TAX UPDATE **PREPARED BY: JOHAN KOTZE**

FOR PERIOD: 1 JULY 2014 – 30 SEPTEMBER 2014

INDEX

1. INTRODUCTION

The purpose of this update is to summarise the developments that occurred during the third quarter of 2014 (i.e. 1 July 2014 to 30 September 2014) specifically in relation to Income Tax and VAT. Johan Kotze, Bowman Gilfillan's Head of Tax Dispute Resolution, has compiled this summary.

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

During this period National Treasury published for public comment the 2014 draft Taxation Laws Amendment Bill (TLAB), 2014 draft Tax Administration Laws Amendment Bill (TALAB) and specific draft regulations related to these bills.

Also during this period new Dispute Rules were published.

The cases are dominated by section 163 of the Tax Administration Act, that provides for a preservation order to prevent the dissipation of assets from which tax is or is reasonably expected to be due. This is clearly a difficult obstacle for taxpayers to surmount. The other cases are no doubt also quite interesting.

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. It is however important to note that these publications are not law, but may bind SARS. Taxpayers should nonetheless consider these publications carefully to determine whether, and how, they are actually applicable to their own circumstances.

Enjoy reading on!

2. MEDIA STATEMENT – 2014 DRAFT TAXATION LAWS AMENDMENT BILL & DRAFT TAX ADMINISTRATION LAWS AMENDMENT BILL

On 17 August 2014 National Treasury published for public comment the 2014 draft Taxation Laws Amendment Bill (TLAB), 2014 draft Tax Administration Laws Amendment Bill (TALAB) and specific draft regulations related to these bills. This follows on the 10 June 2014 publication of the Rates and Monetary Amounts and Amendment of Revenue Laws Bill ('Rates Bill') and the first batch of the 2014 draft TLAB. All the above bills give effect to the tax proposals announced in the 2014 Budget, including in the 2014 Budget Review.

Whilst the Rates Bill deals largely with the rate and threshold changes announced in the Budget, the 2014 draft TLAB deals with the more substantive changes to the law. The 2014 draft TALAB deals with changes to the administrative provisions of tax legislation currently administered by SARS, including the Tax Administration Act.

The 2014 draft TLAB and TALAB are published for public comment prior to formal introduction in Parliament. The Standing Committee of Finance normally convenes public hearings into these draft bills before their formal introduction in Parliament. As part of the process, the National Treasury and SARS hereby invite comments in writing, and will engage separately with key stakeholders, through workshops to be held in August 2014. Thereafter, a response document on comments received will be presented to the Standing Committee on Finance, after which the draft bills will be revised, taking into account public comments, and tabled formally in Parliament for its consideration.

The 2014 draft TLAB gives effect to the following key proposals announced in the 2014 Budget Review:

- the introduction of tax free saving accounts;
- amendments to the taxation of contributions to defined benefit funds;
- changes to the taxation of Small Business Corporations;

- adjustments to the tax treatment of the risk business of long term insurers;
- refinements to the employment tax incentive; and
- the repeal of the VAT zero rating in respect of goods for agricultural, pastoral or other farming purposes.

A summary of the main issues is provided below in this media statement, and a more comprehensive description of the draft amendments is provided in the draft Explanatory Memorandum.

Draft regulations dealing with specific amendments in the 2014 draft TLAB are also published for comment. These draft regulations relate to the taxation of contributions to defined benefit funds and tax incentive provisions relating to research and development and Special Economic Zones (SEZs).

It should be noted that comments were received on the first batch of the 2014 draft TLAB regarding the taxation of contributions to defined benefit funds and the tax treatment of the risk business of long term insurers. The draft legislation has been amended to take some of these comments into account. However, National Treasury and SARS will still engage with key stakeholders before revising the draft legislation for tabling.

For legal reasons, the draft tax amendments continue to be split into two bills, namely, a money bill (section 77 of the Constitution) dealing with issues relating to rates and the tax base and an ordinary bill (section 75 of the Constitution) dealing with issues relating to tax administration.

The 2014 draft TLAB, TALAB and Regulations deal with the following amendments:

Taxation Laws Amendment Bill (TLAB)

1. Income Tax: Individuals, employment and savings

Tax free savings accounts

Tax free savings accounts are proposed from 1 March 2015 as a measure to encourage household/individual savings. Individuals will be allowed to open multiple tax free savings accounts, however, they may only contribute up to a maximum of R30 000 into these accounts within any given year. A

lifetime contribution limit of R500 000 will apply. The returns accruing to these accounts will not be subject to income or dividends tax. Amounts within the tax free savings accounts may be withdrawn at any time.

Where an individual contributes in excess of the prevailing annual or lifetime contribution limit in any year, a 'penalty' (additional income tax) of 40 per cent on the amount of excess contribution will be levied by SARS on the individual.

Taxation of contributions to defined benefit funds

Defined benefit funds offer retirement benefits that are calculated according to the rules of the pension fund, where the value of the contributions to the fund may not be an accurate reflection of the benefits that may be received by the retirement fund member. For example, if the pension fund is in financial difficulty and the employer needs to make additional contributions to meet the expected liabilities, it may be unfair to tax members of the fund on those contributions since there would be no associated increase in benefits.

A prescribed methodology is proposed to determine a notional employer contribution for members of defined benefit pension funds. The notional employer contribution will be a fringe benefit that is taxable in the hands of the employee and will be included in the total pension contribution amount to calculate whether the individual is still below the allowable annual and monthly deductible limits.

Company car fringe benefit

A company car fringe benefit arises when an employer provides the employee with the right of use of a company owned car. In general, the monthly fringe benefit for the employee is deemed to be 3.5 per cent of the 'determined value' of the vehicle. The net outcome of the different procedures used to calculate the 'determined value' results in inequitable tax treatment. To align the tax treatment of company car fringe benefit in respect of all employees, it is proposed that actual retail market value be used in all cases for company cars that are purchased, acquired or manufactured after 1 March 2015.

2A Income Tax: Small businesses

The following two proposals follow from two of the recommendations made by the Davis Tax Committee's SME report, published on 14 July 2014, and available on the Tax Committee's website (www.taxcom.org.za) as well as the websites of the National Treasury and SARS. Whilst comments on the entire report can be submitted to the Davis Committee by 31 August 2014, the comments on these two proposals are regarded as more urgent. The Treasury and SARS will co-ordinate with the Davis Tax Committee on how to take account of the two processes when responding to the public comments.

Changes to the taxation of small business corporations (SBC): Replacing the current reduced tax rates regime with an annual refundable tax compliance rebate

Currently, SBCs are taxed according to the reduced tax rates, instead of the flat corporate tax rate of 28 per cent. The Davis Tax Committee concluded in its report on SME taxation that the lower tax rates for SBCs are not effective, do little to support the objective of small business growth, and do not address compliance costs. The current regime provides tax relief to only 50 000 businesses and, in some instances to professions not originally intended as beneficiaries. In addition, businesses in a tax loss position do not benefit from the current SBC regime, despite having the same tax compliance burden as profit making businesses.

Based on the above, the Davis Tax Committee recommended that the SBC reduced rate regime be replaced with an annual refundable tax compliance rebate. The primary purpose of the rebate will be to assist SBCs with their tax compliance costs. As a result, if this proposal is adopted, SBCs will be taxed at a flat corporate tax rate of 28 per cent and not according to the reduced tax rates. In turn, SBCs will be entitled to receive an annual tax rebate of R15 000. The rebate will be refundable, meaning that SBCs in a tax loss position will also receive the rebate.

<u>Tax treatment of grant funding to SME's by non-profit funding entities</u>

Most SME's find it difficult to access funding due to their inherent risk and lack of collateral together with the fact that they often lack the necessary training and commercial skills to manage and develop the businesses. Several non-profit entities are engaged in activities that support SME's. They provide developmental funding, including business support and training to SME's. In order to assist in the development of SME's, it is proposed that non-profit entities providing funding and support to SME's be exempt from income tax. This relief is similar to the relief provided to PBOs.

In turn, funding received by SME's from the above-mentioned non-profit funding entities will be exempt from tax in the hands of the SME's.

2B. Income Tax: Venture Capital and Public Benefit Organisations (PBOs)

Broadening the scope of the Venture Capital Company (VCC) regime

The VCC regime was introduced in 2008 to encourage potential funders to invest equity into small businesses. Since its introduction, the VCC regime has seen limited uptake. Page 5 of 9

In order to get the VCC regime to gain more traction, and to achieve its objectives of growing SMME's and creating employment, it is proposed that the asset limits for qualifying investee companies be increased and that the normal tax deductions for investments in a VCC held for more than five years be made permanent.

PBOs: Lowering of the distribution requirement

Individuals and businesses are encouraged through the tax system to make tax deductible donations to qualifying conduit PBOs. At least 75 per cent of funds received by a conduit PBO by way of tax deductible donations during a year of assessment should be distributed to other approved PBOs. The purpose of the 75 per cent distribution rule is to discourage conduit PBOs from locking in funds and to obtain a degree of matching between timing of the tax deduction claimed by the taxpayers and the distribution of such donations by the conduit PBO.

While Government is concerned that the funds required to support public benefit activities might be potentially locked in to accumulate reserves,

several entities have indicated that the 75 per cent distribution rule is too restrictive, and affects their sustainability adversely. In order to enable conduit PBOs to have some flexibility to build up reserves over time so as to ensure some degree of financial sustainability, it is proposed that the 75 per cent distribution requirement of all funds received by way of tax deductible donations during a specific tax year be reduced to at least 50 per cent.

3. Income Tax: Business

The tax treatment of the risk business of long term insurers

The current taxation of long term insurers does not distinguish between the investment and risk businesses. However, from a tax policy point of view the two types of businesses cannot be taxed by applying the same principles. From the perspective of a long-term insurer profits or losses arising in respect of a risk business should be fully taxed and should therefore not form part of the tax calculation of a policyholder fund that focuses on the taxation of the return on assets invested for the benefit of policyholders on the trustee basis.

It is proposed that as from 1 January 2016 a clear distinction be drawn in the taxation of investment and risk businesses conducted by long term insurers. Profits or losses that result from such new risk business will be taxed in the corporate fund.

Changes to the formula and rules relating to the limitation of interest deductions

In 2013 amendments were made to the tax legislation to provide for measures to limit the deduction of excessive interest payments. A formula to determine the maximum amount of interest payments that may be deducted in any given tax year was also introduced. The maximum (expressed as a percentage of earnings before interest, taxation, depreciation and amortization-EBITDA) is currently set at 40 per cent. It is proposed that this formula be amended to allow for the maximum (percentage) to fluctuate, recognizing that interest rates (and thus cost of finance) can change. Using this formula, the percentage is 40 per cent of

EBITDA at prevailing interest rates and will be capped at 60 per cent of EBITDA.

Third party backed shares: Changes to the provisions relating to refinancing, limited pledges and definition of an operating company

The third party backed shares anti-avoidance rule concerns preference shares with dividend yields backed by third parties. The dividend yield of third party backed shares is treated as ordinary revenue unless the funds derived from the issue of the third party backed shares were used for a qualifying purpose, i.e., the acquisition of equity shares in an operating company.

Currently, an exception exists that allows for the refinancing of preference shares if the initial preference shares were used to finance the acquisition of equity shares in an operating company. Concerns have been raised that certain exception rules may not provide the relief originally envisaged for the refinancing of preference shares. As a result, it is proposed that refinancing of qualifying transactions be allowed. Also, with respect to asset backed preference shares, it is proposed that the scope of the exemption guarantees be broadened to allow for the pledging of the equity shares and associated debt claims in the issuer of preference shares.

In addition, it is proposed that the definition of an 'operating company' be extended to allow third party backed preference shares issued to acquire equity shares in an exploration company (usually by BEE parties).

Refinements to the employment tax incentive

The employment tax incentive was introduced on 1 January 2014 to support employment growth amongst the youth by sharing the cost of employment between the government and the private sector. Employers have asked for clarification of the definition of a 'full time employee' when calculating the value of the incentive for employees who only work for part of a month. Further refinements are put forward for the reimbursement mechanism that is intended to be in place before the end of the year.

It is proposed that the calculation of the value of the incentive be simplified and linked to an hourly rate where the grossing up mechanism is linked to a

baseline of 160 hours of work per month, rather than through the use of a discretionary 'full time' calculation. The effect of this is that the incentive can be claimed for qualifying employees who earn between R12.50 an hour (if there is no minimum wage) and R37.50 an hour (provided they work 160 hours or less per month).

With regard to the reimbursement mechanism, it is proposed that this should be simplified by 'ring fencing' the excess amount that is available to be rolled over at the end of the employer reporting period. Employers will be able to claim the value of the excess amount that has been ring fenced after SARS have determined whether they are tax compliant.

4. Value Added Tax (VAT)

Repeal of the VAT zero-rating in respect of goods for agricultural, pastoral or other farming purposes

Currently, the supply of goods used or consumed for agricultural, pastoral or other farming purposes are charged with VAT at the rate of zero per cent. These goods may be supplied at the zero rate only if the recipient is a registered vendor carrying on agricultural, pastoral or other farming operations and is authorized by SARS to acquire those goods at the rate of zero per cent. This concession was intended to provide cash flow relief to the agricultural sector.

There is strong evidence that this provision is open to substantial abuse as various entities (i.e., those with and without endorsement from SARS to acquire goods at the zero rate) have entered into activities to fraudulently obtain a VAT input tax deduction. As a result, it is proposed that the zero rating of goods for agricultural, pastoral and other farming activities be repealed.

Exclusion of second hand goods made from precious metal (gold) from claiming a notional input tax

Currently, a VAT vendor who acquires second hand goods, including goods made from precious metals, from a seller who is not a vendor, is entitled to claim a notional input tax deduction. This allows for the unlocking of part of the VAT on goods previously paid by final consumers as those goods re-

enter the formal supply chain. While the acquisition of gold jewellery by VAT vendors from non-VAT vendors should allow for the deduction of notional input VAT, in practice, this provision significantly contributes to creating an enabling environment for fraudulent input tax deductions. In order to address this problem, it is proposed that second hand goods made from precious metals be excluded from obtaining the notional input tax.

Tax Administration Laws Amendment Bill (TALAB)

Insertion of section 64MA in Income Tax Act

The amendment enables a company to claim a refund of dividends tax paid to SARS, in certain circumstances where the company had to pay the tax in respect of the distribution of dividends *in specie*.

Alignment of exemptions from payment of provisional tax and increase of threshold

The amendment proposes to align the exemptions from payment of provisional tax for people 65 years or older with those of people under 65. The threshold for taxable income derived from interest, foreign dividends and fixed property rentals is raised from R20 000 (previously only applicable to under 65s) to R30 000 for all natural persons.

Repeal of paragraph 20A of the Fourth Schedule to the Income Tax Act

The repeal addresses the issue that a single underestimation of provisional tax contemplated in paragraph 20 of the Fourth Schedule may result in a penalty under both paragraphs 20(1) and 20A(1). Also, paragraph 20 has been amended to allow a reduction of a penalty under paragraph 20(1) by the amount of any penalty under paragraph 27 for the late payment of provisional tax.

Elimination of the four monthly VAT category

The four-monthly VAT category regime was introduced in 2005 to assist small businesses. Subsequently, other measures were introduced to assist small businesses and during 2012/13 fewer than 100 vendors, with only R44million output VAT and R23million input VAT, were registered for this

provision. It is therefore proposed to eliminate this category and bring the registered vendors into the bi-monthly VAT system.

Preventing the unlawful use of SARS' names, trademarks and logos

Fraudulent use of SARS' names, trademarks and logos by, for example, bogus tax practitioners has become prevalent and has been aggravated by their improper and unauthorised use in domain names, the internet and social media. The purpose of a proposed amendment to the SARS Act is to broaden SARS' protection against unlawful use of its intellectual property and to protect the public from fraudulent schemes and misrepresentations of SARS' names and logos on the internet, in various media as false advertising and on goods.

Automatic exchange of information

The new international standard for the exchange of information is automatic exchange of information. Amendments are proposed to improve the framework for automatic exchange of information and related due diligence obligations on third parties.

Amendments to the reportable arrangement scheme

An amendment is proposed to include tax evasion under the term 'tax benefit' to provide greater certainty as to what is meant by a 'tax benefit' for purposes of the reportable arrangement system under the Tax Administration Act. Other proposed amendments clarify the reporting obligation of the promoter of an arrangement and all of the participants, that all participants to a reportable arrangement are responsible for reporting that arrangement and when the reporting obligation arises.

Allowing temporary write-off of disputed tax debt

Currently, SARS cannot temporarily write off a debt while it is under dispute by a taxpayer. It is proposed that changes be made to the legislation to enable SARS to temporarily write-off a tax debt where it is evident that it is uneconomical to pursue and is thus akin to a 'doubtful debt', despite the fact that the tax debt may still be disputed by the debtor.

Draft Regulations

Linked to the 2014 draft TLAB are draft regulations which will give effect to the following amendments. These draft regulations are also published for comment.

Taxation of contributions to defined benefits

As stated above, in 2014, proposals were made regarding changes to the valuation of defined benefit contributions by an employer as a fringe benefit in the hands of the employee. In order to calculate the fringe benefit, the employer would need to multiply the pensionable salary by the 'fund member category factor' that is provided in the 'contribution certificate' and subtract the value of any contributions made by the employee. The pension fund would be required to calculate the 'fund member category factor'. The methodology for this calculation will be provided by way of regulation.

Research & Development (R&D) Tax Incentive: Clinical Trials and Multisource Pharmaceutical Products (generics)

The current tax legislation still poses a barrier and prevents taxpayers conducting certain clinical trials and/or producing multisource pharmaceutical products from claiming the R&D tax incentive, despite amendments made in the tax legislation in 2013. In order to address these anomalies, it is proposed that changes be made to the R&D tax incentives to make certain clinical trials and/or multisource pharmaceutical products eligible for the R&D tax incentive. The criteria for eligible activities in this regard will be provided by way of regulation.

