TAX UPDATE

For period: October 2025 to December 2025

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1. FOREWORD

The purpose of this update is to summarise developments that occurred during the fourth quarter of 2025, 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!

"The only thing that hurts more than paying an income tax is not having to pay an income tax." – Lord Thomas Dewar

I contend that for a nation to try to tax itself into prosperity is like a man standing in a bucket and trying to lift himself up by the handle. – Winston Churchill

Government is the great fiction, through which everybody endeavours to live at the expense of everybody else. – Frederic Bastiat, French economist (1801-1850)

If you think health care is expensive now, wait until you see what it costs when it's free! – P.J. O'Rourke"

The difference between tax avoidance and tax evasion is the thickness of a prison wall." – Denis Healey

2. NOTICES / REGULATION

2.1. Table of interest

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

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

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

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

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	31 January 2025	8,75%
1 February 2025	31 May 2025	8,50%
1 June 2025	31 August 2025	8,25%
1 September 2025	30 November 2025	8,00%
1 December 2025	Until change in the Repurchase rate as announced by the Reserve Bank	7,75%

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.

2.2. Further information required for donation receipts

The following further information must be included on a receipt issued in terms of section 18A(2)(a) of the Income Tax Act:

- Information relating to the donor:
    - Nature of person (natural person, company, trust, etc.)
    - Identification type and country of issue (in the case of a natural person)
    - Identification or registration number (in the case of a juristic person)

- Trading name (if different from the registered name)
- Income tax reference number
- Contact number
- Electronic mail address

- Information relating to bona fide donations of property made in kind:
  - An adequate and accurate description of the donation of property made in kind.
  - The deemed amount of the deduction of a donation of property made in kind determined under section 18A(3) or (3A) of the Income Tax Act.
- Information relating to the receipt issued:
  - A unique receipt number

3. DRAFT NOTICES / REGULATION

3.1. Incidences of non-compliance by a person in terms of section 210(2) of the TA Act

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. Incidences of non-compliance subject to fixed amount penalty

Failure by a trust to submit an income tax return as and when required under the Income Tax Act, for years of assessment commencing on or after 1 March 2023, where SARS has issued that trust with a final demand, referring to this notice and requiring the submission of the outstanding income tax return, and the trust failed to submit the return within 21 business days of the date of issue of the final demand.

4. TAX CASES

4.1. C:SARS v Nyhonyua and others (87 SATC 347)

This was an appeal by SARS against an order setting aside the winding-up of Regiments Capital (Pty) Ltd (Regiments).

The order had been made by the Gauteng Division of the High Court on the application of the first to eleventh Respondents who were parties that had an interest in Regiments and had opposed the appeal. The twelfth and thirteenth respondents were the joint liquidators of Regiments and their participation in the appeal was aimed at showing that the winding-up of Regiments should not have been set aside.

On 16 September 2020 Regiments had been placed in final winding-up at the instance of an unpaid creditor and on 26 October 2020 a provisional restraint order obtained by the National Director of Public Prosecutions (the NDPP) under the Prevention of Organised Crime Act 121 of 1998 which related, inter alia, to the assets of Regiments was discharged and this prompted the application of the Respondents in the court a quo for an order setting aside the winding-up of Regiments.

The aforesaid application came before Vally J in the court a quo together with an application by SARS for leave to intervene which was granted by the court.

SARS then filed an application to oppose Regiment's application to set aside the winding-up order and gave a full exposition of the grounds for its opposition to the setting aside of the winding-up of Regiments.

SARS stated that it had been in the process of conducting an audit in respect of the liability of Regiments for income tax for the 2014 to 2019 income tax periods, as well as its liability for Value-Added Tax (VAT) in respect of the 2013/03 to 2016/02 VAT periods. Its findings in respect of the 2014 to 2016 income tax periods and the VAT periods, were in the process of being finally approved.

The SARS audit indicated an income tax liability for the 2014 to 2016 income tax periods of R217 578 411, 92 and liability for VAT in the amount of R61 765 421, 56. This total amount of R279 343 833,48 did not include understatement penalties, statutory penalties or interest.

SARS further stated that the audit in respect of the 2017 to 2019 income tax periods had not been completed. All of this meant that assessments in the amount of R279

343 833 would be issued soon and that this amount was a conservative estimation of Regiments' liability towards SARS.

On the return date of the order only SARS opposed the setting aside of the winding-up of Regiments.

SARS accepted that Regiments had cash on hand in the amount of R36 348 950 and that it held Capitec shares worth R350 million. It was also prepared to accept that the amount of R4,5 million was due to Regiments by Nedbank Limited and that therefore, its total liquid and realisable assets amounted to R390 848 950.

It was common cause or not disputed that Regiments owed unrelated creditors the amount of R278 011 795 and that R113 920 106 was due to related creditors who had given the undertaking that they would not seek payment of the debts owed to them until the unrelated creditors were paid in full.

The court a quo accepted the evidence contained in SARS' supplementary affidavit and it thus proceeded on the basis that Regiments owed SARS R279 343 833. Because the relevant assessments had not been issued, however, this debt was not yet due and payable and on this basis Regiments' total liabilities amounted to R671 275 734.

The court a quo also accepted that the respective values of Regiments' interests in Kgoro and Little River (accepted from various unconfirmed valuation reports) were R513 million and R32 million. On the basis of this finding, Regiments' total assets (i.e. R545 million together with the liquid assets of R390 848 950) would amount to R935 848 950 and that would exceed its total liabilities by R264 573 216. The court a quo noted that the papers showed on a balance of probabilities that Regiments was 'asset rich but cash poor. It is, in other words, only commercially insolvent' and that therefore the winding-up order fell to be set aside.

The court a quo ordered SARS to issue its assessments of the tax liabilities of Regiments within fifteen calendar days of its order.

On appeal in the Supreme Court of Appeal two main issues were raised: the first was whether the setting aside of a winding-up under section 354 of the Companies Act 61 of 1973 constituted the exercise of a discretion in the strict sense (true discretion) and the second issue was whether Regiments was commercially solvent at the time of the hearing in the court a quo.

Section 354(1) provided at the relevant time:

'The Court may at any time after the commencement of a winding-up, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed or set aside, make an order staying or setting aside the proceedings…..on such terms and conditions as the Court may deem fit.'

Judge van der Merwe held the following:

<u>As to misdirection by the court a quo</u>

(i) That the language of section 354 of the Companies Act 'is wide enough to afford the Court a discretion to set aside a winding-up order both on the basis that it ought not to have been granted at all and on the basis that it falls to be set aside by reason of subsequent events'. The test for setting aside a winding-up under section 354 on the basis of subsequent events was whether the applicant had proved facts that show that it was unnecessary or undesirable for the winding-up to continue. This did not involve a choice between permissible alternatives. The test is either satisfied or it is not.

(ii) That it followed that the decision of the court a quo in this matter did not constitute the exercise of a true discretion.

(iii) That nevertheless it had to be said that the court a quo had misdirected itself on the facts and the law as its decision was based on incorrect facts and wrong principles of law and the court dealt firstly with the factual errors.

(iv) That the Respondents did not deal with the value of Regiments' shares in Kgoro and Little River in their affidavits. Valuation reports on these assets were not confirmed under oath. They did not qualify the valuer as an expert with regard to the valuation of these commercial properties. In the result the court a quo had materially erred on the facts by placing a total value of R545 million on these shares. It therefore also erred in determining the matter on the factual basis that Regiments was factually solvent.

(v) That the court a quo did not consider whether the facts demonstrated that the continuation of the winding-up of Regiments was unnecessary or undesirable. Instead, it effectively ordered an alternative, court-designed winding-up. Moreover, it did so on the back of a finding that Regiments was unable to pay its debts, which was the touchstone for its liquidation in the first place. In the process it also arrogated to itself the power to regulate statutory functions and powers determined by Chapter 8 of the Tax Administration Act 28 of 2011, by

directing SARS to issue tax assessments within a fixed period of time which was a course wholly impermissible in law.

As to the issue of commercial solvency

(vi) That, as was demonstrated by the court, Regiments was factually insolvent when the matter came before the court a quo and it was undisputed that it did not trade and that there was no prospect that it might do so in future. The court failed to see how a finding that Regiments was commercially solvent at the time, could have justified the order of the court a quo.

(vii) That in Namex (Edms) Bpk v KBI 56 SATC 1 this court held that liability for tax came into existence at the latest at the end of a tax year, even though an assessment had not been issued. The issue of an assessment is a prerequisite for the enforcement of the tax liability, but not for its existence. Thus, an unassessed tax liability is not a contingent debt, that is, a debt which may or may not arise on the fulfilment of a condition. The Respondents did not challenge this decision or its applicability.

(viii) That, therefore, the debt owed to SARS had to be factored into the equation. On the evidence, tax assessments in the minimum amount of R279 343 833 would be issued in the immediate future and, in the event, Regiments would be unable to settle the claims of all its current creditors, that is the Table A creditors and SARS and, consequently, Regiments was commercially insolvent.

(ix) That, in conclusion, on the evidence before the court a quo, Regiments was both factually and commercially insolvent. On these facts there was no basis for finding that the continuation of its winding-up was unnecessary or undesirable and it followed that the appeal must succeed.

Appeal upheld.

4.2. C:SARS v State Structured Mezzanine Investments (Pty) Ltd (87 SATC 358)

SARS had notified the First Respondent taxpayer, being SMI, on 1 June 2017 that an audit would be conducted for its tax years 2009 to 2013 and, in addition, SARS requested the relevant material for the tax years 2014 to 2016 in the event that the audit scope would be extended to include these years as well.

SARS, on 6 February 2020, issued a further request in terms of section 46 of the Tax Administration Act 28 of 2011 (TA Act) to the First Respondent via its attorneys requiring the provision of signed loan agreements for the 2009 to 2013 tax years within 21 days and this request pertained to loan agreements between First Respondent and several entities.

SARS, on 17 February 2020, due to the First Respondent's failure to respond, sent a follow-up letter, care of its attorneys, requesting that the relevant material must be submitted by no later than 5 March 2020.

Since it had received no response to its section 46 request for relevant material SARS sent a further letter to the First Respondent and, in response, the First Respondent's legal representatives responded to SARS by requesting a 21-day extension to submit the requested material. They explained that the First Respondent had started collating information but due to the significant amount of data requested, the process was taking longer than anticipated.

Thereafter First Respondent's attorneys in an objection letter first raised their objection to SARS' section 46 request for relevant material. First Respondent queried the purpose of the audit and asserted that the audit was not genuinely random but was rather a contrived reason to conduct the audit. First Respondent in its objection letter further submitted that the section 46 request constituted an administrative action which was subject to judicial review, alternatively, the section 46 request remained reviewable under the principle of legality which required an administrative action to be lawful, reasonable and procedurally fair.

SARS thereafter approached the High Court for an order compelling the Respondents to produce the requested material pertaining to the tax years 2009–2013.

The crisp issue for determination by the High Court was whether SARS had satisfied the jurisdictional facts as required in terms of section 46 of the TA Act.

First Respondent, in opposing SARS' section 46 request, suggested that SARS had not provided sufficient justification or explanation for why the requested documents were necessary or relevant to the investigation or audit as required by the TA Act.

First Respondent contended that by bringing this application to court, SARS was prematurely seeking judicial intervention in an ongoing audit process and this suggested that SARS had neglected to follow the clear, practical steps outlined in the TA Act.

Judge Cengani-Mbakaza Held

(i) That section 46 of the TA Act under Chapter 5 which is entitled 'Information gathering' empowered SARS to request relevant material from a taxpayer or any other person, in writing or orally within a reasonable period, for tax administration purposes. In essence, the TA Act granted SARS extensive powers to investigate and gather information before any issue arises or a dispute emerges and under section 46 SARS could request any information it believed may potentially impact a person's tax liability, even if there was no ongoing tax dispute or issue.

(ii) That SARS' role was to determine the taxpayer's taxable income, and to that end, it may conduct the information-gathering exercise, even before any issues or disputes arose between the authority and the taxpayer and the information-gathering powers are internationally recognised. SARS was mandated to ascertain a taxpayer's taxable income, which necessitated extensive anticipatory inquiries and such inquiries were a critical precursor to assessment, enabling SARS to gather relevant material before potential disputes of factual issues materialised.

(iii) That the information-gathering exercise was crucial to a tax authority's audit activities and, without the power to obtain confidential information, the burden of taxation would unfairly fall on diligent taxpayers alone. This was because revenue authorities lacking such power would be unable to identify and address non-compliance by negligent or dishonest taxpayers. Robust information-gathering capabilities enabled the authority to verify compliance, detect non-compliance and maintain the integrity of the tax system.

(iv) That it was acknowledged that taxpayers have certain rights, which must be respected and protected. However, the taxpayer's rights should not impede SARS' authority and ability to discharge its statutory duties by obtaining the relevant material. Rather, taxpayers' rights should strike a balance between protecting these rights and ensuring SARS' ability to effectively administer the tax system.

(v) That SARS had the authority to issue such a request for tax administration purposes, as defined in section 3(2) of the TA Act. This included gathering information relevant to a taxpayer's liability for past, present and future tax periods. As noted earlier, this was merely an information-gathering exercise,

and the relevance of the required material was determined by SARS, not the taxpayer.

(vi) That our courts have emphasized that the provisions of section 46 of the TA Act were peremptory and pursuant to the principle of legality, the peremptory provisions of section 46 of the TA Act, pertaining to a request for relevant material, necessitated compliance, leaving no discretion to refuse. The argument that SARS was interfering with the ongoing audit process by bringing this court application was unfounded.

(vii) That despite sending multiple letters requesting the relevant material, SARS received no meaningful response, necessitating the court application. For information-gathering purposes, the justification provided by SARS in its letter dated 6 February 2020 was considered adequate to compel the disclosure of the relevant material. The section 46 request satisfied the requirements of reasonable specificity as contemplated in section 46(6) of the TA Act and the court was therefore satisfied that all the jurisdictional requirements in terms of section 46 of the TA Act had been met.

Application to compel the Respondents to submit the relevant material as listed in the letter dated 6 February 2020, as provided in terms of section 46 of the TA Act was granted and had to be provided to the Applicant within 21 days from the date of the order.

4.3. C:SARS v Agrizzi and another (87 SATC 369)

First Respondent was Mr Angelo Agrizzi and his wife was the Second Respondent, but no relief was sought against the Second Respondent and the court therefore only referred to Mr Agrizzi as the Respondent.

As a result of evidence led before the Zondo Commission, including the evidence led by the Respondent, the Applicant, being SARS became aware of a large scheme of fraud, money laundering, racketeering and tax evasion, involving Mr Agrizzi's former employer, the African Global Group of Companies (BOSASA).

Mr Agrizzi, at the relevant time, was the group's Chief Operating Officer (COO) and, as a result, SARS investigated the allegations and on 29 March 2019 had obtained an order in terms of section 51 of the Tax Administration Act 28 of 2011 (TA Act) authorising

a tax enquiry into the finances of BOSASA and various related individuals, and companies and BOSASA was eventually wound up.

Subsequently a tax enquiry was convened and Mr Agrizzi was called to testify and as a result of his testimony and subsequent investigations, SARS formed the view that Mr Agrizzi had received 'gross income' as defined in section 1 of the Income Tax Act 58 of 1962 (IT Act) which he had failed to declare in his annual income tax return.

SARS, on 7 December 2020, issued a letter of audit findings to Mr Agrizzi and on 11 March 2021 SARS raised additional income tax assessments assessing Mr Agrizzi's tax for 2006 to 2019 years of assessment in terms of the IT Act read with the TA Act (the assessments). In terms of these assessments SARS assessed an amount of R196 050 232.83 as undeclared taxable income. The tax liability was assessed as amounting to R230 166 728.55 and this amount comprised normal income tax, understatement penalties in terms of section 222 of the TA Act at a rate of 150%; penalties in terms of par. 20 of the Fourth Schedule to the IT Act and interest on the underpayment of provisional tax.

The due date for the full payment of the assessed indebtedness of Mr Agrizzi in terms of the IT34 notice was 18 March 2021.

SARS submitted that in terms of section 162 of the TA Act read with the definition of 'outstanding tax debt' in section 1 of the TA Act, an outstanding tax debt means a tax debt not paid by the day referred to in the IT34 notice and must be paid as a single amount.

Ultimately, after the exchange of correspondence, the legal representatives of SARS and Mr Agrizzi agreed that the first due date for payment of the assessed tax amount would be 1 April 2021 and the second due date would be 30 April 2021.

Mr Agrizzi, on 28 April 2021, delivered a request to SARS for an extension of the period to lodge an objection to 10 June 2021, and the extension request was granted. Also, on 28 April 2021 Mr Agrizzi submitted a section 164 request for the suspension of payment of the debt.

SARS, on 26 July 2021, declined Mr Agrizzi's request for a suspension of payment of the assessed amount and directed that the payment of his tax debt be made within 10 business days, namely on or before 10 August 2021.

SARS pointed out that, in terms of section 164 of the TA Act, an objection does not suspend the obligation to pay unless a senior SARS official suspends payment of the

tax or a portion thereof. Consequently, the full amount thus remained due and outstanding.

Mr Agrizzi, on 13 August 2021, after his request for a suspension of payment was declined by SARS, submitted his objections against the assessments relating to the 2006 to 2019 years of assessment, in terms of section 104 of the TA Act.

SARS considered Mr Agrizzi's objections and on 9 February 2022 communicated to him that the objections were partially allowed and that the assessed amount was reduced from R230 million to R174 million which amounted to an approximate 25% reduction in liability.

Mr Agrizzi indicated that he intended to follow the statutory appeal process against SARS' decision to disallow the remainder of his objections and he submitted, with reference to the application for a suspension of payment, that a sensible approach would be to defer the enforcement of the payment whilst the full objection procedure runs its course including the statutory appeal process.

SARS, on the other hand, insisted that Mr Agrizzi pays the full amount, hence this application for a repatriation order under section 186 of the TA Act.

SARS contended that it was entitled to an order in terms of section 186(2) of the TA Act in that it had satisfied the jurisdictional requirements of such an order.

Mr Agrizzi, on 14 October 2020, was arrested for crimes other than tax offences. He was charged with fraud and corruption which resulted in him launching a bail application and on 30 October 2020 he was released on bail. Some of his bail conditions were relevant to this application, i.e. the bail amount set was equal to the value of his fixed property situated in Italy.

Mr Agrizzi was required, in terms of the bail order, to hand over the original title deed of the said property. In addition, he had to furnish the National Prosecuting Authority (NPA) with a signed guarantee secured by the said property. Pursuant to the bail conditions Mr Agrizzi signed a guarantee in terms of which Mr Agrizzi's fixed property in Italy was bound in securitatem debiti to the NPA for purposes of his bail and he ceded over to the State all his rights, title and interest in the property to be held in security pending the said discharge of his obligations.

Judge Basson held the following:

As to the application for a repatriation order under section 186 of the TA Act

(i) That section 186 of the TA Act, falling under Chapter 11 of the TA Act, dealt with the recovery of tax, more specifically Part F, dealing with remedies in regard to foreign assets and sets out the jurisdictional ambit within which such an order may be sought.

(ii) That Mr Agrizzi had raised three objections against the compulsory repatriation application.

- The first was that there was no 'tax debt'. The court decided that point in favour of SARS.
- The second was that Mr P Engelbrecht, who had deposed to the founding affidavit in the compulsory repatriation application on behalf of SARS, was not a 'senior SARS official' and therefore not authorised to bring the repatriation application. The court likewise decided this point in favour of SARS.
- The third point was that the order sought in the repatriation application was 'legally impermissible' as it would be contrary to Mr Agrizzi's bail conditions and the court had decided this point in favour of Mr Agrizzi having had regard to the bail conditions set for Mr Agrizzi and the terms of the Guarantee and Cession Agreement. In the court's view, the latter finding was dispositive of the compulsory repatriation application.

