted from the cost of that closing stock for purposes of determining the value of closing stock that must be included in gross income under section 22(1)(a).

This Note does not deal with the valuation of trading stock in the case of mining companies, farmers or trading stock falling under section 22(1)(b).

This Note replaces Practice Note 36 “Income Tax: Valuation of Trading Stock” issued on 13 January 1995.

Generally speaking, if the requirements of a relevant section are met, taxpayers are allowed to claim a deduction for expenditure and losses actually incurred during the year of assessment against their income received or accrued in that year. Taxpayers are generally allowed to claim a deduction under section 11(a) for the expenditure incurred in acquiring trading stock in the year of assessment in which the trading stock is acquired, as the expenditure would be incurred in the production of income and not of a capital nature. For example, if trading stock is purchased and sold during the same year of assessment, there would be an inclusion of the selling price in the taxpayer’s gross income, and a deduction under section 11(a) for the expenditure incurred in purchasing the trading stock. If trading stock is not sold during the year of assessment in which it is purchased, there would be no inclusion in the taxpayer's gross income, but there would be a deduction under section 11(a) for the trading stock purchased. Section 22 addresses this timing mismatch by aligning the year in which a deduction is effectively given with the year in which there is an inclusion of the selling price in gross income. This is, broadly speaking, achieved by section 22(1)(a) that requires that the amount of closing stock must be added to gross income when determining taxable income, and section 22(2) that effectively allows a deduction for opening stock in the subsequent year of assessment.

Section 22(1)(a) also prescribes the basis on which the amount of closing stock must be determined. Specifying the basis tells taxpayers how the amount must be determined and in so doing also prevents possible manipulation that may arise by, for example, a taxpayer adopting a basis that gives a lower amount, therefore a lower gross income inclusion and a lower taxable income in the particular year of assessment.

Section 22(1)(a) is a balancing mechanism for the deduction claimed under section 11(a) for trading stock purchased during the year but still on hand at the end of the year of assessment. Closing stock held and not disposed of at the end of the year of assessment is included in gross income. The value of that closing stock is the cost price of the trading stock, less any amount that represents any diminution in value which SARS may think just and reasonable by reason of damage, deterioration, change of fashion, decrease in market value or for any other reason satisfactory to SARS. The value of such diminution is subject to the discretion of SARS and subject to objection and appeal.

The diminution in the value of closing stock must be determined on an item-by-item basis or, if appropriate, on a category basis.

The judgment of the Supreme Court of Appeals in the Volkswagen and Atlas Copco South Africa cases may be referred to as authority on section 22(1) for the following principles:

- The cost price of the goods and not the actual or anticipated market value is the benchmark against which any claim for the diminution in value is to be measured.
- A claim for a diminution of cost price must be based on events that exist at the end of the year of assessment or events that it is known with reasonable certainty will occur in the following year of assessment.

- There will only be scope for a diminution of cost price if the events in question have led to the cost price of the goods ceasing to be a proper measure of their value.
- The use of NRV to determine the value of closing stock under section 22(1)(a) is inconsistent with the principles that underpin the Act.

6. BINDING PRIVATE RULING

6.1. Tax consequences of a deemed input tax deduction under the VAT Act – No. 411

This ruling determines the tax consequences of a deemed input tax deduction when a motor vehicle financed under an Instalment Credit Agreement (ICA), as defined in section 1 of the VAT Act, is repossessed by the creditor.

In this ruling references to sections and paragraphs are to sections of the relevant Act and paragraphs of the Eighth Schedule to the Act applicable as at 11 September 2024. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the relevant Act.

This is a ruling on the interpretation and application of:

- the Income Tax Act:
  - section 1(1) – definition of “gross income”;
  - paragraph 1 of the Eighth Schedule to the Act – definition of “asset”;
- the VAT Act:
  - section 1 – paragraph (c) of the definition of “input tax”;
  - section 8(10); and
  - section 16.

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

The Applicant: A resident company that conducts the business of a bank and is registered under the Banks Act 94 of 1990

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

As part of its business the Applicant provides motor vehicle finance to its clients under an ICA, which is subject to the National Credit Act 34 of 2005. In the event of repayment default by a debtor, the ICA between the Applicant and the debtor provides for repossession of the motor vehicle by the Applicant. If the debtor is not registered as a vendor under the VAT Act, the Applicant deducts the amount determined in accordance with section 16(3)(a)(i) of the VAT Act read with paragraph (c) of the definition of "input tax" in section 1 of the VAT Act in respect of the repossession and credits the respective debtor's account with the amount.

The Applicant proposes, instead of crediting the respective debtor's account with the amount, to credit "other income" as disclosed on its Statement of Comprehensive Income.

<u>Conditions and assumptions</u>

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

<u>Ruling</u>

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

- The Applicant will be entitled to an input tax deduction in accordance with section 16(3)(a)(i) of the VAT Act read with paragraph (c) of the definition of "input tax" under section 1 of the VAT Act, in respect of the supply (not being a taxable supply) deemed by section 8(10) of the VAT Act to be made to the Applicant on the repossession of a motor vehicle under the ICA. This deduction is subject to compliance with the requirements of section 16(2)(c) of the VAT Act.
- The amount determined in accordance with section 16(3)(a)(i) of the VAT Act read with paragraph (c) of the definition of "input tax" in section 1 of the VAT Act, does not constitute "gross income" as defined in section 1(1) of the Act nor will it result in any capital gains tax consequences under the Eighth Schedule to the Act.

6.2. Tax consequences of the issue of a long-term loan for the issuer and holder – No. 412

This ruling determines the tax consequences attendant upon the issue of 30-year interest-bearing loan by the Applicant to the Co-Applicant, particularly the re-characterisation of interest as dividends in specie.

In this ruling references to sections are to sections of the Act applicable as at 23 September 2024. 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 8F;
- section 10(1)(k);
- section 41(1) – definition of "group of companies"; and
- section 64FA.

Parties to the proposed transaction

The Applicant: A resident company

Company A: A resident company that is the 100% shareholder of the Applicant

Co-Applicant: A resident company that is the 100% shareholder of Company A

Description of the proposed transaction

The Applicant will advance a loan to the Co-Applicant under the following terms and conditions:

- The Co-Applicant will not be obliged to repay the loan capital within 30 years from the date the Loan was advanced to it by the Applicant.
- The Co-Applicant will be allowed, in its own discretion, to make voluntary repayments of the capital amount outstanding before the final repayment date, but subject to certain trigger events, without incurring any penalty.
- If it becomes impossible for any reason whatsoever for any party to perform its obligations as contemplated in the loan agreement as a result of the introduction, change, interpretation, administration or application of any applicable law or the compliance with any applicable law, then the Applicant will notify the Co-Applicant upon becoming aware of such event or change and upon receipt of the above notice by the Co-Applicant, the Co-Applicant will repay the outstanding amount on the date specified by the Applicant in the notice.
- The Loan will bear interest at a market related rate which will be compounded semi-annually in arrears. Interest accrued on the Loan shall be payable semi-annually each year.

- Non-payment of capital (after 30 years), and/or non-payment of interest by the Co-Applicant will be a breach event. In the event of a breach the Applicant will be able to claim repayment for any accrued interest, however, the Applicant will not be entitled to claim a repayment of any capital amounts prior to the expiry of the period of 30 years.
- The Co-Applicant will further, in accordance with the terms of the Loan, not have any right, whether fixed or contingent, to require any other person to:
  - acquire the Loan;
  - make any payment in respect of the Loan in terms of a guarantee, indemnity or similar arrangement; or
  - procure, facilitate, or assist with the acquisition or the making of any payment as noted above.
- The Applicants will classify and measure the loan at amortised cost in accordance with IFRS 9.
- There will thus be no fair value accounting entries processed on the loan in either the Applicant's or Co-Applicant's Statement of Comprehensive Income

Conditions and assumptions

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

- For purposes of the definition of "group of companies" in section 41(1), none of the equity shares of Company A or the Applicant are the subject of any contractual obligation to sell or purchase, or of any option contract, that feature non-market related pricing.
- In relation to every year of assessment during its term, the Loan would not contain any right, whether fixed or contingent, to require any person other than the issuer of that instrument to:
  - acquire that instrument from the holder thereof;
  - make any payment in respect of that instrument in terms of a guarantee, indemnity or similar arrangement; or
  - procure, facilitate or assist with any acquisition contemplated in (i) above, or the making of any payment contemplated in (ii) above.

Ruling

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

- The Loan is a hybrid debt instrument as defined in section 8F(1) and the interest accrued by the Applicant under the Loan will be deemed to be a dividend *in specie* in respect of a share that is declared and paid by the Co-Applicant to the Applicant on the last day of the year of assessment of the Co-Applicant.
- The deemed dividend in specie received or accrued to the Applicant in terms of section 8F will be exempt from income tax in terms of section 10(1)(k).
- The deemed dividend in specie in terms of section 8F will be exempt from Dividends Tax under section 64FA.

6.3. Application of proviso to section 8EA(3) – No. 413

This ruling determines that the proviso to section 8EA(3) will apply where equity shares in an operating company acquired by a person through the direct or direct application of preference share funding are no longer directly or indirectly held by that person.

In this ruling references to sections are to sections of the Income Tax Act applicable as at 13 November 2024. 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 8EA.

Parties to the proposed transaction

The Applicant: A resident company

The Co-Applicants: Institutions that provide funding to the Applicants group of companies

Company A: A resident company and a wholly-owned subsidiary of the Applicant

Company B: A resident company and a wholly-owned subsidiary of the Applicant

Company C: A resident company and a wholly-owned subsidiary of the Applicant

Company D: A resident company and a wholly-owned subsidiary of the Applicant

Company E: A resident company and a wholly-owned subsidiary of the Applicant

Company F: A non-resident company

Company G: A resident company and a wholly-owned subsidiary of Company B

Company H: A resident company and a wholly-owned subsidiary of Company B

Company I: A resident company partly held by Company D

Company J: A resident company

Description of the proposed transaction

The Applicant is an intermediary holding company of a group of companies comprising, among others, Company A to Company E.