Special Economic Zones (SEZs)

In 2013, additional tax incentives for SEZs that will include the current Industrial Development Zones (IDZs) were introduced in the Income Tax Act. The Department of Trade and Industry will be responsible for determining (and regulating) the qualifying criteria for the type of business that may locate in a special economic zone. The Income Tax Act provides certain tax concessions to businesses that locate in an SEZ approved by the Minister of Finance. The criteria for eligible business activities/sectors that do not qualify for the reduced corporate income tax rate will be provided by way of regulation.

3. NEW DISPUTE RULES

PART A - GENERAL PROVISIONS

3.1 Definitions

In these rules, unless the context indicates otherwise, a term which is assigned a meaning in the Act, has the meaning so assigned, and the following terms have the following meaning:

'appellant' means a taxpayer who has noted an appeal under section 107 of the Act against an assessment as defined in these rules;

'assessment' includes, for purposes of these rules, a decision referred to in section 104(2) of the Act;

'clerk' means the clerk of the tax board appointed under section 112 of the Act;

'day' means a 'business day' as defined in section 1 of the Act;

'deliver' means to issue, give, send or serve a document to the address specified for this purpose under these rules, in the following manner:

(a) by SARS, the clerk or the registrar, in the manner referred to in section 251 or 252 of the Act, except the use of ordinary post;

(b) by SARS, if the taxpayer or appellant uses a SARS electronic filing service to dispute an assessment, by posting it on the electronic filing page of the taxpayer or appellant; or

(c) by the taxpayer or appellant, by-

  (i) handing it to SARS, the clerk or the registrar;

  (ii) sending it to SARS, the clerk or the registrar by registered post;

  (iii) sending it to SARS, the clerk or the registrar by electronic means to an e-mail address or telefax number; or

  (iv) if the taxpayer or appellant uses a SARS electronic filing service to dispute an assessment, submitting it through the SARS electronic filing service.

'document' means a document as defined in the Act, and includes-

(a) an agreement between the parties under these rules, whether in draft or otherwise;

(b) a request or application under these rules; and

(c) a notice required under these rules;

'electronic address' has the meaning assigned in the rules for electronic communication issued under section 255 of the Act;

'electronic filing page' has the meaning assigned in the rules for electronic communication issued under section 255 of the Act;

'grounds of assessment', for purposes of these rules, include any-

(a) grounds of assessment referred to in section 42(6) or section 96(2) of the Act;

(b) grounds for a decision by SARS not to remit an administrative non-compliance penalty under Part E of Chapter 15 of the Act;

(c) grounds for a decision by SARS not to remit a substantial understatement penalty under section 223(3) of the Act;

(d) grounds for a decision referred to in section 104(2) of the Act; and

(e) reasons for assessment provided by SARS under rule 6(5).

'party' means-

(a) for purposes of an objection, the taxpayer or SARS;

(b) for purposes of an appeal to the tax board or tax court, the appellant or SARS; and

(c) for purposes of an application under Part F, the applicant or the respondent;

'parties' means-

(a) for purposes of an objection, the taxpayer and SARS;

(b) for purposes of an appeal to the tax board or tax court, the appellant and SARS; and

(c) for purposes of an application under Part F, the applicant and the respondent;

'registrar' means the registrar of the tax court appointed under section 121 of the Act;

'Rules Board for Courts of Law Act' means the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985);

'SARS electronic filing service' has the meaning assigned in the electronic communication rules issued under section 255 of the Act;

'sign' or **'signature'** has the meaning assigned in the electronic communication rules issued under section 255 of the Act to an electronic signature, where a party-

(a) uses electronic means to deliver a document at an electronic address provided by the other party, the clerk or the registrar for this purpose; or

(b) uses a SARS electronic filing service to lodge an objection or note an appeal under these rules;

'Superior Courts Act' means the Superior Courts Act, 2013 (Act No. 10 of 2013);

'the Act' means the Tax Administration Act, 2011 (Act No. 28 of 2011); and

'these rules' means the rules reflected in this Schedule made under section 103 of the Act.

3.2 Prescribed form and manner and date of delivery

(1) A document, notice or request required to be delivered or made under these rules must be-

(a) in the form as may be prescribed by the Commissioner under section 103 of the Act;

(b) in writing and be signed by the relevant party, the party's duly authorised representative, the clerk or the registrar, as the case may be; and

(c) delivered to the address that-

(i) the taxpayer or appellant must use or has selected under these rules;

(ii) SARS has specified under these rules or, in any other case, the Commissioner has specified by public notice as the address at which the documents must be delivered to SARS; or

(iii) is determined under rule 3 as the address of the clerk or the registrar.

(2) For purposes of these rules, the date of delivery of a document-

(a) in the case of delivery by SARS, the clerk or the registrar, is regarded as the date of delivery of the document in the manner referred to in the definition of 'deliver' in rule 1, but subject to section 253; and

(b) in the case of delivery by the taxpayer, appellant or applicant (other than SARS), is regarded as the date of the receipt of the document by SARS, the clerk or the registrar.

3.3 Office of clerk of tax board and registrar of tax court

(1) The location of the office of the clerk and the registrar will be determined by a senior SARS official from time to time by public notice.

(2) The office of the clerk and the registrar will be open every Monday to Friday, excluding public holidays, from 08h00 to 16h00.

3.4 Extension of time periods

(1) Except where the extension of a period prescribed under the Act or these rules is otherwise regulated in Chapter 9 of the Act or these rules, a period may be extended by agreement between-

(a) the parties;

(b) a party or the parties and the clerk; or

(c) a party or the parties and the registrar.

(2) A request for an extension must be delivered to the other party before expiry of the period prescribed under these rules unless the parties agree that the request may be delivered after expiry of the period.

(3) If SARS is afforded a discretion under these rules to extend a time period applicable to SARS, SARS must in the notice of the extension state the grounds of the extension.

(4) If a period is extended under this rule by an agreement between the parties or a final order pursuant to an application under Part F, the period within which a further step of the proceedings under these rules must be taken commences on the day that the extended period ends.

3.5 Index and pagination of documents

(1) In all proceedings before the tax board and tax court, all documents required to be delivered under these rules must be-

(a) if drafted under these rules, divided into paragraphs numbered consecutively;

(b) paginated by the party who seeks to put them before the tax board or tax court; and

(c) as far as practical, arranged in chronological order.

(2) All documents must be accompanied by an index that corresponds with the sequence of the paginated documents and the index must contain sufficient information to enable the tax board or tax court to identify every document without having to refer to the document itself.

(3) If additional documents are filed after the index has been completed, the party who files additional documents must paginate them following the method of original pagination, and compile a supplementary index describing the additional documents.

(4) Unless the parties agree otherwise, the party who produces the paginated documents and index must make the number of copies specified by the clerk or the registrar of the original and any supplementary documents, as well as the related index, and deliver a copy to the clerk or registrar and to the other party.

(5) A document delivered electronically must comply with the rules for electronic communication issued under section 255 of the Act.

PART B - REASONS FOR ASSESSMENT, OBJECTION, APPEAL AND TEST CASES

3.6 Reasons for assessment

(1) A taxpayer who is aggrieved by an assessment may, prior to lodging an objection, request SARS to provide the reasons for the assessment required to enable the taxpayer to formulate an objection in the form and manner referred to in rule 7.

(2) The request must-

(a) be made in the prescribed form and manner;

(b) specify an address at which the taxpayer will accept delivery of the reasons; and

(c) be delivered to SARS within 30 days from the date of assessment.

(3) The period within which the reasons must be requested by the taxpayer may be extended by SARS for a period not exceeding 45 days if a SARS official is satisfied that reasonable grounds exist for the delay in complying with that period.

(4) Where a SARS official is satisfied that the reasons required to enable the taxpayer to formulate an objection have been provided, SARS must, within 30 days after delivery of the request, notify the taxpayer accordingly which notice must refer to the documents wherein the reasons were provided.

(5) Where in the opinion of a SARS official the reasons required to enable the taxpayer to formulate an objection have not been provided, SARS must provide the reasons within 45 days after delivery of the request for reasons.

(6) The period for providing the reasons may be extended by SARS if a SARS official is satisfied that more time is required by SARS to provide reasons due to exceptional circumstances, the complexity of the matter or the principle or the amount involved.

(7) An extension may not exceed 45 days and SARS must deliver a notice of the extension to the taxpayer before expiry of the 45 day period referred to in subrule (5).

3.7 Objection against assessment

(1) A taxpayer who may object to an assessment under section 104 of the Act, must deliver a notice of objection within 30 days after-

(a) delivery of a notice under rule 6(4) or the reasons requested under rule 6; or

(b) where the taxpayer has not requested reasons, the date of assessment.

(2) A taxpayer who lodges an objection to an assessment must-

(a) complete the prescribed form in full;

(b) specify the grounds of the objection in detail including-

(i) the part or specific amount of the disputed assessment objected to;

(ii) which of the grounds of assessment are disputed; and

(iii) the documents required to substantiate the grounds of objection that the taxpayer has not previously delivered to SARS for purposes of the disputed assessment;

(c) if a SARS electronic filing service is not used, specify an address at which the taxpayer will accept delivery of SARS' decision in respect of the objection as well as all other documents that may be delivered under these rules;

(d) sign the prescribed form or ensure that the prescribed form is signed by the taxpayer's duly authorised representative; and

(e) deliver, within the 30 day period, the completed form at the address specified in the assessment or, where no address is specified, the address specified under rule 2.

(3) The taxpayer may apply to SARS under section 104(4) for an extension of the period for objection.

(4) Where a taxpayer delivers an objection that does not comply with the requirements of subrule (2), SARS may regard the objection as invalid and must notify the taxpayer accordingly and state the ground for invalidity in the notice within 30 days of delivery of the invalid objection, if-

(a) the taxpayer used a SARS electronic filing service for the objection and has an electronic filing page;

(b) the taxpayer has specified an address required under subrule (2)(c); or

(c) SARS is in possession of the current address of the taxpayer.

(5) A taxpayer who receives a notice of invalidity may within 20 days of delivery of the notice submit a new objection without having to apply to SARS for an extension under section 104(4).

(6) If the taxpayer fails to submit a new objection or submits a new objection which fails to comply with the requirements of subrule (2) within the 20 day period, the taxpayer may thereafter only submit a new and valid objection together with an application to SARS for an extension of the period for objection under section 104(4).

3.8 Request for substantiating documents after objection lodged

(1) Within 30 days after delivery of an objection, SARS may require a taxpayer to produce the additional substantiating documents necessary to decide the objection.

(2) The taxpayer must deliver the documents within 30 days after delivery of the notice by SARS.

(3) If reasonable grounds for an extension are submitted by the taxpayer, SARS may extend the period for delivery of the requested document for a further period not exceeding 20 days.

3.9 Decision on objection

(1) SARS must notify the taxpayer of the allowance or disallowance of the objection and the basis thereof under section 106(2) of the Act within-

(a) 60 days after delivery of the taxpayer's objection; or

(b) where SARS requested supporting documents under rule 8, 45 days after-

(i) delivery of the requested documents; or

(ii) if the documents were not delivered, the expiry of the period within which the documents must be delivered.

(2) SARS may extend the 60 day period for a further period not exceeding 45 days if, in the opinion of a senior SARS official, more time is required to take a decision on the objection due to exceptional circumstances, the complexity of the matter or the principle or the amount involved.

(3) If a period is extended the official must, before expiry of the 60 day period, inform the taxpayer that the official will decide on the objection within a longer period not exceeding 45 days.

3.10 Appeal against assessment

(1) A taxpayer who wishes to appeal against the assessment to the tax board or tax court under section 107 of the Act must deliver a notice of appeal in the prescribed form and manner within-

(a) 30 days after delivery of the notice of disallowance of the objection under rule 9; or

(b) the extended period pursuant to an application under section 107(2).

(2) A notice of appeal must-

(a) be made in the prescribed form;

(b) if a SARS electronic filing service is used, specify an address at which the appellant will accept delivery of documents when the SARS electronic filing service is no longer available for the further progress of the appeal;

(c) specify in detail-

(i) in respect of which grounds of the objection referred to in rule 7 the taxpayer is appealing;

(ii) the grounds for disputing the basis of the decision to disallow the objection referred to in section 106(5); and

(iii) any new ground on which the taxpayer is appealing;

(d) be signed by the taxpayer or the taxpayer's duly authorised representative; and

(e) indicate whether or not the taxpayer wishes to make use of the alternative dispute resolution procedures referred to in Part C, should the procedures under section 107(5) be available.

(3) The taxpayer may not appeal on a ground that constitutes a new objection against a part or amount of the disputed assessment not objected to under rule 7.

(4) If the taxpayer in the notice of appeal relies on a ground not raised in the objection under rule 7, SARS may require a taxpayer within 15 days after delivery of the notice of appeal to produce the substantiating documents necessary to decide on the further progress of the appeal.

(5) The taxpayer must deliver the documents within 15 days after delivery of the notice by SARS unless SARS extends the period for delivery for a further period not exceeding 20 days if reasonable grounds for an extension are submitted by the taxpayer.

3.11 Appeal to tax board or tax court

(1) Where-

(a) the provisions of section 109(1) of the Act apply, the appeal must be dealt with by the tax board under Part D; or

(b) the chairperson of the tax board directs an appeal to the tax court under section 109(5) or the provisions of section 117 apply, the appeal must be dealt with by the tax court under Part E.

(2) If no alternative dispute resolution procedures under Part C are pursued, the appellant must, if the appeal is to be dealt with by the tax board, within 35 days of delivery of the notice of appeal request the clerk to set the matter down before the tax board under rule 26.

3.12 Test cases

(1) A senior SARS official must upon designating an objection or appeal as a test case or staying a similar objection or appeal by reason of a designation under section 106(6) of the Act, inform the taxpayers or appellants accordingly by notice before-

(a) the objection is decided under rule 9;

(b) if the appeal is to be dealt with by the tax board, a decision by the chairperson of the tax board is given under section 114; or

(c) if the appeal is to be dealt with by the tax court, the appeal is heard by the tax court.

(2) The notice must set out-

(a) the number of and common issues involved in the objections or appeals that the test case is likely to be determinative of;

(b) the question of law or fact or both law and fact that, subject to the augmentation thereof under rule 34, constitute the issues to be determined by the test case; and

(c) the importance of the test case to the administration of the relevant tax Act.

(3) The taxpayer or appellant concerned may within 30 days of delivery of the notice, deliver a notice-

(a) opposing the decision that an objection or appeal is designated as a test case;

(b) opposing the decision that an objection or appeal is stayed pending the final determination of a test case on a similar objection or appeal before the tax court; or

(c) if the objection or appeal is to be stayed, requesting a right of participation in the test case, which notice must set out the grounds of opposition or for participation, as the case may be.

(4) If no notice under subrule (3) is received by SARS, the designation of the test case or suspension of the objection or appeal by reason of the designation is regarded as final.

(5) Within 30 days after receipt of a notice under subrule (3) a senior SARS official may-

(a) withdraw the decision to select the objection or appeal as a test case or to stay the objection or appeal pending the outcome of a test case;

(b) agree that a taxpayer or appellant requesting participation may do so; or

(c) apply to the tax court under Part F for an order under rule 52.

(6) The stay of an objection or appeal terminates on the date of the-

(a) expiry of the 30 day period prescribed under subrule (5), if a taxpayer or appellant has delivered a notice under subrule (3) and the senior SARS official has not within the 30 day period withdrawn the decision under subrule (5)(a) or made an application under subrule (5)(c);

(b) delivery of the notice by the official that the decision has been withdrawn under subrule (5)(a);

(c) agreement between the taxpayer or appellant and the official that the stay of the objection or appeal is terminated; or

(d) dismissal by the tax court, or higher court dealing with an appeal against the decision of the tax court under rule 52, of an application by the official under subrule (5)(c).

(7) For the period during which an objection or appeal is stayed under section 106(6)(b)-

(a) a period prescribed under these rules (other than under this rule) in relation to the objection or appeal does not apply; and

(b) if the staying of an objection or appeal terminates, a period prescribed under these rules is treated as if the period was extended by the same period that the suspension of the objection or appeal was in effect.

(8) Proceedings in an objection or appeal under these rules which have been instituted but not determined by the tax board, tax court or any other court of law are stayed with effect from delivery of the notice under subrule (1) until the stay of an objection or appeal is terminated under subrule (6).

(9) A test case designated under section 106(6) must be heard by the tax court constituted under section 118(5) and if not so designated, the tax court constituted under section 118(1).

(10) For purposes of a cost order by the tax court, or higher court dealing with an appeal against the judgment of the tax court, in a test case designated under section 106(6), the appellants in the test case include:

(a) the appellant whose appeal was selected as the test case; and

(b) a taxpayer or appellant who participated in the test case.

(11) In the event that a tax court under section 130, or a higher court dealing with an appeal against the judgment of the tax court in the test case, awards costs and-

(a) SARS is substantially successful in a test case, the appellants in the test case will be responsible for their legal costs on the proportionate basis as may be determined by the tax court; or

(b) the appellants are substantially successful in a test case, SARS will be liable for the legal costs of the appellants and the taxpayers whose objections or appeals were stayed on the proportionate basis as may be determined by the tax court.

PART C - ALTERNATIVE DISPUTE RESOLUTION

3.13 Notice of alternative dispute resolution

(1) If the appellant has in a notice of appeal indicated a willingness to participate in alternative dispute resolution proceedings under this Part in an attempt to

resolve the dispute, SARS must inform the appellant by notice within 30 days of receipt of the notice of appeal whether or not the matter is appropriate for alternative dispute resolution.

(2) If the appellant has not indicated in the notice of appeal that the appellant wishes to make use of alternative dispute resolution under this Part, but SARS is satisfied that the matter is appropriate for alternative dispute resolution and may be resolved by way of the procedures referred to in this Part-

(a) SARS must inform the appellant accordingly by notice within 30 days of receipt of the notice of appeal; and

(b) the appellant must within 30 days of delivery of the notice by SARS deliver a notice stating whether or not the appellant agrees thereto.