(iii) That section 186(1) of the TA Act had to be considered in the context of Chapter 11 which was concerned with the recovery of tax. So also, must the disputed words 'outstanding tax debt' be considered in the context of Chapter 11. In keeping with the view that the context was important in the TA Act, it was important to note that section 186 referred to an 'outstanding tax debt' and not to a 'tax debt' as defined in section 169(1). The express wording of these sections cannot be ignored. Relying on the definition of a 'tax debt' as referred to in section 169(1) was therefore misplaced as it effectively ignored the clear wording of the definition of an 'outstanding debt' as referred to in section 186 of the TA Act. The court was accordingly of the view that the adjusted amount assessed was an outstanding amount (tax debt) that must be paid by the day and place notified by SARS and this was done in terms of the IT34 furnished to Mr Agrizzi.

(iv) That one of the jurisdictional requirements in section 186 of the TA Act was that only a 'senior SARS official' may apply for a compulsory repatriation order. On behalf of Mr Agrizzi it was submitted that SARS did not place sufficient evidence before the court of Engelbrecht's authority or seniority as required by the TA Act to depose to the founding affidavit. Having regard to the papers, the court was satisfied that Engelbrecht was a senior SARS official as claimed in the founding affidavit and that he did have the necessary authority to launch the compulsory repatriation application in terms of section 186 of the TA Act.

(v) That, as to the impossibility of the order sought by SARS, Mr Agrizzi submitted that the relief sought by SARS was legally impossible as it would be contrary to his bail conditions. Also, as part of his bail conditions, Mr Agrizzi had ceded in securitatem debiti his property in Italy to the National Prosecuting Authority (NPA). It was common cause that neither the NPA nor the South African Reserve Bank had been joined as a Respondent to these proceedings. In the court's view the NPA had a substantial interest in the outcome of these proceedings, particularly in circumstances where the effect of a compulsory repatriation order will significantly interfere with the terms or bail conditions set in an order to which the NPA was a party.

(vi) That SARS acknowledged that Mr Agrizzi's non-compliance with his bail conditions would result in his bail to be automatically revoked and that he would be remanded to custody within 48 hours of the breach of 'any of these conditions.' The only response to this eventually from SARS was that Mr Agrizzi would have to renegotiate his bail conditions with the NPA. This was untenable. By not joining the NPA to these proceedings, the court was left to its own devices to speculate as to what the attitude of the NPA might be to a request from Mr Agrizzi to renegotiate his bail conditions should he be ordered by this court to sell the property held in Italy. The NPA is not before this court and the court therefore is not informed as to whether the NPA would be willing to do so and if it was, what the renegotiated bail conditions might be.

(vii) That, in summary, the court agreed with the submission that the relief sought in this application was legally impossible. Not only would such an order result in a variation of a material bail condition, but such an order may also result in the arrest and incarceration of Mr Agrizzi, as Mr Agrizzi's bail conditions specifically require of him to cede as security of his obligations to the State his Italy property.

(viii) That, accordingly, the application in terms of section 186 of the TA Act was dismissed with costs including the costs consequent to the employment of two counsel.

<u>As to the application to review SARS' decision to decline the suspension of Mr Agrizzi's outstanding tax liability in terms of section 164 of the TA Act</u>

(ix) That in this counter-application Mr Agrizzi sought an order reviewing and setting aside the decision of SARS refusing his request for a suspension of payment of his assessed outstanding income tax liability, which was brought in terms of section 164 of the TA Act pending the finalisation of an objection or appeal against SARS' assessments.

(x) That section 162 of the TA Act provides for the default position in respect to the obligation to pay tax. The default position is that the obligation to pay will not be suspended by an objection or appeal or pending a decision of a court of law pursuant to an appeal, i.e. the so-called pay-now-argue-later principle. Only a senior SARS official considering the factors set out in section 164(3) of the TA Act may authorise the suspension of payment of a disputed tax.

(xi) That because of the potential harsh effects to the taxpayer, a senior SARS official is afforded a discretion in terms of section 164(3) of the TA Act to depart from the pay-now-argue later rule by considering various factors listed in section 164(3). Having regard to the factors listed in section 164(3), it was clear that a request for a suspension of payment will not be granted if there is some pressing need for SARS to collect the disputed tax immediately instead of waiting for the objection procedure to run its course.

(xii) That there was some debate about whether this was a PAJA or a legality review. SARS had submitted that the decision in this instance did not constitute administrative action because the decision did not 'adversely affect Mr Agrizzi's rights.' The court did not agree as on SARS' own version this argument had no merit. SARS had in fact conceded that the decision not to suspend would cause Mr Agrizzi irreparable hardship. Secondly, the notion that decisions that do not adversely affect a person do not amount to administrative action, was misplaced and has been dispelled by the court.

(xiii) That the decision in the present matter has the capacity to affect Mr Agrizzi's rights and was made by a bureaucratic functionary…carrying out the daily functions of the State. Moreover, these types of decisions by SARS have been

regarded by the Constitutional Court in Metcash Trading Ltd v C:SARS and Another 63 SATC 13 as administrative action capable of being reviewed in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

(xiv) That the basis of a judiciary review is where the administrative action is not lawful, reasonable or procedurally fair. A decision will be unlawful if, for example, the decision maker considered irrelevant considerations or failed to take into account relevant considerations. With regard to the reasonableness of the decision, a decision will be unreasonable and therefore reviewable if it is 'one that a reasonable decision-maker could not reach.'

(xv) That, having regard to the general principles of judicial review, the court then briefly considered whether the decision taken by SARS fell within the bounds of reasonableness as required by the Constitution. Mr Agrizzi raised only one factor in support of the contention that he will suffer irreparable financial harm if he is forced to make payment of the outstanding tax debt and that pertained to his medical condition. He submitted that, if he is compelled to make a payment now, he will be severely prejudiced should it eventuate that his objection is allowed and that he did not owe the disputed tax.

(xvi) That although SARS referred to the aforesaid factor, no attempt was made to engage with the merits of this contention nor was any finding made by SARS as to why this factor (i.e. Mr Agrizzi's health) should not weigh in favour of a suspension of payment. SARS seemingly ignored this factor and instead focused on Mr Agrizzi's inability to pay his outstanding tax debt and the perceived reasons (not relating to his medical condition) for not being able to do so.

(xvii) That there appeared to be no rational basis for refusing to suspend the payment of Mr Agrizzi's outstanding tax debt. It was furthermore inherently contradictory to find, on the one hand, that Mr Agrizzi had no assets to execute against, but, on the other hand, to find that the recovery of the tax debt was in jeopardy.

(xviii) That it was not a rational justification for SARS to refuse the suspension of payment on the ground that it would make no difference to Mr Agrizzi whether or not the suspension was granted, as he, in any event, did not possess any assets against which SARS could execute. Conversely, it would equally make no difference to SARS if the payments were suspended as Mr Agrizzi lacked the means to pay the outstanding tax debt. It was not rational to reject the suspension of payment based on the perceived subjective view held by the

decision maker that the irreparable hardship was self-inflicted based on the assets dissipated and repatriated to Italy. Further, it was not rational to conclude, as the decision maker did, that the suspension of payment should be declined on the basis that the 'recovery of the tax debt was in jeopardy'.

(xix) That considering all the reasons presented by SARS justifying the refusal to grant the request for a suspension, it became evident that irrelevant factors had been considered while relevant factors such as Mr Agrizzi's medical condition and its impact on his ability to pay, were ignored.

(xx) That, in conclusion, the decision by SARS to refuse the suspension lacked a rational connection to the underlying purpose of section 162 of the TA Act, which was to ensure prompt payment of the assessed tax without first having to consider any objections raised against the assessments. Considering the facts, there was no pressing need for SARS to collect the disputed tax, particularly as it was accepted that Mr Agrizzi would suffer irreparable hardship, that he lacked funds to pay the outstanding tax debt and that there was no risk of dissipation of assets.

(xxi) That, for all of these reasons, the court reviewed the decision of SARS and set it aside under the relevant provisions of PAJA.

(xxii) That, in keeping with the principle that due deference must be given to the decision maker the court decided that it would not substitute SARS' decision and grant the suspension application but that it would rather remit the matter back to SARS for a reconsideration of Mr Agrizzi's application for a suspension of payment in terms of section 164 of the TA Act. As to costs, Mr Agrizzi was substantially successful and therefore costs should follow the result.

4.4. C:SARS v Medtronic International Trading SARL (87 SATC 390)

Respondent, being Medtronic International Trading SARL (Medtronic International), was a Swiss registered company. It manufactured and distributed medical devices and provided certain medical solutions.

During the period June 2004 to May 2017 Ms Hildegard Steenkamp was employed as an accountant by Medtronic Africa. Although employed by Medtronic Africa, she performed functions for Medtronic International as well. Her duties entailed all VAT-related work, and the management of audits from tax authorities.

During the aforesaid period Ms Steenkamp embezzled an amount of R537 236 176 from the Medtronic Group. She did this by exploiting SARS and the Group's weak accounting systems. She made repeated payments from one of the Group's bank accounts to her late husband's bank account and she added this bank account to a list of bank accounts into which the Medtronic Group had to make payments lawfully.

Ms Steenkamp concealed the embezzlement by submitting false VAT returns to SARS. Medtronic International then sought reimbursements for VAT payments which it had not made. Consequently, the funds embezzled by Ms Steenkamp were repaid by SARS. This was a complex scheme and, in all of this, Medtronic Africa and Medtronic International had underpaid on their VAT liabilities.

Ms Steenkamp's fraudulent activities were eventually uncovered through extensive investigations and forensic audits. She was arrested, charged criminally, convicted in respect of more than 330 transactions and sentenced to a lengthy period of imprisonment.

Round about the time of Ms Steenkamp's arrest, Medtronic Africa and Medtronic International each applied to SARS' voluntary disclosure unit for relief in terms of the Voluntary Disclosure Programme (VDP). This they did in terms of sections 225 to 230 of the Tax Administration Act 28 of 2011 (TA Act). Their voluntary disclosures related to the VAT underpayments.

The benefit a taxpayer who is in 'default' gets under the VDP is absolution from criminal prosecution and relief in respect of any understatement penalties and administrative non-disclosure penalties or other penalties imposed under a tax Act. This benefit was obtainable if the taxpayer had made a valid voluntary disclosure and had concluded a voluntary disclosure agreement (VDA).

During the negotiations under the VDP, Medtronic Africa and Medtronic International made separate requests to SARS for the waiver of interest arising from the VAT underpayment.

Responses to the two companies were that SARS would waive penalties in terms of section 229(b) and (c) but that it lacked the power to waive interest under the VDP. The voluntary disclosure unit advised that the Medtronic companies could either proceed to the conclusion of the VDAs and pay the full agreed amounts, including interest, or withdraw from the VDP, in which event SARS' ordinary statutory enforcement processes would ensue.

The companies elected to continue pursuing relief under the VDP and this culminated in the conclusion of two VDAs, one in respect of each company. In terms of its agreement, Medtronic International was to pay a total amount of R457 670 112, made up of capital VAT, understatement penalties and interest.

After conclusion of the VDA, Medtronic International submitted a request for remission of interest in terms of section 39(7) of the Value-Added Tax Act 89 of 1991 (the VAT Act). The appellant, being SARS, refused to consider this request. The reason was that section 39(7) of the VAT Act did not apply to VDAs.

Medtronic International then brought an application in the Gauteng Division of the High Court (see Medtronic International Trading SARL v C:SARS 83 SATC 281) in which it sought a declarator that sections 225 to 233 of the TA Act do not prohibit a request for remission of interest in terms of section 39(7) of the VAT Act and an order reviewing and setting aside SARS' refusal to consider its request for remission.

Medtronic International succeeded and the High Court remitted the matter to SARS to consider Medtronic International's request.

On appeal by SARS to the Supreme Court of Appeal (see C:SARS v Medtronic International Trading SARL 86 SATC 158), the court was split three-two. The majority judgment framed the question to be decided as being whether SARS could lawfully refuse to consider Medtronic International's request for remission of interest. The majority emphasised that this was the real question by saying the following. The court was not called upon to determine 'the issue whether section 39(7) finds application in circumstances where SARS and a taxpayer have concluded a [VDA]'. 'For now', continued the majority, 'all we are called upon to decide is whether SARS was justified in law to refuse to even consider [Medtronic International's] request by virtue of such request having been made subsequent to the conclusion and implementation of the [VDA].'

Proceeding to answer the identified question, the majority held that SARS bore a statutory duty buttressed by section 33 of the Constitution to, at the very least, give consideration to the request and decide it on its own merits and this SARS had irrefutably refused to do and hence in these circumstances a review under section 6(2)(g) read with sections 6(3) and 8(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) was warranted.

The majority went on to hold that neither the VAT Act nor the TA Act provided, whether expressly or by necessary implication, that a taxpayer who has concluded a VDA may

not seek remission of interest in terms of section 39(7) of the VAT Act. If such a result was intended, that intention 'would have been clearly and indeed easily expressed.'

Consequently, the majority dismissed the appeal.

The minority judgment would have upheld the appeal. Unlike the majority's PAJA-based approach, the minority foregrounded an interpretative exercise and it held that a decision on whether SARS may consider a request for the remission of interest in terms of section 39(7) after a VDA had been concluded could only be made upon a proper interpretation of the relevant statutory provisions. Moreover, the provisions governing the VDP do not permit a taxpayer who has entered into a voluntary disclosure agreement to seek a remission of interest, the amount of which was incorporated in the determined tax debt due, after the conclusion of the voluntary disclosure agreement. To hold otherwise would undermine the legal consequences that attach to the conclusion of such agreement.

SARS then sought leave to appeal to the Constitutional Court from that court and he submitted that, since this was a PAJA review, the Constitutional Court's jurisdiction was engaged. SARS also invoked that court's general jurisdiction and argued that the question of interpretation raised an arguable point of law of general public importance that warranted consideration by that court. On whether leave to appeal must be granted, SARS contended that there were reasonable prospects of success which were demonstrated by the three-two split in the Supreme Court of Appeal.

Medtronic International argued that SARS was raising the constitutional issue for the first time in the Constitutional Court and that, therefore, its constitutional jurisdiction was not engaged.

Medtronic International also argued that this case was not about the interpretation of PAJA, but was about the interpretation of the VAT Act and the TA Act. That too, according to Medtronic International, did not engage the court's constitutional jurisdiction.

Medtronic International also countered the submission that the Constitutional Court's general jurisdiction was engaged by contending that the point of law raised was not arguable. That there was a split Bench in the Supreme Court of Appeal was a function of errors made by the minority. Finally, Medtronic International argued that what happened in this case was fact-specific or unique and thus not of general public importance.

In broad terms, on the merits, SARS supported the reasoning of the minority in the Supreme Court of Appeal and Medtronic International, that of the majority.

Judge Madlanga held the following:

As to the jurisdiction of the Constitutional Court and leave to appeal

(i) That because of the holding by the majority in the Supreme Court of Appeal that all that the Supreme Court of Appeal 'was called upon to decide was whether SARS was justified in law to refuse even to consider Medtronic International's request by virtue of such request having been made subsequent to the conclusion and implementation of the parties' VDA.' That concerned the interpretation and application of PAJA. Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism 2004 (4) SA 490 (CC) states that 'as PAJA gives effect to section 33 of the Constitution, matters relating to the interpretation and application of PAJA will of course be constitutional matters.'

(ii) That, on leave to appeal, the application bore reasonable prospects of success.

(iii) That, also, axiomatically, the question to be answered potentially affected large numbers of taxpayers and was thus of general import. VDAs that may have appeared to be acceptable to the taxpayers concerned and were never challenged on the question of interest may suddenly be dusted off and requests for remission made. This was also true of current conclusions of VDAs. Consequently, it was in the interests of justice to grant leave to appeal.

(iv) That the second issue, which was related to the first, was the interpretation of the TA Act in order to determine whether it was competent for SARS to grant a remission of interest after a VDA had been concluded. It would soon be shown that SARS' interpretative points were arguable. As with the first issue, the determination of this issue had a potential impact on a large number of taxpayers and, in the court's view, it ought to determine it and, for these reasons, the court's general jurisdiction was also engaged.

As to the merits of the appeal

(v) That the majority in the Supreme Court of Appeal had identified the issue for decision to be whether SARS could in law not even consider Medtronic International's request for remission after conclusion of a VDA. The court had difficulty understanding how this could be the pre-eminent question. If there was no power to decide the request for remission of interest under section 39(7)

of the VAT Act post conclusion of a VDA, there was no point in considering the request.

(vi) That, therefore, in line with the minority's approach, the question to answer first was whether – once a VDA had been concluded – SARS had the power to remit interest in terms of section 39(7). If SARS lacked the power, that was the end of the matter. If it was within SARS' remit to exercise the section 39(7) remission power after conclusion of a VDA, SARS was obliged to exercise the power.

(vii) That being the position, it was unsurprising that the majority found it unnecessary – albeit secondarily – to engage with the question whether SARS enjoyed the section 39(7) remission power post conclusion of a VDA. Without this secondary holding, it would not have made sense for the majority to require SARS not only to consider the request for remission, but also to decide it 'on its own merits.' However, this secondary holding did not sit comfortably with the majority's firm view that all that the Supreme Court of Appeal was called upon to decide was whether SARS could in law not even consider Medtronic International's request for remission.

(viii) That the majority judges had also ignored the true nature of the relief sought by Medtronic International in the High Court. In the main, that relief was a declarator whether, post conclusion of a VDA, a taxpayer was entitled to seek remission of interest in terms of section 39(7) of the VAT Act. The need for SARS to consider the request for remission would arise only if the first question was answered in the affirmative. That was the sequence in which the relief sought was couched. That sequence was logical and ought to have been followed by the majority.

(ix) That with all this in mind, the real question could only be whether SARS enjoyed the section 39(7) remission power post conclusion of a VDA. If it did not, PAJA could not enjoin it to consider a request for remission under section 39(7) of the VAT Act made after a VDA had been concluded. What then was the answer to this real question? The court then dealt first with the provisions governing the VDP.

(x) That the TA Act's silence on remission of interest in terms of section 39(7) of the VAT Act did not of necessity lead to a conclusion that it permitted remission post conclusion of a VDA. In terms of section 39(1)(a)(ii) of the VAT Act, when a disclosure about a default in respect of VAT was made in terms of the VDP

with a view to concluding a VDA, interest was automatically on the table. The court stated so because, in terms of section 39(1)(a)(ii), if a taxpayer was more than one month late with its VAT payment, interest would automatically be payable on the tax amount. In this regard, the provisions were couched in peremptory terms; the word 'shall' was used and that meant that agreement in a VDA by a taxpayer to pay interest was an agreement to pay something that section 39 peremptorily required to be paid.

(xi) That a taxpayer concluded a VDA with the section 39(1)(a)(ii) provision on interest with her or his eyes wide open. There could be only one conclusion, and that was that the taxpayer accepted this provision and considered her – or himself bound by it. That being the case, Medtronic International's contention that – in the event of interest being remitted in terms of section 39 of the VAT Act – it was open to it to walk away from part of this unequivocal covenant was glaringly absurd. On this argument, a taxpayer may conclude a VDA and on the same day apply for remission of the interest. Effectively, the interest portion of the VDA was not worth the paper it was written on. One may ask: why bother to have this portion of the agreement? The reality was that this portion was there because it was decreed statutorily. By signing the VDA, a taxpayer categorically accepts its terms, including the provision for interest which was a statutorily imposed component.

(xii) That Medtronic International's interpretation had to be rejected as it led to a glaringly absurd outcome and the principle applied in Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] 2 All SA 262 (SCA) at para [25] applied more so here because there was not even language that supported the absurd interpretation.

(xiii) That, also, Medtronic International's interpretation rendered the VDP susceptible to the negotiation of VDAs in bad faith. The court was not here focusing on individual VDAs. Its focus was on the susceptibility to bad faith negotiation of the entire voluntary disclosure scheme.