The Applicant makes and directs the investment and funding decisions of the group.

The Co-Applicants provide funding to the group of companies by way of, among others, preference share funding. The preference share funding for the group is raised by Company A and on-advanced directly or indirectly to the company that requires funding in the group.

The Co-Applicants have in the past subscribed for preference shares in Company A. The Applicant has provided guarantees to the Co-Applicants for the due compliance with the obligations of Company A in respect of the preference share funding in addition to guarantees provided by the subsidiary companies of the Applicant which provide the Co-Applicants with direct access to their underlying assets in the event of the execution of security rights.

The proceeds from the previous issue of tranches preference shares by Company A to the Co-Applicants mentioned above and relevant to this ruling has been applied as follows:

- Pref Shares 1

  The Pref Shares 1 subscription proceeds were used by Company A to redeem other previously issued tranches preference shares the proceeds from which subscription were applied by Company A to advance a loan to Company C, which in turn advanced a loan to Company B to acquire equity shares in Company F. X portion of the equity shares acquired by Company B in Company F were subsequently disposed of by Company B to Company G and Company H, both companies being wholly-owned subsidiaries of Company B. The remaining Y portion of equity shares in Company F remain held by Company B.

- Pref Shares 2

  The Pref Shares 2 subscription proceeds were used by Company A to redeem other previously issued tranches of preference shares the proceeds from which subscription were applied to advance a loan to Company D to acquire equity shares in Company I.

- Pref Shares 3

  The Pref Shares 3 subscription proceeds were applied by Company A to advance a loan to the Applicant to acquire equity shares in Company J.

The Applicant and some of its subsidiary companies propose to enter into the transactions detailed below, with the consent of the Co-Applicants. The proposed steps to implement transaction are as follows:

- Company B will dispose of the shares it holds in Company G and Company H to the Applicant whereafter Company G and Company H will be liquidated, resulting in the Applicant holding the shares in Company F that were previously held by Company G and Company H.
- Company D will dispose of the shares it holds in Company I to the Company E.
- The Applicant will dispose of X portion of shares that it holds in Company J. The funding so raised will not be applied to redeem any of the Pref Shares 3 but will be used for business operations purposes. The Applicant will continue to hold Y portion of shares in Company J.

Conditions and assumptions

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

- Each one of the Pref Shares 1, 2 and 3 constitutes a “preference share” as defined in section 8EA(1).
- An “enforcement right” as defined in section 8EA(1) read with section 8EA(3)(b) is present in respect of the Pref Shares 1, 2 and 3 as a result of the guarantee provided by the Applicant which is a person contemplated in section 8EA(3)(b).
- At the time of the receipt by or accrual to the Co-Applicants of any dividend in respect of the Pref Shares 1, 2 and 3, Company F, Company I and Company J will be “operating companies” as defined in section 8EA(1).

Ruling

The ruling below in connection with the proposed transaction applies in respect of dividends received by or accrued to the Co-Applicants in respect of Pref Shares 1, 2 and 3 in their respective years of assessment commencing on or after 1 January 2024 as follows:

- As Company B will no longer directly or indirectly hold X portion of the equity shares in Company F at the time of the receipt by or accrual to the Co-Applicants of any dividend in respect of the Pref Shares 1, the proviso to section 8EA(3) will apply, with the effect that section 8EA(3) will not apply to the X portion of the Pref Shares 1 on which the dividend was received or accrued and therefore the X portion of any dividend in respect of those Pref Shares 1 must be deemed, in relation to each Co-Applicant, to be an amount of income received or accrued.
- As Company B will still directly hold Y portion of the equity shares in Company F at the time of the receipt by or accrual to the Co-Applicants of any dividend in respect of the Pref Shares 1, the proviso to section 8EA(3) will not apply, with the effect that section 8EA(3) will apply to the Y portion of the Pref Shares 1 on which the dividend was received or accrued and therefore the Y portion of any dividend in respect of those Pref Shares 1 must not be deemed, in relation to each Co-Applicant, to be an amount of income received or accrued, provided that the requirements of section 8EA(3) are satisfied at the time of the receipt by or accrual to each Co-Applicant of such dividend.
- As Company D will no longer directly or indirectly hold equity shares in Company I at the time of the receipt by or accrual to the Co-Applicants of any dividend in respect of the Pref Shares 2, the proviso to section 8EA(3) will apply, with the effect that section 8EA(3) will not apply to the Pref Shares 2 on which the dividend was received or accrued and therefore any dividend in respect of those Pref Shares 2 must be deemed, in relation to each Co-Applicant, to be an amount of income received or accrued.
- As the Applicant will no longer directly or indirectly hold X portion of the equity shares in Company J at the time of the receipt by or accrual to the Co-Applicants of any dividend in respect of the Pref Shares 3, the proviso to section 8EA(3) will apply, with the effect that section 8EA(3) will not apply to the X portion of the Pref Shares 3 on which the dividend was received or accrued and therefore the X portion of any dividend in respect of those Pref Shares 3 must be deemed in relation to each Co-Applicant to be an amount of income received or accrued.

- As the Applicant will still directly hold Y portion of the equity shares in Company J at the time of the receipt by or accrual to the Co-Applicants of any dividend in respect of the Pref Shares 3, the proviso to section 8EA(3) will not apply, with the effect that section 8EA(3) will apply to the Y portion of the Pref Shares 3 on which the dividend was received or accrued and therefore the Y portion of any dividend in respect of those Pref Shares 3 must not be deemed, in relation to each Co-Applicant, to be an amount of income received or accrued, provided that the requirements of section 8EA(3) are satisfied at the time of the receipt by or accrual to each Co-Applicant of such dividend.

7. BINDING CLASS RULING

7.1. Award of listed shares under share incentive schemes – No. 91

This ruling determines income tax and securities transfer tax consequences for employer companies and their employees participating in the proposed share incentive schemes.

In this ruling references to sections and paragraphs are to sections of the relevant Act and paragraphs of the Fourth and Eighth Schedule to the Act applicable as at 10 October 2024. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the relevant Act.

This is a ruling on the interpretation and application of:

- the Act :
  - section 8C;
  - section 10(1)(k)(i);
  - section 11(a), read with section 23(g);
  - section 23H;
  - section 56;
  - section 58;
  - paragraph 2 of the Fourth Schedule;
  - paragraph 11A of the Fourth Schedule; and

- o paragraph 35 of the Eighth Schedule.

- the STT Act:

  - o section 1 – definition of “transfer

Class

The class members to whom this ruling will apply are the Employer companies and Participants referred to below.

Parties to the proposed transaction

The Applicant: A resident wholly-owned subsidiary of Company A

Company A: A resident company listed on the JSE and the holding company of the Employer companies

Employer companies: The Applicant and the other operating companies within the Company A group of companies that employ the eligible employees who will participate in the proposed employee share incentive schemes

Participants: The eligible employees of the Employer companies that will participate in the proposed share incentive schemes

Trust A: A trust approved as a public benefit organisation under section 30(3) of the Act established to carry out public benefit activities on behalf of the group

Description of the proposed transaction

The Applicant is an employer company within the Company A group of companies and the administrator of the group's share incentive schemes. The Applicant intends to implement two new share incentive schemes for the benefit of eligible employees of the Employer companies. The main objective of the proposed share incentive schemes is the protection and enhancement of the Employer companies’ businesses and their income. This will be achieved by incentivising the eligible employees to be efficient, productive and remain in the group's employ.

The practical implementation of the new share incentive schemes can be summarised as follows:

- The Employer companies will make proposals to the remuneration committee recommending a conditional award of a rand value to be converted to shares in Company A at the award settlement date to be awarded to the eligible employees (the award shares), subject to the terms and conditions set out in an award letter and the share incentive scheme rules. In essence each Participant will be required to still be employed at the relevant Settlement dates under each of the share incentive schemes and achieving the agreed performance targets set forth in the Award letter. Once the eligible employee accepts the terms and conditions of the scheme, they will become a Participant in the share incentive scheme and will be entitled to a number of shares in Company A determined based on the volume weighted average market price of the award shares at the relevant settlement dates.

- In respect of each settlement date the Applicant will provide a list of all the Participants who qualify for shares and the respective rand values of the award shares to its stockbroker that will administer each Participant's securities account. The stockbroker will calculate the number of award shares to be bought and allocated to the Participants' accounts.
- The stockbroker will aggregate the total incentive scheme purchase value of the award shares and devise an appropriate trading strategy to acquire the award shares. The stockbroker requires between three and ten days to purchase the full quantity of the award shares. The stockbroker will buy the required quantity based on its trading plan for each of the respective trading days. The award shares will be purchased throughout the trading day to achieve the targeted volume weighted average market price.
- The award shares will be purchased and deposited in an allocation account of the stockbroker. At the end of each trading day, the award shares will be allocated to each Participant based on the proportional allotment, and the quantities allocated will be rounded to the nearest whole number.
- The main differences between the two schemes are as follows:
  - In Scheme 1, 100% of the award amount will be settled 6 months after the award date by delivery of the award shares subject to the employment condition and performance condition stated in the award letter (settlement date).
  - The award shares acquired in respect of Scheme 1 will be subject to the condition that the Participants will not be entitled to dispose of or encumber the award shares within an 18-month period from the settlement date, and only after the lapse of the 2-year period from the award date will the award shares vest in a Participant.

- In Scheme 2, 50% of the award amount will be settled 1 year after the award date by the delivery of the award shares of equivalent amount (first settlement date) and the balance of 50% of the award amount will be settled two years after the award date in a like manner subject to the employment condition and performance condition stated in the award letter (second settlement date).
- The award shares acquired in respect of Scheme 2 will be subject to the condition that the Participants will not be entitled to dispose of or encumber the award shares within a 3-year period from the award date, being 2 years after the first settlement date and 1 year after the second settlement date. Only after the lapse of the 3-year period from the award date will the award shares vest in a Participant.