(3) An appellant who requests alternative dispute resolution or agrees thereto, is regarded as having accepted the terms of alternative dispute resolution set out in this Part.

3.14 Reservation of rights

(1) The parties participate in alternative dispute resolution proceedings under this Part with full reservation of their respective rights in terms of the procedures referred to in the other Parts of these rules.

(2) Subject to rule 22(3)(c), any representations made or documents submitted in the course of the alternative dispute resolution proceedings will be without prejudice.

3.15 Period of alternative dispute resolution

(1) The period within which the alternative dispute resolution proceedings under this rule are conducted commences on the date of delivery of the notice by SARS under rule 13(1) or the notice by the appellant under rule 13(2)(b), and ends on the date the dispute is resolved under rule 23 or 24 or the proceedings are terminated under rule 25.

(2) The period referred to in subrule (1) interrupts the periods prescribed for purposes of proceedings under rule 12 and Parts D, E and F of these rules.

(3) The parties must finalise the alternative dispute resolution proceedings within 90 days after the commencement date referred to in subrule (1).

3.16 Appointment of facilitator

(1) A senior SARS official must establish a list of facilitators of alternative dispute resolution proceedings under this Part and a person included on the list-

(a) may be a SARS official;

(b) must be a person of good standing of a tax, legal, arbitration, mediation or accounting profession who has appropriate experience in such fields; and

(c) must comply with the duties under rule 17.

(2) A facilitator is only required to facilitate the proceedings if the parties so agree.

(3) Where the parties agree to use a facilitator, a senior SARS official must appoint a person from the list of facilitators-

(a) within 15 days after the commencement date of the proceedings under rule 15; or

(b) within 5 days after the removal of a facilitator under subrule (4) or the withdrawal of a facilitator under rule 18(2);

and give notice thereof to the appellant and the SARS official to whom the appeal is allocated.

(4) A senior SARS official may not remove the facilitator appointed for the proceedings once the facilitator has commenced with the proceedings, save-

(a) at the request of the facilitator;

(b) by agreement between the parties;

(c) at the request of a party and if satisfied that there has been misconduct, incapacity,incompetence or non-compliance with the duties under rule 17 by the facilitator; or

(d) under the circumstances referred to in rule 18.

(5) A senior SARS official may request a party to submit evaluations of the facilitation process, including an assessment of the facilitator, which evaluations are regarded as SARS confidential information.

3.17 Conduct of facilitator

A person appointed to facilitate the proceedings under this Part has a duty to-

(a) act within the prescripts of the proceedings under this Part and the law;

(b) seek a fair, equitable and legal resolution of the dispute between the appellant and SARS;

(c) promote, protect and give effect to the integrity, fairness and efficacy of the alternative dispute resolution process;

(d) act independently and impartially;

(e) conduct himself or herself with honesty, integrity and with courtesy to all parties;

(f) act in good faith;

(g) decline an appointment or obtain technical assistance when a case is outside the field of competence of the facilitator; and

(h) attempt to bring the dispute to an expeditious conclusion.

3.18 Conflict of interest of facilitator

(1) A facilitator will not solely on account of his or her liability to tax and, if applicable, employment by SARS be regarded as having a personal interest or a conflict of interest in proceedings in which he or she is appointed to facilitate.

(2) A facilitator must withdraw from the proceedings as soon as the facilitator becomes aware of a conflict of interest which may give rise to bias which the facilitator may experience with the matter concerned or other circumstances that may affect the facilitator's ability to remain objective for the duration of the proceedings.

(3) Either party may request the senior SARS official who appointed the facilitator to withdraw the facilitator on the basis of conflict of interest or other indications of bias and, if the parties so agree, appoint a new facilitator to continue the proceedings.

3.19 Determination and termination of proceedings by facilitator

(1) The facilitator must, after consulting the appellant and the SARS official involved in the alternative dispute resolution proceedings-

(a) within 20 days of the facilitator's appointment, determine a place, date and time at which the parties must convene the alternative dispute resolution meeting and notify the parties accordingly in writing; and

(b) if required, notify each party in writing which written submissions or any other document should be furnished or exchanged and when the submissions or documents are required.

(2) Where a facilitator has not been appointed, the parties must-

(a) within 30 days determine a place, date and time at which the parties must convene the alternative dispute resolution meeting; and

(b) if required, notify the other party in writing which written submissions or any other document should be furnished or exchanged and when the submissions or documents are required.

(3) The facilitator may summarily terminate the proceedings without prior notice-

(a) if a party fails to attend the meeting;

(b) if a party fails to carry out a request under subrule (1)(b);

(c) if of the opinion that the dispute cannot be resolved through such proceedings; or

(d) for any other appropriate reason.

3.20 Proceedings before facilitator

(1) The alternative dispute resolution proceedings before the facilitator must be conducted in accordance with the procedures set out in this Part.

(2) A facilitator or a party is not required to record the proceedings and the proceedings may not be electronically recorded.

(3) During the proceedings the appellant, if a natural person or if a representative taxpayer within the meaning of section 153 of the Act, must be personally present or participate by telephonic or video conferencing and, if SARS so agrees, may be represented by a representative of the appellant's choice.

(4) If a facilitator was appointed, the facilitator, in exceptional circumstances, may allow the appellant to be represented in the appellant's absence by a representative of the appellant's choice.

(5) The meeting may be-

(a) concluded at the instance of the facilitator or if the parties so agree; and

(b) if both parties and the facilitator, if appointed, agree, resumed at the place, date or time determined by the parties and which suits the facilitator.

(6) If a facilitator was appointed, the facilitator must at the conclusion of the meeting deliver a report that records-

(a) the issues which were resolved;

(b) the issues upon which agreement or settlement could not be reached; and

(c) any other point which the facilitator considers necessary.

(7) The facilitator must deliver the report to the taxpayer and SARS within 10 days of the cessation of the proceedings.

3.21 Recommendation by facilitator

(1) SARS, the appellant and the facilitator may agree at the commencement of the proceedings that, if no agreement or settlement is ultimately reached between the parties, the facilitator may make a written recommendation at the conclusion of the proceedings.

(2) The facilitator must deliver the recommendation to the parties with 30 days after the termination of the proceedings under rule 25 unless the parties agree to an extension of this period.

(3) A recommendation by a facilitator will not be admissible during any subsequent proceedings including court proceedings unless it is required by the tax court for purposes of deciding costs under section 130 of the Act.

3.22 Confidentiality of proceedings

(1) Representations made or documents tendered to the facilitator in confidence by a party during the course of the facilitation should be kept by the facilitator in confidence and not be disclosed to the other party except with the consent of the party that disclosed the information.

(2) A facilitator who is not a SARS official will be regarded as such for purposes of Chapter 6 of the Act.

(3) The proceedings under this rule will not be one of record, and any representation made or document tendered in the course of the proceedings-

(a) is subject to the confidentiality provisions of Chapter 6;

(b) is made or tendered without prejudice; and

(c) may not be made or tendered in any subsequent proceedings as evidence by a party, except-

  (i) with the knowledge and consent of the party who made the representation or tendered the document;

  (ii) if such representation or document is already known to, or in the possession of, that party;

(iii) if such representation or document is obtained by the party otherwise than under the proceedings in terms of this rule; or

(iv) if a senior SARS official is satisfied that the representation or document is fraudulent.

(4) Unless a court otherwise directs, no person may-

(a) subject to the circumstances listed in subrule (3)(c), subpoena a person involved in the alternative dispute resolution proceedings in whatever capacity to compel disclosure of any representation made or document tendered in the course of the proceedings;

(b) subpoena the facilitator to compel disclosure of any representation made or document tendered in the course of the proceedings in any other proceedings; or

(c) subpoena the facilitator during or after termination of the proceedings under rule 25 to explain or defend a recommendation made under rule 21.

3.23 Resolution of dispute by agreement

(1) A dispute which is subject to the procedures under this rule may be resolved by agreement whereby a party accepts, either in whole or in part, the other party's interpretation of the facts or the law applicable to those facts or both.

(2) An agreement under this rule-

(a) must be recorded in writing and signed by the appellant and the SARS official duly authorised to do so;

(b) must relate to the appeal as a whole, including costs;

(c) if not all issues in dispute were resolved, must stipulate those areas in dispute-

(i) that are resolved; and

(ii) that could not be resolved and on which the appellant may continue the appeal to the tax board or tax court;

(d) may be made an order of court either with the consent of both parties, or on application to the tax court by a party under Part F; and

(e) must be reported internally in SARS in the manner as may be required by the Commissioner.

(3) Where an agreement is concluded, SARS must issue an assessment to give effect to the agreement within a period of 45 days after the date of the last signing of the agreement.

(4) If the appellant wishes to pursue the appeal on the unresolved issues to the tax board or tax court, the appellant must deliver a notice to this effect to the clerk or registrar,as the case may be, within 15 days of the date of the agreement.

3.24 Resolution of dispute by settlement

(1) Where the parties are, despite all reasonable efforts, unable to resolve the dispute under rule 23, the parties may attempt to settle the matter in accordance with Part F of Chapter 9 of the Act.

(2) A settlement under Part F of Chapter 9 pursuant to proceedings under this Part-

(a) is subject to the approval of the senior SARS official referred to in section 147 of the Act;

(b) must be recorded in writing and signed by the appellant and the senior SARS official;

(c) must relate to the appeal as a whole, including costs;

(d) if not all issues in dispute were settled, must stipulate those areas in dispute-

(i) that are resolved; and

(ii) that could not be resolved and on which the appellant may continue the appeal to the tax board or tax court;

(e) may be made an order of court either with the consent of both parties, or on application to the tax court by a party under Part F; and

(f) must be reported in the manner referred to in section 149.

(3) Where a settlement is concluded, SARS must issue the assessment referred to in section 150 to give effect to the settlement within a period of 45 days after the date of the last signature of the settlement.

(4) If the appellant wishes to pursue the appeal on the unresolved issues to the tax board or tax court, the appellant must deliver a notice to this effect to the clerk or registrar, as the case may be, within 15 days of the date of the settlement.

3.25 Termination of proceedings

(1) The alternative dispute resolution proceedings are terminated on the day after the expiry of the 90 day period under rule 15, unless the parties agreed that this period may be extended.

(2) Before expiry of the 90 day period under rule 15 or any extension thereof, if no agreement under rule 23 or settlement under rule 24 is concluded, the alternative dispute resolution proceedings are terminated on the date that-

(a) the facilitator terminates the proceedings under rule 19;

(b) the parties so agree; or

(c) a party delivers a notice of termination to the other party.

(3) If alternative dispute resolution proceedings are terminated under this rule, the appellant must within 20 days of the date of the termination-

(a) if the appeal is to be dealt with by the tax board, request the clerk to set the matter down before the tax board under rule 26; or

(b) if the appeal is to be dealt with by the tax court, give notice to SARS that the appellant wishes to proceed with the appeal.

PART D - PROCEDURES OF TAX BOARD

3.26 Set down of appeal before tax board

(1) The clerk must set an appeal down before the tax board within 30 days after receipt of-

(a) a notice by the appellant under rule 11(2)(a), 23(4), 24(4) or 25(3);

(b) a decision by the chairperson to condone non-appearance before the tax board under rule 30; or

(c) an order by the tax court to condone non-appearance before the tax board under rule 53.

(2) The clerk in his or her sole discretion may allocate a date for the hearing.

(3) The clerk must give the parties written notice of the date, time and place for the hearing of the appeal at least 20 days before the hearing.

3.27 Subpoenas and dossier to tax board

(1) At the request of either party, or if a tax board directs, a subpoena may be issued by the clerk requiring a person to-

(a) attend the hearing of the appeal for the purpose of giving evidence in connection with the appeal; and

(b) produce any specified document which may be in that person's possession or under that person's control and which is relevant to the issues in appeal.

(2) The Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa issued under the Rules Board for Courts of Law Act will apply in respect of subpoenas issued under this rule.

(3) A witness or document subpoenaed must be relevant to the issues in appeal as reflected in the grounds of assessment, notice of objection, notice of disallowance of objection and notice of appeal.

(4) At least 10 days before the hearing of the appeal or as otherwise agreed between the parties, the clerk must prepare and deliver a dossier to the chairperson and the parties containing copies of-

(a) all returns by the appellant relevant to the tax period in issue;

(b) all assessments relevant to the appeal;

(c) all documents relevant to a request for reasons for the assessment under rule 6;

(d) the notice of objection under rule 7 and documents, if any, provided under rule 8;

(e) the notice of disallowance of the objection under rule 9;

(f) the notice of appeal under rule 10; and

(g) any order by the tax court under Part F relating to the appeal.

(5) The dossier must be prepared in accordance with the requirements of rule 5.

3.28 Procedures in tax board

(1) Sections 122, 123, 124, 126, 127, 128 and 129 of the Act apply, with the necessary changes, to the tax board and the chairperson.

(2) A party must present all evidence, including leading witnesses, on which the party's case is based and must adhere to the rules of evidence.

(3) At the conclusion of the evidence, the parties may be heard in argument.

(4) The clerk must as required under section 114(3) deliver of a copy of the tax board's decision to both parties within 10 days of receipt of the decision.

(5) If no referral of the appeal to the tax court is requested under rule 29, SARS must, if required, issue the assessment to give effect to the decision of the tax board within a period of 45 days after delivery of a copy of the tax board's decision by the clerk.

3.29 Referral of appeal from tax board to tax court

(1) A party requiring an appeal to be referred to the tax court for a de novo hearing under section 115 of the Act must deliver a notice to the clerk requesting the referral and deliver a copy thereof to the other party.

(2) The referral notice must be delivered within the 21 day period prescribed under section 115 or the period extended under this rule-

(a) after delivery by the clerk of the tax board's decision under rule 28(4) or decision to extend the period under subrule (5);

(b) after delivery by the registrar of the tax court's decision to extend the period under rule 53; or

(c) the expiry of the 60 day period within which the chairperson must deliver the decision under section 114(2).

(3) If the party seeking the referral is unable to deliver the notice within the prescribed period, the party may within the 21 day period prescribed under section 115 deliver a request for an extension by the chairperson under section 115(1) to the clerk, setting out the grounds for the extension or delay.

(4) The clerk must within 10 days of receipt of the request, deliver the request to the relevant chairperson and a copy thereof to the other party.

(5) The chairperson must determine whether good cause exists for the extension and must make a decision within 15 days of receipt of the request and inform the clerk accordingly, and the clerk must notify the parties within 10 days of delivery of the decision of the chairperson.

3.30 Reasons for non-appearance at tax board hearing

(1) If the chairperson confirms an assessment under section 113(9) of the Act or allows an appeal under section 113(11), a party who failed to appear at the hearing of the board must provide the reasons referred to in section 113(13) for the non-appearance and request that the chairperson withdraws the tax board's decision.

(2) The request must set out the reasons for the non-appearance and must be delivered to the clerk within 10 days after-

(a) if the tax board decided the matter on the day of the hearing when the party failed to appear, the date of the hearing;

(b) if the tax board decided the matter after the day of the hearing, the date of delivery of a copy of the tax board's decision; or

(c) in any other case, the date that the party becomes aware of the tax board's decision.

(3) The clerk must within 10 days of receipt of the request deliver the application to the chairperson and a copy thereof to the other party.

(4) The chairperson must determine whether the party's non-appearance is due to sound reasons and must make a decision within 15 days of receipt of the request and inform the clerk accordingly.

(5) The clerk must deliver the chairperson's decision to the parties within 10 days of receipt of the decision.

PART E - PROCEDURES OF TAX COURT

3.31 Statement of grounds of assessment and opposing appeal

(1) SARS must deliver to the appellant a statement of the grounds of assessment and opposing the appeal within 45 days after delivery of-

(a) the documents required by SARS under rule 10(4);

(b) if alternative dispute resolution proceedings were followed under Part C, the notice by the appellant of proceeding with the appeal under rule 24(4) or 25(3);

(c) if the matter was decided by the tax board, the notice of a de novo referral of the appeal to the tax court under rule 29(2); or

(d) in any other case, the notice of appeal under rule 10.

(2) The statement of the grounds of opposing the appeal must set out a clear and concise statement of-

(a) the consolidated grounds of the disputed assessment;

(b) which of the facts or the legal grounds in the notice of appeal under rule 10 are admitted and which of those facts or legal grounds are opposed; and

(c) the material facts and legal grounds upon which SARS relies in opposing the appeal.

(3) 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.

3.32 Statement of grounds of appeal

(1) The appellant must deliver to SARS a statement of grounds of appeal within 45 days after delivery of-

(a) the required documents by SARS, where the appellant was requested to make discovery under rule 36(1); or

(b) the statement by SARS under rule 31.

(2) The statement must set out clearly and concisely-

(a) the grounds upon which the appellant appeals;

(b) which of the facts or the legal grounds in the statement under rule 31 are admitted and which of those facts or legal grounds are opposed; and

(c) the material facts and the legal grounds upon which the appellant relies for the appeal and opposing the facts or legal grounds in the statement under rule 31.

(3) The appellant may not include in the statement a ground of appeal that constitutes a new ground of objection against a part or amount of the disputed assessment not objected to under rule 7.

3.33 Reply to statement of grounds of appeal

(1) SARS may after delivery of the statement of grounds of appeal under rule 32 deliver a reply to the statement within -

(a) 15 days after the appellant has discovered the required documents, where the appellant was requested to make discovery under rule 36(2); or

(b) 20 days after delivery of the statement under rule 32.

(2) The reply to the statement of grounds of appeal must set out a clear and concise reply to any new grounds, material facts or applicable law set out in the statement.

3.34 Issues in appeal

The issues in an appeal to the tax court will be those contained in the statement of the grounds of assessment and opposing the appeal read with the statement of the grounds of appeal and, if any, the reply to the grounds of appeal.

3.35 Amendments of statements

(1) The parties may agree that a statement under rule 31, 32 or 33 be amended.