(xiv) That SARS had to act in this manner, not only because the TA Act bound it to do so, but also because of the attendant belief that all the terms of the VDA were binding. A belief that may prove to have been misplaced as a result of the taxpayer's bad faith. Once the commitment to pay interest, which is definitively a material term of the agreement, is removed from the VDA, the court did not see how the rest of the terms of the agreement can remain binding on SARS.

As the taxpayer was being released from the obligation to pay interest, so too must SARS be released from the section 229 obligations. The edifice of the VDA came tumbling down. In fact, this would be true even in instances where a taxpayer would be acting innocently in seeking remission of interest in terms of section 39(7) of the VAT Act and this undermined the entire voluntary disclosure scheme.

(xv) That the object of the TA Act was that – once concluded – a VDA could not be undone by a remission of interest in terms of section 39(7) of the VAT Act. In fact, and to be more direct, a request for remission in terms of this section was incompetent. This was a harmonious reading of the TA Act's provisions on the VDP, on the one hand, and section 39(7) of the VAT Act, on the other. Medtronic International's reading led to disharmony and that was at odds with the rules of interpretation.

(xvi) That Medtronic International's reading of the provisions on the VDP and section 39(7) had the potential to create uncertainty and run counter to the broader purpose of the VDP, which was to regularise tax affairs and provide a clean slate to taxpayers who satisfied the VDP's requirements.

(xvii) That also of importance was the fact that the Explanatory Memorandum to the Tax Administration Bill 2011 stated that the permanent framework of the VDP was in the interest of the good management of the tax system. A self-contained VDP aids SARS in achieving its purpose of enhancing 'good management of the tax system.' A fractured system that permits the remission of interest after conclusion of a VDA and outside of the TA Act provisions on the VDP flies in the face of this purpose. A self-contained process better conduces to the achievement of this purpose. Hence the interpretation that the court was advancing found support in the Memorandum on the Objects of the Tax Administration Bill.

(xviii) That, to summarise, it simply led to a glaring absurdity to permit a taxpayer to conclude a VDA which makes provision for interest and, at the same time, to allow the taxpayer subsequently to deal with issues relevant to interest separately. This destabilises the VDP framework. Finality of VDAs would be up in the air. Regard should be had to these words from Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para [26]: '[a]n interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the

legislation …under consideration.' Medtronic International's interpretation was at variance with this salutary principle and must fail.

(xix) That section 230 of the TA Act specifically required that successful engagement under the VDP must culminate in the conclusion of an agreement. The need for an agreement was not idle. Surely, the agreement must bind the parties to it, SARS and Medtronic International, and be enforceable on all its terms: pacta sunt servanda (agreements must be honoured).

(xx) That the VDP regime in the TA Act required the conclusion of an 'agreement'. The effect of Medtronic International's argument was that a taxpayer enjoys a right effectively to undo one of the material terms agreed to (ie the interest payable in terms of the VDA). That cannot be. The argument is at odds with the longstanding pacta sunt servanda principle that enjoyed the recognition of this court.

(xxi) That the question that arose was whether Medtronic International was entitled to Biowatch protection so as not to be ordered to pay SARS' costs. In the present circumstances what claim Medtronic International might have had to Biowatch protection was tenuous and the court did not consider it appropriate to afford the protection.

Leave to appeal was granted.

The appeal was upheld with costs, including the costs of two counsel.

4.5. Naraidu v The State (87 SATC 408)

Appellant, Mr Naraidu, a tax practitioner, was, together with two other accused, charged with three counts of fraud, and three alternative charges under the Value-Added Tax Act 89 of 1991 (the VAT Act) read with s 269(9) of the Tax Administration Act 28 of 2011 (the TA Act).

The charges, in essence, alleged that Serghony's Shoes Fashion CC (SSF and the first accused), together with its sole member, Mr Mbom (the second accused) and Mr Naraidu (the third accused) unlawfully, and with intent to defraud, misrepresented to the SARS that SSF had incurred expenses and was entitled to refunds under the VAT Act, knowing that SSF was not entitled to any such refunds and that the information submitted to SARS was false.

In the Regional Court, Gauteng, Mr Mbom and Mr Naraidu were convicted on the three counts of fraud, with Mr Naraidu being sentenced to six years of imprisonment without an option of a fine. Mr Naraidu appealed to the High Court in respect of his conviction which appeal was dismissed as the court found that the Regional Court had correctly found that Mr Naraidu had been aware that the documents submitted to SARS supporting the claim for the VAT refund were false.

The regional magistrate had found that Mr Naraidu had acted with Mr Mbom in 'a premeditated plan to defraud SARS'. The High Court agreed as it reasoned that the enquiries directed by Mr Naraidu to SARS concerning the VAT refund due to SSF meant that he had 'insight of the fraudulent supporting documents'. Both courts thus rejected the version advanced by Mr Naraidu, at trial, that he was merely making enquiries of SARS on behalf of SSF.

With special leave, Mr Naraidu appealed to the Supreme Court of Appeal where the issue before the court was whether the State had discharged its onus of proof to show that Mr Naraidu had been complicit in Mr Mbom's fraudulent scheme to use SSF to make fraudulent claims upon SARS for a VAT refund.

There was clear evidence that the documents submitted to SARS to support the claim of SSF for a VAT refund were false, and that the claim constituted a misrepresentation. The investigation undertaken by SARS, the evidence of which was led at the trial, had revealed that the invoices that were submitted to SARS in support of the claim for the VAT refund were fictitious. The refund sought was substantial, amounting to R2 748 037.51.

The findings of the Regional Court that Mr Mbom was guilty of fraud were incontestable.

Judge Unterhalter held the following:

(i) That the issue before the court was whether the State had discharged its onus of proof to show that Mr Naraidu had been complicit in Mr Mbom's fraudulent scheme to use SSF to make fraudulent claims upon SARS for a VAT refund.

(ii) That there was a great deal that was unsatisfactory about Mr Naraidu's evidence. How he came to be retained; that he was, on his own version, willing to engage SARS on behalf of a client that he knew next to nothing about; that he took an instruction without any proper mandate; and then pursue a claim in ignorance of the claim that was being made – all of this suggests a reckless disregard for his duties as a tax practitioner, but that was not the charge he was

facing. The question was whether he made himself party to the fraud that Mr Mbom had perpetrated upon SARS. And the primary evidence relied upon by the State to make that case were emails sent to SARS by Mr Naraidu on behalf of SSF.

(iii) That the emails in issue conveyed that Mr Naraidu had the documents used in support of the claim of SSF for a VAT refund, and that he had resubmitted these documents to SARS. Mr Naraidu denied that he did so. But, even if Mr Naraidu must be held to what he wrote in the emails, it did not follow that because he resubmitted the documents in support of the claim, he had any knowledge that these documents were fictitious invoices and that the claim was fraudulent. There was no direct evidence of this. It was the investigations undertaken by SARS that uncovered the fraud.

(iv) That it could not be inferred that, because he submitted the documents on behalf of SSF, he thereby represented that they recorded transactions that supported the VAT refund, knowing that they were fictitious. Once that was so, the State had failed to prove beyond reasonable doubt that Mr Naraidu had the intent to defraud SARS.

(v) That Mr Naraidu had acted recklessly was plainly the case. He lent his efforts to secure the payment of a fraudulent claim. But absent proof beyond reasonable doubt that he knew the claim to be fraudulent, it cannot be said to have made himself party to the fraud. There was an absence of proof that Mr Naraidu had the intention required to be guilty of fraud.

(vi) That, accordingly, Mr Naraidu's conviction on the charges of common law fraud was thus unsafe, and must be set aside.

(vii) That, with regard to the alternative statutory charges, these charges entailed some complexity because section 59 of the VAT Act was repealed by section 271 of the TA Act. However, section 269(6) of the TA Act permitted of the prosecution of statutory offences repealed by this enactment, if they were committed before the commencement of the TA Act. The TA Act commenced on 1 October 2012 and the statutory offences with which Mr Naraidu was charged were alleged to have occurred in 2013 and 2014 and it was thus doubtful that these statutory charges were valid in law.

(viii) That it sufficed to observe that the statutory charges brought against Mr Naraidu all alleged an intent, on his part, to secure a refund to which SFF was

not entitled. For the reasons given, while Mr Naraidu sought to secure a refund for SFF, the State did not discharge its onus to prove that he intended to do so knowing that SFF was not entitled to the refund and he thus cannot be convicted on the alternative statutory charges.

Appeal upheld.

Appellant acquitted of the charges against him.

4.6. ITC 1985 (87 SATC 447)

The taxpayer had conducted the trade of farming from which it had derived income from the sale of fruit and vegetables.

The taxpayer had entered into two agreements with an insurance company, Company XYZ, in 2018 and 2019 respectively. The 'Multi-Peril Contingency Policy Contract' stipulated that annual premiums were required in order to obtain coverage for uncertain future events set out in the table of 'Specifications'.

The premiums were allocated to a 'Special Experience Account' ('the experience account') and the bulk of the premiums were repaid to the taxpayer in the absence of any claims being made during the 12-month term and it was common cause that the taxpayer had submitted no claims during the relevant periods.

The taxpayer contended that the premiums paid by it constituted insurance expenses and were therefore deductible in terms of section 11(a) of the Income Tax Act 58 of 1962 (the IT Act) which section permitted deductions from income for expenses and losses that were 'actually incurred in the production of the income' provided that they did not pertain to capital expenditure and losses. The annual premium payable in respect of the 2018 policy was R35 000 037 (VAT inclusive) and the total annual aggregate limit of indemnity was recorded as R41.5 million. The annual premium payable in respect of the 2019 policy was R35 391 732 (VAT inclusive) and the total annual aggregate limit of indemnity was R49.5 million.

SARS disallowed the deduction of the premium for the 2018 year of assessment in the amount of R30 434 815 and the only deduction that was allowed was for a fee that was charged by Company XYZ which it retained as payment which was not included in the experience account in the amount of R243 739.

SARS, in the 2019 year of assessment, disallowed an amount of R2 332 976 claimed by the taxpayer in respect of premiums paid but only allowed R345 033 as a deduction from income derived by the taxpayer.

SARS contended that its reason in the main for disallowing the premiums was that the annual premium that was paid by the taxpayer was not expenditure but was simply another form of asset in the hands of the taxpayer.

SARS, in addition, imposed an understatement penalty (USP) of 10% on the disallowance of the insurance expense claimed in the 2018 year of assessment in terms of sections 222 and 223 of the Tax Administration Act 28 of 2011 (TA Act) in the amount of R2 211 119.10 and interest was also levied in terms of section 89quat(2) of the IT Act for the underpayment of provisional tax due to 'the excessive deductions claimed' in the amount of R1 950 355.74.

The sole issue for determination in this appeal was whether the deposits paid to Company XYZ in respect of premiums paid to it by the taxpayer qualified as deductible expenses in terms of section 11(a) of the IT Act.

Both Company XYZ contracts were for the calendar years 2018 and 2019, with respective durations of one year and the contractual provisions of both contracts were identical. In their terms the Company XYZ contracts identify and refer to themselves as a 'policy' and they also refer to Company XYZ as 'the Company' and to the taxpayer as 'the insured.'

Two of the clauses in the Company XYZ contracts that lay at the heart of the appeal were clause 6 entitled 'Special Experience Account' and clause 7 entitled 'Premium Refund and/or Performance Bonus Clause.'

In essence the Company XYZ contracts stated that the taxpayer would pay to Company XYZ an amount of R35 million which would be credited by Company XYZ to the experience account and which earned a return. Company XYZ would debit the experience account with a charge that was labelled the 'insurer's margin' of 2.25% and Company XYZ would compensate the taxpayer on the occurrence of the defined events during the contract period.

Any amount that Company XYZ paid to the taxpayer as a claim payment would be debited to the experience account. On expiry of the contract period, Company XYZ would refund to the taxpayer the balance of the experience account and the balance of the experience account would also be repayable to the taxpayer if it cancelled the contracts which it could do by giving 30 days' notice.

Judge Windell held the following:

(i) That the main issue for determination on the merits was whether the Company XYZ deposits, referred to as the 'annual premium' in the Company XYZ contracts, were deductible in terms of section 11(a) of the IT Act. In terms of section 102(1) of the TA Act the onus of proving that the Company XYZ deposits were deductible in terms of section 11(a) was upon the taxpayer.

(ii) That the Supreme Court of Appeal has described the test for deductibility under section 11(a) as 'the general deduction formula' which allowed the deduction of expenditure and losses actually incurred in the production of income 'provided such expenditure and losses are not of a capital nature'.

(iii) That for any amount to qualify for deduction under section 11(a) it had to satisfy the following requirements: (a) Expenditure; (b) Actually incurred; (c) In the production of income; (d) For purposes of trade; and (e) Not of a capital nature.

(iv) That 'expenditure' meant the action of expenditure, disbursement or consumption – hence money spent. Therefore, to constitute expenditure, money must have been permanently outlaid in exchange for something else other than money – purchase of goods or services; or an asset must have been permanently outlaid in exchange for a different type of an asset or service – in a barter transaction.

(v) That the taxpayer had expended the 'annual premium' to acquire the rights in terms of the Company XYZ contracts and these rights included the rights that the taxpayer had acquired in respect of the experience account and the refund of the amount recorded in this account, as specified in clauses 6 and 7 of the contracts. Save for the 'insurer's margin component, the taxpayer was not poorer by the 'annual premium' that it had incurred. Moreover, since there was a movement in the taxpayer's assets (cash being exchanged for the rights in terms of the Company XYZ policy), it had incurred expenditure equal to the 'annual premium' despite there being no diminution in its overall assets.

(vi) That section 11(a) prohibited the deduction of expenditure that was 'of a capital nature.' The phrase 'not of a capital nature' in respect of expenditure was likewise not defined in the Income Tax Act. 'Revenue nature' is the antonym of 'capital nature' and a convenient summary of the test for determining whether expenditure was of a capital nature or revenue nature was to be found in BP Southern Africa (Pty) Ltd v C:SARS 69 SATC 79 and, accordingly, the purpose

for which the amount was paid is important and often decisive. A distinction must therefore be drawn between 'income-producing concern' and 'income-producing operation'.

(vii) That an income-generating concern is an asset or infrastructure used to generate income such as machinery used to manufacture trading stock, premises for hire, service contracts, contracts granting rights of use such as leases and loans. Accordingly, amounts paid to acquire or expand income-generating concerns were of a capital nature. An income-generating operation is an activity performed to produce income or incidental to the production of income such as operating machinery to manufacture trading stock, repairs and maintenance of premises for hire, provision of services under a service contract.

(viii) That in exchange for payment of the 'annual premium' the taxpayer obtained the right to a credit of the same amount which stood for its benefit in the experience account. The balance of the experience account was refundable at the end of the contract period and had generated income in the form of interest. Irrespective of what the yield was called the taxpayer's right to the experience account was an income-producing concern and therefore a capital asset. Because the 'annual premium' was paid to acquire a capital asset, it was payment of a capital nature and for this reason the 'annual premium' did not qualify for deduction under section 11(a) of the Act.

(ix) That the taxpayer bore the onus to prove that the payments made to Company XYZ were not of a capital nature and it had failed to demonstrate a sufficient link between its rights to the experience account and the performance of its income-earning operations.

(x) That, accordingly, the taxpayer's appeal against the additional assessments raised by SARS in respect of the 2018 and 2019 years of assessment had to fail.

(xi) That, in regard to the understatement penalties of 10% imposed by SARS, the facts upon which SARS had based the imposition of USP were that the claiming of a non-deductible amount as a deduction resulted in substantial understatement by the taxpayer and the court had no reason to interfere in the imposition of the USP.

(xii) That, in regard to interest payable by the taxpayer in terms of section 89quat(3) of the Income Tax Act, it remained liable for interest levied in terms of section 89quat(2) of the IT Act as the underpayment of provisional tax was not due to circumstances beyond the control of the taxpayer.

Appeal dismissed.

Additional assessments for 2018 and 2019 confirmed.

4.7. ITC 1986 (87 SATC 461)

Appellant, Fast (Pty) Ltd (Fast), was a wholly owned subsidiary of Fast Holdings (Pty) Ltd and Fast Holdings (Pty) Ltd was in turn a wholly owned subsidiary of Fast Nederland BV, which was a wholly owned subsidiary of Fast SE incorporated in Germany and another wholly owned subsidiary of Fast SE was Fast Metals GmbH, more commonly referred to as Fast Zug which was incorporated in Switzerland.

Fast's principal activity concerned manufacturing, selling and importing chemical products and it manufactured and sold catalysts which were used in the abatement of exhaust emissions from motor vehicles. The manufacturing process involved coating the catalysts and the coating was derived from certain XYZs. The XYZs were bought by Fast from Fast Zug and the catalysts were sold to South African customers referred to as original equipment manufacturers (OEMs).

SARS had in January 2014 initiated an audit on Fast in relation to its 2009–2011 financial years which focused specifically on transfer pricing and to that end it had examined the relationship and transactional arrangement between Fast and Fast Zug in the context of definitions in section 1 of the Income Tax Act 58 of 1962 (the IT Act)..

The XYZs were regarded as inventory by Fast and it held these and bore the risk of holding them as inventory.

SARS, in assessing the nature of the transaction of purchase from Fast Zug, examined the consideration received by Fast in the sale of the final product to the OEMs and came to the conclusion that it was not an arms-length transaction and accordingly adjusted the taxable income of Fast and this was conveyed to Fast in the assessment issued by SARS.

Essentially SARS applied the transactional net margin method (TNMM) of assessing the profit earned by Fast. This method compared the nett profit earned by a party, Fast

in this case, of a controlled transaction with the nett profit earned in uncontrolled transactions. TNMM was based on a view that companies which are functionally similar and are operating in a similar market tend to make similar profits over time.

Fast unsuccessfully objected to the assessment and proceeded to lodge an appeal and this was responded to by SARS by filing the necessary Rule 31 statement of grounds of assessment and opposing appeal.

SARS' conclusion in his statement was that the tested transaction was not an arms-length one and, as a result, section 31 of the ITA, which specified that tax payable in respect of international transactions had to be determined on the arms-length principle, was engaged.

Fast filed its Rule 32 statement of grounds of appeal wherein it identified what it maintained were the shortcomings of the approach adopted by SARS and it contended that an appropriate benchmarking study was one that chose comparator companies that utilised XYZs as well as other precious metals in the manufacturing process rather than only XYZs.

SARS, during preparation for the appeal, took particular note of the criticisms levelled at the approach that it adopted in determining whether the tested transaction was an arms-length one or not and this prompted SARS to engage the services of an economist specialising in the field of transfer pricing, Dr Emann, to scrutinise the approach adopted by SARS and SARS also mandated Dr Emann to consider the approach suggested in Fast's Rule 32 statement.

The introduction of Dr Emann was clearly designed to collect relevant admissible evidence with probative value for the appeal, and his conclusion was that the tested transaction was not an arms-length one.

SARS, in order to ensure that Dr Emann's evidence was not prohibited at the hearing of the appeal, sought to amend his Rule 31 statement as it made no mention of an alternative basis to test the transaction. It only made reference to the TNMM approach adopted during the audit stage of the process.

SARS wished to prevent a situation where the appeal court was required to rule on the admissibility of its evidence in circumstances where it had failed to foreshadow it in his Rule 31 statement.

To this end SARS wished to amend its statement by introducing a second ground of assessment which was ‘in the alternative’ to the first ground, and which should only become relevant if the first ground was not upheld by the court.

Fast opposed the application for amendment on the basis that it constituted a justification of the additional assessment on grounds that were absent when the assessment was made, i.e. it was an ex-post facto justification and required the admission of evidence that was not before SARS and was therefore not taken into account by SARS at the time the assessment was made.

Fast contended that by relying, albeit on an alternative basis, on a new comparator for testing the transaction, SARS had introduced a wholly new factual ground for the assessment which was prohibited by rule 31(3) of the Tax Court rules.

The court was called upon to determine whether the amendment sought fell foul of the provisions of rule 31(3) of the Tax Court Rules.