- The following terms and conditions will apply to the award shares acquired under both schemes:
  - If a Participant is a "good leaver" as set out in the scheme rules, such participant will either –
    - be entitled to retain the award shares, which may only be disposed of from vesting date; or
    - the vesting date will be accelerated, and the Participant will become entitled to dispose of the award shares immediately in certain circumstances as set out in the scheme rules.
  - If a Participant is a "bad leaver" as set out in the scheme rules, such Participant will be obliged to forfeit the award shares for no consideration in favour of Trust A.
  - A Participant will be entitled to all voting, dividend and other rights attaching to the award shares acquired from the respective settlement dates.
  - When the abovementioned restrictions cease to have effect and a Participant becomes entitled to dispose of the award shares, the Participant may elect that a portion of the award shares be disposed of in order for the Employer company to settle the employees' tax obligation that may arise.

Trust A will acquire the forfeited award shares under both share incentive schemes for no consideration. After acquisition Trust A will dispose of the forfeited award shares in the market as soon as is practically possible, irrespective of whether the share price has increased or decreased from the time of acquisition. The reason for the disposal of the award shares is solely to convert the forfeited award shares acquired into cash to be utilised by Trust A to carry out its public benefit activities.

Conditions and assumptions

This binding class ruling is not subject to any additional conditions and assumptions save as stipulated in the proviso in paragraph 7(d).

Ruling

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

- Each Employer Company may, under section 11(a) read with section 23(g) of the Act, deduct the expenditure incurred by it at settlement date in respect of its qualifying employees to acquire the award shares for delivery to the Participants of the proposed employee share incentive schemes.
- Section 23H(1) of the Act applies to the amount that is deductible under section 11(a), read with section 23(g), in respect of the expenditure incurred to acquire the award shares.
- The Employer Companies will be obliged to withhold employees' tax in terms of the Fourth Schedule on the vesting of the award shares, if any gain is determined in terms of section 8C(2) of the Act.
- Securities transfer tax will be imposed under section 2(1) of the Securities Transfer Tax Act 25 of 2007 once on the acquisition by the stockbroker of the award shares in the market, provided that those shares are allocated to the Participants' share accounts by the close of business on the date of the transaction.
- On granting of the award to a Participant, the Participant will not be required to include the value of the award in his or her income in that year of assessment.
- Each award share delivered to a Participant will constitute a restricted equity instrument as defined in section 8C(7) of the Act with the following tax consequences:

- The Participant will not be required to include the value of the restricted equity instrument delivered to him or her in his or her income in that year of assessment.
- Only when the restrictions cease to have effect or when the Participant disposes of the award shares (whichever happens first), will the Participant be required to include any gain determined in terms of section 8C(2) in his or her income.
- On the disposal of the forfeited award shares for no consideration, no gain will be realised by the Participant in terms of section 8C, and no capital gain or loss will be realised by the Participant for purposes of the Eighth Schedule to the Act.

- Any dividend as defined in section 1(1) of the Act, received by or accrued to the Participants will be exempt from normal tax and the exceptions in paragraphs (dd), (ii), (jj) and (kk) of the proviso to section 10(1)(k)(i) of the Act will not apply.
- The forfeiture of award shares by the Participants in favour of Trust A for no consideration will not be subject to donations tax.

8. BINDING GENERAL RULING

8.1. Application of section 20(7) and 21(5) of the VAT Act – No. 27 (Issue 2)

This BGR sets out the circumstances and conditions under which:

- a vendor need not issue a tax invoice, credit- or debit note; or
- the particulars required on a tax invoice may be furnished in another manner.

Background

The VAT Act contains certain requirements and prescribes certain particulars that must be contained on a tax invoice, credit- or debit note (as the case may be). However, recognising that in certain industries and for certain transactions it may be challenging to comply with these prescribed particulars, SARS has a discretion to approve deviations therefrom in certain circumstances.

Discussion

Under section 20(7) SARS may direct that, subject to such conditions as may be prescribed, specified particulars in section 20(4) or (5) need not be contained on a tax invoice, or may be furnished in another manner, or that a tax invoice need not be issued.

Similarly, under section 21(5), SARS may, subject to conditions as may be prescribed, direct that some of the particulars required under section 21(3)(a) or (b) need not be contained on a credit- or debit note (as the case may be).

SARS must, however, be satisfied that there are, or will be, sufficient records available to establish the particulars of a supply or categories of supplies, and that it would be impractical to require a full tax invoice, credit or debit note (as the case may be), to be issued.

Ruling

This ruling constitutes a BGR issued under section 89 of the TA Act insofar as it relates

Written contracts for the supply of goods or services

Approved circumstances

- SARS is satisfied that, in the circumstances under paragraph (b) below:
  - it is impractical to require that a full tax invoice, credit- or debit note be issued; and
  - there are sufficient records available to identify the supplies if the transactions in question consist of a once-off supply, or a number of progressive or periodic taxable supplies made by a registered vendor in accordance with a written contract for a supply of goods or services which provides for a regular payment of a determinable amount.
- The approved circumstances are as follows:
  - Instalment credit agreements in respect of goods consisting of corporeal movable goods or of any machinery or plant, whether movable or immovable

- Rental agreements for movable or immovable property
- Royalty agreements
- Short-term insurance

Tax invoices, credit or debit note not required

Subject to the approved circumstances, and the requirements, SARS directs under section 20(7)(b) and 21(5)(b) that a tax invoice, credit- or debit note is not required to be issued.

Specified particulars furnished in any other manner

Subject to the approved circumstances, and the requirements, SARS directs under section 20(7)(c) that the particulars specified under section 20(4) and (5) may be furnished in:

- the contract document; or
- a combination of a tax invoice read with the contract document.

Requirements of the contract document

SARS' direction in respect of these circumstances is on condition that:

- the recipient is in possession of the contract document which contains the following information:
  - The names, addresses and VAT registration numbers of the supplier and recipient. The VAT registration number of the recipient will only be required if the recipient is a vendor. Furthermore, the name and VAT registration number of the recipient will not be required if the consideration for the supply does not exceed R5 000;
  - A description of the goods or services supplied; and
  - A statement that the supplies are charged with VAT at the applicable rate.
- the supplier and recipient retain proof of payment of each amount paid if the relevant contract does not contain the consideration payable;

- the contract mentioned above contains a statement that the contract complies with SARS' direction under section 20(7) or 21(5), as the case may be;
- the abovementioned contract which includes the relevant particulars must be retained for the period contemplated in compliance with section 55, read with Part A of Chapter 4 of the TA Act.

Description of the goods or services

- Subject to the requirements, SARS will be satisfied that:
  - it would be impractical to require that a full tax invoice, credit- or debit note be issued; and
  - there will be sufficient records available to identify the supplies if the full and proper description of the transactions in question are, due to practical or system constraints, or accepted industry practice, contained in a separate document.
- SARS directs under section 20(7)(c) that the full and proper description of the goods or services required under sections 20(4)(e) and (5)(d) may be contained in a separate document such as an Annexure, price list, stock list, contract etc subject to:
  - the tax invoice containing a reference to the description of the supply which can be linked to the separate document containing the full and proper description, for example, software development, repair services, or a product code such as a commodity code or a part number;
  - such separate documents being available on request by the recipient or the South African Revenue Service (SARS);
  - past, current and any updates being retained, to the extent that such separate documents are contained on a computer system, or any online resource such as a website; and
  - copies of the relevant documents being retained for the period contemplated in compliance with section 55, read with Part A of Chapter 4 of the TA Act.

<u>Quantity or volume of the goods or services</u>

- Subject to the requirements, SARS will be satisfied that:
    - it would be impractical to require that a full tax invoice, credit- or debit note be issued; and
    - there will be sufficient records available to identify the supplies if the quantity or volume of the goods or services are, due to practical or system constraints or accepted industry practice contained in a separate document.
- SARS directs under section 20(7)(c) that the quantity or the volume of the goods or services required under section 20(4)(f) may be contained in a separate document such as an Annexure, a list, contract etc subject to:
    - the tax invoice containing a reference to the quantity or volume which can be linked to the separate document, for example, a reference to a delivery note, list, contract etc containing the particulars;
    - such separate documents being available on request by the recipient or SARS; and
    - copies of such separate documents being retained for the period contemplated in compliance with section 55, read with Part A of Chapter 4 of the TA Act.

8.2. VAT treatment of certain supplies of goods or services made by a municipality to a national or provincial government (VAT) – No. 74

This BGR sets out the VAT treatment of supplies of goods or services that are made by municipalities to national or provincial government under each method of contracting. This BGR does not purport to determine the contractual agreement between the parties but gives the VAT implications based on the nature of the transaction and the contractual capacity of the parties to the agreement.

Background

According to section 40 of the Constitution, the government of the Republic is constituted as national, provincial and local spheres of government, which are distinctive, interdependent, and interrelated. Schedules 4 and 5 to the Constitution set out the powers and functions allocated to each sphere of government. Under section 41(f) of the Constitution, all spheres of government and all organs of state within each sphere must not assume any power or function except those conferred on them under the Constitution.

The Constitution allows the national and provincial government to assign aspects of their legislative or executive powers or functions to a municipality, to move the operational responsibilities to a municipality under an agency agreement or to delegate functions to a municipality. Each method of contracting has VAT consequences that are set out in 4. In a VAT system, government is an end-user, and therefore any sphere of government should pay VAT on goods or services acquired by it.

Assignment

Under an assignment, a municipality takes over the function and there is a complete shifting of the responsibility either through legislation or by executive decision. An assignment can only take place once all the requirements or limitations in 2.1.1 to 2.1.3 of this BGR are met.

National assignment of functions (section 99 of the Constitution)

A Cabinet member may assign any power or function that is to be exercised in terms of an Act of Parliament to a member of a provincial Executive Council or to a Municipal Council. An assignment:

- must be in terms of an agreement between the relevant Cabinet member and the Executive Council member or Municipal Council;
- must be consistent with an Act of Parliament in terms of which the relevant power or function is exercised or performed; and
- takes effect upon proclamation by the President.