(2) If the other party does not agree to the amendment, the party who requires an amendment may apply to the tax court under Part F for an order under rule 52.

3.36 Discovery of documents

(1) The appellant may, within 10 days after delivery of the statement under rule 31, deliver a notice of discovery to SARS requesting it to make discovery on oath of any document material to a ground of the assessment or opposing the appeal specified in the statement under rule 31 not set out in the grounds of assessment as defined in rule 1, to the extent that such document is required by the appellant to formulate its grounds of appeal under rule 32.

(2) SARS may within 10 days after delivery of the statement under rule 32, deliver a notice of discovery requesting the appellant to make discovery on oath of any document material to a ground of appeal in the statement under rule 32 and not set out in the grounds of assessment, to the extent such document is required by SARS to formulate its grounds of reply under rule 33.

(3) A party may within 15 days after delivery of the statement under rule 32 or 33, as the case may be, deliver a notice of discovery to the other party requesting that party to-

(a) make discovery on oath of all documents relating to the issues in appeal as referred to in rule 34; and

(b) if required and reasonable, produce specified documents in a specified manner, including electronically.

(4) A party to whom a notice of discovery has been delivered must make discovery on oath of all documents relating to a request under subrule (1) or (2) or the issues in appeal, as the case may be, within 20 days after delivery of the discovery notice, specifying separately-

(a) the documents in or under the party's possession or control, or in or under the control of that party's agent;

(b) the documents which were previously in the party's possession or control, or under the control of the party's agent, but which are no longer in the party's possession or control or that of the party's agent; and

(c) the documents in respect of which the party has a valid objection to produce.

(5) After delivery of the documents, the production or inspection of the documents must take place at a venue and in a manner that the parties agree on.

(6) If either party believes that, in addition to the documents disclosed, there are other documents in possession of the other party that may be relevant to a request under subrule (1) or (2) or the issues in appeal, as the case may be, that have not been discovered, then that party may give notice of further discovery within 10 days of the discovery under subrule (4), or of the inspection of the documents under subrule (5), to that other party requiring the other party to within 10 days-

(a) make the further documents available for inspection; or

(b) state under oath that the documents requested are not in that party's possession, in which event the party must state their whereabouts, if known.

(7) A document not disclosed pursuant to a notice of discovery may not, unless the tax court in the interest of justice otherwise directs, be used for any purpose at the appeal by the party who failed to make disclosure, but the other party may use such document.

(8) A document referred to in subrule (7) does not include a document specifically prepared to assist the court in understanding the case of the relevant party and which is not presented as evidence in the appeal.

3.37 Notice of expert witness

Neither party may, save with the leave of the tax court or if the parties so agree, call a person as a witness to give evidence as an expert, unless that party has-

(a) not less than 30 days before the hearing of the appeal delivered a notice to the other party and the registrar of the party's intention to do so; and

(b) not less than 20 days before the hearing of the appeal delivered to the other party and the registrar a summary of the expert's opinions and the relevance thereof to the issues in appeal under rule 34.

3.38 Pre-trial conference

(1) SARS must arrange for a pre-trial conference to be held by not later than 60 days before the hearing of the appeal.

(2) During the pre-trial conference the parties must attempt to reach consensus on-

(a) what facts are common cause and what facts are in dispute;

(b) the resolution of preliminary points that either party intends to take;

(c) the sufficiency of the discovery process;

(d) the preparation of a paginated bundle of documents;

(e) the manner in which evidence is to be dealt with, including an agreement on the status of a document and if a document or a part thereof, will serve as evidence of what it purports to be;

(f) whether evidence on affidavit will be admitted and the waiver of the right of a party to cross-examine the deponent;

(g) expert witnesses and the evidence to be given in an expert capacity;

(h) the necessity of an inspection in loco;

(i) an estimate of the time required for the hearing and any means by which the proceedings may be shortened; and

(j) if the dispute could be resolved or settled in whole or in part.

(3) This conference must take place at the SARS office determined by SARS unless the parties agree that it may take place at a different venue.

(4) SARS must within 10 days of the conclusion of the pre-trial conference prepare and deliver to the appellant a minute setting out the parties' discussion and an agreement reached in respect of each matter referred to in subrule (2).

(5) Where the appellant does not agree with the content of the minute, the appellant must, within 10 days of delivery of the minute by SARS, deliver a differentiating minute to SARS setting out with which statements in the minute by SARS the appellant does not agree and why.

3.39 Set down of appeal for hearing before tax court

(1) The appellant must apply to the registrar to allocate a date for the hearing of the appeal within 30 days after delivery of the appellant's statement of grounds of appeal under rule 32 or SARS' reply under rule 33, as the case may be, and give notice thereof to SARS.

(2) If the appellant fails to apply for the date within the prescribed period, SARS must apply for a date for the hearing within 30 days after the expiry of the period.

(3) The registrar in his or her sole discretion may allocate a date for the hearing.

(4) The registrar must deliver to the parties a written notice of the time and place appointed for the hearing of the appeal at least 80 days before the hearing of the appeal.

3.40 Dossier to tax court

(1) At least 30 days before the hearing of the appeal, or as otherwise agreed between the parties, SARS must deliver to the appellant and the registrar a dossier containing copies, where applicable, of-

(a) all returns by the appellant relevant to the year of assessment in issue;

(b) all assessments by SARS relevant to the issues in appeal;

(c) the appellant's notice of objection against the assessment;

(d) SARS' notice of disallowance of the objection;

(e) the appellant's notice of appeal;

(f) SARS' statement of grounds of assessment and opposing the appeal under rule 31;

(g) the appellant's statement of grounds of appeal under rule 32;

(h) SARS' reply to the appellant's statement of grounds of appeal under rule 33, if any;

(i) SARS' minute of the pre-trial conference and, if any, the appellant's differentiating minute;

(j) any request for a referral from a tax board decision to the tax court under rule 29; and

(k) any order by the tax court under Part F or a higher court in an interlocutory application or application on a procedural matter relating to the objection or the appeal.

(2) The dossier must be prepared in accordance with the requirements of rule 5.

(3) The registrar must deliver copies of the dossier to the tax court at least 20 days before the hearing of the appeal.

3.41 Places at which tax court sits

(1) The Judge-President of the Division of the High Court with jurisdiction in the area where a tax court has been established under section 116 of the Act must-

(a) determine the place and the times of the sittings of the tax court in that area by arrangement with the registrar under section 117(2); and

(b) allocate a judge or an acting judge of the High Court as the president of the tax court for each sitting.

(2) The tax court established in the area which is nearest to the residence or principal place of business of the appellant must hear and determine an appeal or application under Part F by the appellant, unless-

(a) the parties agree that the appeal or application be heard by a tax court sitting in another area; or

(b) the tax court, on application by a party under Part F, orders that the appeal or application be heard and disposed of in that tax court if-

(i) there are reasonable grounds to determine the matter in that tax court; and

(ii) approved by the Judge-President of the Division of the High Court with jurisdiction in the area where that tax court sits.

3.42 Procedures not covered by Act and rules

(1) If these rules do not provide for a procedure in the tax court, then the most appropriate rule under the Rules for the High Court made in accordance with the Rules Board for Courts of Law Act and to the extent consistent with the Act and these rules, may be utilised by a party or the tax court.

(2) A dispute that arises during an appeal or application under Part F concerning the use of a rule of the high court must be dealt with by the president of the tax court as a matter of law under section 118(3) of the Act.

3.43 Subpoena of witnesses to tax court

(1) At the request of either party, or if a tax court directs, a subpoena may be issued by the registrar requiring a person to attend the hearing of the appeal for the purpose of giving evidence in connection with an appeal.

(2) The subpoena may require the person subpoenaed to produce any specified document which may be in that person's possession or under that person's control and which is relevant to the issues in appeal.

(3) A witness or document subpoenaed must be relevant to the issues in appeal under rule 34.

(4) The Rules for the High Court made in accordance with the Rules Board for Courts of Law Act governing the service of subpoenas in civil matters in the high court will apply in respect of subpoenas issued under this rule.

3.44 Procedures in tax court

(1) At the hearing of the appeal, the proceedings are commenced by the appellant unless-

(a) the only issue in dispute is whether an estimate under section 95 of the Act on which the disputed assessment is based, is reasonable or the facts upon which an understatement penalty is imposed by SARS under section 222(1); or

(b) SARS takes a point in limine.

(2) A party-

(a) must present all evidence, including leading witnesses, on which the party's case is based and must adhere to the rules of evidence; and

(b) may present a document specifically prepared to assist the court in understanding the case of the party and which is not presented as evidence in the appeal.

(3) At the conclusion of the evidence, the parties may be heard in argument and the party heard first may reply to new points raised in the argument presented by the other party or to other points with the leave of the president of the tax court.

(4) The hearing of an appeal may be adjourned by the president of the tax court from time to time to a time and place that the tax court deems convenient.

(5) The tax court may reserve its decision until a later date and where the decision is reserved, the judgment must be delivered by the president of the tax court in the manner considered fit.

(6) The registrar must by notice deliver the written judgment of the tax court to the parties within 21 days of delivery thereof.

(7) If a party or a person authorised to appear on the party's behalf fails to appear before the tax court at the time and place appointed for the hearing of the appeal, the tax court may decide the appeal under section 129(2) upon-

(a) the request of the party that does appear; and

(b) proof that the prescribed notice of the sitting of the tax court has been delivered to the absent party or absent party's representative,

unless a question of law arises, in which case the tax court may call upon the party that does appear for argument.

3.45 Postponement or removal of case from roll

(1) If the parties agree to postpone the hearing of the appeal that has been set down for hearing, or to have that appeal removed from the tax court's roll, the party initiating the proceedings must notify the registrar thereof.

(2) An application by a party to postpone or remove an appeal from the roll, which is opposed by the other party, may be heard and determined by the president of the tax court in the manner referred to in section 118(3) of the Act and the president may make an appropriate cost order under section 130(3).

3.46 Withdrawal or concession of appeal or application

(1) If at any time before it has been set down under rule 39 an appeal or application under Part F is withdrawn by the appellant or conceded by SARS under section 107 of the Act, notice of the withdrawal or concession, whichever is applicable, must be given to the other party.

(2) If an appeal or application has been set down for hearing under rule 39, or is partheard, and the appellant withdraws or SARS concedes the appeal or application, the relevant party must-

(a) deliver a notice of withdrawal or concession, whichever is applicable, to the other party and to the registrar; and

(b) in such notice, indicate whether or not the party consents to pay the costs of the other party.

3.47 Costs

(1) Where the tax court makes an order as to costs or if a consent to pay costs is made by a party under these rules, at the request of a party, the registrar may-

(a) perform the functions and duties of a taxing master; or

(b) at the request of the tax court or the party, appoint any other person to act as taxing master on such terms and for such period as the registrar considers appropriate.

(2) The registrar must be satisfied that the person appointed by the registrar to act as taxing master is suitably qualified or experienced to perform the functions and duties of a taxing master.

(3) The fees, charges and rates to be allowed by the tax court are, as far as applicable, those fixed by the tariff of fees and charges in cases heard before the Division of the High Court within which area of jurisdiction the tax court sits.

3.48 Witness fees

(1) A witness in proceedings before the tax court is entitled to be paid in accordance with the tariff of allowances prescribed by the Minister of Justice and Constitutional Development and published under section 37 of the Superior Courts Act.

(2) A tax court may, at the request of a party, order that no allowances or only a portion of the prescribed allowances be paid to a witness.

3.49 Request for recordings

(1) If the appellant requires from the registrar under section 134(3) of the Act-

(a) a transcript of the evidence or part thereof given at the hearing of the appeal; or

(b) a copy of the recording of the evidence or a part thereof given at the hearing of the appeal for purposes of private transcription,

the appellant must pay to the registrar the costs as prescribed by the Commissioner in a public notice issued under section 134(3).

(2) The appellant must pay the costs as follows:

(a) if a transcript is required, payment must be made within 20 days of delivery of the transcript and the invoice by the registrar; or

(b) if a copy of the recording of the evidence is required, payment in full must be made upon receipt of the copy and invoice by the registrar.

PART F - APPLICATIONS ON NOTICE

3.50 Procedures under this Part

(1) For the purpose of this Part-

(a) the party bringing the application is the applicant and the party against whom relief is sought is the respondent; and

(b) a reference to the tax court means the president of the tax court acting in the manner referred to in section 118(3) of the Act.

(2) The rules referred to in Parts A to E and G, to the extent applicable and together with the necessary changes as required by the context, apply to this Part.

(3) A document required to be delivered under this Part must be delivered-

(a) to the registrar at the address specified by public notice under rule 3;

(b) to SARS at the address specified under rule 2(1);or

(c) to the taxpayer or appellant, at the address specified under rule 2(1).

(4) An application under this Part, unless the context otherwise indicates, interrupts the periods prescribed for purposes of proceedings under Parts A to E of these rules for the period commencing on the date of delivery of a notice of motion under rule 57 and ending on the date of-

(a) delivery of a notice of withdrawal of the application by the applicant;

(b) an agreement between the applicant and respondent to terminate proceedings under this Part; or

(c) delivery of the judgment of the tax court to the parties.

(5) The tax court hearing an application under this Part may-

(a) make an order as referred to in this Part, together with any other order it deems fit, including an order as to costs; and

(b) reserve its decision until a later date and where the decision is reserved, the judgment must be delivered by the president of the tax court in the manner considered fit.

(6) The registrar must by notice deliver the written judgment of the tax court to the applicant and the respondent within 10 days of delivery thereof.

3.51 Application provided for in Act

(1) An application to the tax court provided for in the Act must, unless otherwise specified, be brought in the manner provided for in this Part.

(2) An interlocutory application relating to an objection or appeal must, unless the tax court before which an appeal is set down otherwise directs, be brought in the manner provided for in this Part.

3.52 Application provided for under rules

(1) A party who failed to obtain an extension of a period by agreement with the other party, the clerk or the registrar, as the case may be, under rule 4 may apply to the tax court under this Part for an order, on good cause shown-

(a) condoning the non-compliance with the period; and

(b) extending the period for the further period that the tax court deems appropriate.

(2) A taxpayer or appellant may apply to a tax court under this Part-

(a) if SARS fails to provide the reasons under rule 6 required to enable the taxpayer to formulate an objection under rule 7, for an order that SARS must provide within the period allowed by the court the reasons regarded by the court as required to enable the taxpayer to formulate the objection;

(b) if an objection is treated as invalid under rule 7, for an order that the objection is valid;

(c) if the period of time to lodge an objection to an assessment has not been extended by SARS under section 104(4) on request by the taxpayer under rule 7, for an order extending the period within which an objection must be lodged by a taxpayer;

(d) if the period of time to provide documents to substantiate an objection requested by SARS has not been extended under rule 8, for an order extending the period within which the information must be provided by the taxpayer; or

(e) if the period of time to lodge an appeal to an assessment has not been extended by SARS under section 107(2) of the Act on request by the taxpayer under rule 10, for an order extending the period within which an appeal must be lodged by an appellant.

(3) SARS may for purpose of rule 12 apply to a tax court under this Part for an order-

(a) that an objection or appeal be selected as test case;

(b) that an objection or appeal be stayed pending the determination of the test case;

(c) if in dispute, what are the issues that will be determined in the test case; or

(d) that a taxpayer or appellant requesting participation in the test case should not be allowed to do so.

(4) A taxpayer may apply, if SARS does not agree, to the tax court for an order that the judgment in a test case is not determinative of the issues in that taxpayer's objection or appeal and that the taxpayer may pursue its objection and appeal under these rules.

(5) A party to an agreement under rule 23 or a settlement under rule 24 pursuant to alternative dispute resolution proceedings under Part C, may apply to a tax court under this Part for an order that-

(a) the agreement or settlement be made an order of court; or

(b) if SARS fails to issue the assessment to give effect to an agreement or settlement within the period prescribed under rule 23(3) or 24(3), as the case may be, SARS must issue the assessment.

(6) A party who failed to deliver a statement as and when required under rule 31, 32 or 33, may apply to the tax court under this Part for an order condoning the failure to deliver the statement and the determination of a further period within which the statement may be delivered.

(7) A party seeking an amendment of a statement under rule 35, may apply to the tax court under this Part for an appropriate order, including an order concerning a postponement of the hearing.

(8) A person who is of the view that the issue of a subpoena under rule 27 or 43 constitutes an abuse of process may apply to the tax court under this Part for the withdrawal of the subpoena.

(9) If a notice of withdrawal or concession is delivered under rule 46 after the appeal or application has been set down for hearing without a consent to pay the other party's costs, the aggrieved party may apply to the tax court under this Part for an order as to costs under section 130(1)(e).

(10) A party may apply to the tax court under this Part for an order as to the reconsideration of items or portions of items in a bill of costs taxed by the registrar or the person appointed to act as taxing master under rule 47 and whether items or portions of items in the bill of costs taxed may be allowed, reduced or disallowed.

3.53 Application against decision by chairperson of tax board

(1) A party may, despite the procedures set out in Part D, apply to a tax court against a decision by a chairperson of a tax board that concerns-

(a) the non-appearance of a person at a hearing of the tax board under section 113(13) of the Act; or

(b) the extension of the period within which a request to refer a tax board decision to the tax court under section 115 must be made.

(2) A party may apply to the tax court to may make an order-

(a) condoning a party's non-appearance at a tax board hearing; or

(b) allowing a party's request for extension of the referral of the appeal to the tax court.

3.54 Application for withdrawal of chairperson of tax board

(1) An application for the withdrawal of a chairperson of the tax board under section 111(7) of the Act may be made to-

(a) that chairperson before or during the hearing of the appeal by the tax board; or

(b) if the application made to that chairperson was refused, the tax court in the manner provided for in this Part.

(2) For purpose of the application to the tax court by the applicant, the chairperson must postpone the hearing sine die.