In this matter there were two interlocutory applications before the court. Both SARS and Fast sought to amend their respective statements that they had filed in court. Neither party consented to the amendment sought by the other party, thus compelling each party to seek the court’s approval for its intended amendment.

The first application, as described above, was brought by SARS to amend his Rule 31 statement of grounds of assessment and opposing appeal which it filed in response to the appeal lodged against his assessment of Fast’s tax liability for the 2011 year and the second was an application by Fast to amend its Rule 32 statement of grounds of appeal in respect of the 2011 year of assessment.

The two applications were heard separately, but on the same day and it was therefore prudent to issue one judgment.

In the second application Fast applied to amend its Rule 32 statement by submitting 7 amendments which could be grouped into three categories.

SARS opposed the application, inter alia, on the ground that it was prohibited by rule 32(3) of the Tax Court Rules.

The court, before embarking on an analysis of rule 32(3), had to consider Rules 7 and 10 of the Tax Court Rules and then had to consider whether Fast’s amendments, if allowed, would fall foul of the prohibition set out in rules 10(3) and 32(3) of the Tax Court Rules.

Judge Vally held the following:

As to the application by SARS to amend his Rule 31 statement

(i) That at the relevant time rule 31(3) provided that SARS may not include in the statement a ground that constitutes a novation of the whole of the factual or legal basis of the disputed assessment or which requires the issue of a revised assessment.

(ii) That on a plain reading it was clear that the rule prohibits SARS from relying on a new ground for the whole of the factual or legal basis of his assessment. It is allowed to rely on a new ground, however, as long as the new ground did not constitute a change of the whole of the factual or legal basis of his assessment and should that occur it was obliged to withdraw the assessment and replace it with a new one.

(iii) That for the amendment to constitute a new ground for the whole of the factual or legal basis of his assessment, the ground stated in the Rule 31 statement must in substance be different from that in the assessment.

(iv) That the question was: has SARS, by amending his Rule 31 statement, novated the whole of the factual or legal basis that underlay his assessment? The court's answer was no. Pre-amendment, the case of SARS had been that the tested transaction had not been an arms-length one and the case remained the same post-amendment. The evidence that SARS relied upon to make its assessment in the first place remained the evidence that it intended to rely upon to make out his case at the appeal.

(v) That SARS, by asking for the amendment, was seeking no more than to be given an opportunity to meet the case that Fast intended to bring. Moreover, it had not abandoned the basis of his assessment which remained his primary case and the amendment did not detract from this. SARS was not novating and it was not changing the facts of the tested transaction. It was simply introducing a different comparator.

(vi) That the facts of the tested transaction were the facts upon which it based his conclusion regarding its arms-length nature. The amended Rule 31 statement did not alter the assessment and SARS was not 'novating the whole' of the facts of his assessment.

(vii) That, accordingly, in these circumstances, the application to amend SARS' Rule 31 statement should be allowed.

As to Fast's application for leave to amend its Rule 32 statement

(viii) That Fast was not allowed to raise a ground of appeal in its Rule 32 statement which was not previously raised in its objection. Rule 32(3) was similar in content to that of rule 31(3). As with rule 31(3), relating to SARS, it placed a prohibition on a taxpayer who objected to an assessment from seeking to make out a new case at the appeal court.

(ix) That the prohibition in rules 10(3) and 32(3) ties Fast down to its objection, but rules 10(3) and 32(3) appear to be undermined if not contradicted by the provisions of rules 10(4) and 33(2). However, there is weighty authority to support the conclusion that the provisions of rules 10(3) and 32(3) must be given effect to.

(ix) That the apparent confusion created particularly by rules 10(4) and 33(2) has been judicially considered in ITC 1912 80 SATC 417 where the court scrutinised them and concluded that the consequence of including rules 10(4) and 33(2) was that the taxpayer was now no longer bound to the grounds of objection set out in Rule 7, and was not faced with an absolute bar to raising a new ground. The taxpayer is only barred from raising a ground that was completely novel, one that was not at all raised in the objection filed in terms of Rule 7.

(x) That there must be at least a connection 'between the amounts previously disputed and thus the subject to the disputed assessment, and the new ground.' The new ground in the appeal must not be 'an entirely new case.'

(xi) That the first category of amendments sought by Fast was captured in para. [1], [2], [4], [5] and [7] of Fast's application for leave to amend its Rule 32 statement. There was certainly a connection between what Fast now wished to introduce on appeal in its Rule 32 statement to what it claimed in its Rule 7 objection statement and, accordingly, amendments 1, 2, 4, 5 and 7 should be allowed.

(xii) That in the second category of amendments Fast was making out an entirely new case–one that was very different from the one it made out in its Rule 7 statement. Accordingly leave should not be granted to Fast to amend its Rule 32 statement as per para [3] in its notice in terms of Rule 35.

(xiii) That the third category of amendments also contained a novel claim which was not raised in the Rule 7 objection statement and there was no other allegation or averment in the Rule 7 statement to which it could be connected. It was an entirely new case that Fast wished to raise in this court, and it was prohibited from raising it in its Rule 32 statement and hence leave to include it by way of an amendment had to be refused.

4.8. ITC 1987 (87 SATC 474)

First Applicant ('Dr X') was a specialist neurologist and he rendered services to the Second Applicant ('Dr X Inc') and he was the company's public officer.

Applicants approached the Tax Court seeking a declaratory order that an objection which they had filed with the SARS, on 14 August 2023 ('the Second Objection') and which had been invalidated by SARS due to non-compliance with Rule 7(2)(b) of the Tax Court Rules, was indeed valid.

Applicants contended that the Second Objection met the requirements of Rule 7(2)(b) and contended further that in invalidating their Second Objection, SARS wrongly conflated the test for a valid objection with the test for whether an otherwise valid objection should be disallowed or not.

Applicants' tax affairs were placed in audit by SARS in April and July 2021 and on 30 April 2021 SARS directed a notification of audit letter to Dr X stating that the scope of audit was gross income and capital gains tax for the 2016, 2017 and 2019 tax years, but could be extended. The audit notification set out details of the information that Dr X was required to provide to SARS for the audit and this included a detailed description of all income streams, lists of bank accounts and bank statements, statement of assets and liabilities, investment portfolio statements and details of capital gains tax calculations and Dr X was required to provide the information within 21 days.

On 8 and 9 July 2021 SARS directed audit notifications to Dr X Inc which stated that the scope of the audit related to the company's VAT returns for the period April 2016 to February 2020 and corporate income tax for the 2019 and 2020 tax years but could be extended.

The audit notifications also recorded the relevant material such as financial and accounting records which the company was required to provide to SARS and the dates for submission thereof. The information required by SARS was electronic accounting

records such as general ledgers, trial balances, VAT tax type reports and debtors and creditors ledgers for the periods under audit. The audit notification specifically recorded that SARS required these electronic accounting records to be made available by the taxpayer to the SARS Electronic Forensic Services Department ('EFS') in electronic format and that the EFS Department would contact the taxpayer to obtain the electronic accounting records.

Second Applicant was further informed that should the information sought not be provided, SARS would be entitled to raise estimated assessments based on information available to it and, in addition, the audit notifications stated that it was a criminal offence to wilfully and without just cause fail to provide the relevant material requested.

After a long exchange of requests by SARS for financial information from the taxpayers in order to conduct the audit on their income tax and value-added tax affairs, SARS on 4 October 2021 issued a section 46 notice to Dr X in his capacity as public officer of the company which listed the information which had previously been requested from the taxpayers and had still not been provided to SARS. SARS recorded in the notice that the taxpayers were in breach of section 46 of the Tax Administration Act 28 of 2011 (TA Act) which obliged a taxpayer to provide relevant material to SARS.

In addition, the taxpayers were informed that SARS may impose understatement penalties and that one of the factors that may be taken into account in this regard was whether the taxpayer had co-operated with SARS or had been obstructive in the exercise of SARS's duties.

SARS thereafter issued its audit findings letters in respect of Dr X's personal income tax audit and the company's corporate income tax audit as well as its VAT audit findings letter for the relevant tax periods.

The audit findings letter stated that SARS therefore intended to issue an additional assessment in terms of section 92 of TA Act and intended to issue estimated assessments for all the unexplained deposits in terms of section 95(1) of the TA Act, as the taxpayer had failed to prove that his returns were correct and accurate.

SARS issued Dr X Inc with a finalisation of audit letter on 25 March 2022 in respect of corporate income tax. A VAT audit assessment letter was also issued on 25 March 2022.

The VAT audit assessment letter stated that SARS would be imposing a 200% USP due to intentional tax evasion in the form of overstatement of VAT deductible expenses

and obstructive behaviour. Both letters set out the detailed findings, basis and reasoning of SARS in relation to the estimated assessment and adjustments.

The total assessment raised by SARS for personal income tax, VAT, donations tax, understatement penalties and interest in respect of both taxpayers, amounted to the sum of R87 376 185.

Following the issue of the assessment letters the taxpayers appointed professionals to represent them in objecting to the assessments which had been raised by SARS and reasons were requested for the assessments on 6 June 2022, which reasons were provided by SARS on 31 August 2022.

On 25 October 2022 an objection was lodged against the taxpayers' income tax and VAT assessments ('the First Objection') and in response thereto SARS issued a notice invalidating the taxpayers' objections and setting out its reasons for this decision ('the First Notice of Invalid Objections').

On 14 August 2023, and following an agreement with SARS, the taxpayers lodged a second objection to the assessments raised by SARS ('the Second Objection') for income tax, VAT and donations tax for the tax periods falling within the 2016 to 2020 years of assessment.

Between 14 August 2023 and 22 September 2023 a lengthy series of back-and-forth discussions and exchanges of correspondence then took place between the parties regarding the ongoing dispute relating to access by SARS to the taxpayers' Healthbridge electronic records system.

SARS, on 22 September 2023, issued its notices informing the taxpayers that their 14 August 2023 objections were invalid due to non-compliance with Rule 7(2)(b) of the Tax Court Rules ('the Second Notice of Invalid Objections').

It was common cause that in the Second Notice of Invalid Objections SARS had invalidated the taxpayers' second objection ostensibly due to non-compliance by the taxpayers with Rule 7(2)(b) of the Tax Court Rules.

The reasons provided by SARS in this regard were inter alia the following:

- the taxpayers failed to provide the documents to substantiate the grounds of objection or reliable documents in that regard;
- the taxpayers failed to provide evidence to prove in which period they had rendered services; and

- the taxpayers' grounds of objection were contradictory and misleading.

Following the issuing of the Second Notice of Invalid Objections, further unsuccessful communications ensued between the parties regarding the proposed meeting between SARS and the taxpayers regarding what was required of them by SARS for the filing of valid objections.

On 24 October 2023 the taxpayers launched the current application to the Tax Court in terms of rule 52(2)(b) of the Tax Court Rules for an order declaring their second objection to be valid for the purposes of rule 7(2)(b).

Judge Magardie held the following:

(i) That the requirements of rule 7(2) for a valid objection and the purpose which these requirements sought to achieve, had firstly to be considered in the context of section 106 of the TA Act.

(ii) That section 106 of the TA Act dealt with decisions by SARS on objections against assessments. Section 106(1) stated that SARS 'must consider a valid objection in the manner and within the period prescribed under this Act and the Rules'. In terms of section 106(2) of the TA Act SARS 'may disallow the objection or allow it either in whole or in part.' Section 106(3) provided that where SARS allowed an objection against an assessment, either in whole or in part, the assessment must be altered accordingly.

(iii) That two aspects were clear from these provisions of the TA Act. Firstly, the decision on whether a taxpayer's objection to an assessment was valid, was a discretionary decision vested with SARS. Secondly, a decision by SARS that an objection was valid, was a necessary pre-condition for the disallowance of an objection or its allowance in whole or in part in terms of section 106(1) of the TA Act read with rule 9(1).

(iv) That an objection by a taxpayer which had not been determined by SARS to be 'valid' did not reach the stage of allowance or disallowance on its merits in terms of rule 9(1). It was only when such an objection had been determined by SARS to be valid and then allowed or disallowed, either in whole or part, that the appeal process to the Tax Court may subsequently be engaged.

(v) That turning to the provisions of the rules relating to objections against assessments, rule 7(2)(b) in essence establishes three discrete requirements

for the validity of such an objection and these requirements all related to the grounds of objection, which the objection must set out in detail.

(vi) That rule 7(2)(b)(i) in the first place required a taxpayer to specify the part or specific amount of the disputed assessment objected to. Secondly, in terms of rule 7(2)(b)(ii) the objection must specify which of the grounds of assessment were disputed. Thirdly and in terms of rule 7(2)(b)(iii) the taxpayer must submit the documents required to substantiate the grounds of objection, that the taxpayer had not previously delivered to SARS for purposes of the disputed assessment.

(vii) That in terms of rule 7(4), where a taxpayer delivered an objection that did not comply with the requirements of rule 7(2), SARS may regard the objection as invalid. SARS is required in these circumstances to notify the taxpayer accordingly and to state the ground for invalidity in the notice within 30 days of delivery of the invalid objection.

(viii) That the overarching requirement of 'detail' in the taxpayers' grounds of objection and the requirement that the taxpayer must 'specify…[and] in detail' the part or specific amount of the assessment objected to, made it clear that a globular, vague or unspecific objection did not pass muster as a valid objection in terms of rule 7(2)(b). The taxpayers' objection is required to be specific and precise in its identification of the grounds of objection and which parts, amounts and grounds of the disputed assessment are disputed and objected to. The specificity requirements of rule 7(2)(b)(i) and (ii) were given further force by rule 7(2)(b)(iii) which required the taxpayer to submit all documentation required to substantiate the objection, but which was not previously submitted to SARS.

(ix) That all of these requirements, i.e. specificity in the formulation of the grounds of objection and submission of documents required to substantiate the objection, were directed at ensuring that SARS was placed in a position where it was able to properly determine the merits of the objection itself and whether to allow or disallow the objection in whole or partially. An objection which is valid as a consequence of meeting the specificity requirements of rule 7(2)(b) could be rationally determined on its substantive merits. An objection which is vague, imprecise, lacked detail and did not submit the documents required to substantiate the grounds of objection which it advanced, could not.

(x) That a taxpayer was not entitled to play possum in an objection to a tax assessment. Were it otherwise, it would be all too easy for vague and

generalised objections to pass the hurdle established by rule 7(2)(b). This would defeat the purposes of an effective tax dispute resolution system and with it, the efficient collection of taxes due to the fiscus by taxpayers following an assessment by SARS.

(xi) That the court then addressed the requirements of rule 7(2)(b)(iii) as the taxpayers had submitted that SARS had erred in both its interpretation of the rule and its application to the objections lodged by the taxpayers. Rule 7(2)(b)(iii) did not contemplate a wholly subjective choice being afforded to taxpayers to submit only those documents which they considered necessary to substantiate their grounds of objection.

(xii) That rule 7(2)(b) plainly required the taxpayer to not only specify its grounds of objection in detail, including the part or the amount objected to, but to submit all documentation required for the substantiation of the objection, which was not previously presented to SARS. That had the intention of the drafters of rule 7(2)(b)(iii) been to permit a taxpayer to subjectively decide what documents it considered were 'required' to substantiate its grounds of objection, the rule would instead provide that the taxpayer may submit documents that the taxpayer 'deems necessary' to substantiate its objections but rule 7(2)(b)(iii) did not however so provide, neither expressly nor impliedly.

(xiii) That there were further difficulties with the taxpayers' argument that for the purposes of assessing the validity of an objection, SARS was limited to only determining whether they had submitted the documents that they relied upon in their objection. It was difficult to see how the purpose of rule 7(2) could be achieved other than by SARS determining whether the taxpayer had submitted the documents which were 'required' to substantiate its pleaded grounds of objection.

(xiv) That rule 7(2) acted as a procedural filter. It was aimed at ensuring that only objections which SARS had determined to comply with the validity and specificity requirements of this rule, may proceed to a determination on their merits in terms of rule 9 and consequent thereto, the appeal process pursuant to section 107(1) of the TA Act.

(xv) That it was the taxpayer who chooses its grounds of objection to an assessment. The taxpayer may elect to advance certain grounds of objection and not others, it may decide to challenge certain parts or amounts in the assessment and leave others undisputed. Such an election, however, carries

consequences. The main consequence was that rule 7(2)(b)(iii) then obliged the taxpayer to submit the documents which are required to substantiate those grounds of objection. It is submission of such documents by the taxpayer which is obligatory, not merely specifying what the documents are.

(xvi) That the main reason for the invalidation of the taxpayers' objections by SARS, as set out in the Second Notice of Invalid Objection, related to non-compliance by the taxpayer with the document submission requirements of rule 7(2)(b)(iii). In particular, SARS had concluded that various documents submitted by the taxpayers had no evidentiary value and that submitted documents did not comply with rule 7(2)(b)(iii) in that they had not submitted documents required to substantiate their objection. These conclusions were not meaningfully addressed or disputed by the taxpayers either in the Second Objection or in their founding papers in the present application. In relation to the Healthbridge system, it was undisputed that the taxpayers had not given SARS access to the system at the time when SARS took its decision to invalidate the Second Objection.

(xvii) That in the court's view SARS had applied the correct legal test. That test was to assess the objections against the requirements for their validity set out in rule 7(2)(b). In any event, whether or not SARS was right or wrong in considering that the burden of proof contemplated by section 102(1) of the TA Act was relevant, had nothing to do with the factual question of whether the taxpayers' objections were valid and complied with the requirements of rule 7(2)(b).

(xviii) That, in regard to the taxpayers' other arguments, inter alia, the objection relating to understatement of donations tax, the court stated that there was no dispute that Dr X did not submit any documents to substantiate the Second Objection insofar as it related to the donations tax levied by SARS and the objection in this regard did not comply with the requirements of rule 7(2)(b)(iii). It was the duty of the taxpayers to have provided relevant information during the audit itself, not months after its completion at which stage the assessments had already been raised by SARS.

(xix) That in regard to SARS's treatment of deposits from unknown sources, there were significant amounts paid to Dr X from unknown sources during the audit period 2016 to 2019. According to SARS, these deposits were all from sources other than those reflected in the taxpayer's returns and they were consequently

treated as undeclared gross income. These findings by SARS ought to have alerted the taxpayer to the need for detail, specifics and supporting documentation in any future objection to the assessments raised by SARS.

(xx) That in order to comply with the requirements of rule 7(2)(b), the taxpayers were required to deal in detail in their objection with each and every one of the unexplained deposits and accruals into their bank accounts for each year of the audit period and it did not suffice for the taxpayers to adopt a globular approach to the disputed assessment and object solely on a broad principle as they sought to do.

(xxi) That the court was unable to conclude that the taxpayer's objection in this regard met the validity requirements of rule 7(2)(b) and, in regard to the objection relating to understatement of VAT output tax, the taxpayers' objection relating to the VAT assessment raised by SARS did not meet the requirements of rule 7(2)(b)(i) or rule 7(2)(b)(iii).

(xxii) That it was entirely rational for SARS to conclude that it was unable to rely on the veracity of the company's financial statements or the Xero accounting records provided. The court agreed with SARS that access to the accounting records on the Healthbridge system was integral to the performance of the audit process and required for the purposes of substantiating the taxpayers' grounds of objection in the Second Objection.

(xxiii) That, accordingly, the court was of the view that the main objections raised by the taxpayers in their Second Objection to the income tax, donations tax and VAT assessments raised by SARS, did not comply with the validity requirements of rule 7(2)(b). The taxpayers were under a duty to co-operate with and not to obstruct SARS during the performance of the audit process, but their conduct as set out in the judgment did not demonstrate such co-operation. It cannot be said to have been reasonable of the taxpayers to have persisted with not submitting documents required to substantiate their Second Objection.

Application in terms of rule 52(2)(b) of the Tax Court Rules is dismissed.