Provincial assignment of functions (section 126 of the Constitution)

A member of the Executive Council of a province may assign any power or function that is to be exercised or performed in terms of an Act of Parliament or a provincial Act, to a Municipal Council. An assignment:

- must be in terms of an agreement between the relevant Executive Council member and the Municipal Council;
- must be consistent with an Act in terms of which the relevant power or function is exercised or performed; and
- takes effect upon proclamation by the Premier.

Assignment of legislative authority (sections 44, 104 and 156 of the Constitution)

Section 43 of the Constitution provides that the legislative authority of the various spheres of government is vested as follows:

- The national sphere of government is vested in Parliament as set out in section 44 of the Constitution. The National Assembly may, under section 44(1)(a)(iii) of the Constitution, assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government.
- The provincial sphere of government is vested in the provincial legislature as set out in section 104 of the Constitution. The provincial legislature may, under section 104(1)(c) of the Constitution assign any of its legislative powers to a Municipal Council in the province.
- The local sphere of government is vested in the Municipal Councils as set out in section 156 of the Constitution. A municipality has, under section 156(1)(b) of the Constitution, the executive authority and the right to administer any matter assigned to it by national or provincial legislation.

Old order legislation (Schedule 6 to the Constitution)

Transitional measure

Old order legislation, as outlined in Schedule 6 to the Constitution, serves as a transitional measure to ensure legal continuity and does not assign functions under the current constitutional framework.

Preservation of pre-existing laws until amended

The purpose of Schedule 6 is to preserve pre-existing laws at the time until they are repealed or amended by the new democratic legislature, not to create new assignments of power or function under the new Constitution.

Procedures for assigning functions

The Constitution provides explicit procedures for assigning functions requiring legislative or executive action, precluding the automatic assignment of functions through old order legislation under the new Constitution.

Constitutional supremacy

Any interpretation suggesting that old order legislation assigns functions would undermine the principle of constitutional supremacy by allowing old order legislation to override the explicit provisions and procedures established in the new constitutional order.

Interpretation of transitional provisions

Transitional provisions should be interpreted to support and enhance the new constitutional framework rather than create ambiguity or conflict with its core principles.

<u>Supremacy of the Constitution (section 2 of the Constitution)</u>

Section 2 of the Constitution provides that the Constitution is the supreme law of the Republic and that any law or conduct which is inconsistent with it is invalid.

It follows that any assignment of a national function or a provincial function that is inconsistent with the provisions of sections 99 or 126 of the Constitution, respectively, is invalid.

<u>Agency and delegation (section 238 of the Constitution)</u>

Under an agency arrangement or contract, a municipality performs the function on behalf of a national or provincial government. It therefore merely implements the national or provincial instructions and plans as per the agency agreement or service level agreement (SLA). It does not take on the authority or responsibility of having to perform that function as part of its constitutional mandate as envisaged in Schedules 4B and 5B to the Constitution.

A delegation takes place when national or provincial government authorises a municipality under an SLA to perform the function on its behalf. In this regard a municipality will be making a taxable supply of services to the national or provincial government in its capacity as a principal.

An executive organ of state in any sphere of government may, under section 238 of the Constitution:

- delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed; or
- exercise any power or perform any function for any other executive organ of state on an agency or delegation basis.

If a municipality is contracted by means of an agency agreement or an SLA to implement a national or provincial function on behalf of a national or provincial department, the provisions of section 54 will apply. It follows that the municipality will be making a taxable supply of services to national or provincial government to the extent that the rendering of such service gives rise to the payment of an implementation fee, agency fee or management fee.

If a function of a national or provincial government is delegated to a municipality by means of an SLA, the municipality is contracted in its capacity as a principal. In this regard the municipality will be making a supply of goods or services to a national or provincial government in its capacity as a principal.

The instrument of an agency or a delegation may not be used to assign any of the national or provincial government functions to a municipality.

<u>Importance of a contract or agreement entered into between a municipality and a national or provincial government</u>

A contract or an agreement entered into by the parties to a transaction is an essential source document that is called for when establishing and considering the details of a transaction to determine the VAT consequences of the transaction. In this regard, national, provincial and local government must carefully consider the details of their contracts to ensure that their intentions are accurately reflected and that actions are aligned with intentions.

Discussion

Value-added tax is levied under section 7(1)(a) on the supply of goods or services by a vendor in the course or furtherance of an enterprise carried on by that vendor. This is subject to the exemptions, exceptions and adjustments provided for in the VAT Act.

Grants

The term “grant” is defined in section 1(1) and specifically excludes, amongst others, payments made by public authorities for the actual supply of goods or services to the public authority. Section 8(5A) will apply only to the extent that no actual supply of goods or services are made to national or provincial government in return for the payment received by a municipality.

Section 8(5A)

A vendor (excluding a designated entity) that receives a “grant” from a public authority in the course or furtherance of an enterprise carried on by the vendor is deemed to supply a service to the relevant public authority under section 8(5A).

Zero rate

A service that is deemed to be supplied under section 8(5A) is subject to VAT at the rate of 0% under section 11(2)(t).

Input tax

Value-added tax paid on goods or services acquired by a vendor may be deducted by the vendor to the extent that such VAT constitutes “input tax” as defined in section 1(1). The definition of “input tax” determines that, amongst others, the goods or services must be acquired by a vendor for consumption, use or supply in the course of making taxable supplies. The deduction is subject to sections 16(2) and (3), 17, and 20. Furthermore, the vendor’s deduction is limited to the five-year period contemplated in the proviso to section 16(3).

Agent (section 54)

The VAT Act does not define the term “agent”. In this regard the term “agent” will take its ordinary dictionary meaning, as applied to the subject matter with regard to which it is used.

Under section 54(1), if an agent acts on behalf of a principal in supplying goods or services, the supply is deemed to be made by the principal and not the agent for VAT purposes. To the extent that the supply made by an agent on behalf of the principal is not a taxable supply, the agent may not issue a tax invoice in respect of such supply.

Similarly, if any vendor makes a taxable supply of goods or services to an agent who is acting on behalf of a principal, the supply is deemed to be made to the principal and not the agent under section 54(2). This is the case even if the supplier may have issued the tax invoice in the name of the principal.

The effect of section 54(1) and (2) is that an agent may not account for output tax or deduct input tax on supplies of goods or services made or acquired by the agent on behalf of a principal.

The agent must, under section 54(3), notify the principal in writing within the prescribed 21-day period of the requisite particulars of the supply that was made or received on behalf of the principal.

Under the VAT Act, for an arrangement to qualify as that of agency, the agent may not make a margin on supplies made or received on behalf of a principal unless the agreement explicitly makes provision for this.

Ruling

This ruling, in table form below, sets out the VAT consequences applicable to each method of contracting in the form of assignment (of powers of functions and legislative authority), agency and delegation.

VAT consequences of functions assigned to or performed by a municipality under an agency or delegation basis		
Assignment of powers or functions and legislative authority	**Agency (May not be used to assign powers or functions)**	**Delegation (May not be used to assign powers or functions)**
a) Grant received in the course or furtherance of carrying on an enterprise: i) A taxable supply is deemed to be made by the municipality under section 8(5A). ii) The taxable supply is zero-rated under section 11(2)(t). iii) The municipality must issue zero-rated tax invoice under section 20. iv) The municipality must account for the zero-rated supply. v) The municipality may deduct input tax on the VAT incurred on goods or services acquired in the course or furtherance of carrying out the assigned function subject to section 1(1) definition of "input tax" and sections 16(2), 17, and 20.	d) The municipality is contracted to perform a function on an agency basis. The agency fee, management fee or implementation fee is consideration for a standard-rated supply of services. i) The municipality must account for output tax on the full price of the agency, management or implementation services. ii) The municipality must issue a standard-rated tax invoice under section 20 in respect of the agency services supplied to national or provincial government. iii) The municipality is entitled to deduct input tax on the VAT incurred on goods or services acquired in the making of the taxable supply of agency, management or implementation services.	e) The municipality is contracted in its capacity as a principal to perform a delegated function. It supplies services to national or provincial government in its capacity as a principal (contractual principal) and charges VAT on these supplies. i) The full contract price is the consideration for a taxable supply of goods or services. ii) The taxable supply is subject to VAT at the standard rate under section 7(1)(a). iii) The municipality must issue a standard rated tax invoice under section 20. iv) The municipality must account for output tax calculated on the full price of the contract. v) The municipality is entitled to deduct the full VAT incurred on goods or services acquired in

b) Grant received in the course of carrying on non-enterprise activities: i) The grant is received outside the scope of the VAT Act. ii) No output tax liability arises for the municipality on the receipt of such a grant. iii) The municipality is not entitled to deduct any input tax on goods or services acquired in the course or furtherance of carrying out the assigned function. c) Old order legislation assignments which are inconsistent with the national or provincial assignment of functions as contemplated in section 99 or 126 of the Constitution are invalid. The effect of this is that the VAT consequences set out in a) and b) of this table will not apply to such old order legislation assignments	This is subject to section 1(1) definition of "input tax" and sections 16(2), 17, and 20. This would be limited to overheads and direct costs relating to the management or contractual agency services. iv) The municipality is not entitled to deduct input tax on the VAT incurred on goods or services acquired to perform the function on behalf of province, as the supply of goods or services in question is deemed to be made to the province and not to the municipality under section 54(2). This is applicable even if the contract may be in the name of the municipality. The municipality must issue a statement under section 54(3) to provincial government setting out the goods or services acquired on behalf of provincial government. Failure to meet this requirement will result in the transaction being treated as a taxable supply made by the	performing the delegated function subject to section 1(1) definition of "input tax" and sections 16(2), 17 and 20.

	contractual principal and therefore the full contract price will be subject to VAT. v) Output tax is calculated based on the amount retained by the municipality and not to the full amount expended by the municipality in the course of performing the function on behalf of a national or provincial government provided the above conditions are met.	

9. GUIDES

9.1. Frequently Asked Questions – Deceased Estates (Issue 4)

The Frequently Asked Questions (FAQs) in this document have been compiled on the basis of questions that executors and the public at large have about the tax treatment of deceased estates.