(3) The tax court to which an application is made may order the withdrawal of the chairperson if satisfied that there-

(a) is a conflict of interest on the part of the chairperson that may reasonably be regarded as giving rise to bias which the chairperson may experience with the case concerned; or

(b) are other circumstances that may reasonably be regarded as giving rise to bias and affect the chairperson's ability to remain objective for the duration of the case,

together with any other order it deems fit, including an order as to costs.

(4) The applicant must within 10 days of delivery of the judgment of the tax court by the registrar under rule 50(6), request the clerk to convene or reconvene, as the case may be, the tax board under rule 26.

3.55 Application for withdrawal of member of tax court

(1) An application for the withdrawal of a member of the tax court under section 122 of the Act, may be made in the manner provided for in this Part to-

(a) if the appeal has been set down under rule 39, the tax court where the appeal has been set down; or

(b) if the appeal has not been set down under rule 39, the tax court where the application is set down under this Part.

(2) If an application for the withdrawal of a member of the tax court is made-

(a) after the appeal has been set down but before the hearing, the applicant must request the registrar to postpone the hearing of the appeal sine die; or

(b) during the hearing of the appeal, the tax court must postpone the hearing of the appeal sine die.

(3) The tax court to which an application is made under this rule may order the withdrawal of the member if satisfied that there-

(a) is a conflict of interest on the part of the member that may reasonably be regarded as giving rise to bias which the member may experience with the case concerned; or

(b) are other circumstances that may reasonably be regarded as giving rise to bias and affect the member's ability to remain objective for the duration of the case.

(4) If an application for the withdrawal of a member of the tax court is successful, the applicant must within 10 days of delivery of the order of the tax court by the registrar, request the registrar to set the appeal down under rule 39.

(5) The registrar after receipt of the notice of the applicant requesting set down, must select another person from the panel of members of the tax court established under section 120 for the hearing of the appeal.

3.56 Application for default judgment in the event of non-compliance with rules

(1) If a party has failed to comply with a period or obligation prescribed under these rules or an order by the tax court under this Part, the other party may-

(a) deliver a notice to the defaulting party informing the party of the intention to apply to the tax court for a final order under section 129(2) of the Act in the event that the defaulting party fails to remedy the default within 15 days of delivery of the notice; and

(b) if the defaulting party fails to remedy the default within the prescribed period, apply, on notice to the defaulting party, to the tax court for a final order under section 129(2).

(2) The tax court may, on hearing the application-

(a) in the absence of good cause shown by the defaulting party for the default in issue make an order under section 129(2); or

(b) make an order compelling the defaulting party to comply with the relevant requirement within such time as the court considers appropriate and, if the

defaulting party fails to abide by the court's order by the due date, make an order under section 129(2) without further notice to the defaulting party.

3.57 Notice of motion and founding affidavit

(1) Every application must be brought on notice of motion which must set out in full the order sought, be signed by the applicant or the applicant's representative and be supported by a founding affidavit that contains the facts upon which the applicant relies for relief.

(2) An application must be brought within 20 days after the date of the action, including the delivery of a notice, document, decision or judgment by a party, the clerk, the registrar, a tax board or a tax court or a failure to do so, giving rise to an application under this Part or the Act.

(3) Copies of the notice of motion and founding affidavit, together with all annexures, must be delivered to the registrar and the respondent.

3.58 Address and due date

In the notice of motion, the applicant must-

(a) indicate an address, if different from the address referred to in rule 50(3), at which the applicant will accept notice and delivery of all documents in proceedings under this Part;

(b) set forth a day, not less than 10 days after delivery thereof to the respondent, on or before which the respondent is required to notify the applicant, whether the respondent intends to oppose that application; and

(c) state that if no such notification is given, the application will be set down for hearing on the first available day determined by the registrar, being not less than 15 days after service of that notice on the respondent.

3.59 Set down for hearing where no intention to oppose

(1) If the respondent does not, on or before the day set out in the notice under rule 58(b), deliver to the applicant a notice of intention to oppose the application, the applicant may apply to the registrar to set the matter down.

(2) An application must be heard by a tax court having jurisdiction within any area in which the appellant resides or carries on business unless the applicant and the registrar agree that it be heard in another area.

(3) The registrar must deliver to the parties a written notice of the time and place appointed for the application at least 10 days before the date on which it has been set down.

3.60 Notice of intention to oppose and answering affidavit

If the respondent wishes to oppose the grant of an order sought in the notice of motion, the respondent must-

(a) on or before the day set out in the notice under rule 58(b), deliver to the applicant and the registrar a notice of intention to oppose the application;

(b) if the respondent is the taxpayer or the appellant, indicate in the notice of intention to oppose the application an address, if different from the address referred to in rule 50(3), at which the respondent will accept notice and delivery of all documents in proceedings under this Part; and

(c) within 15 days of notifying the applicant of the intention to oppose the application, deliver an answering affidavit, if any, together with relevant annexures, to the applicant and the registrar.

3.61 Replying affidavit

(1) Within 10 days of delivery of the respondent's answering affidavit under rule 60(c), the applicant may deliver a replying affidavit to the respondent and the registrar.

(2) The tax court may in its discretion permit further affidavits to be filed.

3.62 Set down for hearing where no answering affidavit

(1) If no answering affidavit is delivered by the respondent within the period referred to in rule 60(c), the applicant may within 5 days of the expiry of that period apply to the registrar to set the application down.

(2) The registrar must deliver to the parties a written notice of the time and place appointed for the application at least 10 days before the date on which it has been set down.

3.63 Application for set down by respondent

(1) If the applicant fails to apply to the registrar for set down of the application within the period referred to in rule 59 or 62, as the case may be, the respondent may apply to the registrar to allocate a date for the application within 10 days of the expiry of the period referred to in rule 59 or 62.

(2) The registrar must deliver to the parties a written notice of the time and place appointed for the application at least 10 days before the date on which it has been set down.

3.64 Judgment by tax court

(1) The tax court after hearing an application under this Part may reserve its decision until a later date and where the decision is reserved, the judgment must be delivered by the tax court in the manner considered fit.

(2) The registrar must by notice deliver the written judgment of the tax court to the parties, or the clerk of the tax board if appropriate, within 10 days of delivery thereof.

PART G - TRANSITIONAL ARRANGEMENTS

3.65 Definitions

Any meaning given to a word or expression in the Act and Part A to F must, unless the context otherwise indicates, bear the same meaning in this Part, and-

'Income Tax Act' means the Income Tax Act, 1962 (Act No. 58 of 1962); and

'the previous rules' means the rules promulgated under section 107A of the Income Tax

Act and repealed under section 269(1) of the Act with effect from the date that these rules commence.

3.66 Application of rules to prior or continuing action

(1) Subject to this Part, these rules apply to an act or proceeding taken, occurring or instituted before the commencement date of these rules, but without prejudice to the action taken or proceedings conducted before the commencement date of the comparable provisions of these rules.

(2) A request for reasons, objection, appeal to the tax board or tax court, alternative dispute resolution, settlement discussions, interlocutory application or application in a procedural matter taken or instituted under the previous rules but not completed by the commencement date of these rules, must be continued and concluded under these rules as if taken or instituted under these rules.

(3) A document delivered by the taxpayer, appellant, SARS, clerk or registrar under the previous rules, must be regarded as delivered in terms of the comparable provision of these rules, as from the date that the document was issued or delivered under the previous rules.

(4) If, before the commencement of these rules and before an appeal has been heard by the tax court a statement of grounds of appeal by the taxpayer under rule 11 of the previous rules has been delivered, SARS may deliver a reply to the statement under rule 33.

3.67 Applications of new procedures

A party in a dispute which has not been decided on by a tax board or a tax court before the commencement of these rules may use a procedure provided for in these rules provided that-

(a) the procedure sought to be used follows in sequence after the last action taken by either of the parties; and

(b) the period contained in the relevant previous rule has not expired, counting from the commencement date of these rules.

3.68 Completion of time periods

(1) If the period for an application, objection or appeal prescribed under the previous rules had expired before the commencement date of these rules, nothing in these rules may be construed as enabling the application, objection or appeal to be made under these rules by reason only of the fact that a longer period may be prescribed under these rules.

(2) If the previous rules prescribed a period within which a party, clerk or registrar must deliver a document, and that period expires after the commencement date of these rules, the first day of the prescribed period for any further procedures under these rules is regarded as commencing on the day after the last day of that expired period.

(3) If an objection or an appeal could have been lodged before the commencement date of these rules but is lodged after the period prescribed under the previous rules, an application for the condonation of the late lodging of the objection or appeal must be considered under these rules.

4. TAX CASES

4.1 C:SARS v Krok & Another

Applicant, being the Commissioner for SARS, had been acting as a result of a request received from the Australian Tax Office (ATO) in terms of Article 25A of the Double Tax Agreement between the Government of Australia and the Government of the Republic of South Africa and the purpose of entering into the said agreement was for the avoidance of double taxation and the prevention of fiscal evasion in respect of taxes that had been entered into on 1 July 1999 and amended by a Protocol signed on 31 March 2008 ('the Protocol').

SARS, during January 2012, had received a request from the Australian Commissioner for assistance with tax collection and conservancy of the assets of the First Respondent ('Krok') in South Africa, pending collection of the amount alleged to be due by him under the tax laws of Australia and this request was renewed during February 2013 and was accompanied by a formal certificate issued by the Australian Commissioner stating that Krok was liable to the Commissioner for taxes in a total amount of Australian $25 361 875,799 plus interest which, during April 2013, had amounted to R235 705 169,19.

The aforesaid liabilities arose as a result of the Australian Commissioner issuing a Notice of Assessment of Tax and Penalties under Australian law and there was a risk of dissipation or concealment of the assets by the Krok.

SARS had agreed to lend assistance to the Australian Commissioner in terms of the Protocol in the collection of the said revenue claim in accordance with article 25A of the agreement as amended by the Protocol. At the time when the initial request was received there had been no special provision in the South African Tax Acts that had entitled SARS to apply for orders to preserve assets and SARS, therefore, at that stage, was dependant on the provisions of the common law in that regard.

However, the Tax Administration Act came into force on 1 October 2012 and the deponent to the Commissioner's founding affidavit stated that in terms of section 185 of the Tax Administration Act he was authorised to apply on behalf of the SARS for an order for the preservation of the Krok's assets in terms of section 163 of the Act. Such an order to preserve assets may be applied for if such order was required to secure the payment of taxes.

It was also stated that in terms of section 185(3) the certificate received from ATO was conclusive proof of the existence of the tax debt and prima facie proof of the other statements contained therein. Accordingly, the allegation was made that the certificate amounted to inter alia prima facie proof of a danger that the South African assets of the Krok would be dissipated and, accordingly, it was contended that as a result of the status of the certificate, a prima facie case for the preservation order in terms of the Notice of Motion had been established, especially in the absence of an answering affidavit by the Krok himself.

In essence it was the SARS' case that in terms of section 163 of the Tax Administration Act an intention to dissipate assets was no longer necessary and preservation must merely be 'required' in order to 'secure' tax collection.

The Australian Commissioner had stated that Krok had lodged an objection to the Australian Notice of Assessment of Tax and Penalties and the objection had been disallowed in full and a notice was sent to the taxpayer on 6 February 2012. As a result of the determination of the objection, the debt was not currently in dispute and it was also stated that it was not believed that the objection had been entered into solely to delay or frustrate collection of the amount alleged but it was stated that 'it is believed that there is a risk of asset dissipation or concealment of assets by Mr Mark Krok.'

The memorandum of understanding between the two competent authorities of South Africa and Australia, concerning assistance in the collection of taxes under Article 25A of the Protocol amending the agreement between South Africa and Australia, for the avoidance of double taxation and the

prevention of fiscal evasion, with respect to taxes on income, states that its purpose is to outline the shared understanding between the competent authorities of the procedural issues involved, in providing mutual assistance to each other in their collection of revenue claims. It refers to the appropriate form that must be used for a request for assistance in collection and it is stated that a request for assistance in tax collection or conservancy requires sufficient information to be provided to the requested authority to enable collection or conservancy action to be taken and, amongst others, this would include the providing of 'evidence reflecting on the likelihood that the debtor's assets without conservancy action will be dissipated.'

On 18 February 2013 the North Gauteng High Court had granted a provisional Preservation Order in terms of the provisions of section 163 of the Tax Administration Act with all the provisions of the order having immediate effect and the application before the court on this occasion was to confirm the provisional order.

In terms of the aforementioned order a curator bonis was appointed in whom the rights, title and interest in all the assets of the Krok would vest and these assets included a large portfolio of shares on the Johannesburg Stock Exchange, certain funds in a non-resident account at a bank, a current account, two erven in the Cape and a motor vehicle. It was also ordered that Krok disclose to the curator bonis all his assets held in South Africa and all of his sources of income in South Africa, and to identify where such assets could be found and to co-operate in order to ensure that all his assets were placed at the disposal of the curator bonis.

Krok had filed opposing affidavits and they dealt in the main with legal argument setting out the Krok's defences to the application and SARS had filed a replying affidavit.

Section 163 of the Tax Administration Act provided for a preservation order to prevent the dissipation of assets from which tax is or is reasonably expected to be due, which is made on an ex parte application by a senior SARS official to the High Court. Reasonable steps, including the appointment of a curator bonis, must be taken to preserve any seized assets, pending the issue of a preservation order.

Section 151 of the Tax Administration Act provided that a 'taxpayer' included any person who is the subject of a request from a foreign government to SARS to provide assistance under a bilateral arrangement with that government under a tax Act.

Section 185(1) of the Tax Administration Act provided that if a foreign government with a qualifying agreement requested assistance in preventing the dissipation of assets of a foreign taxpayer in South Africa or requested that SARS should collect foreign taxes due, a senior SARS official could apply for a preservation order in terms of section 163 or require the foreign taxpayer to indicate whether he admitted liability for the taxes allegedly due.

Any request by a foreign government must be in a prescribed form and must indicate whether the tax allegedly due is disputed, whether the foreign authority believes any dispute is intended solely for purposes of delay or frustration and whether there is a risk of dissipation of assets and the request is treated as conclusive proof of the stated liability and rebuttable evidence of any other statements.

The answering affidavit on behalf of the Krok stated that there were no suggestions in the SARS' founding affidavit of any objective events which might have transpired since January 2012 (when the first certification was made) and the date of the Notice of Motion, which would justify the position now contended for, that there was a risk of asset dissipation or concealment of assets by the Krok. In addition, no objective evidence had been tendered on behalf of the ATO to support such a conclusion.

There was therefore no need for these proceedings, and there was no objectively sustainable argument to be advanced on behalf of the ATO justifying the 'belief' that there is a risk of asset dissipation or concealment.

Krok submitted that three issues arose in this case for decision:

(1) Whether or not the SARS had discharged the onus that rested on him in the context of the relevant legislation and the Protocol,

(2) Whether or not the facts would justify a reasonable apprehension of dissipation, and

(3) Whether the introduction of article 25A into the Double Tax Agreement (by the Protocol) applied to taxes claimed by the ATO from Krok for the income years ending 30 June 2004 to 30 June 2009.

Krok contended that upon a proper interpretation of all the relevant legislation and the Protocol, article 25A could only be invoked by the tax authorities if the taxes owing to the ATO arose during the income years commencing from 1 July 2009, when the Protocol came into operation.

The Second Respondent, Jucool Enterprises Inc, associated itself with the defence of Krok, except in stating that if those grounds of opposition were not successful, then Jucool's case would be that it was the beneficial owner of the assets that formed the subject matter of the application, and that those assets therefore should not form part of any provisional or final preservation order.

It is necessary to refer to other contextual considerations relating to both Krok and Jucool that appear in an affidavit in support of an application by Jucool for leave to intervene in these proceedings. Jucool was a company incorporated in the British Virgin Islands on 23 December 2008 and the sole shareholder of Jucool was Nova Trust Ltd, in its capacity as a trustee of the Jucool Trust. The Jucool Trust was established on 22 December 2008 by way of a Declaration of Trust executed by Nova Trust Ltd. It was a discretionary trust governed by Jersey law and its sole material assets were shares in Jucool and a loan receivable from Jucool. The beneficiaries of the Jucool Trust were Krok, his children, and the Jersey Blind Society. Krok was not, nor had he ever been, a director of Jucool or a trustee of the Jucool Trust. Nova Trust Ltd was a company incorporated under Jersey law and carrying on business in Jersey.

It appeared therefore that Krok had, during 2002, relocated from South Africa to Australia where he had become a resident and had ceased to be a resident of South Africa for tax, exchange control or any other purpose. At that time, and as required by law (including Exchange Control Regulations) certain assets were placed under the control of an authorised dealer in foreign exchange, in this instance Investec Bank. In 2008 Krok decided to relocate from Australia to the United Kingdom and as part of his planning to

take up residence in the United Kingdom, Krok and Jucool entered into the following agreements: An income sale agreement in terms of which Jucool purchased from Krok certain specified rights and interests in the assets listed in that agreement for a purchase price of R72 000 000 and the purchase price payable in terms of the income sale agreement was left outstanding as an interest-free loan owed by Jucool to Krok: the second was an asset sale agreement in terms of which Jucool purchased from Krok those rights and interests in the assets which had not been sold by Krok to Jucool in terms of the income sale agreement and the purchase price was R217 500 000 which was also left outstanding as an interest-free loan owed by Jucool to Krok.

In consequence of the aforementioned agreements Jucool had a debt owing to Krok in the amount of R290 000 000. Also, on 29 December 2008, and immediately after the conclusion of the income sale agreement and the asset sale agreement Krok entered into a deed of assignment pursuant to which he assigned absolutely all his right, title and interest in and to the debt to Nova Trust Ltd as trustee of the Jucool Trust, free of consideration. It was stated that the directors of Jucool were aware that the assets of persons emigrating from South Africa could not be freely transported from that country, but were subject to certain rules and procedures and were accordingly aware that the assets were 'blocked' in South Africa under South African Exchange Control Regulations as was generally the case with all emigrants from South Africa at that time. Transactions of this sort entered into by Krok were therefore common under similar circumstances.