5. INTERPRETATION NOTES

5.1. Diminution in the value of closing stock – No. 140

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 amount 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 operations, 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 diminution in value refers to the amount by which the cost price of the closing stock has diminished owing to one of the specified reasons. 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 judgments of the Supreme Court of Appeal 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 be scope for a diminution of cost price only 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.

5.2. The meaning of reserve fund under section 23(3) – No. 141

This Note considers the meaning of ‘reserve fund’ for purposes of section 23(e).

The general deduction formula under the Act to determine a person’s taxable income derived from carrying on any trade consists of a positive test in section 11(a) as well as a negative test in section 23. These two sections must be read together in order to determine whether a taxpayer will be entitled to a general deduction. Section 23(e)

prohibits specifically any deduction relating to income carried to any reserve fund or capitalised in any way.

It is a common practice for businesses to establish a reserve fund for future costs and financial obligations. It further is generally accepted accounting practice to create a provision for contingent or anticipated liabilities.

This Note considers the meaning of reserve fund as envisaged in section 23(e). Other provisions in the Act that allow specifically for the deduction of a reserve in certain circumstances are listed but not considered in detail in this Note.

Owing to the specific terms of different types of insurance policies, this Note does not consider whether so-called self-insurance policies may be considered to be a reserve fund. The interpretation and application of section 23L are also beyond the scope of this Note.

Under section 23(e), the deduction of any income carried to any reserve fund or capitalised in any way is prohibited unless the Act provides specifically for the deduction of a reserve. Such reserves created are generally not expenditure actually incurred in the production of income.

Reserve funds are normally separate accounts or highly liquid assets controlled by the taxpayer and which allow the taxpayer easy access to the funds to settle contingent liabilities or anticipated expenditure and losses.

The reserve fund can be distinguished from, for example, a trust account, which is set up on behalf of a third party for the benefit of that third party.

5.3. Income tax exemption: Registered political party

This Note provides guidance on the interpretation and application of the exemption from income tax under section 10(1)(cE) of the receipts and accruals of any political party registered under section 15 of the Electoral Commission Act.

According to the Constitution, all adult citizens are entitled to vote in elections for any legislative body created by the Constitution. Citizens are also assured the right to free, fair, and regular elections for these bodies. Additionally, the Constitution guarantees each citizen’s right to make political choices, which encompasses:

- forming a political party;
- participating in the activities of a political party or recruiting its members; and

- campaigning on behalf of a political party or a particular cause.

Chapter 9 of the Constitution establishes certain state institutions to support and uphold constitutional democracy. Amongst these, the Electoral Commission is specifically identified, with its constitutional duties including:

- overseeing the conduct of elections for national, provincial, and municipal legislative bodies as required by national legislation,
- ensuring that these elections are conducted freely and fairly, and
- declaring the outcomes of such elections within the shortest period allowed by national legislation.

The Constitution also states that the Commission is granted further powers and functions as determined by national legislation. The Electoral Commission Act was enacted to give effect to this constitutional requirement by formally establishing the Commission and outlining its extended powers and functions. These include, amongst other things, compiling and maintaining a register of political parties, as well as fostering liaison and co-operation with political parties, independent representatives, and independent candidates.

In My Vote Counts NPC v Minister of Justice and Correctional Services and another, the Constitutional Court recognised that political parties and independent candidates are the constitutionally designated means for attaining public office. However, it was observed that running a successful campaign for public office typically requires significant financial resources. Many candidates lack sufficient funding to conduct an effective campaign without outside support. While the State does offer some financial assistance to political parties for their activities, including campaigning, this support seems to fall short of which is actually needed to operate an effective political organisation or election campaign. As a result, there is a need for considerable financial contributions from the private sector or individuals to bridge the gap.

An independent candidate or representative, based on the definitions of ‘party’, ‘independent candidate’, and ‘independent representative’ in the Electoral Commission Act, do not qualify for this exemption. Therefore, this Note focuses exclusively on registered political parties, as they are currently the only entities eligible for the exemption under section 10(1)(cE).

Section 10(1)(cE) provides an automatic exemption from income tax for all receipts and accruals of any political party registered under the Electoral Commission Act, no application or approval from SARS is required.

Registered political parties are not allowed to issue section 18A receipts to donor taxpayers for any donations received.

All reporting and administrative requirements under the Act and TA Act must be met. It is the responsibility of the political party to prove its registration under the Electoral Commission Act and compliance with the relevant requirements for purposes of the income tax exemption considered in this Note. The registered political party must keep sufficient evidence to support its status and the view taken and if SARS requests it, this proof must be provided in an acceptable form.

6. DRAFT INTERPRETATION NOTES

6.1. Reduced assessments: Meaning of 'readily apparent undisputed error'

This Note provides guidance on the interpretation and application of the phrase 'readily apparent undisputed error' referred to in section 93(1)(d).

To simplify and harmonise tax administration, the TA Act consolidates administrative provisions that are generic to all taxes imposed under the other tax Acts. Although the TA Act is the primary vehicle for tax administration, some other tax Acts contain administrative provisions that are unique to the tax type that they govern or additional to those contained in the TA Act. Because these Acts are the main legislative authority on both the charging and administration of the tax type that they regulate, where they specifically provide for administration and the TA Act is silent, their provisions apply, and in the case of inconsistency with the TA Act, prevail. Conversely, where the other tax Act is silent, the TA Act applies, and if there is no inconsistency, both Acts find application.

A taxpayer who is aggrieved by an assessment has the right to dispute that assessment.

In the case where an assessment has been issued and the taxpayer is aggrieved by the assessment, the taxpayer may follow the dispute resolution process provided under Chapter 9. An alternative, less formal process, is provided under section 93(1)(d) in terms of which a taxpayer can request a reduced assessment. This process applies only when there is a readily apparent undisputed error in an assessment by SARS or by the taxpayer in a return.

Due to the misuse of the process in the past, section 93(1)(d) was amended to include the requirement that the error must be 'readily apparent' and not just 'apparent'. The Memorandum on the Objects of Tax Administration Laws Amendment Bill, 2015, explains the reason for the amendment as follows:

> 'Section 93(1)(d) of the Tax Administration Act was inserted to allow taxpayers a less formal mechanism to request corrections to their returns and so reduced assessments, without having to follow the objection and appeal route to do so. However, taxpayers have attempted to use these requests for correction to raise substantive issues that would more properly be the subject of an objection under section 104, so as to bypass the timeframes and procedures for an objection. Furthermore, taxpayers and unregistered tax practitioners have also attempted to use the requests for correction to obtain fraudulent refunds for multiple years. For these reasons, the wording has been amended to provide that SARS must be satisfied that there is a ''readily apparent'' error to clarify the nature of the errors anticipated here.' (Emphasis added)

The determination of what constitutes a 'readily apparent undisputed error' to the satisfaction of SARS is critical for the following reasons:

- It determines whether the taxpayer is entitled to request a correction for a reduced assessment under section 93(1)(d) or whether the taxpayer must follow the objection and appeal route under Chapter 9.
- It ensures consistency in the interpretation and application of section 93(1)(d) by both SARS and taxpayers.

Importantly, section 93(1)(d) does not replace the dispute resolution process under Chapter 9 but offers a less formal, cost-effective mechanism to resolve undisputed errors that are readily apparent.

Section 93(1)(d) can be applied only if all the requirements are met. This Note provides general guidance on the application and interpretation of section 93(1)(d). Since it is not possible to define or apply a definite all-embracing test, the facts of each case must be considered.

Section 93(1)(d) provides for a taxpayer to request SARS to reduce an assessment without having to follow the normal objection and appeal process under section 104 and 107. Section 93(1)(d) must not be regarded as an alternative for formal disputes where a taxpayer has exceeded the prescribed periods for objection and appeal. SARS will consider this request only if all the requirements of section 93(1)(d) are met.

A taxpayer requesting a reduced assessment under section 93(1)(d) must satisfy SARS that:

- an error was made in an assessment by SARS or a taxpayer in a return;
- the error must be readily apparent; and
- the error must be undisputed

It is a factual enquiry whether the requirements of section 93(1)(d) are met having regard to the facts of a specific case and it is therefore not possible to provide a definite all-embracing test to apply. The taxpayer bears the burden of proof to satisfy SARS that a readily apparent undisputed error was made by SARS in an assessment or a taxpayer in a return.

6.2. The meaning of 'deemed to be one and the same person' for determining the entitlement to the wear-and-tea allowance under an amalgamation transaction

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

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

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

Section 41(2) provides that, subject to section 41(3), the corporate rules in sections 42 to 47 apply to transactions set out in those sections, and these sections take

precedence over other provisions in the Act, except for the specific sections mentioned in section 41(2).

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

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

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

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

The phrase 'deemed to be one and the same person' creates for a situation that results in a tax-neutral position for both the amalgamated and resultant companies upon the transfer of an allowance asset.

Unlike section 11(e), section 12C does not provide for the apportionment of the deduction if the asset is used for only part of the year of assessment. Therefore, if the amalgamated company meets the requirements of section 12C to claim the allowance in the year of assessment during which the transfer of the asset occurs, the amalgamated company, not the resultant company, may claim the full allowance for that year, even if the resultant company meets the requirements for the allowance after the transfer. The resultant company may claim the section 12C allowance in the year of assessment following the year in which the amalgamation occurred, provided that the requirements of section 12C are satisfied.

6.3. Loan, advance, or credit granted to a trust by a connected natural person

This Note provides guidance on the interpretation and application of section 7C, which targets interest-free or low-interest loans, advances, or credit granted by a connected person to a trust (with certain exclusions). It deems the interest forgone by the lender to be a continuous donation for as long as the interest-free or low-interest loan remains outstanding.

Wealth transfer through trusts can occur in several ways. For example:

- A person may donate assets to a trust, triggering donations tax at a rate of 20%.
- A person may sell assets to a trust on loan account, subject to interest at a market-related rate. In this case, the person is liable for normal tax on the interest portion of the loan repayments made by the trust.
- A person may sell assets to a trust on loan account with interest below the official rate or no interest at all. Donations tax will not be triggered since this transaction is classified as a sale rather than a donation. Consequently, the income tax provisions are not applicable to the forgone interest due to not charging interest at market-related rates.
- A person may advance an interest-free loan or a loan with interest below market-related rates to a trust, enabling the trust to acquire assets or retain the advance, thereby avoiding donations tax and income tax on the forgone interest.

In certain cases, the lender may also reduce or waive the loan capital owed, either as settlement for an outstanding consideration for an asset disposal or to settle loan funding advanced to a trust. This action also circumvents estate duty by reducing or waiving the lender's asset base concerning the loan capital.

To restrict taxpayers' ability to transfer wealth to a trust without incurring tax, section 7C was introduced, effective from 1 March 2017. This section applies to any loan, advance, or credit provided under specific circumstances to a trust by a connected person who must be a resident. It covers loans made to the trust on or after 1 March 2017, including those made before the effective date.

Following the introduction of these rules, some taxpayers sought to avoid section 7C by providing interest-free or low-interest loans to companies whose shares are held by trusts. By advancing the loan to the company instead of the trust, the original anti-

avoidance measures of section 7C did not apply, as the rules only targeted loans made directly to trusts. To address this, the Taxation Laws Amendment Act 17 of 2017 amended section 7C(1) to include interest-free or low-interest loans, advances, or credit provided by a person or a company (at the instance of a person) to a company whose shares are held by a trust that is a connected person in relation to that individual or a beneficiary of that trust. This amendment took effect from 19 July 2017 and applies to any amount owed by a trust or company for a loan provided before, on, or after that date.

Further amendments were made by the Taxation Laws Amendment Act 23 of 2020 to counter new structures used to bypass the anti-avoidance rules under section 7C.

These involved persons subscribing for preference shares with little or no return in companies owned by trusts connected to those individuals. The amendment introduced section 7C(1B), addressing subscriptions for preference shares by individuals or companies at the request of a person, as a method to circumvent section 7C's anti-avoidance rules. Section 7C(1B) deems such subscriptions to be loans liable to donations tax under specific circumstances. Any dividend or foreign dividend accrued regarding these preference shares is deemed to be interest concerning the loan, and this amendment applies to any dividend or foreign dividend accruing during any year of assessment commencing on or after 1 January 2021.

The anti-avoidance provisions under section 7C impose an ongoing, annual donations tax liability on the individual, reversing the affected transfer of wealth while the loan, advance, or credit remains outstanding. If a trust or company incurs no interest on a loan, advance, or credit, or incurs interest below the official rate, the difference between the interest incurred during the year of assessment and what would have been incurred at the official rate is deemed a donation to the trust or company.

Donations tax in these circumstances is determined on the last day of the year of assessment of the trust or company, after deducting any applicable annual donations tax exemption.

For the purposes of section 7C, interest is calculated as simple interest on the outstanding balance of the loan, advance, or credit based on the official rate of interest as it is adjusted periodically.

Some exclusions from application of section 7C

Section 7C(5) provides that section 7C does not apply to any amount owed by a trust or company during any year of assessment in respect of a loan, advance, or credit referred to in subsection (1) under for example the circumstances listed below:

Public benefit organisation or small business funding entity

The trust or company is a PBO approved by SARS under section 30(3) or a small business funding entity approved under section 30C.

Vesting interest in the receipts or accruals and assets of the trust

A loan, advance, or credit provided to that trust by a person is by reason of or in return for a vested interest held by that person in the receipts, accruals, and assets of such a trust.

Special trust

A loan, advance, or credit to a 'special trust' as defined in paragraph (a) of the definition of 'special trust' in section 1(1).

Acquisition or improvement of primary residence

A loan utilised by the trust or company, either wholly or partially, to fund the acquisition or improvement of an asset, where the person or their spouse uses that asset as a primary residence, as outlined in paragraph (b) of the definition of 'primary residence' in par. 44 of the Eighth Schedule. It is also necessary that the primary residence is primarily used for domestic or private purposes throughout the year of assessment during which the trust or company held that asset.

The amount owed must correspond to the portion of the loan, advance, or credit that funded the acquisition or improvement of that asset.

The term 'primary residence' is defined in paragraph 44 of the Eighth Schedule. Under paragraph (b) of this definition, 'primary residence' means a residence where the person, a beneficiary of that special trust, or the spouse of either:

- ordinarily resides or resided in as his or her main residence; and
- uses or used mainly for domestic purposes.

If the loan, advance, or credit is partly used to fund the acquisition or improvement of a primary residence as described above, only that portion will be exempt from the provisions of section 7C.

The assessment of whether the primary residence and the land are mainly used for domestic or private purposes is a matter of fact. The term ‘mainly’ is not defined in the Act. The Cambridge English Dictionary defines ‘mainly’ as ‘usually, or to a large degree’.

In SBI v Lourens Erasmus (Edms) Bpk, Botha JA determined that, in the context of an exemption for the previously applicable undistributed profits tax, the term ‘mainly’ prescribed a purely quantitative standard of more than 50%.

In the ITC 1897, 64 Boqwana J, held that the normal usage of the word ‘mainly’ implies a quantitative measure of more than 50%.

In the context of section 7C(5), ‘mainly’ is similarly interpreted to mean ‘more than 50%.’ Consequently, more than 50% of the primary residence and unconsolidated adjacent land must be used for domestic or private purposes throughout the year of assessment for it to qualify for the exclusion.

Conclusion

Further consequences of loans, advances, or credit made to connected persons that fall outside the scope of section 7C are not addressed in this Note (for instance, loans made by a trust to a beneficiary).

Section 7C applies to any loan, advance, or credit that a person, or at the request of a person, a company to which that person is a connected person under paragraph (d)(iv) of the definition of connected person, directly or indirectly provides to certain connected trusts or companies.

If the loan, advance, or credit was provided under these prescribed circumstances interest-free or at a low interest rate relative to the official rate of interest, donations tax consequences are triggered based on the daily calculation of simple interest. This calculation is performed for each year of assessment of the trust or company based on the outstanding amount of the loan, advance, or credit during that year.

Certain amounts owed by a trust or company in respect of a loan, advance, or credit are not subject to section 7C.

7. BINDING PRIVATE RULING

7.1. Sale of fixed assets and an interest in a joint venture – No. 415

This ruling determines the tax consequences of the Applicant selling fixed assets and an interest in a Joint Venture (JV), which operates the Applicant's assets on a cost recovery basis.

In this ruling references to sections are to sections of the VAT Act applicable as at 22 July 2025. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the VAT Act.

This is a ruling on the interpretation and application of:

- section 7(1)(a).

Parties to the proposed transaction

The Applicant: A resident company

Foreign Co: A company resident in the United Kingdom, unrelated to the Applicant

SA Co: A resident company, of which all the shares are indirectly held by Foreign Co

Joint Venture: A joint venture in which the Applicant holds an interest

Description of the proposed transaction

The Applicant and Foreign Co entered into a sale agreement (the Sale Agreement) in terms of which the Applicant will dispose of assets to Foreign Co. The sale assets include the Applicant's interest in the JV (the JV interest). The JV interest consists of a 36.36% undivided interest in fixed assets owned by the Applicant and a 36.36% undivided interest in the JV agreement with the other JV partner in respect of the operations which are conducted on a cost recovery basis. Foreign Co has assigned all of its rights and obligations under the Sale Agreement to SA Co.

Conditions and assumptions

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

Ruling

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

- Although the Joint Venture operations are separately registered for VAT, the Joint Venture operates the Applicant's fixed assets on a cost recovery basis for

the benefit of the Applicant, and therefore the assets sold under the Agreement as set out are connected to the Applicant's enterprise.

- The sale of the fixed assets and the interest in the Joint Venture agreement by the Applicant, which are together defined as 'the assets' under the Sale Agreement, is subject to VAT at the standard rate in accordance with section 7(1)(a) of the VAT Act.

7.2. Transfer of reinsurance business from a resident company to a local branch of a foreign company – No. 416

This ruling determines the tax implications of the transfer of a reinsurance business from a resident reinsurer to a local branch of a foreign company.

In this ruling references to sections and paragraphs are to sections of the relevant Income Tax Act and paragraphs of the Eighth Schedule to the IT Act, and the VAT Act applicable as at 9 April 2025.

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 IT Act:
    - section 1(1) – definition of 'gross income' and 'dividend';
    - section 11(a);
    - section 28;
    - section 29A;
    - section 64D – definition of 'dividend';
    - paragraph 3;
    - paragraph 4;
    - paragraph 11(1); and
    - paragraph 11(2)(a).
- the VAT Act:
    - section 1(1) – definition of 'supply';
    - section 8(7);

- section 10(4);
- section 11(1)(e); and
- section 16(3)(h).

Parties to the proposed transaction

The Applicant: A private company and a resident of South Africa

Company A: A foreign company and a non-resident of South Africa, that holds all the issued share capital in the Applicant

The Co-Applicant: A permanent establishment of Company A in South Africa

The Trust: A resident trust established for insurance regulatory purposes as required by section 40 of the Insurance Act 18 of 2017

Description of the proposed transaction

The Applicant has active business operations (including employees, facilities, and infrastructure) in South Africa. Its main business is short-term and long-term reinsurance and it retrocedes a significant portion of its business with foreign group companies.

Company A wishes to convert the ownership of its operations in South Africa from a subsidiary (the Applicant) to a branch (the Co-Applicant). Company A, incorporating the Co-Applicant, will be a foreign connected person in relation to the Applicant.

The Applicant intends to implement the restructuring by transferring its entire business, consisting of all its assets and liabilities, to Company A in exchange for Company A returning all but one of its shares in the Applicant as consideration for the transfer of the business. The assets and liabilities acquired by Company A will be attributable to its branch in South Africa, the Co-Applicant.

Prior to the transfer of business, the Applicant will dispose of any non-cash assets used to back the net policyholder liabilities, with the effect that it will have cash on its balance sheet instead of non-cash assets to back the net policyholder liabilities when the transfer takes place, which will also be reported to the Prudential Authority as such. The disposal of the non-cash assets will attract income tax and capital gains tax consequences in the various tax funds of the Applicant depending on the nature of the asset disposed and the tax fund the asset is allocated to for the purposes of section 29A of the IT Act.