Question	**Answer**
General – Estate duty	
1. What is estate duty?	Estate duty is the duty levied under the Estate Duty Act, 1955 (the ED Act) on the dutiable amount of an estate of a deceased person.
2. What is the estate duty rate?	The duty is levied on the dutiable amount of an estate that does not exceed R30 million at a rate of 20%. Estate duty is levied at a rate of 25% on the dutiable amount of an estate that exceeds R30 million.
Estate duty calculation	

3. How is estate duty calculated?	The following table illustrates how estate duty is calculated:	
		R
	Value of property (section 3(2))	xx
	Plus: The value of deemed property (section 3(3))	xx
	Gross value of the estate	**xxx**
	Less: Allowable deductions / expenses (section 4)	(xx)
	Net value of Estate	**xxx**
	Less: Section 4A rebate	(xx)
	Dutiable Amount of the Estate	**xxx**
	Estate duty @ 20% on value of property not exceeding R30 million	X
	Estate duty @ 25% on value of property exceeding R30 million	X
4. What is included in an estate?	The estate of any person consists of all the property and deemed property (situated in and outside South Africa) of the deceased person as at the date of death. However, for a deceased person who was not ordinarily resident in South Africa, any property situated outside South Africa is excluded.	
5. What is the meaning of "property"?	"Property" is defined in section 3(2) of the ED Act to mean any right in or to property, movable or immovable, corporeal or incorporeal. The definition is comprehensive and includes real rights such as the rights attached to fixed or moveable property as well as personal rights (for example, any fiduciary, usufructuary or like interest in property and any right to an annuity (other than a right to an annuity charged on property))	

	Crypto assets are regarded as movable, incorporeal property in the estate of the deceased person and is included for estate duty purposes (see Questions 42 to 44). Section 3(3) of the ED Act further includes certain property as deemed property in the estate. The following property is regarded as deemed property: • Domestic policies on the life of the deceased, subject to exclusions. • Exempt donations under section 56(1)(c) or (d) of the Income Tax Act. • An accrual claim on behalf of the deceased person against the surviving spouse under the Matrimonial Property Act, 1984. • Any property that the deceased was before his or her death competent to dispose of for his or her own benefit or for the benefit of his or her estate. Section 3(3)(e) of the ED Act specifically includes any contributions made by the deceased person to an approved South African retirement fund that was allowed as a deduction under section 5 of the Second Schedule to the Income Tax Act, in determining the lump sum benefit payable to the deceased person.
6. What property is excluded from an estate?	A distinction should be made between a person who is ordinarily resident at the time of death and a person who is not. Ordinarily resident: Section 4(e) of the ED Act provides that property acquired before becoming ordinarily resident in South Africa may under certain circumstances be excluded from the estate. If the deceased is ordinarily resident in South Africa at the date of death, his/her property in South Africa as well

	as his/her property situated outside South Africa, subject to certain exclusions, is taxable. Not ordinarily resident: Property situated outside South Africa as provided for in section 3(2)(c) – (h) of the ED Act is excluded from the deceased estate in South Africa. If the deceased person was ordinarily resident outside South Africa at the time of death, but had assets in South Africa, the deceased person will have a South African estate for estate duty purposes. Furthermore, section 3(2)(i) of the ED Act excludes any benefit payable to the deceased from an approved retirement fund as a result of death.
7. Are there any exemptions from estate duty?	No. The ED Act does not provide for any exemptions, but only for the exclusion of certain property from an estate (see Question 6).
8. What impact can the matrimonial property regime have on the estate duty calculation of the deceased?	The matrimonial property regime under which the deceased person was married will impact the calculation of estate duty. In a marriage out of community of property, each spouse has his or her own estate. Where the accrual system applies to a marriage out of community of property, the spouse with the smallest accrual will have a claim against the other spouse. If the deceased person has the larger estate, a claim will be made against the deceased estate by the surviving spouse [section 4(IA)]. If the deceased person has the smaller estate, the estate have an accrual claim against the surviving spouse and it will be included in the deceased estate as an asset [section 3(3)(cA)]. In a marriage in community of property, a joint estate exists. When one spouse dies, the entire estate must be administered, but the surviving spouse has a 50% interest in the joint estate and may claim his or her half share. Additional claims may arise under the law

	of intestate succession. The value of the surviving spouse's estate is calculated after liabilities and administration costs have been deducted from the joint estate. The funeral costs and estate duty are paid from the deceased's half of the estate. The latter two deductions are only made after the joint estate had been divided. Although the whole amount of funeral costs is taken into consideration for administration of the joint estate, that amount is added back to establish the one-half share of the joint estate belonging to the surviving spouse and which is not subject to estate duty. The whole amount of funeral costs is then subtracted from the deceased's one-half share of the joint estate.
9. What deductions are available to reduce the value of an estate?	The following list of expenses are available to qualify as deductions against the gross value of the estate to determine the net value: • Section 4(a): Funeral, tombstone and deathbed expenses. • Section 4(b): Debts owed in South Africa. • Section 4(c): Costs of administration and liquidation. Costs incurred in relation to the management and control of income accruing after the date of death is excluded from this deduction. • Section 4(d): Costs incurred to adhere to the requirements of the Master of the High Court (Master) or (SARS), for example, cost of valuing property included in the estate, legal costs in relation to disputes with SARS, security costs and fees to professional persons.

	• Section 4(e): Deductions in respect of foreign assets and rights. • Section 4(f): Deductions in relation to foreign debt • Section 4(g): Limited interests received as a gift. • Section 4(h): Bequests to certain institutions. • Section 4(i): Improvements made by beneficiaries to property. • Section 4(j): Improvements to properties subject to a limited interest. • Section 4(IA): Accrual claims under the Matrimonial Property Act. • Section 4(m): Limited interests created by the predeceased spouse and enjoyed by the deceased. • Section 4(o): Value of books, pictures, statuary other objects of art. • Section 4(p): Deemed property and the valuation of company shares. • Section 4(q): Bequest to the surviving spouse.
10. Do all funeral expenses qualify as a deduction under section 4(a)?	The ED Act does not provide a prescribed list for funeral expenses and the allowing of a deduction is subject to the discretion of SARS. When applying the discretion in allowing any funeral expenses, it is measured against the type of expense (being critical to the burial of the deceased) and the value of the expense and whether it can be considered as reasonable (bearing in mind the station of the person in life and the value of the estate). The following expenses are not allowed as a deduction under section 4(a):

	• Flowers • Wreaths • News advertisements • Catering, Food, Drinks, Snack, Tea, Coffee • Marquee hiring/Chairs and tables • Restaurant bills • Transport of people/attendees/family members to the grave • Premiums paid prior to death in respect of a funeral policy	
11. How is the dutiable amount of an estate determined?	The net value of the estate is calculated by deducting from the gross value of all property and deemed property the amounts provided for in section 4. Once the net value is determined, an amount of R3,5 million is deducted under section 4A to determine the dutiable amount of the estate. Estate duty is then calculated on the dutiable amount, if any (see Question 3).	
12. What is the value of the section 4A abatement? f	The value of the section 4A abatement has increased over time as follows:	
	Period	
	Prior to 1 March 2005	R1.5 million
	1 March 2006 to 28 February 2007	R2.5 million
	1 March 2007 to date	R3.5 million
13. What is the impact on the section 4A abatement if	An abatement of R3,5 million is available in respect of every estate, however, where a deceased person	

the deceased had a predeceased spouse at the time of death?	has a predeceased spouse, the deceased person is entitled to a rebate of R7 million (R3,5 million × 2) less any amount used by the predeceased spouse's estate. The maximum that the latter dying spouse can have is R7 million. Example: A died in January 2020 but had a predeceased spouse, B, who died in 2019 and used R3 million of the section 4A abatement. What is the value of the section 4A abatement in A's deceased estate? = (R3,5 million × 2) less any amount used by predeceased spouse = R7 million less R3 million = R4 million is available to A's deceased estate
14. If the section 4A abatement entitlement was less than R3,5 million at the time of the predeceased spouse's death, how is the section 4A abatement calculated in the latter dying spouse's estate?	The fact that the allowable section 4A abatement was worth less than the R3,5 million (for example R2,5 million in September 2006), does not affect the starting point of R7 million in the second dying spouse's hands. Example: A died in June 2020 but had a predeceased spouse, B, who died in September 2006 when the section 4A abatement was only R2,5 million. The full R2,5 million was used in B's deceased estate. What is the value of the section 4A abatement in A's deceased estate? The section 4A abatement will be calculated as follows: = (R3,5 million × 2) less any amount used by predeceased spouse = R7 million less R2,5 million = R4,5 million qualify as the section 4A abatement in A's deceased estate.

15. Can a deceased person claim a section 4A(2) abatement in respect of a previously deceased spouse who was not ordinarily resident in South Africa?	Yes. The ED Act does not require the predeceased spouse to be ordinarily resident for the latter dying spouse to make use of any unused portion of the R3,5 million. The only requirement is that there must be a predeceased spouse. The fact that the predeceased spouse ended up having no estate does not disqualify the R3,5 million to be rolled over to the latter dying spouse's estate
16. What documentation is required to qualify for the section 4A(2) abatement?	A stamped copy by the Master of the liquidation and distribution account (L&D account) or a stamped copy by the Master of the pre-deceased's estate duty return (REV267) together with the other estate documentation, is required to qualify for the section 4A(2) abatement. The deduction will not be allowed if the L&D account or REV267 is not submitted or is not stamped by the Master's office. Alternatively, SARS may request any other relevant material that SARS may regard as reasonable in relation to the estate of the predeceased spouse.
17. Does an estate qualify for the R7 million under section 4A(2) if the pre-deceased's estate was not reported at the Master?	Yes. The requirements under the ED Act are not dependent on whether the predeceased spouse's estate was reported at the Master. Alternative documentation can be requested to confirm whether or not the R3,5 million was used.
18. Who qualifies as a "spouse" for estate duty purposes?	A spouse includes any partner in: • a marriage or customary union recognised in the Republic; • unions recognised as marriages under tenets of religion; or • a same sex or heterosexual union, which SARS is satisfied is intended to be permanent.