In terms of the aforementioned agreements as and when the assets became transferable, Krok was required to transfer registered title to the assets into Jucool's name at such time as Jucool deemed appropriate. There was also a requirement that the Exchange Control Regulations be adhered to by proper applications for consent to remit the assets from South Africa as and when that became legally possible.

The agreements referred to were subject to the law of the British Virgin Islands and according to an opinion furnished by a QC, an expert on the

law of the British Virgin Islands, the agreements were valid and binding agreements under the laws of the British Virgin Islands.

Jucool therefore contended that it was the 'beneficial' owner of the relevant assets which were held by Krok upon trust for Jucool. Furthermore, in terms of the relevant Exchange Control Regulations at the time, the income derived from the assets is, and always has been, remittable from South Africa. There was no prohibition whatsoever on a non-resident to whom income may be remitted, on assigning his right to that income to another non-resident. Both the spirit and the letter of the Exchange Control Regulations were respected, since such a transaction would in no way result in more flowing out of South Africa than would have been the case had the emigrant retained the right to income, in his own name.

Both agreements recognised that the capital of the assets themselves could not be remitted from South Africa, and that the transfer of the assets was subject to the consent of the Exchange Control Department of the South African Reserve Bank and, as required by the Regulations, the assets had throughout been held under the control of an authorised dealer in foreign exchange in an account which is recognised by all concerned as being subject to the provisions of Regulation 4(2) of the relevant Exchange Control Regulations.

Judge Fabricius held the following:

(i) That the first issue before the court was whether or not the SARS had proved its case on a prima facie basis for the purposes of section 185 of the Tax Administration Act in the context of the mentioned Protocol to the Double Taxation Agreement entered into between Australia and South Africa on 1 July 1999 and the question was whether or not the SARS had shown that there was prima facie proof of risk of dissipation or concealment of assets by Krok and the further question whether Jucool was the 'beneficial' owner of the relevant assets which were held by Krok upon trust for Jucool

(ii) That it had appeared from Krok's own submissions to the ATO and the reasoning of the ATO in reply thereto, that the ATO had based its

assessments on the fact that contrary to Krok's contentions, he had retained legal and beneficial interests in the assets held in South Africa and its position was that Jucool had omitted assessable income from his Income Tax Returns in Australia that had been derived on assets held in South Africa while he was an Australian resident and the ATO rejected his contention that he had assigned his rights and interest to the income and capital of the assets held in South Africa to Jucool.

(iii) That it appeared clearly from the documentation supplied by the ATO to the South African authorities for purposes of the present application that Krok had repeatedly applied through Investec to the relevant South African Reserve Bank Department for the release of 'blocked' funds in substantial amounts, amounting to many millions of rands and it also appeared from the same document that Krok's legal representatives had held a meeting with the ATO on 19 July 2010 at which meeting the ATO had been told that he had formalised his emigration facilities with the South African Reserve Bank Excon Department on the basis that he was legally and beneficially the holder of the rights and interests to the South African assets, and that he had remitted income and capital thereon in accordance with the formalised emigration facilities. However, the South African Reserve Bank had not granted exemption or approval to remit any income or capital to the BVI company under their purported assignment agreement already described, and the rights and interests of the South African assets were at all times regarded by the Reserve Bank as belonging to Krok. Moreover, it was also stated that in his dealings with the Reserve Bank, Krok had maintained that those South African assets were legally and beneficially held by him solely, and that income accruing thereon was his.

(iv) That it was stated that during the period from January 2004 through to April 2010 Krok had made, through Investec, no less than 24 applications to the South African Reserve Bank Excon Department to use his South African blocked assets to fund his expenditure in South

Africa and with reference to a loan application to a St George's Bank, details were then given of amounts remitted from South Africa which demonstrated his control thereof. In the loan application to St George's Bank, statements were made which conflicted with submissions made to the ATO.

(v) That the Australian Commissioner had stated that he considered Krok's use of entities established in banking secrecy jurisdictions, such as the BVI and Lichtenstein, as an attempt to preclude the operation of the attribution regime under Australian tax law, and supported his view that Krok had intended to avoid his tax obligations in Australia, particularly given the timing of his permanent departure from South Africa and his settlement in Australia.

(vi) That in the period subsequent to 15 December 2008, when he departed Australia to reside in the United Kingdom, through to 30 June 2010, Krok had continued to remit funds abroad from the Investec bank accounts in South Africa and it was noted that none of these funds were remitted to the ostensible assignee which would have been expected if the assignment arrangement had been intended to take effect according to its tenor, but instead he remitted amounts from his South African accounts directly to his own personal accounts abroad or to another offshore account held in the name of Jucool Enterprises Incorporated.

(vii) That sections 163 and 185 of the Tax Administration Act needed to be interpreted in the light of the formal certificate requiring assistance and such interpretation must be done in the light of its context, the apparent purpose to which it is directed, and the material known to those responsible for its production, ie the production of the certificate referred to in section 185(2) of the Act.

(viii) That it was clear that the documentation drawn by the ATO was in their mind when the relevant certificate was drafted and this was then considered by the South African authorities who in the founding affidavit then state that the certificate, as per the wording of section

185(3) of the Act, amounts to prima facie proof of a danger that the South African assets of Krok will be dissipated.

(ix) That, having regard to the objective facts that were placed before the court, the purpose of the relevant legislation and the purpose of the Protocol, and the proper context, sections 163 and 185 of the Tax Administration Act, in the context of the relevant Protocol, justified the confirmation of the Preservation Order that was provisionally made.

(x) That in regard to whether the taxes claimed by the ATO from Krok fell beyond the scope of Art 25A of the Double Taxation Agreement, the court was of the view that this was not a question of retrospectivity at all but that the co-operation between the governments was prospective and related to all taxes and certainly to all taxes since inception of the Double Taxation Agreement, in other words since 1999.

(xi) That in regard to Jucool's contention that it was the beneficial owner of the assets in issue, numerous examples abound in the documentation emanating from the ATO which indicate that Krok dealt with relevant assets as if he was still the beneficial owner thereof and on numerous occasions he sought release of blocked funds from the Reserve Bank without any reference to Jucool and from the nature of many of these requests it was apparent that it could only have been for release to Krok and his family personally.

(xii) That it was submitted by SARS that in the absence of an affidavit from Krok and the persons who allegedly negotiated the 2008 agreements with him, the 2008 structure was just as unreal as was the previous 2002 structure and, furthermore, Jucool had failed to show that it was the so-called beneficial owner of the relevant assets.

(xiii) That, further, there was also no explanation as to how Jucool could in law become the owner of immovable property situated in South Africa, contrary to the laws of South Africa, that require registration in the Deeds Office for the transfer of immovable property from one person to another, including to a trust.

(xiv) That an essential element of the passing of ownership in South African law was that there must be an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property. Moreover, there was simply no intent to immediately transfer any rights to Jucool and there was no merit in that defence. At best it could be said that Krok only intended to create personal rights in favour of Jucool, pending consent being granted and a transfer taking place thereafter and there was no concept like 'ownership' of a 'right-to-claim'.

The Provisional Preservation Order was confirmed and Jucool were ordered to pay SARS' costs jointly and severally, including the costs of two senior counsel.

4.2 C:SARS v C-J van der Merwe

Applicant, being the Commissioner for SARS, had made application on 30 August 2013 for a provisional preservation order under the provisions of section 163 of the Tax Administration Act against certain Respondents including Second Respondent in the ex parte application of the Commissioner for SARS v G W Van der Merwe and other Respondents in the Western Cape High Court.

While certain of the Respondents had opposed confirmation of the provisional order, only the Second Respondent, Candice-Jean Van der Merwe, had anticipated the return day of the provisional order and it was the application for confirmation of the provisional order made against C-J van der Merwe that was before the court for determination in this matter.

In terms of the provisional order made against C-J van der Merwe, she was interdicted from dealing with, disposing of encumbering or removing from the Republic certain specified assets.

A similar provisional order had been made against the First Respondent, Gary Walter Van der Merwe, who was the father of the C-J van der Merwe.

Section 163 of the Tax Administration Act provided, inter alia, that a senior SARS official may, in order to prevent any realisable assets from being disposed of or removed which may frustrate the collection of the full amount of tax that is due or payable or the official on reasonable grounds is satisfied may be due or payable, authorise an ex parte application to the High Court for an order for the preservation of any assets of a taxpayer or other person prohibiting any person, subject to the conditions and exceptions as may be specified in the preservation order, from dealing in any manner with the assets to which the order relates.

SARS based its case for such a provisional order against C-J van der Merwe on various grounds and began by highlighting the activities of C-J van der Merwe's father, being the First Respondent in the proceedings.

SARS stated that First Respondent had been engaged in numerous disputes over a number of years with SARS and that he had been linked to several companies that SARS maintained had fraudulently claimed VAT refunds, resulting in substantial amounts being incorrectly paid out with the result that First Respondent and various other entities were then liable to SARS for payment of the total sum of R291 000 000 in respect of tax, additional tax, penalties and interest and, in addition, criminal charges had been instituted against him and these transactions have been regarded by SARS as falling within the meaning of a scheme as envisaged by section 73 of the VAT Act.

SARS also provided in its founding papers the history of the arrest of First Respondent on 13 July 2004 at Cape Town International Airport with foreign currency in the approximate rand value of R1.2 million and the lengthy litigation that ensued regarding the return of the funds.

SARS contended that C-J van der Merwe, either in her own right, owed SARS taxes or held assets on behalf of her father, or some of the other Respondents, against which assets SARS may execute in the collection of taxes.

During May 2013 the Financial Intelligence Centre ('FIC') made SARS aware of certain transactions relating to the First Respondent and C-J van

der Merwe: On 16 May 2013 Standard Bank of South Africa received the amount of US$15 300 000 for the benefit of the C-J van der Merwe and the remitter of the funds was identified as Muhamad Nazih Rawas and the funds were transferred from the Bank Med Sal in Lebanon.

C-J van der Merwe, in her application to sell this foreign currency, had given her contact details as those of her father and had stated that the funds were a gift from Rawas. On 21 May 2013 the rand amount of R142 901 673,10 less bank charges was transferred to an account number held by C-J van der Merwe, on which account she had signing powers.

From the papers before the court, where the various transactions relating to the aforesaid amount are described, it strengthened SARS' belief that the funds received by C-J van der Merwe may not have been her own but had been received on behalf of her father or some of the other Respondents, alternatively that she had allowed her accounts to be used by them and SARS considered that these transactions had tax implications and required investigation. SARS further contended that all of the described transfers supported its reasonable belief that First Respondent had used the Respondents and other persons and entities to hide his assets.

C-J van der Merwe had been working as a model and she had declared taxable income in 2009 of R20 023, in 2010 of R20 912, in 2011 of R24 995 and in 2012 of R45 366.

Furthermore, in May 2013 she had acquired an Audi R8 and during June 2013 a Land Rover SD4 Coupe Auto and both vehicles were not financed.

SARS was of the view that the US$15.3 million received by C-J van der Merwe had been received by her on behalf of any one or more of the Respondents, alternatively that she had allowed her accounts to be used by them. Accordingly, a final preservation order was sought against her in order to secure assets that may be executed against in respect of existing indebtedness to SARS, as well as indebtedness still to be established.

SARS contended that C-J van der Merwe may be held personally liable for the indebtedness of her father or the other Respondents owing taxes to SARS in accordance with the Income Tax Act or the Companies Act.

SARS sought that the order remain in force for as long as it was required to secure the collection of tax and until the tax debts of Van der Merwe and the Respondents owing or found to be owing taxes had been settled in full, and pending finalisation of steps to be instituted to declare the assets of the other respondents executable for the tax debts or hold them personally liable.

To that end a curator bonis as envisaged in section 163(7)(b) of the Tax Administration Act was appointed in terms of the provisional preservation order to take charge of the assets of Respondents and to identify assets that could be executed against for the collection of taxes due to SARS.

SARS was further of the view that it was undesirable for First Respondent to be left in control of the Respondents as it was reasonable to believe that if allowed to do so, the assets of the Respondents would be dissipated or their value diminished and the effective realisation of the assets to the benefit of both the respondents and SARS may be 'extremely difficult and even impossible.'

C-J van der Merwe contended that the provisional preservation order made against her should be set aside and took issue with the fact that SARS, without notice to her, had interdicted her from dealing with her assets and now sought a 'most draconian' final order against her on the basis of a bald allegation that the funds 'may' not be her own but with no facts to support this.

C-J van der Merwe stated that SARS knew in May 2013 that the aforesaid funds were received by her on 21 May 2013 as a gift remitted by Rawas from an account in Lebanon for the purchase of property in Cape Town and no facts had been uncovered since transfer to show that the transactions were not genuine 'or that the funds paid by Rawas were anyone else's, let alone her father's.The vast majority of the funds had been invested in immovable property which 'plainly is not going anywhere' and SARS was not entitled to divest her of her assets. She had requested her father, who was an experienced businessman, to assist and represent her in dealing with the funds and the negotiations for the purchase of property.

C-J van der Merwe referred to trips she had made to the Seychelles as a model to attend at resorts and shortly after her return to South Africa, after her visit in March 2013, her car had been written off in an accident and her cellphone was damaged. She had discussed the incident with people with whom she had become friendly in the Seychelles and a few days later she had received two new cellphones by courier and had been presented with an Audi R8 Spyder which had been registered in her name and had been purchased for her and, similarly, a Land Rover Evoque had been presented to her in like manner.

C-J van der Merwe stated that the rand amount paid to her of R142 901 028,10 was used to purchase three immovable properties totalling R98 578 030,82 and all of the transactions were concluded openly and had been investigated by the authorities with no further investigation required.

SARS' response to C-J van der Merwe's opposition to the order was that it lacked merit and persuasion and that she had not raised any bona fide dispute of fact, that piecemeal adjudication of the application should be avoided and that her 'vague and unsubstantiated version' was not capable of being resolved on affidavit.

Judge Savage held the following:

<u>As to the nature of and requirements for a preservation order</u>

(i) That the Tax Administration Act which came into operation on 1 October 2012 replaced the common law preservation interdict which required that an SARS prove on a balance of probabilities that the assets sought to be preserved would be diminished with the specific objective of frustrating the claimant's claim if the interdict were not granted.

(ii) That a preservation order may be made in terms of section 163(3) of the Act 'if required to secure the collection of tax' with its purpose in section 163(1) being 'to prevent any realisable assets from being disposed of or removed which may frustrate the collection of the full

amount of tax that is due or payable or the official on reasonable grounds is satisfied may be due or payable.'

(iii) That a preservation order obtained remains in force in accordance with section 163(10) pending any appeal against the order or 'until the assets subject to the preservation order are no longer required for purposes of the satisfaction of the tax debt', with a tax debt defined in section 1 as 'an amount of tax due by a person in terms of a tax Act.' In preserving the assets of a person, the order neither divests a person of such assets, nor grants an order of forfeiture against the assets and the person against whom the order is made is not obliged by its terms to settle any tax debt.

(iv) That there is no requirement contained in section 163 that the SARS prove that the assets sought to be preserved would be diminished if the order were not made. The basis on which a preservation order, in terms of s 163(3), may be made is 'if required to secure the collection of tax.'

(v) That whilst the grant of a preservation order may be considered harsh, there are compelling reasons within the context of our constitutional democracy why steps which assist the fiscus securing the collection of tax are required, which include court orders to preserve assets so as to secure the collection of tax. Had it been intended by the legislature that the court infuse the requirement of necessity to prevent dissipation into a determination as to whether a preservation order should be granted in terms of section 163(3), as much would have been apparent from the statute and necessity to prevent dissipation is also not capable of being read into the statute by implication or otherwise.

(vi) That it followed therefore that for a court to determine whether a preservation order is required to secure the collection of tax in terms of section 163(3), it did not need to be shown that the grant of the order was required as a matter of necessity, or to prevent dissipation of the assets. Rather, in making the assessment as to whether to grant the order or not, the court must be apprised of the available

facts in order to arrive at a conclusion, reasonably formed on the material before it, as to whether a preservation order is required or not to secure the collection of tax. These facts must not amount to a statement of the applicant's opinion but must illustrate an appropriate connection between the evidence available and the nature and purpose of the order sought.

(vii) That it was not required of the court to determine whether the tax is, as a matter of fact, due and payable by a taxpayer or other person contemplated in s 163(1) which will be determined by later enquiry. Rather, at the preservation stage, sufficient information is to be placed before the court to enable it to determine whether such an order is required against the persons against whom it is sought.

(viii) That once it has been shown that the order is required to secure the collection of tax, the court is properly seized of its discretion and, as with the granting of a restraint order under the provisions of POCA, it is not open to the court to then frustrate the statutory provision when it purports to exercise its discretion.

<u>As to whether confirmation of the order amounted to final relief</u>

(ix) That it was trite that in order to obtain interim interdictory relief an applicant must establish a prima facie right to such relief, show there to exist an apprehension of harm which may be irreparable, that the balance of convenience favours it and indicate the absence of a satisfactory alternative remedy.

(x) That s 163(10) of the Act provided that a preservation order remained in force pending the setting aside of such order on appeal, if any, or until the assets subject to the preservation order are no longer required for purposes of the satisfaction of the tax debt. The legislature clearly contemplated therefore that such an order was capable of being appealed. Thus, while the order may, as with a restraint order under POCA, be of temporary duration and rescindable, where it is neither rescinded nor set aside on appeal, its

effect is to create an otherwise unalterable situation which removes control, and in certain instances, use of such assets from a person.

(xi) That, given the distinct species of relief sought in a preservation order, it was not appropriate that the test for final interdictory relief apply to the grant of such order, not only given that the order is not only in all respects final, given that its terms may be varied but also given the unique nature of such order and it followed that disputed evidence in applications of this nature would not be subject to the well-known rule enunciated by Corbett JA in Plascon-Evans Paint Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) but that the court be entitled to arrive at a conclusion reasonably formed on a consideration of the material before it that such an order 'is required to secure the collection of tax.'