The detailed steps include:

- As part of the transfer of its business, the Applicant will delegate its liabilities to the Co-Applicant net of any insurance and reinsurance contract assets and insurance-related financial instruments. The assets transferred as part of the business by the Applicant to the Co-Applicant to back these net liabilities, will constitute cash with a value equal to the market value of the net liabilities delegated to the Co-Applicant. The remainder of the assets transferred, in excess of the market value of the net liabilities delegated, will constitute cash as well as certain non-cash assets; and
- The consideration for the transfer of business will be all but one share in the Applicant, all of which are currently held by Company A. As the shares will be transferred to the issuer (i.e. the Applicant) this element of the transaction will amount to a share repurchase. The consideration in respect of the repurchase of shares is regarded as a distribution of the value of the business, which comprises assets less liabilities. The Applicant will distribute its remaining assets (including cash, fixed assets, investments, receivables, contracts including those related to employees, intellectual property, and intangible assets), in excess of the market value of the net liabilities delegated to the Co-Applicant, to Company A.

The value of the business is recorded for purposes of the transaction as in the Applicant's audited annual financial statements at the end of its 2024 financial year.

Regulatory approval is required from the Prudential Authority to proceed with the license for the Co-Applicant in South Africa as well as the transfer of the business from the Applicant to the Co-Applicant in South Africa. In addition, it is a regulatory requirement that a South African trust (the Trust) be established to hold certain assets of the Co-Applicant as security. The legal structure of the Trust must be approved by the Prudential Authority and must comply with the legislative requirements of the Trust Property Control Act 57 of 1988 and the Insurance Act 18 of 2017.

The Co-Applicant will continue to carry on the business previously conducted by the Applicant in South Africa in the same manner as the Applicant, as a foreign reinsurer conducting reinsurance business in South Africa in terms of section 6 of the Insurance Act.

The Applicant will dispose of its assets and liabilities to the Co-Applicant, but certain assets required to be held in trust for regulatory purposes will be delivered to the Trust and be held by the Trust for the benefit of the Co-Applicant.

The Co-Applicant will own the assets held as security in the Trust and the income accruing in respect of those assets will accrue to and for the benefit of the Co-Applicant. However, the Insurance Act requires that the Co-Applicant must comply with all requirements under the Insurance Act before giving instruction to the trustee(s) to release assets, claims, and rights comprised in the security held in trust to the Co-Applicant, including the requirement that the Co-Applicant may not access or withdraw funds held in the Trust without the approval of the Prudential Authority.

The Co-Applicant will be required to ensure that assets are held in the Trust at all times, such that such assets are at least equal to the technical provisions (after certain allowances) for the reinsurance business of the Co-Applicant calculated in accordance with the Insurance Act, as contemplated in section 40(1) of the Insurance Act. For these purposes, it is envisaged that the Co-Applicant may transfer further assets to the Trust to ensure this requirement is satisfied. The Trust may return excess assets to the Co-Applicant, subject to the required approvals in terms of the Insurance Act.

The Applicant makes both taxable and non-taxable supplies for VAT purposes and its main business (i.e. more than 50%) relates to gross premium income on non-life reinsurance, retrocession commission for retroceded non-life business, zero rated premium income from life reinsurance (non- residents) and non-life retrocession recoveries received from local reinsurers, which are all taxable supplies for VAT purposes. The Applicant is in possession of a VAT ruling issued under section 41B of the VAT Act, which allows the Applicant to use a special method of apportionment to determine its apportionment ratio for purposes of section 17(1) of the VAT Act. The Applicant is further permitted under the said ruling to calculate and apply apportionment ratios in respect of each of its three different business areas.

Company A is currently registered for VAT as an electronic services supplier in South Africa. This registration is because of electronic services supplied by Company A to the Applicant. For purposes of this transaction, the intention is to use the current Company A VAT registration number. The Applicant and Company A have agreed in writing that the business is being transferred or disposed of as a going concern for VAT purposes.

Conditions and assumptions

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

Ruling

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

Income Tax

- Only the transfer of the net assets (i.e. the value of assets exceeding the value of net liabilities delegated by the Applicant to the Co-Applicant) of the Applicant to the Co-Applicant will constitute a dividend for the purposes of sections 1(1) and 64D of the IT Act, to the extent that the transfer is not made from available contributed tax capital.
- The receipt of the cash by the Co-Applicant from the Applicant equal to the value of the net liabilities assumed constitutes a receipt of a capital nature and is therefore not included in the gross income of the Co-Applicant in terms of the definition of 'gross income' in section 1(1) of the IT Act. The receipt also does not give rise to any Capital Gains Tax (CGT) consequences in the hands of the Co-Applicant, as the amount paid does not constitute expenditure incurred in respect of the acquisition of an asset. However, an amount that is equal to the amount to be deducted by the Applicant under section 28(3B)(a) must be included in the income of the Co-Applicant, as provided for by section 28(3B)(b) of the IT Act c) The Co-Applicant will constitute a short-term insurer conducting short-term insurance business in terms of section 28 of the IT Act and therefore the provisions of section 28(2), 28(3), 28(3A), 28(3B) and 28(4) will be applicable. Accordingly, the Co-Applicant will be entitled to section 11(a) deductions read with section 28(2), for claims paid in respect of long-term and short-term insurance policies newly written, as well as those existing policies assumed from the Applicant, within the context of section 28 of the Act and the definitions of short-term policy and branch policy included in that section.
- Premiums received by the Co-Applicant in respect of its short-term insurance business, which included its long-term insurance business, constitute premiums as defined in section 28 with the effect that section 28(2)(a) will also apply to the premium income received in respect of the long-term insurance business deeming it to be equal to insurance revenue for insurance contracts and net earned premiums for investment contracts, under International Financial Reporting Standards.
- The Co-Applicant will be entitled to deduct from its income the closing balance of its liabilities determined in terms of section 28(3) in relation to its short-term insurance business only.

- The Co-Applicant will be entitled to deduct from its income the closing balance of its liabilities determined in terms of section 28(3A) in relation to its long-term insurance business only.
- The Applicant will be allowed a deduction from its income, in terms of section 28(3B)(a), for both the liability for incurred claims and the liability for remaining coverage components of the liabilities relating to the short-term insurance book of business transferred to the Co-Applicant.
- Insofar as the cash amount transferred by the Applicant to the Co-Applicant relates to operational liabilities assumed by the Co-Applicant that have been actually incurred by the Applicant (but not yet paid) which are not contingent in any way, that cash payment will constitute deductible expenditure under section 11(a), read with section 23(g) of the IT Act.
- Any gains and losses on the assets held in security in the Trust on behalf of and for the benefit of the Co-Applicant and the income accruing on such assets will be attributed to the Co-Applicant in terms of the definition of gross income in section 1(1) of the IT Act and paragraphs 3 and 4 of the Eighth Schedule to the IT Act with the result that the Trust will derive no taxable income in respect of such amounts.
- The transfer of assets by the Co-Applicant to the Trust to ensure the required level of assets are held in security by the Trust for regulatory purposes will not be considered disposals for CGT purposes.

Value-Added Tax

- The disposal of the Applicant's enterprise as a going concern, forming part of the transfer of its business to the Co-Applicant, will constitute a supply that is subject to VAT at the zero rate under section 11(1)(e) of the VAT Act. The disposal of goods or services applied mainly (that is, more than 50%) for purposes of the Applicant's enterprise, as part of this transfer of the business, will also be deemed to form part of the enterprise disposed of as a going concern which is subject to VAT at the zero rate. The zero rate in this regard applies only to the supply of those goods and/or services forming part of the enterprise being disposed of as a going concern.

  This ruling is not an expression of an opinion on the intention by the Co-Applicant to use the VAT registration number of Company A for purposes of the transaction in this case.

- The disposal of the Applicant's enterprise as a going concern, forming part of the transfer of the business by the Applicant to the Co-Applicant, is deemed to be a supply of goods in the course of the Applicant's enterprise under section 8(7) of the VAT Act. This deeming provision does not apply to the portion of the business transferred that is not considered to form part of such enterprise.
- The Applicant is entitled to make an adjustment in terms of section 16(3)(h) of the VAT Act, in respect of each item of the goods and/or services forming part of the supply of an enterprise that is a going concern for purposes of section 11(1)(e) of the VAT Act (where applicable) and by applying the formula set out in the said section in calculating the adjustment amount. The Applicant may make this adjustment by determining, for purposes of the formula, the non-taxable portion of the apportionment ratio of the specific business area from where the item is transferred, at the time the original input tax deduction was made, taking into account the ratio of any subsequent change in use adjustments, and claim an adjustment using the tax fraction prevailing at the time of making the adjustment.
- There is no separate supply made by the Co-Applicant to the Applicant where it assumes the insurance liabilities (net of any 'negative liabilities') of the Applicant together with the cash that backs these liabilities.
- A separate supply is considered to be made by the Co-Applicant where it assumes all of the Applicant's other free-standing liabilities together with the cash that backs these liabilities. The supply is however considered to fall outside of the scope of VAT and therefore has no VAT consequences from an output tax perspective.
- The 'negative liability' is merely an adjustment and a means of arriving at the market value of the liabilities transferred to the Co-Applicant and for VAT purposes does not constitute a separate supply of goods or services from the Applicant to the Co-Applicant or from the Co-Applicant to the Applicant.
- The bonds, shares, loans or cash transferred to the Trust do not constitute supplies made by the Co-Applicant for VAT purposes, as the Trust merely holds the assets for regulatory purposes and there is no underlying supply made or consideration being paid. As there is no supply, the value of supply rules in section 10 of the VAT Act, including those for connected parties envisaged in section 10(4) of the VAT Act, do not apply.

- Non-cash assets transferred from the Co-Applicant to the Trust do not constitute supplies made by the Co-Applicant for VAT purposes, as the Trust merely holds the assets for regulatory purposes and there is no underlying supply made or consideration being paid. As there is no supply, the value of supply rules in section 10 of the VAT Act, including those for connected parties envisaged in section 10(4) of the VAT Act, do not apply.

7.3. Distribution of funds in the furtherance of objectives – No. 417

This ruling determines that the distribution by the Applicant of its funds to its members is in the furtherance of its objectives and that the distribution does not have any donations tax implications.

In this ruling references to sections are to sections of the Income Tax Act applicable as at 19 May 2025. 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 30B(2)(b)(iii);
- section 55(1) – definition of ‘donation’; and
- section 58(1).

Parties to the proposed transaction

The Applicant: A body created in terms of its constitution read with sections 27 and 30 of the Labour Relations Act 66 of 1995 (the LRA) and duly registered bargaining council in terms of the LRA.

Description of the proposed transaction

The members of the Applicant are registered employer’s organisations and registered trade unions whose members are engaged or employed in a specific industry (the Industry).

The objects of the Applicant according to its Constitution include the following:

- to promote good relationships between employers and employees;
- to secure complete organisation of employers and employees in the Industry;
- to administer agreements arrived at by the parties;

- to receive and raise monies by such means as the Applicant may, from time to time, consider advisable for the purpose of furthering the objects of the Applicant in the interest of employers and employees in the Industry, including the disbursement of moneys to such persons, bodies or organisations on behalf of the Applicant;
- to do such other things as may tend to the furtherance of the above objects or any of them.

Substantially the whole of the Applicant's funding is derived from its members.

The Applicant previously entered into an agreement (the Agreement) with:

- employer's organisations in the Industry; and
- trade unions in the Industry,

collectively referred to as the Affiliated Labour and Employer Organisations.

The object of the Agreement was to be to ensure that all employees who received the benefits of collective bargaining contributed towards its costs.

In terms of the Agreement, a levy had to be deducted by employers from the wages of all employees who were employed in the Industry on scheduled activities and who were not members of a trade union which was a member of the Applicant. The employers were required to deduct the levy, complete return forms monthly and pay the levies collected to the Applicant. The Applicant was required to deposit all monies received as per the Agreement to a separate bank account administered by it and transfer the amounts so received to the trade unions which were members of the Applicant in proportion to the number of members of each trade union. Upon receipt of the amounts, the trade union were to pay the amounts into separate bank accounts administered by each one of them.

As regards employers who were not members of any employer organisation affiliated to the Applicant but who were engaged in the Industry, the Agreement required that they pay a monthly levy to the Applicant. The non-member employers were required to complete and submit a return form and pay the levies to the Applicant. The Applicant was required to pay the levies collected to the employer's organisations affiliated to the Applicant.

The employees who were not members of trade unions referred to above and the employers who were not members of an employer organisation referred to above are collectively hereafter referred to as Non-Parties.

The Applicant acted as an agent for the Affiliated Labour and Employer Organisations in the collection of the levy mentioned above. In terms of the Applicant's Constitution, it was entitled to earn interest on monies received by it from the Non-Parties.

The Agreement subsequently expired and the Applicant notified Non-Parties accordingly. Despite the expiry of the Agreement and the Non-Parties being notified that the Agreement had expired and there was no legal obligation to make payments anymore, several Non-Parties continued to make payments to the Applicant (the Post-Expiry Amounts). Where possible, the Applicant was able to refund PostExpiry Amounts paid by Non-Parties to the Non-Parties but this was not possible in respect of all amounts paid to it.

The Applicant kept the Post-Expiry Amounts collected for the 2013 – 2023 years of assessments and interest earned separate from its other receipts for accounting purposes and in separate bank accounts. The Applicant never utilised the monies.

Claims for the repayment of a proportion of the amounts so overpaid having prescribed, the proposed transaction entails the distribution of that portion of the Post-Expiry Amounts to the Affiliated Labour and Employer Organisations in the proportions to which the Agreement entitled them.

The proposed transaction will be achieved as follows:

- The Applicant will deduct from the Post-Expiry Amounts the following:
    - interest to which the Applicant is legally entitled;
    - a handling fee; and
    - fees for advisory services rendered relating to the Post-Expiry Amounts.
- The Applicant will distribute the remaining balance of the Post-Expiry Amount (the Distributable Amount) to the Affiliated Labour and Employer Organisations.

Conditions and assumptions

This binding private ruling is subject to the additional conditions and assumptions that nothing contained in the ruling should be construed as a determination that any Non-Party or Affiliated Labour and Employer Organisation is entitled to any particular amount, or that the Applicant has calculated any of its liabilities arising out of the proposed transaction correctly.

Ruling

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

- On the basis that the Applicant has been granted approval by SARS under section 30B, the distribution of the Distributable Amount by the Applicant to the Affiliated Labour and Employer Organisations will not be in contravention of section 30B(2)(b)(iii) .The distribution will be undertaken in the course of the furtherance of the Applicant's objectives in accordance with its Constitution.
- The distribution of the Distributable Amount by the Applicant to the Affiliated Labour and Employer Organisations will not constitute a 'donation' as defined in section 55(1) nor a deemed donation as contemplated in section 58(1).

7.4. Asset-for-share transfer involving close corporation– No. 418

This ruling determines the income tax, value-added tax (VAT) and transfer duty consequences of the disposal in accordance with section 42 of the Act by a natural person of assets to a close corporation of which he is the sole member.

In this ruling references to sections are to sections of the Income Tax Act, VAT Act and the Transfer Duty Act and references to schedules are to schedules to the Act applicable as at 19 May 2025.

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) – paragraph (f) of the definition of 'company' and the definition of 'trading stock';
    - section 24BA;
    - section 41(1) – definition of 'base cost';
    - section 41(7);
    - section 42;
    - section 55(1) – definition of 'donation';
    - section 58(1);
    - paragraph 1 of the Eighth Schedule – definitions of 'asset' 'base cost' and 'pre-valuation date asset';
    - paragraph 14(1) of the First Schedule.

- the VAT Act:
    - section 8(7); and
    - section 11(1)(e).
- the Transfer Duty Act –
    - section 9(1)(l).

Parties to the proposed transaction

The Applicant: A resident close corporation.

Co-Applicant: A resident natural person.

Description of the proposed transaction

The Co-Applicant is a sole proprietor conducting a timber farming operation in South Africa. The Co-Applicant is the owner of movable and immovable assets which he uses in this farming operation. The Co-Applicant's immovable asset consists of land on which there are standing timber and buildings, including buildings used for residential purposes. The movable and immovable assets are referred to in the proposed transaction as the Sale Assets. They are all held on capital account by the Co-Applicant.

Some of the Sale Assets are pre-valuation date assets as defined in paragraph 1 of the Eighth Schedule.

The Applicant is a close corporation registered in terms of the Close Corporations Act 69 of 1984. The Co-Applicant is the sole member of the Applicant and thus holds all the member's interest in the Applicant. The Applicant also conducts a timber farming operation on its own land separate from the Co-Applicant's land.

The Co-Applicant proposes to streamline the two timber farming operations by disposing of the Sale Assets (held in person) to the Applicant so that the farming operations may be conducted solely through the Applicant.

The proposed steps to implement the restructuring are as follows:

- The Co-Applicant will dispose of the Sale Assets to the Applicant as a going concern in exchange for the Exchange Share (defined below) by the Applicant in terms of an 'asset-for-share transaction' as defined in paragraph (a) of that definition in section 42(1). The Sale Assets will be disposed of without debt and the Co-Applicant will not be entitled to additional consideration other than the Exchange Share.

- The Co-Applicant will be engaged on a full-time basis in the business of the Applicant by rendering a service.

The salient terms of the agreement between the Applicant and Co-Applicant will include the following:

- The words 'Exchange Share' are defined in the agreement – they mean the additional member's contribution, equivalent to the market value of the Sale Assets, credited to the Applicant's capital and reserve account, representing 31.86% of the member's contribution once the Sale Assets have been transferred, registered and delivered.
- The Applicant and Co-Applicant agree that at the effective date, the Co-Applicant shall transfer the right, title and interest in and to the Sale Assets to the Applicant. In exchange, the Applicant shall record the Exchange Share against the Co-Applicant's member's contribution on the effective date.
- The:
    - Co-Applicant is a registered value-added tax (VAT) vendor;
    - Applicant is a registered VAT vendor;
    - Sale Assets to be transferred constitute part of the Co-Applicant's income-earning enterprise as of the commencement date and will continue to be so at the effective date;
    - Applicant and Co-Applicant understand that the transaction will be subject to VAT at the zero rate; and
    - transaction will, by virtue of the provisions of section 9 of the Transfer Duty Act and the provisions of section 42, result in no Transfer Duty or VAT payable.

The Applicant and Co-Applicant will not elect out of section 42.

<u>Conditions and assumptions</u>

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

- The Applicant will acquire the Sale Assets currently held by the Co-Applicant as capital assets.
- The market values of the individual Sale Assets will be equal to or exceed their base costs at the time of disposal by the Co-Applicant.

Ruling

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

- The disposal of the Sale Assets by the Co-Applicant to the Applicant as a going concern in exchange for the Exchange Share by the Applicant will meet the requirements of paragraph (a) of the definition of 'asset-for-share transaction' in section 42(1)
- The Co-Applicant will, in terms of section 42(2)(a)(i), be deemed to have disposed of each of the Sale Assets to the Applicant for an amount equal to the base cost of each asset on the date of disposal taking into consideration the definition of 'base cost' in section 41(1).
- The Co-Applicant will be deemed, in terms of section 42(2)(a)(ii), to have acquired the Exchange Share on the date that the Co-Applicant acquired the Sale Assets (other than for purposes of section 9C) and for a cost equal to any expenditure in respect of the Sale Assets incurred by the Co-Applicant that is allowable in terms of paragraph 20 of the Eighth Schedule, and to have incurred such cost at the date of incurral by the Co-Applicant of such expenditure. The cost mentioned above must be treated as expenditure actually incurred and paid by the Co-Applicant in respect of the Exchange Share for purposes of paragraph 20 of the Eighth Schedule.
- In terms of section 42(2)(c), any valuation of the individual Sale Assets effected by the Co-Applicant within the period contemplated in paragraph 29(4) of the Eighth Schedule must be deemed to have been effected in respect of the Exchange Share acquired by the Co-Applicant.
- The disposal of the timber plantation will not result in any recoupment for the Co-Applicant in terms of section 42(3)(a)(i) read with section 41(7) and paragraph 14(1) of the First Schedule.
- The disposal of any other allowance assets will not result in any recoupment for the Co-Applicant in terms of section 42(3)(a)(i).
- The Applicant will be deemed in terms of section 42(2)(b) to be one and the same person as the Co-Applicant in determining any taxable income or capital gains or capital losses in respect of the future disposal of the Sale Assets.
- The Applicant will be deemed to be one and the same person as the Co-Applicant in determining the amount of any allowance or deduction to which

the Applicant may be entitled in respect of the timber plantation and any other allowance asset acquired from the Co-Applicant, or that is to be recovered or recouped by or included in the income of the Applicant in respect of the timber plantation or any other allowance asset in terms of section 42(3)(a)(ii).