	Under section 13 of the Civil Union Act, 2006 read with the definition of "spouse" in the ED Act, a civil union partner is also included as a spouse.
19. If the deceased was in a life partnership at the time of death what documentation would be required to satisfy SARS' discretion that the relationship was intended to be permanent?	Before SARS can consider the life partner of the deceased to qualify as a "spouse" under section 1 of the ED Act, SARS needs to be provided with three affidavits from different parties to confirm the relationship. The following guidelines may be regarded as proof in support of a life partnership: • An affidavit in which neighbours, relatives or professional people confirm that the deceased and his or her partner had such a relationship. • A cohabitation agreement. • A joint bank account. • The will of the deceased in which the partner is appointed as a beneficiary • Proof of joint ownership of immovable property or other assets. • Life policies, retirement annuity fund (RAF) or pension fund benefits of which the partner is a beneficiary. • Membership of a medical scheme reflecting the partner as a dependant. • The period of such relationship.
Income tax of the deceased estate after death	
20. Is there a distinction between a deceased person and the deceased estate for income tax purposes?	Yes. The deceased person's liability for tax and year of assessment come to an end at the date of death and a new taxpayer, namely, the deceased estate comes into existence in respect of any income and liabilities that arise after the date of death. Although

	the deceased estate is treated as a natural person, it is not regarded as the same natural person as the deceased person.
21. What is a deceased estate?	In general, a deceased estate is not a person but simply a collection of rights and obligations of the deceased person administered by an executor. However, for income tax purposes, a deceased estate is regarded as a "person" by way of the inclusion of such an estate in the definition of a "person" as defined in section 1(1) of the Income Tax Act.
22. What rate of tax applies to a deceased estate?	A deceased estate is treated as a natural person for income tax purposes, except for the application of sections 6, 6A and 6B of the Income Tax Act. Therefore, the rate of tax applicable to individuals also apply to a deceased estate. The exclusion of deceased estates from the application of section 6 of the Income Tax Act means that the tax thresholds applicable to individuals do not apply to a deceased estate.
23. How is the year of assessment determined for a deceased estate?	The first year of assessment for the deceased estate commences on the day after the date of death and ends on the last day of February. If the L&D account becomes final before the end of the year of assessment, the year of assessment will end on such date. For subsequent years of assessment, the executor of a deceased estate must continue to submit income tax returns for each year of assessment until the L&D account becomes final.
24. Can a deceased estate be a provisional taxpayer?	No. A deceased estate is specifically excluded from the definition of "provisional taxpayer" as defined in paragraph 1 of the Fourth Schedule to the Income Tax Act. A deceased estate cannot settle a tax liability by way of provisional tax.

25. How is the residence of a deceased estate determined?	The residence of a deceased estate in South Africa for income tax purposes follows the residence of the deceased person at the time of death. This determination of residence for income tax purposes is wide and can be by way of physical presence or by being ordinarily resident in South Africa. For estate duty purposes, the concept of residence is narrow and determined by whether the deceased person was ordinarily resident in South Africa.
26. What happens if the deceased person was a resident for income tax purposes by way of physical presence, but not ordinarily resident?	For income tax purposes, the worldwide income of the deceased person would be subject to tax in South Africa, however, for estate duty purposes, only the property situated in South Africa is included in the deceased estate.
27. What types of income is taxable in the deceased estate?	The following types of income are taxable in the deceased estate: • All local and foreign income, except for a non-resident deceased estate where only the income earned in South Africa is subject to tax. • Investment income (including local interest income exceeding R23 800) • Rental income from immovable property • Trading income • Farming income • Trust income • Capital gains on assets disposed of by an executor • No IRP5/IT3a type income, for example, lump sums or vesting of share options • Any income received after the date of death, for example, a bonus, relating to a period

	before death accrues to the deceased person as at date of death and not to the deceased estate. This income must be declared in the deceased person's last return. Any income (investment, rental or trade) that have accrued over a period of time that relates to a period before and after the date of death must be split between the deceased person and the deceased estate. The income that accrued up to the date of death must be included in the return of the deceased person and the income that accrued after the date of death, must be included in the income and expenditure account of the L&D account.
28. How is the interest exemption applied to the interest received by the deceased estate?	The exemption available to the deceased estate per year of assessment is R23 800. Previously, it was not apportioned if the year of assessment was less than 12 months. However, from 1 March 2023 (that is, the 2024 year of assessment) if the year of assessment is less than 12 months, the R23 800 exemption shall be apportioned according to the same ratio as the number of days in that year of assessment bears to 365 or 366 days. Example: The deceased died on 31 October 2023 and the interest income that accrued to the deceased estate from the date of death up to 29 February 2024 amounts to R30 000. The taxable portion of the interest is calculated as follows: The period of assessment from 1 November 2023 to 29 February 2024 amounts to 121 days (30 + 31 + 31 + 29). The available interest exemption is R7 868 (121 / 366 × R23 800). The taxable portion of the interest income for the 2024 year of assessment in the deceased estate

	amounts to R22 132 [R30 000 – (R23 800 but limited to R7 868)]. Note: The same rule applies when the estate is deregistered during a year of assessment where the interest exemption must be apportioned pro-rata.
29. What is the impact on the income and expenditure that arise after death if the deceased person was married in community of property?	Where the deceased person was married in community of property and income (investment and rental income) is earned by the deceased estate, 50% of such income must be declared by the deceased estate and the surviving spouse must declare the other 50%. All income, both local and foreign (including investment and rental income) as well as capital gains and foreign credits must be reflected as 50%. For a non-resident estate, only local income is included. Income derived from the carrying on of a trade (except rental income) only forms part of the estate of the person carrying on the trade. The 50/50 split therefore does not apply to trade income. A capital gain up to R1 million in respect of the disposal of a primary residence may be claimed in the deceased estate, the balance must be reflected in the spouse's return.
30. How often should an income tax return be submitted on behalf of the deceased estate?	An income tax return should be submitted for each year of assessment until such time as the estate becomes distributable. Even when an estate is finalised during the year of assessment, an income tax return must be submitted for the full year of assessment during which the liquidation process was finalised.
31. If a deceased estate takes more than one year of assessment to be finalised,	The income earned and expenditure incurred after the date of death must be allocated to each relevant year of assessment until the deceased estate is finalised.

how should the income and expenditure be allocated?	
32. How is the income and expenditure that arise after death proven?	The L&D account must be submitted in order to prove any of the following: • Income received by the executor • Assets acquired by the deceased estate from the deceased person • Assets disposed of by the deceased estate to an heir or legatee • Assets disposed of by the deceased estate to a resident surviving spouse. The assessment of this income up to the date of the final L&D account as approved by the Master will form part of the expenditure in the income and expenditure account of the deceased estate and is due and payable by the executor. The usual expenses as in the income and expenditure account are allowed to be claimed by the deceased estate.
33. Who is responsible for the tax liability that arise in respect of the income and expenditure that arise during the advertisement period up to the date the Master approves the L&D account?	The deceased estate is liable for any tax applicable to income earned during the advertisement period up to approval. Any income earned during the advertisement period up to approval must be declared in the deceased estate's final income tax return although not reflected in the income and expenditure account of L&D account.
34. Who is responsible for the tax liability that arises for the period after the Master approved the L&D account?	Any income earned after approval of the L&D account accrues to the beneficiaries (if any). The executor must inform the beneficiaries to declare such income in their respective tax returns.

35. What deductions or exemptions apply to the deceased estate?	The following deductions and exemptions are available to the deceased estate: • The interest exemption for a taxpayer below 65 years of age applies to the deceased estate even if the deceased person was older than 65. • Any capital gain on the disposal of a primary residence, where the gain does not exceed R2 million, will be disregarded. • No capital gains tax implication on property that is inherited by a surviving spouse. Roll-over will apply. • The capital gains tax exclusions on personal use assets. • The deceased estate will be taxed at the same rates and enjoy the same inclusion rate for capital gains tax as is applicable to natural taxpayers. • The exclusion and inclusion rates as per the current tax year of assessment. The following are not applicable to a deceased estate: • Medical and travelling deductions • Provisional tax • Any normal tax rebates • Estate duty
36. Can accounting fees be claimed as a deduction for the period after death?	Only professional fees that were actually paid or are payable for the completion of the income tax return, can be considered as a deduction. Refer to paragraph 7.2.1 of the Guide to the Individual Income Tax Return for Deceased and Insolvent Estates and Practice Note 37 “Deduction of Fees Paid to Accountants,

	Bookkeepers and Tax Consultants for the Completion of Income Tax Returns
37. Is a deceased estate entitled to a deduction under section 18A for a bequest in terms of a will paid to a qualifying public benefit organisation?	No. The bequest is not considered to be a donation made by the deceased estate for purposes of section 18A. However, a bequest in terms of a will made to a qualifying public benefit organisation may qualify for a deduction under section 4(h) of the ED Act for estate duty purpose.
38. Is the section 18A carried-forward balance for excess deductible donations made by the deceased taxpayer available to the deceased estate?	No. The carried-forward balance for excess deductible donations made by the deceased taxpayer up to the date of death is forfeited at death. No carried-forward balance is carried over to the deceased estate as it is a separate taxpayer from the deceased person
39. Which expenses are not allowed as a deduction in the deceased estate?	No expenses may be claimed relating to: • advertisement costs for debtors and creditors • advertisement costs for the L&D account • Master's fees • executor's remuneration (3,5%) • value-added tax (VAT) on the executor's remuneration postage and petties.
40. How is an assessed loss treated?	An assessed loss, including a capital gains tax assessed loss, may not be carried over from the deceased person to the deceased estate. The deceased estate will be allowed to carry over any losses incurred in the deceased estate, until the L&D account becomes distributable.
41. Can a deceased estate register for PAYE and apply	The executor, as the representative taxpayer of the deceased person and the deceased estate, acts as the "representative employer" for PAYE purposes. If

for voluntary disclosure relief (VDP)?	the deceased person should have registered as an employer but failed to do so, the executor can act in a representative capacity on behalf of the deceased person to apply for voluntary disclosure relief.
Crypto assets	
42. Is a crypto asset regarded as an asset in the deceased estate?	Yes. A crypto asset is regarded as a movable asset in the deceased estate.
43. How is a crypto asset treated for tax purposes in the deceased estate?	For estate duty purposes, the crypto asset must be included as property in the deceased estate and is valued at the fair market value at the date of death. For income tax purposes, depending on the facts and circumstances applicable, a crypto asset is regarded as a capital asset or trading stock for tax purposes. If the crypto asset is treated as trading stock, normal tax will apply and if it is treated as a capital asset, capital gains tax may apply.
44. How must a crypto asset be declared to SARS?	The crypto asset must be declared in the deceased person's income tax return. The executor or agent must also declare the crypto asset in the tax return of the deceased estate (if applicable) as well as in the L&D Account.
The role of the executor	
45. Who can act as an executor?	The person appointed by the Master by way of a letter of executorship (or a letter of authority) is the executor (or administrator) of the estate.
46. Who is the representative taxpayer at SARS for the deceased person and the deceased estate?	The appointed executor is the representative taxpayer of the deceased person and the deceased estate. If the executor appointed an agent with a Power of Attorney (PoA), such agent may act on behalf of the executor to fulfil the necessary duties, but the executor remains the legally responsible person.