As to a referral to oral evidence

(xii) That in the event that the court was not inclined to grant a final preservation order, SARS sought an order in terms of Rule 6(5)(g) of the Uniform Rules of Court referring the matter to oral evidence and that C-J van der Merwe be ordered to appear in person to be cross-examined on a number of issues. However, C-J van der Merwe had opposed a referral to oral evidence on the basis that such application for a final order be determined on the papers and only where a matter could not properly be decided on affidavit in terms of Rule 6 that issues may be referred to oral evidence.

(xiii) That the court had a discretion as to whether or not to grant an interdict and such wide discretion included the refusal of an interim interdict, even if the requisites had been established but it was one that must be exercised according to law and upon established facts.

(xiv) That there was no dispute between the parties that there existed no tax debt currently owed by C-J van der Merwe to SARS, nor was it disputed that various tax debts were owed by her father and various enterprises with which he was involved to SARS.

(xv) That it was clear that C-J van der Merwe's denials were bald and uncreditworthy and that they were palpably implausible. It followed that the court was justified in rejecting them merely on the papers and that there was no basis on which to warrant the referral of any issues to oral evidence, nor would this serve a just and expeditious determination of the application before the court. Moreover, oral evidence would not serve any purpose in determining the truth.

(xvi) That, accordingly, the application for confirmation of the preservation order was one capable of determination on the papers and without a referral to oral evidence.

<u>As to confirmation of the order</u>

(xvii) That SARS had shown that a final preservation order was required against C-J van der Merwe to secure the collection of tax on its version contained in the founding papers considered against C-J van der Merwe's answer provided thereto and there was no basis on which to grant the dismissal of the order, alternatively a postponement of the matter pending the determination of constitutional and other issues relevant to C-J van der Merwe which may be raised by her or the other Respondents.

(xviii) That the sudden wealth acquired by C-J van der Merwe lay squarely within her knowledge and she was obliged in such circumstances to provide the answer necessary to substantiate her opposition to a final order being granted but the case put up by her in answer to that of the SARS was so highly improbable in human experience that it could not be accepted and for these reasons the provisional preservation order granted in terms of s 163(3) of the Act stood to be confirmed.

The provisional order granted by the court on 30 August 2013 against C-J van der Merwe was confirmed with costs, including the costs of three counsel.

4.3 Shuttleworth v South African Reserve Bank & Others

Applicant (Shuttleworth) was a South African citizen who in 2001 had emigrated from South Africa to the Isle of Man, British Isles, and had an amount of R4.27 billion to take with him. It was arranged that the amount would be taken in blocks and he had submitted an application on 29 August 2009 to the First Respondent (South African Reserve Bank), through the Standard Bank of South Africa, to take his remaining blocked loan assets in an amount of R2.5 billion out of the Republic of South Africa.

It was not the first time that Shuttleworth had to pay the 10% levy for wanting to take his assets out of the country. However, in 2009 he paid the sum of R250 474 893, 50 out of protest, having been advised that the levy of 10% exit on his blocked assets was unlawful and unconstitutional.

Because of a rule to submit an application to transfer blocked assets out of South Africa via authorised dealers, mainly banks, Shuttleworth submitted his application via Standard Bank of South Africa but when he did so he also instructed Standard Bank to place before the South African Reserve Bank a document that he had prepared containing certain representations regarding his application.

Standard Bank had, however, omitted to place before the South African Reserve Bank the written representations prepared by Shuttleworth and on 13 October 2009, the South African Reserve Bank having approved the application to transfer out of South Africa the remaining Shuttleworth's blocked assets, it further imposed a 10% levy as indicated above.

When Shuttleworth discovered that his representations were not laid before the South African Reserve Bank, he instructed the Standard Bank to place them before the South African Reserve Bank and to ask South African Reserve Bank to reconsider its decision regarding the imposition of the 10% levy.

South African Reserve Bank, having considered the representations, re-affirmed its earlier decision taken on 13 October 2009 and in consequence it refused to uplift the 10% levy in the sum of R250 474 893,50.

Shuttleworth, subsequent thereto, had requested the reasons for the decision to impose the 10% levy and South African Reserve Bank had responded to the request by stating that according to the Minister of Finance's budget speech of 26 February 2009 emigrant's blocked assets were to be unwound and also that amounts up to R750 000 inclusive of amounts already exited, would be eligible for exiting without charge. Holders of blocked assets wishing to exit more than R750 000 inclusive of amounts already exited had to apply to the Exchange Control Department of the South African Reserve Bank to do so and approval would be subject to the exiting schedule and an exit charge of 10% of the amount.

South African Reserve Bank, in its letter of 8 February 2010, had indicated that for its decision of 13 October 2009 and refusal to review it, it was relying on the Minister's decision and public announcement of 26 February 2003 and that Shuttleworth's application was dealt with in accordance with the Minister's decision as embodied in Circular No 380 of 26 February 2003.

In February 2003 after his budget speech the Minister of Finance had released a circular announcing that anyone leaving the country would be allowed to take with a maximum amount of R750 000 and that taking any amount in excess thereof would need authorisation from the Exchange Control Department of the South African Reserve Bank and, if granted, such authorisation would be conditional on the emigrant paying a 10% levy on such extra amount. The circular was issued pursuant to the exchange control regulations made in terms of the Currency and Exchanges Act 9 of 1933 (the 'Act').

Shuttleworth, based on all of the above and, in particular, the decisions to impose the 10% levy on his remaining 'blocked loan account assets', instituted the present proceedings during 2010 in terms of which he sought relief in the form of an order reviewing and setting aside the levy of 10% imposed on him as a precondition to his transfer of his remaining blocked

assets out of the country, the return of the amount thus paid together with interest and he also sought an order declaring a number of regulations unconstitutional, as well as one declaring invalid the 'closed door policy' of the South African Reserve Bank in terms of which members of the public wishing to take money out of the country made application to authorised dealers or commercial banks instead of dealing directly with the Reserve Bank.

Shuttleworth also challenged the power of the president of the country to make regulations amending or suspending any part of the Act or any other Act of parliament and hence sought a declaration that section 9 of the Currency and Exchanges Act 9 of 1933 was inconsistent with the Constitution and invalid.

The issues to be determined in this case were at the commencement of the hearing identified to be as follows:

- Was the decision to impose a 10% levy on Shuttleworth a lawful decision?
- Is the system of Exchange Control constitutionally compliant?
- Are the Respondents obliged to repay to Shuttleworth the levy amount including interest?
- Was the appropriate remedy for the unconstitutionality of section 9 of the Act and the Regulations immediate striking down or an order of suspension?
- Is what is referred to as a 'Closed Door Policy' procedurally right and fair?

The Act and its Regulations which have survived decades of years is the subject of the constitutional challenge before the court.

The Act was assented to on 7 March 1933 and is called the Currency and Exchanges Act 9 of 1933 and was introduced to amend the South African law relating to legal tenders, currency, exchange and banking and it also deals with the system of exchange control. South African Reserve Bank established what is referred to as The Financial Surveillance Department in

pursuance of protecting the value of the Rand in the interest of a balanced and sustainable economic growth in South Africa and it replaced the Exchange Control Department.

The Financial Surveillance Department within the Reserve Bank is meant to regulate the inflow and outflow of capital in terms of the power granted to it and is responsible for the day-to-day administration of exchange control in South Africa including the investigation into alleged contraventions of such Regulations.

The authorised dealers are banks appointed by the Minister of Finance and these banks act as authorised dealers in foreign exchange which give the right to buy and sell foreign exchanges, subject to conditions and within the limits applied by the Exchange Control Department.

The purpose of exchange control is characterised as follows:

- •To ensure the repatriation into the South African banking system of all foreign currency acquired by residents of South Africa, whether through transactions of a current or capital nature;
- •To prevent the loss of such foreign currency resources through the transfer abroad of real or financial capital assets held in South Africa within the receipt of a commensurate consideration for the transfer of such assets; and
- •To control and monitor in an effective manner the movement into and out of South Africa of financial and real assets/money and or goods while at the same time not interfering unduly with the efficient operation of the commercial industrial financial systems of the country.

On a gradual approach post-1994, the Minister of Finance moved towards elimination of exchange controls to suit the prevailing economic conditions of the country and it became necessary to have a gradual process of liberalisation of exchange control rules bearing in mind the accepted complexities and pitfalls inherent in capital accounts.

Subsequent thereto, during the 2003 Budget Speech, the Minister of Finance announced that emigrants wishing to export more than R750 000 would apply to the Exchange Control Department to do so, subject to the submission of an exiting schedule and subject to payment of a charge equal to 10% of the amount sought to be exported and this 10% levy had been applied in respect of Shuttleworth and this appears to have prompted the present proceedings.

Shuttleworth noted that these proceedings were not an attack on the idea of exchange control and he accepted that exchange control served a valid public purpose and that a system of exchange control could be validly put in place under our constitutional scheme.

Shuttleworth's challenge was to the existing system of exchange control which was contrary to the principles of our constitutional scheme.

The Minister of Finance issues what are referred to as Orders and Rules under the regulations which contain various orders, rules, exemptions, forms and procedural arrangements. The current set is said to have been on since 1 December 1961 and that it had been amended from time to time.

As regards exchange control rulings, the Minister appoints certain banks to act as authorised dealers in foreign exchange which gives them the right to buy and sell foreign exchange transactions or currencies, subject to conditions and within the limits applied by the exchange control department.

Judge Legodi held the following:

<u>As to whether the 'closed door policy' was unlawful and unconstitutional</u>

(i) That the words 'Closed Door Policy' came from Shuttleworth and they related to a system of using authorised dealers or bankers to provide information or advice on exchange control or currency matters governed by the Regulations to those who might require such information or advice and they also relate to the approval or permission process in respect of exchange, currency and gold transactions, a function that is assigned to authorised dealers or bankers and this arrangement is embodied in rule 10(a) of the South African Reserve Bank.

(ii) That the aforementioned rule is challenged on two grounds: firstly, that it does not have force of law and, secondly, that it is in conflict with sections 1 and 33 of the Constitution of the Republic of South Africa 1996 ('the Constitution'), the latter section guarantees the right to fair administrative action.

(iii) That in regard to whether rule 10(a) complied with the enabling legislation, a duty is imposed on the Minister in terms of the Regulations made under section 9 of the Act and such a duty is conferred by means of Regulations made under the Act and the making of Orders, Rules and Rulings should therefore be seen in the context of the Regulations and in particular, the delegated authority conferred in terms of the Regulations.

(iv) That providing information or advice on exchange control or currency matters are matters governed by the Regulations and, similarly, the approval or permission in respect of exchange, currency and gold transactions are also governed by the Regulations. When these roles are assigned to the banks and rule 10(a) is introduced to confer these roles on the 'bankers', it cannot be said that there is no empowering authority brought about by the Regulations and, therefore, the first attack on what is referred to as a 'Closed Door Policy' must fail.

(v) That, in regard to the second leg of attack on rule 10(a), i.e. Respondent's constitutional obligation in terms of section 195 of the Constitution, it did not look like the Respondents had relegated their constitutional obligation in terms of section 195 of the Constitution in its entirety to the authorised dealers, neither did Shuttleworth show the shifting of responsibilities by the respondents so as to amount to unfair administrative action. Put simply, Shuttleworth did not show facts upon which he alleges that his constitutional rights to a lawful, reasonable and procedurally fair administrative action have been infringed and the banks appear to be efficient and effective in the execution of the responsibilities and duties delegated to them.

(vi) That the fact that the South African Reserve Bank requires the authorised dealers to put first the interests of the exchange control

department with no facts showing prejudice to people like Shuttleworth, would not without more, render the decision offensive and contrary to the spirit of the Constitution as set out in section 33. Moreover, one would expect of the authorised dealers to act in the best interest of their clients and, at the same time, ensuring that the Rules and guidelines set out by the South African Reserve Bank or Second Respondent on exchange control matters are complied with.

(vii) That, therefore, the court was not satisfied that the so-called 'Closed Door Policy' was unlawful and constitutionally unfair and this finding addressed the relief sought in prayer 9 of Shuttleworth's notice of motion.

<u>As to whether the decision to impose a 10% levy on Shuttleworth was lawful</u>

(viii) That Respondents did not see their purported power to impose the levy of 10% on blocked assets as founded on Exchange Control Circulars D.375 and D.380 issued on 26 February 2003 but they saw their source of power in section 9(1) of the Act and regulation 10(1)(c). Respondents contended that regulation 10(1)(c) was a product of section 9(1) of the Act and the 10% levy was a condition imposed for permission to expatriate Shuttleworth's blocked assets out of the country and was a condition imposed in terms of regulation 10(1)(c). On the other hand, Shuttleworth contended that regulation 10(1)(c) was invalid as it did not comply with the provisions of section 9(4) of the Act, there was a lack of guidelines in the legislation or regulation 10(1)(c) and the imposition of the condition to impose the 10% levy was not followed by a participative process.

(ix) That the question was whether the imposition of the levy was lawful and if it was not lawful it had to be because the exit levy did not comply with a substantive provision of the law, including the relevant provisions of the Constitution. The definite and source of public power in law is either in the Constitution or in national legislation and this is fundamental to the principle of legality.

(x) That Respondents were of the view that the 10% charge, generally speaking, constituted a disincentive to the exit of a large amount of capital, thus asserting to maintain the financial stability of the South African economy. Moreover, the object was, inter alia, to limit the adverse consequences of the outflow of funds on the external balance of payments necessary to maintain South Africa's macro-economic health and to promote financial growth and stability.

(xi) That it is an important principle of the rule of law that rules be stated in a clear and accessible manner and it is because of this principle that section 36 requires that limitation of rights may be justifiable only if they are authorised by a law of general application. Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision.

(xii) That discretion plays a crucial role in any legal system and it permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionary power may vary. At times, they will be broad, particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the Legislature to identify them in advance. A further situation may arise where the decision-maker is possessed of expertise relevant to the decisions to be made.

(xiii) That the exchange control system requires a flexible, speedy, and expert approach to ensure that proper financial governance prevails and the nature of the system is such that it requires and should permit abstract, and several sets of rules to be applied to a specific and particular circumstances as such circumstances and changes prevail themselves. It is a system that would make it impossible to lay down the rules or set out factors in advance. Most importantly, the exchange control system is a system that requires expertise and it is

for this reason it is the Reserve Bank that is delegated and tasked to deal with matters relating to the exchange controls.

(xiv) That it must therefore be found that failure to state any guidelines with reference to conditions in terms of regulation 10(1)(c) is justified and having regard to the nature and importance of the right that might be limited under regulation 10(1)(c) and the extent of limitation that is mediated by permissions, the limitations and/or restrictions should be found to be justified in relation to the nature, importance and effect of the provisions of regulation 10(1)(c) regarding the imposition of certain conditions.

(xv) That regulation 10(1)(c) introduces three things: first, it prohibits the entering into of any transaction whereby capital or any right to capital is directly or indirectly exported from the Republic. Secondly, it allows the granting of permission to export from the Republic capital or any right thereto and, lastly, it allows the imposition of certain conditions when permission is granted.

(xvi) That South African Reserve Bank considers the applications for permission as envisaged in regulation 10(1)(c) and it does so on delegated authority of the Minister. There can be no doubt that when it does so, it exercises discretion whether or not to grant permission. If it does grant the permission, it has to decide what conditions to impose in the granting of such permission and, in the instant case, it exercised its discretion by granting the permission.

(xvii) That the sticky question however is, whether in the circumstances of the case, it had discretion not to impose the 10% levy? The South African Reserve Bank's stance is that it did not have such discretion and this contention must be seen in context. That there can be no doubt about the South African Reserve Bank's discretion to grant or not to grant permission to export the capital or any right thereto from the Republic and, secondly, there can be no doubt that the functions of considering the applications have specifically been delegated to the South African Reserve Bank and, lastly, there can be no doubt as to how the imposition of the 10% levy came about.

(xviii) That the question that remains is: how do you exercise discretion and deviate from a policy guideline that required of the South African Reserve Bank to impose a 10% levy when granting permission to expatriate the capital out of the Republic? The court did not think one could. By doing so, the South African Reserve Bank would have been acting without delegated authority, and, put simply, South African Reserve Bank would have been acting contrary to the one that had conferred certain powers on him and, consequently, South African Reserve Bank had no discretion not to impose the 10% levy on Shuttleworth's blocked assets.

(xix) That the attack on the circulars should be considered on the basis that the imposition of the 10% levy by South African Reserve Bank was founded on the decision of the Second Respondent and therefore, without any challenge to the decision of the Minister, it must be assumed that his decision was correct.

(xx) That, in any event, once it is found that the decision to impose a levy was derived from the empowering section 9(1) and regulation 10(1)(c), there is nothing left of the attack on the unconstitutionality of the Rules, Circulars and Rulings as they did not have to follow the process of a Bill and/or promulgation of regulations considering the volatility of the exchange control matters which required swift and quick reaction.

(xxi) That, accordingly, once it was found that the decision to impose a levy was derived from the empowering section 9(1) of the Act and regulation 10(1)(c), there was nothing left upon which to base any unconstitutionality of the rules, circulars and rulings issued by the Minister and the object of the levy was to limit the adverse consequences of the outflow of funds on the external balance of payments that was necessary to maintain the country's macro-economic health and to promote financial growth and stability.

As to whether there were grounds for the constitutional invalidity of various regulations made under section 9 of the Act

(xxii) That, in regard to section 9(3) of the Act, which provided that the Governor-General, now the President, may, by any such regulations, suspend in whole or in part this Act or any other Act of Parliament or any other law relating to or affecting or having any bearing upon currency, banking, or exchange and any such Act or law which is in conflict or inconsistent with any such conflict or inconsistent with any such regulation shall be deemed to be suspended in so far as it is in conflict or inconsistent with any such regulation, this was an extraordinary wide power that effectively vested in the president the power to amend or suspend any Act of Parliament irrespective of whether that other piece of legislation dealt with issues of currency, banking or exchange and hence section 9(3) had to be found to be inconsistent with the Constitution.