- Section 42(3A) will apply in respect of the increase in the Applicant's contributed tax capital. The Applicant's contributed tax capital must be increased by the aggregate base costs (as determined above) of the Sale Assets at the time of the asset-for-share transaction.
- Section 24BA will not apply to the proposed transaction.
- The disposal by the Co-Applicant of his farming enterprise as a going concern will constitute a supply that is subject to VAT at the zero rate under section 11(1)(e) of the VAT Act. The zero rate will not apply in respect of the consideration for the residential buildings located on the farm.
- There will be no transfer duty payable by the Applicant in terms of section 9(1)(l) of the Transfer Duty Act provided that the public officer of the Applicant makes a sworn affidavit or solemn declaration that the acquisition of the Sale Assets complies with the provisions of section 9(1)(l)(i).
- There will be no donations tax implications.

7.5. Corporate Restructuring – Amalgamation Transaction – No. 419

This ruling determines the income tax consequences resulting from the transfer of shares in a company to the company by its holding company in anticipation of the termination of the latter.

In this ruling references to sections are to sections of the Income Tax Act applicable as at 19 June 2025. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the Act.

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

The Applicant: A resident company and a wholly-owned subsidiary of Foreign Co.

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

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

Foreign Co: The Applicant's non-resident shareholder

Description of the proposed transaction

The group of companies aims to reduce their administrative burden and costs by simplifying its corporate structure in South Africa.

Company A will dispose of all its assets, which includes the shares in the Co-Applicant, to the Applicant as a liquidation distribution in terms of section 47 of the Act. A ruling is not requested in respect of this transaction step.

The Applicant and Co-Applicant propose to enter into an amalgamation transaction in terms of which the Applicant will transfer its assets (the shares in the Co-Applicant received under the preceding transaction step) to the Co-Applicant in exchange for the issue of new shares in the Co-Applicant. The Applicant will, in the process of its termination, distribute the new shares in the Co-Applicant to Foreign Co.

Conditions and assumptions

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

Ruling

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

- The proposed transaction will not meet the requirements of paragraph (a) of the definition of 'amalgamation transaction' in section 44(1). The assets to be transferred by the Applicant to the Co-Applicant will not be transferred by means of an amalgamation, because the assets will be extinguished by confusio. They do not subsist in the Co-Applicant and thus there will be no merging or amalgamation of undertakings.

7.6. Application of section 8EA(3) – No. 420

This ruling clarifies how section 8EA(3) of the Income Tax Act will continue to apply, and the proviso to section 8EA(3) will not apply, in circumstances where equity shares in an operating company acquired by a person through the application of preference share funding, are still held, indirectly, by that person.

Relevant tax laws

In this ruling references to sections are to sections of the Act applicable as at 4 November 2025. 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: Resident companies A, B and C, being the parties that hold preference shares in the Applicant.

Description of the proposed transaction

The Applicant is an investment holding company wholly owned by an inter vivos trust, duly established in South Africa (the Trust).

The Applicant currently holds indirect interests in various South African operating companies through Company D.

In 2015 the Co-Applicants subscribed for cumulative redeemable preference shares in the Applicant (the Preference Shares). Between 2015 and the date of this ruling, further Preference Shares were issued by the Applicant and subscribed for by the Co-Applicants (the Preference Shares Subscriptions).

The Preference Share Subscription consideration was applied, in each instance, by the Applicant for a 'qualifying purpose' as defined in section 8EA(1). The application of the Preference Shares Subscription consideration included the acquisition by the Applicant of the equity shares in two companies that are 'operating companies' as defined in section 8EA(1); namely, Company E in 2019 and Company F in 2021 (collectively referred to as the Opcos). The acquisition by the Applicant of the equity shares in the Opcos was, in each instance, an indirect acquisition by subscribing for ordinary shares in two special purpose vehicles; being, Company G and Company H (collectively referred to as the SPVs). Company G and Company H respectively hold 13.5% and 28% of the shares in Company E and Company F.

In 2022, the Applicant implemented an internal asset restructure, which resulted in the SPVs being housed under Company D, with the Applicant continuing to hold the equity shares in the Opcos on an indirect basis after such restructure.

The Trust guaranteed the obligations of the Applicant vis-à-vis the Preference Shares.

It is now proposed that, in anticipation of liquidation, the SPVs distribute their investments in the Opcos and other assets to Company D, in terms of section 47 of the Act (the Proposed Transaction).

Conditions and assumptions

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

- At the time that a dividend is received by or accrues to a Co-Applicant in respect of a Preference Share, in each instance, such share in respect of which the dividend is received or accrues, constitutes a 'preference share' as defined in section 8EA(1), in respect of which an 'enforcement right', as defined, is exercisable by the holder.
- The funds derived from the issue of the Preference Shares were applied for a qualifying purpose as contemplated in 8EA(3)(a) read with the definition of 'qualifying purpose' in section 8EA(1). This requirement of section 8EA was still met post the implementation of the internal group restructure in 2022. The Opcos are 'operating companies' as defined in section 8EA(1) when the Preference Share dividend is received by or accrue to a Co-Applicant.
- The 'enforcement right' is exercisable against the Trust, being a person contemplated in section 8EA(3)(b).

Ruling

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

- The implementation of the Proposed Transaction will not result in the proviso to section 8EA(3) becoming applicable. Consequently, section 8EA(3) will continue to apply to the Preference Share dividends received by or accrued to the Co-Applicants.
- The implementation of the Proposed Transaction, in and of itself, will not result in section 8EA(2) finding application.

7.7. Withdrawal from a superannuation fund situated outside South Africa – No. 421

This ruling determines the tax consequences of a lumpsum benefit paid to a resident from a superannuation fund situated outside South Africa.

In this ruling, references to sections and paragraphs are to sections of the Income Tax Act and paragraphs of the Eighth Schedule to the Act, applicable as at 5 June 2025.

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

This is a ruling on the interpretation and application of:

- section 1(1) - paragraph (c) of the definition of 'gross income';
- section 6quat; and
- paragraph 54(b).

Parties to the proposed transaction

The Applicant: A resident individual.

Description of the proposed transaction

The Applicant is a resident and has never been a tax resident of Australia. The Applicant incorporated Company A in Australia in 1980 to act as a corporate trustee to an inter vivos trust (the Trust) and received distributions from the Trust from time to time. Company A is managed and controlled in Australia and regarded as an Australian tax resident.

The Applicant established a superannuation fund (the Personal Super Plan) situated in Australia in 2007.

Acting in the capacity as a director of Company A, the Applicant performed his directorship duties in South Africa for which he received both wages and superannuation contributions sponsored by Company A. The contributions by Company A for the Applicant's benefit were made to the Personal Super Plan in Australia (Employer Contributions). The Employer Contributions made by Company A were funded from administration fees charged to and distributions received from the Trust.

Contributions to the Personal Super Plan were also made by the Applicant in his personal capacity (the Applicant Contributions). The source of the Applicant's Contributions was from after tax income earned in South Africa. These amounts were transferred to Australia by the Applicant by making use of his annual 'Approved International Transfer' allowances.

The Applicant left Australia in 2020, having contributed to the Personal Super Plan since circa 2007. The Applicant did not claim from the Personal Super Plan on departing from Australia in 2020.

As there was no claim made by the Applicant against the Personal Super Plan, the Personal Super Plan unclaimed benefits were transferred to the Australian Tax Office (ATO) on 20 March 2024, on a request from the ATO to the Personal Super Plan for such transfer.

The Applicant now wishes to take a full lumpsum withdrawal benefit from his Personal Super Plan in the form of a 'Departing Australian Superannuation Payment' (DASP). Resultant from the transfer on 20 March 2024, the Applicant will claim the DASP from the ATO.

The Personal Super Plan is a fund or arrangement situated outside South Africa which provides for similar benefits under similar conditions to a pension, pension preservation, provident, provident preservation or retirement annuity fund approved in terms of the Act.

Conditions and assumptions

This binding private ruling is subject to the additional condition and assumption that the Applicant has not become unconditionally entitled to any amount forming part of the DASP amount, to be paid in terms of the proposed transaction, at any time prior to the proposed transaction.

Ruling

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

- The withdrawal by the Applicant from his superannuation fund, by way of a DASP, will constitute a disposal of an asset, as defined in the Eighth Schedule.
- Any capital gain or loss determined in respect of the forementioned disposal will be disregarded in terms of paragraph 54(b) of the Eighth Schedule to the Act.
- The 'Employer Contribution' component of the DASP amount, plus the growth thereon, will fall into the ambit of paragraph (c) of the definition of 'gross income' in section 1(1).
- A section 6quat rebate will not be available in respect of the foreign taxes withheld relating to the 'Employer Contribution' component of the DASP amount, plus the growth thereon.

7.8. Lumpsum from a foreign Fund – No. 422

This ruling determines the tax consequences in relation to the accrual of a lumpsum payment to a resident from a foreign pension fund in respect of services rendered outside South Africa.

In this ruling references to sections and paragraphs are to sections of the Income Tax Act and paragraphs of the Second Schedule and the Eighth Schedule to the Act applicable as at 4 September 2025. 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:

- paragraphs (c) and (e) of the definition of 'gross income' in section 1(1);
- section 10(1)(gC)(ii);
- paragraph 1 – definition of 'lumpsum benefit' - of the Second Schedule; and
- paragraph 54(b) of the Eighth Schedule.

Parties to the proposed transaction

The Applicant: A resident of South Africa

Country X: A foreign country

Company A: A company in Country X

Fund A: The Pension Scheme of Company A

Fund B: A pension scheme in Country X

Description of the proposed transaction

The Applicant is a foreign citizen who moved to South Africa on 28 December 2012. The Applicant became a resident by virtue of the physical presence test during the 2019 tax year, that is, resident from 1 March 2018.

Whilst living in Country X the Applicant was employed by Company A from 1987 to 2012. During this period, the Applicant was a member of Fund A and in terms of the scheme rules, both the Applicant and Company A made contributions to Fund A. All the services relating to the Applicant's employment with Company A were rendered in Country X.

Five years after the cessation of the Applicant's employment with Company A and having reached the required retirement age in terms of the rules of Fund A, the Applicant transferred an amount from Fund A to Fund B. Both funds are registered

pension schemes in Country X. The amount transferred was the maximum amount allowed to be transferred or withdrawn by the Applicant from Fund A. In terms of the tax rules in Country X, there was no accrual for the Applicant as a result of the amount transferred. The Applicant retained a deferred annual pension benefit under Fund A, which is prohibited from being transferred.

The Applicant has made no further transfers or further additions to Fund B and any increase in value in Fund B is due to the growth within the fund after the transfer from Fund A. The Applicant proposes to make a full withdrawal in the form of a lumpsum from Fund B.

Conditions and assumptions

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

Ruling

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

- The lumpsum from Fund B must be included in the Applicant's gross income in terms of paragraph (c) of the definition of 'gross income' in section 1(1).
- The lumpsum from Fund B does not comply with the definitions of 'lumpsum benefit' in section 1(1) and paragraph 1 of the Second Schedule to the Act and accordingly does not fall within the provisions of paragraph (e) of the definition of 'gross income'.
- The exemption provided for in section 10(1)(gC)(ii) will apply to the lump sum included in the Applicant's gross income.
- Paragraph 54(b) of the Eighth Schedule will apply to disregard any capital gain or loss determined in respect of the disposal resulting in the Applicant receiving the lumpsum from Fund B.

7.9. Amount paid by a company to the sole beneficiary of its shareholder constitutes a dividend – No. 423

This ruling determines that the payment of an amount by a resident company to the sole beneficiary of a trust that is the sole shareholder of the resident company constitutes a dividend and not a donation.

In this ruling references to sections are to sections of the Income Tax Act applicable as at 23 September 2025. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the Act.

This is a ruling on the interpretation and application of:

- section 1(1) – definition of a 'dividend'; and
- section 55(1) – definition of a 'donation'.

Parties to the proposed transaction

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

The Trust: A trust established in and a resident of South Africa.

The Union: A trade union duly registered in South Africa.

Description of the proposed transaction

The Applicant is wholly-owned by the Trust. The sole beneficiary and founder of the Trust is the Union.

The Union is an approved entity under section 30B of the Act and its receipts and accruals are exempt from normal tax in terms of section 10(1)(d)(iii) The Applicant was incorporated to invest any surplus funds arising from the Union's operations; and to supplement the Union's finances as and when necessary. The Trust as the Applicant's sole shareholder plays a key role in achieving this objective.

The Memorandum of Incorporation of the Applicant allows the Applicant to make distributions from time to time provided that any such distributions are:

- pursuant to an existing legal obligation of the Applicant or a court order; or
- authorised by the board of directors by resolution.

The principle objectives of the Trust include the following:

- to pursue an active investment agenda with the aim of creating a pool of resources to ensure the Union can be sustained into the future;
- to hold shares in the Applicant and other companies;
- to exercise all its rights as a shareholder of the Applicant to the benefit of the Union and ensure that the board of directors of the Applicant remain accountable to it;

- to monitor all investments made by the Applicant and any decisions made in relation thereto with a view to ensuring that those investments create optimal benefit for the Union; and
- to apply the proceeds of any investment for the benefit of the Union and its members, at the direction of the National Executive Committee.

The trust property of the Trust vests in the trustees of the Trust who have complete discretion to dispose and appropriate trust property provided they do so in a manner that is consistent with the principle objectives of the Trust and after consultation with the Union.

The trust fund and income of the Trust must be utilised solely for the purpose of the principle objectives.

The Applicant proposes making annual payments to the Union or incurring expenditure on behalf of the Union to assist the Union with its operating costs. The Union will not give any consideration for the payments or incurral of expenditure. The Applicant requested confirmation that each payment or expenditure to be incurred on behalf of the Union will be a 'donation' as defined in section 55(1) of the Act.

Conditions and assumptions

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

Ruling

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

- Each annual payment to the Union or incurral of expenditure on behalf of the Union by the Applicant will constitute a 'dividend' as defined in section 1(1) of the Act to the Trust.
- Each annual payment to the Union or incurral of expenditure on behalf of the Union by the Applicant will not constitute a 'donation' as defined in section 55(1) of the Act made by the Applicant to the Union.

8. BINDING GENERAL RULING

8.1. Apportionment methodology to be applied by a municipality – No. 4 (Issue 4)

For the purposes of this ruling:

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

Purpose

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

Background

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

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

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

- Taxable supplies

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

- Exempt supplies

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

- Out-of-scope income streams

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

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

Discussion

Section 17(1) provides that the extent to which a municipality may deduct input tax in respect of mixed expenses is determined by means of a ratio determined by SARS in terms of a ruling contemplated in Chapter 7 of the Tax Administration Act, 2011 (that is, a binding general ruling) or a ruling under section 41B (that is, a VAT class ruling, or a VAT ruling).

Ruling

The formula set out below, being the default method of apportionment to be applied by all municipalities in the absence of an alternative method approved by SARS in terms of a ruling as described above, constitutes a BGR under section 89 of the Tax Administration Act 28 of 2011.

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

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

‘y’ = the apportionment ratio or percentage;

‘a’ = the value of all taxable supplies (including deemed supplies) made during the period;

‘b’ = the value of all exempt supplies made during the period; and

‘c’ = the sum of any other amounts of income not included in ‘a’ or ‘b’ that was received or accrued during the period, whether in respect of a supply or not.

The following are excluded from the formula set out above:

E1	Foreign exchange differences that do not form part of any hedging activities
E2	Accounting entries, such as fair value adjustments, resulting in income reflected in the Annual Financial Statements to ensure compliance with relevant Regulatory Frameworks
E3	The supply of capital assets
E4	Extraordinary income
E5	The value of any goods or services supplied if input tax on those goods or services was specifically denied under section 17(2)
E6	Change-in-use adjustments under sections 18, 18A, 18C, and 18D
E7	Indemnity payments received as envisaged under section 8(8) to the extent that the indemnity payments relate to extraordinary income or capital assets
E8	Interest earned from: • the municipality’s current account (meaning, the account used for day-to-day business operations); and • the SARS

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

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

General notes for using the formula set out above:

N1	The exclusions and adjustments to the formula are subject to the further explanations and discussions as outlined in the Annexure.
N2	‘c’ in the formula will typically include, but is not limited to, items such as statutory fines, penalties, dividends etc. However, traffic fines are only included in ‘c’ to the extent that payment has actually been received by the municipality.
N3	The prime rate to be used for all the adjustments listed above is the applicable prime rate at the end of the financial year. The JIBAR rate to be used for all adjustments listed above is the 12-month term rate quoted on the last day of the financial year. If more appropriate for the municipality, or should the JIBAR no longer be applicable, the ZARONIA may be used; the rate being the equivalent to the above stated JIBAR. For ease of reference, the reference to JIBAR in this document includes reference to the ZARONIA.
N4	The term ‘value’ excludes the VAT component of the supply.

N5	The apportionment ratio must be rounded off to two decimal places.
N6	If the formula yields an apportionment ratio of 95% or more, the full amount of VAT incurred on mixed expenses may be deducted [referred to as the de minimis rule and effected under proviso (i) to section 17(1)] as input tax.
N7	Municipalities using their previous year's turnover to determine the current year's apportionment ratio are required to make an adjustment (that is, the difference in the ratio when applying the current and previous year's turnover) within nine months after the end of the financial year, that is, the adjustment must be made in the VAT201 return submitted at the latest nine months after the financial year-end. For example, if the municipality's financial year end is June, the adjustment must be made in the VAT return due to be submitted by no later than March the following calendar year.
N8	This formula may only be used in the following circumstances: • If the method is fair and reasonable to the municipality's business activities, it is the municipality's responsibility to first determine this. If the method is not fair and reasonable, it is the municipality's further responsibility to approach SARS for an alternative method. SARS is unable to approve an alternative apportionment method retrospectively and will only approve the method from a prospective date or such other date falling within the limitations set out in proviso (iii) to section 17(1). • The municipality submits to VATRulings@sars.gov.za the following information on an annual basis, generally at the time the annual adjustment referred to in N7 is reflected in the VAT201 return: ○ The municipality's name ○ VAT registration number ○ Apportionment method and formula used ○ Apportionment ratio for the year. The first time that this formula is applied, the method and apportionment ratio for the past three (3) years must be submitted.