47. Who is responsible for the administrative duties regarding a deceased person and the deceased estate?	The executor as the representative taxpayer is required to act on behalf of the deceased person and the deceased estate. The executor is required under the Administration of Estate Act, 1965 to fulfil all duties and obligations in finalising the estate. As noted above in Question 46, an agent with a PoA may assist an executor.
48. What duties do the executor have at SARS?	The executor is responsible for all tax duties at SARS that include: • The reporting of the deceased person's death (if the deceased was registered for tax or earned taxable income or had a dutiable estate) • All returns for all taxes (including estate duty) the deceased person was registered for must be submitted and all tax liabilities must be settled • The registration of the deceased estate for tax purposes should any post-death taxable income arise • Submission of all the tax returns of the deceased estate and settling of any tax liabilities. Act as the representative employer (PAYE) or vendor (VAT) where applicable.
49. Can an executor be held personally liability?	Yes. The executor is personally liable for tax payable in his or her representative capacity if • a tax liability remains unpaid, and the executor disposes of the amounts in respect of which the tax is chargeable; or • an executor disposes of funds that he or she possesses in a representative capacity or that came into his or her possession after a tax

	liability is due and the funds could legally have been applied to settle the tax liability. An exception to the general rule is that an executor cannot be held personally liable for the tax liability in respect of an asset over which the executor had no control.

Operational aspects

Coding of the death of a person	
50. How to report the death of the deceased person to SARS?	SARS must be notified of the death of the person, even if no estate duty is payable. If the deceased was not registered for tax purposes, it still needs to be reported to SARS. An executor must notify SARS of the death by: • sending it through the new SARS Online Query System; or • sending an e-mail using one of the following: ○ For Tax Practitioners: pcc@sars.gov.za For Taxpayers: contactus@sars.gov.za.
51. Which documents are required by SARS for the deceased person to be coded as such?	The following documents are required for a deceased person to be coded as such with SARS: • Copy of the death notice of the deceased (Form J294) issued by the Master's Office or the death certificate • Copy of Acceptance of trust as Executor (Form J190) or copy of the Letter of Executorship (Form J238) • Copy of the undertaking and acceptance of the Master's directions (Form J155) or copy of the Letter of Authority (Form J170) (in cases where the estate is less than R250 000) • Copy of the Inventory (Form J243)

	• Copy of the last will and testament • Certified copy of the ID of the deceased person and executor • The name, physical address, e-mail address and telephone number of the executor or his or her agent • Copies of the signed final L&D accounts when they become available (if applicable) • The Estate Duty Return (REV267 form).
52. How are the details of the representative taxpayer updated?	The following steps should be taken to update the representative taxpayer's (referred to as the Registered Representative) details: • Open link: Registered Representatives • Select <SARS Registered Details> from the menu on the left • Select <Activate Registered Representative> • If you are the appointed registered representative for an entity, you must activate the status on eFiling in order to transact on behalf of your client. The following steps should be taken to activate the Registered Representative: • Select <Organisation> from the menu on the top • Select <SARS Registered Details> from the menu on the left • Select <Activate Registered Representative> • Select the applicable option (i.e Tax Practitioner or Registered Representative)

	- Agree to the declaration confirming that you are the authorised representative for the taxpayer and click on - Complete the applicable fields and select the representative capacity (e.g. accounting officer, curator, public officer, parent guardian etc) • Click on the activate button at the bottom.
53. What is the process flow to finalise a deceased estate?	There are two processes to follow before a deceased estate can be finalised. The first step is that the estate must be reported to the Master. After the letter of executorship has been issued by the Master, the following should be done: - The executor must, together with the letter of executorship, inform SARS through one of the following channels: - SARS online query system available on the SARS website; or - sending an e-mail using one of the following: For Tax Practitioners: pcc@sars.gov.za For Taxpayers: contactus@sars.gov.za. - The details of the executor must be updated and verified so that it can be linked to the deceased estate. - Once the deceased person has been coded and the executor's details are updated on the SARS system, all outstanding tax returns should be submitted up to the date of death. This applies to all tax types: income tax, VAT, PAYE, SDL, UIF contributions and estate duty.

	• As soon as the L&D account, together with the REV267, have been submitted to the Master, a copy thereof must be provided to SARS. • The L&D account will be audited. • If the estate was dutiable, the estate duty audit will be conducted and the REV250 (estate duty assessment) will be issued. • As soon as all the tax liabilities have been paid in full, the Deceased Estate Compliance (DEC) letter will be issued. The DEC letter is issued for all taxes including estate duty. Once the letter has been issued, it must be submitted to the Master (see Questions 89 to 92). • The DEC letter has to be submitted to the Master before the executor will be granted the discharge letter to indicate that all the requirements were met, and the executor has been released.
Submission of deceased person's tax return up to date of death	
54. Should an income tax return be submitted for the deceased person in the year that the deceased person dies?	Yes. The last return up to the date of death must be submitted if the deceased person was registered for income tax and/or received taxable income. The return must also disclose any property that is sold for purposes of the deemed disposal of assets for capital gains tax purposes at the date of death.
55. If the deceased person was not a registered taxpayer, is he or she still required to submit an income tax return in the year of death?	If the deceased person is not registered for income tax, earned no taxable income and does not own property to be sold for capital gains purposes at the date of death, the income tax return in the year of death is not required.
56. When should the deceased person's last tax	A public notice under section 25 of the Tax Administration Act is published annually to provide the filing season due dates. However, once the

return, in the year of death, be submitted?	deceased person is coded as an estate at SARS, the executor can proceed to submit the tax return without waiting for the filing season to start.
The registration of a deceased estate as a taxpayer (second registration)	
57. How to register a deceased estate as taxpayer for income tax purposes? (Also referred to as the second registration.)	This process is applicable only to deaths on or after 1 March 2016 where the deceased estate is required to register as a separate taxpayer with SARS. The assessment of income applies only to the new number that is issued by SARS. If there is no taxable income after date of death, there is no need to register for the second registration. • The deceased person's income tax number must be registered and coded by SARS as a deceased person before the second registration can be done. • The deceased estate registration may be done via eFiling. • SARS will issue a new number to the deceased estate that will be linked to the existing income tax reference number of the deceased person. • The executor must request for registration of the deceased estate as soon as there is taxable income after date of death (see Questions 20 to 41). • It is not necessary that the deceased person's tax reference number be deactivated at SARS before a deceased estate may be registered. • The deceased person's tax reference number must be coded as a deceased person on the SARS system before a deceased estate can be registered.

	Where an executor has not registered a deceased estate, a SARS auditor may register the deceased estate while auditing the deceased person when it has been determined that there is relevant or qualifying income after date of death as per the income and expenditure account that requires a deceased estate to be registered
58. What documentation is required to register a deceased estate?	The following documentation is required to register a deceased estate with SARS: • Death certificate • Letter of executorship • Certified copy of the executor's ID • Proof of the physical address and contact details of the executor or agent • Power of attorney (if applicable) L&D account (when it becomes available)
59. When should a deceased estate be registered?	SARS should always be notified that a taxpayer has passed away to code such taxpayer as a deceased person. A deceased estate should be registered when taxable income arises after the date of death or any capital gains that may arise subsequent to the date of death for the deceased estate.
60. How can the banking details of a deceased estate be changed?	Change of bank details can be requested via one of the following channels: • On eFiling, by completing the Registration, Amendment and Verification form (RAV01) in the SARS Registered Details tab, Maintain SARS Registered Details menu; • For Personal Income Tax: individuals may change banking details when completing and

	submitting an individual Income Tax Return (ITR12); • SARS Mobile Tax units; • By e-mail for Exceptional Circumstances Only; and • In person at a SARS branch, where it is impossible for the requestor to use electronic means (you may be required to make an appointment). If the taxpayer is coded as a deceased estate, only the person appointed by the Master with the letter of Authority or letter of Executorship can request the changes. However, authority can be delegated to a registered tax practitioner or an agent to act on behalf of the executor. The tax practitioner or agent must have a power of attorney (POA) from the executor, and all required supporting documents for the change of banking details and authenticating the tax practitioner or agent. An agent may include an attorney, auditor or trust company, which in turn may nominate an employee to administer the estate. The nominated employee is required to present a PoA to act on behalf of the executor. For more information on how to change the estate's banking details, refer to the Change of Banking Details External Guide available on the SARS website.

Estate duty

Returns and assessments for estate duty	
61. Is an estate duty return required to be submitted?	Section 7 of the ED Act requires a return to be submitted by an executor. The contents of the estate duty return reflect in principle the content of the L&D

	account, specifically the estate duty addendum. The estate duty return is submitted together with the L&D account to the Master. A copy of the L&D account and estate duty return can also be submitted to SARS through one of the following e-mail addresses: • For Tax Practitioners: pcc@sars.gov.za; • For Taxpayers: contactus@sars.gov.za; or estateduty@sars.gov.za
62. Is estate duty a SARS or self-assessment?	Estate duty is a SARS assessment as section 9(1) of the ED Act requires SARS to issue an assessment in respect of each estate. Section 9(4)(a) and (b) of the ED Act provides for exceptional cases where an assessment is deemed to have been issued under section 9(3).
63. How to request an estate duty assessment?	The L&D account and REV267 should be submitted together with the request for an assessment to one of the following e-mail addresses: • For Tax Practitioners: pcc@sars.gov.za • For Taxpayers: contactus@sars.gov.za ; or estateduty@sars.gov.za .
64. May the estate duty assessment be objected against?	Yes. The normal dispute resolution process as provided for under Chapter 9 of the Tax Administration Act, 2011 (TA Act) applies to estate duty assessments.
Payment of estate duty	
65. Who is liable for estate duty?	Estate duty is calculated on the dutiable amount of an estate and the executor in his or her representative capacity is liable for the duty. However, where property accrues to a specific person or where a policy was paid out directly to a beneficiary, such person or the beneficiary is liable for the proportional share of the estate duty payable.

66. Can a beneficiary be held liable to pay estate duty?	A beneficiary who receives a policy that is directly paid out from an insurance company is liable to pay the estate duty payable on the policy if the deceased estate is a dutiable estate. The same principle applies in respect of a personal right that accrues to a beneficiary as the estate duty payable thereon is payable by the beneficiary.
67. When is estate duty payable?	The liability to pay estate duty arises upon the death of the deceased and consequently only the position as at the date of death is taken into consideration in the assessment of duty. Estate duty is due within one year from the date of death or 30 days from the date of assessment if assessment is issued within one year from the date of death. Currently, interest is levied at 6% per annum on late payments.
68. How to pay estate duty?	Estate duty payments can only be made via e-filing. There is no electronic funds transfer (EFT) option available for estate duty. To make a payment on the e-filing system: 1) Select ‘Additional Payments’ and then ‘Create Additional Payment’. 2) Under ‘Tax Type’, select ‘Estate Duty (ESD)’. 3) Type taxpayer’s (deceased’s) name. 4) Under ‘Type of Payment’, select ‘Estate Duty Normal Payment’. 5) Under ‘Reference Number’, type in the deceased’s tax reference number. (Estate Duty Normal Payment: Please be aware that registration for income tax purposes is required in order to make a payment for the selected tax type. The reference number provided with this payment must be the income tax Reference number.) If the deceased was not registered for income tax, the

	executor will have to apply for an income tax registration in respect of the deceased. 6) Enter the amount. 7) Select 'Make Payment'. Please also confirm the payment with the bank. Proof of payment should be e-mailed to estateduty@sars.gov.za .
69. Under what circumstances will an extension for payment of estate duty be granted?	An extension will be considered if the executor applied in writing for an extension within the prescribed period and paid a reasonable deposit (see Question 81).
70. Can deferred arrangements be entered into for estate duty purposes?	Yes. A deferred arrangement may be entered into, provided the requirements under section 168 of the TA Act are met.
71. Can an application for a compromise be made in respect of estate duty?	Yes. An application for a compromise of a portion of tax debt will be considered provided the requirements of section 201 of the TA Act are met. The approval will depend on whether it results in the highest return from the recovery of the tax debt and it must be consistent with considerations of good management of the tax system and administrative efficiency.
72. Can estate duty be written off?	Yes. SARS may authorise a write off of an estate duty liability, whether temporarily or permanently, provided the relevant legislative requirements are met. SARS may decide under section 195 of the TA Act to temporarily write off an amount of a tax debt when satisfied that it is uneconomical to pursue the collection of such debt at that time. SARS may also authorise a permanent write off of an amount of a tax debt under section 197 of the TA Act if the tax debt becomes irrecoverable after the available legislative provisions have been exhausted.

Refunds for estate duty	
73. Which form should be completed to submit a refund of estate duty?	The executor must submit the completed Part A of the REV16 to estateduty@sars.gov.za .
74. Which documentation should be submitted when requesting a refund?	The following documents should be submitted when requesting a refund: • Letter of executorship • A power of attorney letter in the case of a representative or tax practitioner • Contact details of the executor (to request vouchers etc) • Proof of payment of all payments made for estate duty • Copy of all estate duty assessments • Signed L&D accounts, including the final signed L&D account • The last will and testament of the deceased Copy of the signed pre-deceased spouse's L&D account (if applicable)
75. What bank details and documentation should be provided when requesting a refund?	The deceased person's bank details up to the date of death must be replaced with the Estate Late bank details. The Estate Late bank details also apply to any refunds that may arise in the deceased estate in respect of the period after the date of death. The following details should be provided: • An original stamped letter from the bank (including an electronic letter) not older than three months confirming the account holder's legal name; account number, account type and branch code. OR

	An original bank statement or ATM or Internet generated statement or eStamped statement not more than three months old that confirms the account holder's legal name, bank name, account number, account type and branch code.
76. What bank details should be provided in the case of a section 18(3) estate?	In the case of a section 18(3) estate where the money in hand (including the refund due by SARS) is more than R1 000, the bank details of the Estate must be provided. In the case of a section 18(3) estate where the money in hand (including the refund due by SARS) is less than R1 000, the bank details can be changed to that of the Administrator as reflected on the letter of authority provided that all the required supporting documents can be provided. Where a letter of authority cannot be provided, bank details cannot be changed to a surviving spouse or beneficiary. If a letter of authority was not issued, the surviving spouse or beneficiary must request such letter from the Master.
77. Where should the request and supporting documentation for a refund be sent to?	All documentation for the refund request should be e-mailed to estateduty@sars.gov.za . Please take note: All other taxes must be up to date; all accounts must have zero balances and all outstanding returns should have been submitted and processed before any estate duty refund will be released.
Interest on estate duty	
78. When is interest payable on estate duty?	Interest is payable after one year from the date of death or after 30 days if SARS issued an assessment and the estate duty remined unpaid. Interest will be levied at 6% per annum.
79. How is the interest calculation displayed to the executor?	The interest is reflected on the Statement of Account (REV249).

80. When will the interest be calculated?	The interest calculation is done once the full estate duty liability has been paid. No interest calculation can be done beforehand as the interest continues to run until the estate duty liability is paid in full.
81. May an interest-free extension to pay estate duty be requested?	Yes. SARS may grant an extension under section 10(2) of the ED Act for late payments of estate duty without interest. If a SARS official is satisfied that the delay in the payment of the duty is not occasioned by the executor or person responsible for payment, the SARS official may allow an interest-free extension for the payment for any part or the whole outstanding amount.
82. Where should the request for an interest-free extension to pay estate duty be sent?	All requests should be e-mailed to estateduty@sars.gov.za .
83. What conditions should be met to request an interest-free extension to pay estate duty?	The request for the extension has to comply with the following: • An application in writing • A reasonable deposit is paid The application is made within the timeframes set out in section 10(2) of the ED Act
84. Are there any supporting documents that must be submitted together with the written request for the interest-free extension to pay estate duty?	The following supporting documents must be submitted together with the written request: • A copy or draft signed L&D account • Proof of payment(s) • Reason(s) for the request • Extension date required • Any correspondence relating to the request • Letter of executorship

	A power of attorney letter in the case of a representative or tax practitioner
85. Under what circumstances may an interest-free extension to pay estate duty be granted?	An extension may be granted for the interest-free payment of estate duty in the following circumstances: • If the estate is experiencing a cash shortfall (proof such as bank statements must be provided) • If there are assets outside South Africa and there is no liquidity to make a payment • Exceptional circumstances beyond the control of the executor and proof that reasonable steps were taken to make the payment in time The merits of each case must be considered in relation to the nature of the request and the history of the estate to ensure a clean track record exists relating to previous payments, returns and requests for information. Note: If there is cash available in the estate (based on the recapitulation account) and there is no circumstance outside of the executor's control to make the payment, the full payment may be requested.
86. Can SARS reject a request for an interest-free extension to pay estate duty?	Yes. The request for extension can be declined if the requirements to apply for an interest-free extension have not been adhered to. The executor is entitled to the reasons for arriving at a decision.
87. Can a taxpayer lodge an objection or appeal against a decision from SARS not to extend payment for estate duty?	No. Neither the ED Act nor the TA Act provides for an objection against the decision to not grant an extension.

88. If no extension was granted and interest was payable, can SARS remit interest levied on estate duty?	No. Interest on estate duty is levied under section 10(1) of the ED Act. Section 10(2) of the ED Act does not provide for the remission of interest but merely allows SARS to extend the period in which estate duty is payable, to be interest-free (a delayed commencement date for the imposition of interest). Therefore, no requests for the remission of interest are permissible under section 10(2). Section 187(6) of the TA Act cannot be relied on to remit interest levied under the ED Act, as interest can only be remitted under section 187(6) of the TA Act if the interest was levied under section 187(1) of the TA Act.
Deceased estate compliance letter	
89. What is a deceased estate compliance (DEC) letter?	A DEC letter is a letter issued by SARS in respect of all taxes (including estate duty). The letter provides confirmation that all tax liabilities are secured or paid.
90. When can the DEC letter be requested?	The DEC letter may only be requested once all outstanding returns are submitted, assessments are issued, and duties or taxes are paid or secured to the satisfaction of SARS.
91. How to request the DEC letter?	An executor can request the DEC letter through one of the following e-mail addresses: • For Tax Practitioners: pcc@sars.gov.za • For Taxpayers: contactus@sars.gov.za; or estateduty@sars.gov.za. Please note that the DEC letter will only be issued if ALL taxes are paid in full (including estate duty).
92. When may an executor distribute an estate?	An executor is only allowed to deliver or transfer property to an heir or legatee once the executor satisfied SARS that due provision has been made for the payment of any estate duty payable and the Master grants approval.

10. 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.