N9	A grant that is received partly for taxable purposes and partly for non-taxable purposes must be attributed accordingly. For example, if 70% of a grant is for subsidising the taxable supply of water and electricity to customers, and 30% is for subsidising the municipality's exempt public transport business, the grant amount will have to be split into its respective taxable and non-taxable components in accordance with section 10(22). In this example, 70% of the grant amount will be subject to VAT at the zero rate and will be included in 'a' in the formula. The remaining 30% of the grant will be applied for exempt purposes and will be included in 'b' in the formula.
N10	Notwithstanding any permission which may have been granted by SARS to allow a municipality to account for VAT on the payments basis under section 15(2)(a)(v), the amounts to be included in 'a', 'b', and 'c' in the formula for each tax period and for the annual adjustment contemplated in N7 are to be calculated on the invoice basis and in accordance with the principles set out in the Accounting Standards Board's Standard of Generally Recognised Accounting Practice (GRAP) on Revenue from Non-exchange Transactions (Taxes and Transfers), commonly referred to as GRAP 23. In terms of GRAP 23, income from government grants and subsidies is only recognised when the conditions (if any) are met. Grant income and other income from supplies (including deemed supplies and foreign exchange income) will therefore only be included in the formula to the extent that such funds are reflected in the statement of financial performance of the municipality for the financial year concerned.
N11	It is the responsibility of a municipality to determine whether the supplies made by it are as principal or agent: • If functions have been formally assigned to a national or provincial municipality, the municipality makes these supplies as principal. As a result, these supplies fall within the ambit of the 'enterprise' activities carried on by a municipality, provided the activity does not fall within the ambit of section 12 or is an out-of-scope activity. Any consideration charged, must be included in 'a' in the formula if it relates to a taxable supply, 'b' in the formula if it relates to an exempt supply, and 'c' if it relates to an out-of-scope activity.

	• If a municipality is appointed as agent by provincial government, only the amount charged for the taxable supply of such agency service to the provincial government must be included in 'a' in the formula. Any payment received as a result of the national or provincial government providing financial assistance to enable the municipality to carry out the formally assigned activity is regarded as a 'grant' as defined. The inclusion in the formula will depend on whether the grant relates to the enterprise activities of the municipality (to be included in 'a' in the formula) or otherwise (to be included in either 'b' or 'c' in the formula).
N12	The deduction of input tax in all cases (including on mixed expenses) is subject to the documentary and other requirements set out in sections 16(2), 16(3), 17, and 20 being met.

Period for which this ruling is valid

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

Transitional rules

The Issue 3 formula applies to all financial years preceding those financial years commencing on or after 1 July 2025. If an alternative apportionment method has been approved for use by a municipality in a VAT ruling or VAT class ruling and the municipality regards the apportionment formula set out in this BGR to be fair and reasonable, that municipality can approach SARS to have the VAT ruling or VAT class ruling withdrawn from the financial year commencing on or after 1 July 2025. The request for withdrawal must be submitted to VATRulings@sars.gov.za before the end of the financial year commencing on or after 1 July 2025. The provisional ratio to be applied for the financial year commencing on or after 1 July 2025 may be based on the actual financial results of the preceding financial year using the Issue 3 formula. The adjustment to be made in the tax period, which ends no later than nine months after the end of the financial year that commenced on or after 1 July 2025, must be based on the actual financial results of such financial year using the apportionment formula set out in this BGR.

The provisional ratio to be applied for the financial year commencing on or after 1 July 2026 must be the apportionment ratio as calculated for the preceding year based on the formula as contained in this BGR. In the event that a municipality determines its apportionment on a monthly basis, the municipality must apply the apportionment formula set out in this BGR from the first month of its financial year commencing on or after 1 July 2025. No adjustment after year-end is required.

Annexure – Application of the exclusions and amendments to the apportionment formula as set out in paragraph 4 of the Ruling

Exclusions:

E1	Foreign exchange differences that do not form part of any hedging activities Municipalities may trade with customers or suppliers in currencies other than the South African Rand (ZAR). Due to the differing currencies used by the relevant parties for purposes of accounting records and financial transacting, foreign exchange differences must be accounted for to ensure that the accounting records of a municipality reflect the correct value of each transaction entered into. In these circumstances, the foreign exchange difference that is reflected is merely an accounting entry (refer also to the discussion in E2 below) to properly reflect the sale transaction and does not arise of any further activity by the municipality. As such, these foreign exchange differences must be excluded from the apportionment formula. The exclusion above is limited to a foreign exchange difference that is a natural consequence of a transaction and requires no additional effort from a municipality. Should a municipality decide to hedge its risk against foreign currency exposure, such decision would require the municipality to enter into another transaction and apply resources in developing the most effective hedging strategy whilst continuously developing and ensuring proper implementation of said strategy. Hedging foreign exchange transactions are used to address various risks identified (such as the risk of future or short-term cash flows, or the risk of income) and could take many forms, including forward contracts or options.

	In order to ensure that the use of resources and all transactions are properly reflected in the apportionment formula, any foreign exchange differences that result from a hedging transaction must be included in the formula. If a foreign exchange is hedged, the profit or loss on the underlying foreign exchange may not be set off against the profit or loss on the hedge as these are separate and distinct transactions from a VAT perspective, as explained above.
E2	<u>Accounting entries, such as fair value adjustments, resulting in income reflected in the AFS to ensure compliance with relevant Regulatory Frameworks</u> The GRAP requires certain value adjustments to be made in the accounting records of a person to ensure the true economic value of assets or liabilities is reflected in that person's AFS. From a VAT apportionment perspective, the value adjustments made are not income intended to be included in the formula – no actual income will be received by the municipality as the adjustment is merely a revaluation of an asset or liability at a specific point in time and not consideration for any activity as a result of a separate supply of goods or services. For this reason, any value adjustment made for GRAP purposes is excluded from the apportionment formula. Examples of accounting entries are: • revaluation of a transaction in foreign currency (also refer to E1 above, (excluding hedges); and • fair value adjustment of fixed and/or intangible assets.
E3	<u>The supply of a capital asset</u> The VAT incurred on capital expenditure is generally deducted as a once-off at the time when a municipality acquires the said asset (if a municipality is registered on a payments basis, deduction of the asset is made to the extent of payment). Although the asset is used throughout the municipality's operations, it is not one of the resources that, on an on-going basis, and forms part of the pool of expenses that are subject to the apportionment ratio. It is also accepted that municipalities are not in the

	business of selling off their capital assets on an on-going basis, as that would be un-business like and would severely influence the ability of the municipality to continue its operations. Therefore, the sale of capital assets is generally an extraordinary event that is not expected to occur continuously. Having regard to the extraordinary nature of the supply (such as a sale) of capital assets together with the possible substantial values attached to them, the inclusion of the income earned on the sale of capital assets in the apportionment formula would distort the apportionment ratio in that it would not fairly reflect the use of those resources to which the apportionment ratio is applied. It is worth highlighting that, due to the significant costs involved in acquiring capital assets, it may be necessary for municipalities to determine whether an alternative apportionment method is required for specific capital assets. The municipality must evaluate the specific circumstances and intended use of the capital asset to determine the most appropriate method for the specific asset and, if need be, apply for an alternative method. What is a capital asset? In short, a capital asset is an asset that enables a municipality to operate but is not the operation itself. Consider a municipality selling office furniture. To this municipality, the furniture enables the municipality to conduct its operations as it is not the mandate or purpose of a municipality to buy and sell office furniture for a profit. To the municipality, the office equipment is a capital asset. The circumstances of each case must be evaluated to determine the nature of a specific asset. The most important factor to consider is the intention of the municipality when acquiring and subsequently using the asset. As intention is a very subjective test, various factors must be used to determine and substantiate that intention. Some factors that may assist in determining whether an asset is capital in nature, is as follows: • Trading stock or consumables are not capital assets. • The asset is held with a certain degree of permanency.

	• Linked to the above, the asset is held for a lengthy period of time. Although this test is not conclusive on its own, it could be convincing when deliberated with other factors. • The type of asset is not commonly bought and sold by the municipality on a regular basis. • An asset which stays mostly intact, and which is rather used to produce wealth. The distinction between trading income and income of a capital nature is not a new concept in tax and has been the subject of various disputes and court cases over the years. Chapter 2 of the Comprehensive Guide to Capital Gains Tax provides in-depth examples and discussions on how to distinguish between income and capital. These principles can also be applied as guidance in determining whether an asset is capital in nature for VAT apportionment purposes.
E4	<u>Extraordinary income</u> Extraordinary income is non-recurring income received due to exceptional circumstances that are unlikely to be repeated. From a VAT apportionment perspective, extraordinary income would have a significant impact on the quantum of income received by a municipality without affecting the normal expenses incurred year-on-year. The inclusion of such income in the apportionment formula would therefore severely distort the apportionment ratio as there would be a material fluctuation from one year to another whilst the mixed expenses, and the use these mixed expenses in the municipality's operation, would have remained unchanged. Based on the above, extraordinary income should be excluded from the apportionment formula. In order to give effect to this, 'extraordinary income' is defined for VAT apportionment purposes as non-recurring income received due to exceptional circumstances that are unlikely to be repeated. An example of extraordinary income is dividends received as a result of a liquidation of a municipal entity (see also the discussion on dividends in A2 below).

	Examples of income that are NOT regarded as being extraordinary in the hands of a municipality: • Grant income • Dividends received from investments not as a result of the liquidation of a municipal entity • Development charge. A development charge is a one-off charge levied by a municipality on the landowner as a condition for approving a land development application. Should a municipality receive a development charge during a financial year, it needs to approach SARS for a VAT ruling to determine the rate of inclusion in the formula for that year. The application must comply with the time limitations set out in the proviso to section 17(1), that is, the application must be submitted in the financial year that the development charge was received.
E5	<u>The value of any goods or services supplied if input tax on those goods or services was specifically denied under section 17(2)</u> A municipality is prohibited from deducting input tax on certain items listed in section 17(2). These include, amongst others: • goods or services acquired for purposes of entertainment; and • the acquisition of a 'motor car' as defined in section 1(1). In both instances above, municipalities would generally not supply entertainment or a 'motor car' as defined (and are therefore allowed the deduction), and would therefore not normally buy and sell the items on a regular basis. The goods or services purchased would be of a capital nature and the subsequent supply of these goods or services would automatically be excluded from the apportionment formula as a result of their capital nature. In addition, it would be inequitable to include the income on the sale of such goods or services (or any indemnity payment received from such sale) if the municipality was originally disallowed (by legislation) any input tax deduction in relation to the sale.
E6	<u>Change-in-use adjustments under sections 18, 18A, 18C and 18D</u> A change-in-use adjustment adjusts the input tax deducted to reflect the actual use of goods or services as opposed to their intended use.

	Change-in-use adjustments should be excluded from the apportionment formula.
E7	Indemnity payments received as envisaged under section 8(8) to the extent that the indemnity payments relate to extraordinary income or capital assets Subject to certain exceptions, a municipality is deemed to make a supply of services upon receipt of an indemnity payment (or indemnification of a loss paid to a third party) from an insurer. Section 8(8) further deems that supply to be made in the furtherance of the municipality's enterprise. Any indemnity payment received as a result of a capital asset (such as an office building), or extraordinary income should not be included in the formula in keeping with the exclusions in E3 and E4
E8	The value of municipal bonds issued as a manner of raising funds One of the methods of raising funds available to a municipality is to issue municipal bonds. Although this is not a very common method for municipalities to raise long-term debt, certain municipalities have opted in recent years to issue municipal bonds for special projects, such as the acquisition of capital assets. Under section 2, the issuance of these instruments is deemed to be financial services, being an exempt supply under section 12(a). As this is regarded as being extraordinary, the income derived from the issuing of municipal bonds should not be included in the apportionment formula.
E9	Interest • Earned from the municipality's current account(s) (meaning, the account used for day-to-day business operations) It would be hard for any municipality to function without a bank account used every day to both receive and make payments. The municipality's intention when opening a transactional bank account is therefore never to earn the interest thereon, but rather to facilitate transactions within its business. The income in this account is generally as a result of payments received from third

	parties or customers as a result of trading activities and not investment activities by the municipality. As the interest rates on a transactional account is very low, businesses rarely hold money in a transactional bank account to earn interest. A municipality would rather transfer any excess funds to a call, fixed deposit, money market or similar account where the interest rates are much higher. The business decision to effect such transfer reflects a municipality's purpose of earning investment income in the form of interest. It is for this reason that any interest earned from a call or other investment account is included in the apportionment formula (refer also to A1). • SARS Interest.

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

A1	<u>Interest, other than the interest excluded from the formula in E9</u> Investment activities are more often than not conducted by a municipality on a continuous basis, even though it might not be a municipality's main purpose. This often happens when a grant is received by a municipality for activities to be conducted over a certain period. The excess funds not to be used immediately are held in a savings account for later use, whilst also maximising the investment benefit from these excess funds. To ensure that the purpose for which the VAT incurred on goods or services is fairly reflected in the apportionment formula, one must have cognisance of the wholistic purpose of the entity, and all activities associated in achieving that purpose. For this reason, interest must be included in the formula. It is however accepted that interest received is dependent on external factors, such as external interest rates. These external factors can result in material fluctuations in interest received from year to year even though a municipality's expenses in earning that interest have not significantly changed. For this reason, the interest to be included in the formula must be determined using the guidelines below: • Investment interest

	All investment activities of a municipality, whether investing in cash, equities or other instruments, must be appropriately reflected in the apportionment formula. As previously mentioned, it is acknowledged that the gross interest received is not reflective of how a municipality applies its resources. For this reason, any interest received from investments not otherwise specifically mentioned in the formula, must be included as follows: Interest received for the year × (prime rate − JIBAR) The interest received includes interest on any cash investment placed by a municipality, such as a savings, cash management or fixed deposit account. • Debtor interest Any municipality that has outstanding debtor accounts in their accounting records, have included the full value of the original supply in their apportionment formula. In order to ensure equity in the manner of which these income streams are included in the formula, the gross interest levied on the debtors' accounts must be included in the formula. This extends further to any 'penalty interest' charged to a customer that does not fall under section 2(1)(f), to be included in 'c' of the formula.
A2	<u>Foreign exchange difference resulting from hedging</u> Hedging is in essence a form of trading in financial assets, the activity which should be fairy reflected in the formula. 'Gross trading margin' refers to the gross profit of buying and selling financial assets, being the selling value less the buying value of the said assets, as recorded in the accounting records as being realised (if the municipality is unable to determine the realised gross trading margin, the values may include both realised and unrealised profit or loss for the year). No other expenses may be deducted from the said margin. Furthermore, any income received on the financial assets while held in trading stock (such as dividends or interest) must be regarded as a separate transaction and be included in the apportionment formula based on the principles set out in A1 and A3.

	The objective of a vendor that trades in financial assets is to make the highest profit possible. Due to the fact that there is a continuous sale of financial assets, and the value of those supplies will be significant in comparison to the activities of trading, the purpose of the vendor will not be fairly reflected should the gross selling amount of all the trades be included in the formula. For this reason, the gross trading margin must be included in the formula. Furthermore, the value of financial assets is significantly influenced by external factors such as market value, economics etc. In order to address a possible significant fluctuation in the value of the gross trading profit from year to year (which could adversely affect the apportionment ratio of a vendor), a 3-year moving average of the gross trading margin must be included in the formula. This means that the gross trading margin for the current year and two previous years must be calculated individually and then averaged to determine the value to be included in the formula. Negative gross trading margin Should a municipality's gross trading margin for any of the 3 years be a loss, the absolute value of that loss must be included in the calculation of the 3-year moving average.
A3	<u>Dividends</u> The MSA allows municipalities to provide services through other entities, referred to as municipal entities. These entities are generally owned by one or more municipality. Furthermore, to ensure financial security, municipalities may also invest in various instruments both for the yield and financial growth associated with certain markets. Dividends, including dividends in specie, are the yield paid on investments in equity and similar instruments. In keeping with the principle of reflecting all investment activities in the formula as set out in A1, dividends received must be included in the formula to reflect the investment activity in said instruments (even though dividends are not consideration for any supply made by a municipality). The investment activity associated with the holding of investments (such as shareholdings held through an asset manager), must be fairly reflected in the formula. Having regard to the fact that an entity declares and pays

	dividends based on various requirements and factors (such as a group's dividend policy or economic and market conditions), it is accepted that the quantum of dividends does not fairly reflect the investment activity of holding the investments as capital assets. In addition, significant fluctuations may be experienced in the value of dividends declared from year to year. In order to appropriately reflect a municipality's investment activity in the formula, the value of dividends to be included in the formula must be determined as follows: 3-year moving average of dividends received × (prime rate − JIBAR) • The 3-year moving average is determined by calculating the average of dividends received during the current financial year and two immediately preceding financial years. • If a municipality does not receive dividends during the current financial year, a 3-year moving average of the 3 preceding years may be used as proxy. • If a municipality receives no dividends for at least 2 out of the 3 years, a 5-year moving average must be used instead of the 3-year moving average where dividends were received for at least 2 of the 5 years. • The moving average to be applied to (prime rate – JIBAR), must be determined as an average limited to the years that the municipality has held investments, limited to 3 (or 5) years. For example, if the municipality has made its first investment in this financial year, the average to be applied is the amount of dividends received divided by 1. • If a municipality has not received dividends for 2 out of the 5 years as required above, the municipality must approach SARS for an alternative manner of determining a value to be included in the formula that appropriately reflects its investment activities. The application must comply with the time limitations set out in the proviso to section 17(1).

9. GUIDES

9.1. Reportable arrangements – SARS external guide

The purpose of this guide is to provide guidelines relating to the treatment of 'reportable arrangements' governed by sections 34 to 39 of the TA Act.

Should any aspect of this guide conflict with the applicable legislation, the legislation will take precedence.

This guide supports SARS strategic objective of promoting voluntary compliance and mitigating tax risks through proactive reporting and enforcement.

The primary purpose of these provisions is to provide SARS with early notification of arrangements that have characteristics that might lead to an 'undue tax benefit' or are designed to avoid or postpone tax liabilities. This allows SARS to monitor and review these arrangements to ensure compliance and identify potential tax avoidance schemes.

This guide outlines the definitions, criteria, exclusions, disclosure requirements, 'promoter' obligations, enforcement powers, and penalties associated with 'reportable arrangements'. Practical examples and internal insights are included to support implementation and decision-making.

'Reportable arrangements' refer to specific types of transactions or schemes that taxpayers are legally required to disclose to SARS under the TA Act.

Sections 34 to 39 of the TA Act specifically address 'reportable arrangements' transactions or schemes that may pose a risk of tax avoidance or evasion. These provisions aim to enhance transparency, enable early detection of aggressive tax planning, and support SARS risk-based compliance approach. These sections establish a framework for identifying and managing 'reportable arrangements'.

Sections 37 and 38 of the TA Act sets out the disclosure obligation. It provides that every person who is a 'participant' of an arrangement which derives or will derive any tax benefit in terms of a 'reportable arrangement' has a duty to report that arrangement to SARS. Reporting must be done within 45 business days of the arrangement being reportable or 45 business days of a person becoming a 'participant' in an existing 'reportable arrangement'. A 'participant' need not report a 'reportable arrangement' if they obtain a written statement from any other 'participant' that they have disclosed the

'reportable arrangement'. A further extension of 45 business days will be granted where reasonable grounds for extension exist.

Reporting of an arrangement in terms of this section does not have the effect that SARS approves of the arrangement. The purpose of 'reporting arrangements' is to enable SARS to evaluate them from an anti-avoidance point of view at an early stage of the implementation thereof.

No time limits are set on SARS in terms of this legislation to review the arrangement, but as the legislation was introduced to enable SARS to be proactive in respect of tax avoidance the arrangements will be dealt with as expediently as capacity allows.

Advance Tax Rulings (ATRs) on arrangements which have potential reporting requirements in terms of section 35 of the TA Act may be obtained from SARS on request by the taxpayer. The Advance Tax Rulings division is responsible for issuing such rulings. For more information on ATRs, please refer to the SARS website via the following link Advance Tax Rulings (ATR) | South African Revenue Service.

The SARS Guide to Advanced Tax Rulings can also be accessed via the link above.

The Act empowers SARS to request further information with respect to any matters related to the 'reportable arrangement' from the 'participant'. The information gathering powers are contained in section 46 of the TA Act.

A person who fails to disclose the information in respect of a 'reportable arrangement' as required by sections 37 and 38 of the TA Act, or information that must be disclosed under the regulations is liable to a penalty, in terms of section 212 of the TA Act.

Businesses and individuals engaging in complex financial or commercial transactions in South Africa must be aware of the 'reportable arrangement' provisions and seek professional tax advice to ensure compliance.

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.