(xxiii) That, accordingly, s 9(3) of the Act did not require suspension as it was a clear provision which should never have been allowed to stay in the statute book for so long.

4.4 C:SARS v Mobile Telephone Networks Holdings (Pty) Ltd

Mobile Telephone Networks Holdings (Pty) Ltd (MTN Holdings) was the holding company of five directly held and a number of indirectly held subsidiaries and joint ventures and it, in turn, was a wholly owned subsidiary of the MTN Group Limited. The collective business of the operating companies within the group was the operation of mobile telecommunication networks and the provision of related services to customers in Cameroon, Nigeria, Rwanda, South Africa, Swaziland and Uganda.

MTN Holdings, apart from the dividends that it received from its subsidiaries, which were its primary source of income, also loaned funds to those subsidiaries for application in their businesses primarily on an interest-free basis. It also facilitated a group employee debenture scheme whereby it borrowed funds (through issuing the debentures) and loaned those to group companies at a higher interest rate and it thus had two sources of income: a dividend income and an interest income.

MTN Holdings had no employees of its own and conducted no other business other than those investment holding and lending activities.

MTN Holdings had employed auditors to perform a statutory audit of its financial statements for each of the 2001, 2002, 2003 and 2004 tax years and the amount expended by MTN Holdings on audit fees for each of those years was R365 505, R647 770, R427 871 and R233 786, respectively (the audit fees). In addition, during the course of the 2004 tax year MTN Holdings paid an amount of R878 142 to KPMG in relation to, what was described in the evidence as the 'Hyperion' computer system (the KPMG fee).

MTN Holdings, had, in its income tax returns for the aforementioned tax years filed with Appellant, being the Commissioner for SARS, claimed as deductions all of the audit fees, as also the KPMG fee on the ground that it was deductible expenditure of a revenue nature.

SARS had disallowed the KPMG fee in its entirety and had apportioned the annual audit fees by permitting a deduction of between two and six percent thereof and the apportionment employed by SARS in each instance was based on the ratio of MTN Holdings' interest income as against its total revenue, i.e. revenue from both dividend and interest income.

SARS had overruled MTN Holdings' objection to the disallowance of the aforementioned amounts and MTN Holdings then appealed to the South Gauteng Tax Court (see ITC 1842 (2010) 72 SATC 118 per Gildenhuys J) where the Tax Court upheld the disallowance of the KPMG fee on the basis that it constituted expenditure of a capital nature and it also rejected MTN Holdings' contention that the audit fees were deductible in full, holding

instead that a 50/50 apportionment was appropriate and it, accordingly, set aside those assessments and referred the matter back to the Commissioner for re-assessment in accordance with its judgment.

MTN Holdings then appealed the aforementioned findings to the full court of the South Gauteng High Court (see Mobile Telephone Networks Holdings (Pty) Ltd v C: SARS 73 SATC 315 per Victor J) and MTN Holdings, in the alternative to claiming a full deduction of the audit fees, sought a 94% deduction on an alleged time basis. The Commissioner cross-appealed the 50/50 apportionment order and the full court (per Victor J, Horn and Wepener JJ concurring), upheld MTN Holdings' appeal in relation to the KPMG fees and allowed that deduction in full. It also overturned the 50/50 apportionment of the audit fees and directed the Commissioner to allow for a deduction of 94% thereof as contended for by MTN Holdings.

The full court, accordingly, dismissed the Commissioner's cross-appeal and the appeal to the Supreme Court of Appeal by the Commissioner against those findings was with the leave of the full court.

In the Supreme Court of Appeal the thrust of the argument advanced on behalf of the Commissioner was that in terms of section 11(a) read with section 23(f) of the Income Tax Act the audit fees were deductible only to the limited extent originally allowed by the Commissioner (or to such other extent as this court may allow) and no deduction in respect of the KPMG fee was permissible, alternatively, the KPMG fee was subject to an apportionment on the same or a similar basis to the audit fees.

Judge Ponnan held the following:

<u>As to the deductibility of the audit fees</u>

(i) That taxable income was the basis upon which normal tax was levied and it was arrived at by first determining the taxpayer's gross income and then deducting therefrom any amounts exempt from normal tax in order to arrive at the taxpayer's income. The taxpayer's taxable income is then determined by deducting from the income the various amounts which the Act allows by way of deduction, including those covered by section 11(a). Section 23 prescribes what deductions may

not be made in the determination of taxable income. Subsections (f) and (g) of section 23 represent, what has been described as the 'negative counterpart' of section 11(a) and, in determining whether a particular amount is deductible, it is generally appropriate to consider whether or not such deduction is permitted by section 11(a) and whether or not it is prohibited by section 23(f) and/or (g).

(ii) That the general deduction formula laid down in section 11(a) of the Act permitted the deduction from the taxpayer's income of 'expenditure and losses actually incurred in the production of income, provided that such expenditure and losses are not of a capital nature', whilst sections 23(f) and (g) of the Act prohibit a deduction in respect of any expenses incurred in respect of any amounts received or accrued which do not constitute income as defined in the Act and any moneys, claimed as a deduction from income derived from trade, to the extent to which such moneys were not laid out or expended for the purposes of trade.

(iii) That it was well settled that 'generally, in order to determine in a particular case whether moneys outlaid by the taxpayer constitute 'expenditure incurred in the production of income', important, sometimes overriding, factors are the purpose of the expenditure and what the expenditure actually effects' and, in this connection, the court has to assess the closeness of the connection between the expenditure and the income earning operations.

(iv) That it was not disputed by the SARS that the business of the operating companies within the group could only have been conducted in the corporate form adopted by the group or that consolidation (and the preparation of consolidated financial statements for the group) and audit planning activities would have been necessary irrespective of whether MTN Holdings had lent money at interest or not. Nor was it in dispute that MTN Holdings was statutorily obliged to appoint an auditor and to have its financial records audited and in those circumstances the fees for a statutorily

prescribed procedure such as an audit had to have been incurred by MTN Holdings.

(v) That, accordingly, it had to be accepted, that the audit fee expenditure was part of MTN Holdings' general overhead expenses enabling it to carry out all of its activities, irrespective of whether they involved the investment in subsidiaries, the lending of money interest-free to subsidiaries or the lending of money at interest and it followed that the Tax Court's conclusion that 'the auditing of financial records is clearly a function which is 'necessarily attached' to the performance of [MTN Holdings'] income-earning operations', could not be faulted.

(vi) That where, as here, expenditure is laid out for a dual or mixed purpose, the courts in South Africa and in other countries, have, in principle, approved of an apportionment of such expenditure and over time the courts have applied various formulae to achieve a fair apportionment; moreover, apportionment was a practical solution to what otherwise could be an intractable problem and in a situation where the only other answers, viz disallowance of the whole amount of expenditure or allowance of the whole thereof, would produce inequity or anomaly one way or the other and in making such an apportionment the court considers what would be fair and reasonable in all the circumstances of the case (see CIR v Nemojim (Pty) Ltd 45 SATC 241 per Corbett JA).

(vii) That apportionment is essentially a question of fact depending upon the particular circumstances of each case and as Beadle J puts it in Local Investment Co v COT (SR) 22 SATC 4 at 11 ' . . . it does not seem possible to me to lay down any general rules as to how the apportionment should be made, other than saying that the apportionment must be fair and reasonable, having regard to all the circumstances of the case.'

(viii) That an audit is directed towards signing off an audit opinion. And, as Carel Gericke, the general manager: group tax within the MTN Holdings group, testified, an auditor has to undertake a wide range of general tasks which do not relate to specific income items. MTN

Holdings' contention was that if an apportionment were to be made, it should reflect the relative time spent or work done by the auditors on auditing MTN Holdings' interest and dividend income. But as it was put in ITC 1017 (1963) 25 SATC 337 (F) at 337 'it is no good saying how little time and effort is devoted to the property company unless one can establish how much is devoted to the other ventures, for any such apportionment can only be on a comparative basis.'

(ix) That in assessing MTN Holdings, the Commissioner had apportioned the audit fees on the basis of the ratio between the taxable interest income and the exempt dividend income which was the vast majority of its revenue. Although some interest-bearing loans were made, by far the greater part of the loans made by MTN Holdings appear to have been interest free and the interest-earning operations of MTN Holdings, which related primarily to supporting the employee incentive scheme, were relatively small in comparison to the activity of holding shares and earning dividends and the related activity of advancing the businesses of subsidiaries by large interest free loans. Indeed, on a proper conspectus of all of the evidence, MTN Holdings' value overwhelmingly lay in its principal business as a holding company of extremely valuable subsidiaries. Accordingly, the lending of moneys at interest in the context of its share incentive scheme was relatively modest.

(x) That, in any event, it appeared that the time spent specifically on dividend and interest entries between them may well have made up a relatively small component of the overall audit time; moreover, the audit function involved the auditing of MTN Holdings' affairs as a whole, the major part of which concerned the consolidation of the subsidiaries' results into MTN Holdings' results and it followed that any apportionment must be heavily weighted in favour of the disallowance of the deduction given the predominant role played by MTN Holdings' equity and dividend operations as opposed to its far more limited income-earning operations.

(xi) That it may as well be artificial to differentiate between each of the relevant tax years as the Commissioner did, inasmuch as the audit function would essentially have been the same for each of those years notwithstanding the proportion of MTN Holdings' interest revenue as against its total revenue. It followed that whilst the court agreed with the Tax Court that in this case to invoke the arithmetical formulae laid down in cases such as CIR v Rand Selections Corporation Ltd 20 SATC 390 and CIR v Nemojim (Pty) Ltd 45 SATC 241 may well lead to anomalous results, on the facts here present a 50/50 apportionment of the audit fees was far too generous to the taxpayer and in all the circumstances the court considered that it would be fair and reasonable that only ten percent of the audit fees claimed by MTN Holdings for each of the tax years in question should be allowed.

As to the deductibility of the computer system fee

(xii) That in regard to the 'Hyperion' computer system in respect of which MTN Holdings paid an amount of R878 142 to KPMG, MTN Holdings alleged that the said fee had been incurred in respect of the 'implementation, adjustment, fine tuning and user operation of the [Hyperion] system' and it had claimed a 100% deduction in respect thereof.

(xiii) That there was no explanation from MTN Holdings for its failure to call as witnesses persons at MTN Holdings or KPMG with personal knowledge of the implementation and workings of the Hyperion system and, accordingly, given the inadequacy of the evidence adduced by MTN Holdings, it was well-nigh impossible to determine whether the KPMG fee fell legitimately to be deducted by MTN Holdings. It followed that the Commissioner could not be faulted for having disallowed that fee in its entirety and in the result the contrary conclusion reached by the full court to that of the Tax Court that the deduction of the KPMG fee must be allowed in full, fell to be set aside.

Appeal upheld with costs, such costs to include those consequent upon the employment of two counsel.

4.5 MTN International (Mauritius) Ltd v C:SARS

Appellant (MTN Mauritius) was a subsidiary of the MTN Group Limited, a South African company listed on the Johannesburg Securities Exchange and the intermediate holding company of cellular telephone operating subsidiaries outside South Africa for the MTN group.

MTN Mauritius had claimed interest on loans that it had incurred for purposes of making investments in Nigeria and the Middle East as expenditure in terms of the Income Tax Act against its gross income for the 2006 year of assessment.

Respondent, being the Commissioner for SARS, had, on 31 March 2011, which was the last day before the original assessment was due to prescribe in terms of section 79(1) of the Income Tax Act 58 of 1962, raised the revised assessment disallowing the interest expenditure which had been claimed as a deduction.

When raising the revised assessment, the relevant SARS official, Mr Toshilongo, had manually fixed the 'due date' on the relevant IT40 form as 30 March 2011, being one day prior to the day on which the assessment was actually raised. The 'second date' and something described as a 'process date' was fixed as 31 March 2011. The IT 40 form intimated that 'a combined IT 34 assessment [was] to follow.' The revised assessment resulted in an income tax liability by MTN of R73 476 101 and SARS recovered this amount by setting it off against a tax refund due on MTN's provisional tax account.

SARS, on 2 April 2011, had issued an IT 34 notice of assessment to MTN Mauritius and it reflected the 'due date' as 1 May 2011 and the 'second due date' as 31 May 2011.

MTN Mauritius, on 15 April 2011 and after the issuance of the IT 34 by SARS, applied to the North Gauteng High Court for an order to have the additional tax assessment processed by SARS in respect of MTN Mauritius' 2006 tax year raised on 31 March 2011 set aside and to order SARS to

credit or reverse any set-off that it had applied against the refund owed by Respondent to MTN Mauritius.

The issue that arose for determination in this appeal was whether the aforementioned revised assessment raised by SARS on 31 March 2011 in terms of the Income Tax Act to assess MTN Mauritius to tax for the 2006 year of assessment fell to be set aside.

The court a quo, being the North Gauteng High Court (see MTN International (Mauritius) Ltd v C:SARS 75 SATC 171 per Tlhapi J), held that the revised assessment raised by SARS did not fall to be set aside but granted leave to MTN Mauritius to appeal to the Supreme Court of Appeal.

MTN Mauritius pointed out that the additional tax assessment had been backdated to show the due date as being 30 March 2011 which was the date of the assessment as prescribed in the Income Tax Act 58 of 1962 even though the assessment was clearly only processed and created on 31 March 2011.

MTN Mauritius, accordingly, submitted that such a manipulation of dates to meet SARS' needs was so irregular and unlawful that the additional tax assessment stood to be set aside on this basis alone.

SARS contended that at all relevant stages it had acted within its powers and duties in terms of the Income Tax Act and it was entitled and duty bound in terms of section 79 of the Income Tax Act to raise the 2006 additional assessment on 31 March 2011.

The original 2006 assessment had by then not prescribed and SARS was satisfied as envisaged in terms of section 79(1)(a) of the Income Tax Act that an amount which was subject to tax and should have been assessed to tax had not been assessed due to the fact that the interest expenditure that MTN Mauritius had claimed was erroneously allowed by SARS as a deduction when raising the original 2006 assessment.

SARS further contended that the so-called 'manipulation' or 'backdating' of the 'due date' of the assessment to 30 March 2011 and the fixing of the 'second date' not 30 days in the future, were of no consequence for present purposes as this, at best for MTN Mauritius, may theoretically have had a

one day detrimental impact on the period allowed within which MTN Mauritius could file an objection or when prescription started to run. However, the said detrimental effect never materialised insofar as the objection period was concerned and from whatever angle the matter was viewed, it had no impact on the validity of the assessment.

SARS' explanation of the backdating of the 'due date' to 30 March 2011 was that the official concerned had manually fixed the 'due date' and the 'second date' of the assessment as respectively 30 March 2011 and 31 March 2011 because he had been under the erroneous impression that the two dates could not be on the same day and was afraid that if he fixed later dates then it could perhaps be said that the assessment had prescribed, which was also wrong since the relevant date was the date upon which the assessment was raised. The official therefore fixed the 'due date' as the date prior to the date upon which the assessment was raised and MTN Mauritius, accordingly, contended that nothing inappropriate or untoward could be inferred from this.

Judge Ponnan held the following:

(i) That it was common cause in this case that: (a) on 31 March 2011 SARS assessed MTN Mauritius to additional tax; (b) that assessment was made within the prescriptive period allowed by the Income Tax Act; and (c) the assessment was notified to MTN Mauritius on that day.

(ii) That an 'assessment' was defined in section 1 of the Act as 'the determination by the Commissioner, by way of a notice of assessment' of one or more matters and what was required was at least a purposeful act, one whereby the document embodying the mental act is intended to be an assessment.

(iii) That as was apparent from the definition of 'assessment' it was not a requirement that in order for a notification of a determination by SARS to be a valid assessment, it should be dated, much less that a valid 'due date' should be fixed. On the contrary, the legislature in section 1 of the Act defined 'date of assessment' to mean '. . . the date

specified in the notice of such assessment as the due date, or where a due date is not so specified, the date of such notice.'

(iv) That it followed that where no 'due date' – to be read 'lawful or valid' due date – was specified, it could not be said that the assessment was a nullity.

(v) That indeed it had been accepted by both parties that the notice did not have to be dated and that 'an undated notice' would still constitute a valid notice. Likewise, it was accepted that inadvertently fixing an incorrect date by way, for example, of a simple clerical error would not have affected the validity of the assessment; moreover, in those circumstances had the dates fixed by the SARS official, which plainly were unworkable, been disregarded, the default position in terms of the Act would have been the date on which the taxpayer was notified of the determination.

(vi) That it was open to the SARS official to have raised the revised assessment on 31 March 2011 and fixed the due date on some later occasion which was the effect of the IT 34 notice of assessment that issued on 2 April 2011.

(vii) That if it was to be accepted, as indeed it must be, that the fixing of a due date in the IT 40 was not necessary for a valid assessment, it must follow that the fact that the 'due date' may have been incorrectly fixed would be irrelevant to deciding whether or not the assessment was valid. Much less, could it be said, that that in and of itself must result in the revised assessment being set aside.

(viii) That the aforesaid conclusion ought to have disposed of the appeal but it was nonetheless necessary to touch, albeit briefly, on two further contentions advanced on behalf of the MTN Mauritius.

(ix) That, firstly, according to MTN Mauritius, the SARS official's approach left it with only 29 days to object to the assessment, 'robbing' it of its right (being the 30 days afforded to it by the Act) within which to object and it went without saying that the Commissioner cannot 'rob' a taxpayer of a right afforded to it by the Act but that plainly did not

occur here – it was important to note that it was not the notice of assessment that allowed or disallowed MTN Mauritius the 30 days within which to object. Its right to do so derived from the Act as read with the rules promulgated under section 107A of the Act. Thus where, as here, the due date was unworkable, the 30 days fell, in terms of the Act, to be computed from the date of assessment, being 31 March 2011. In any event, MTN Mauritius had elected not to file an objection within 30 days from the date of assessment. By 29 April 2011 it had requested reasons for the assessment, as it was entitled to do in terms of rule 3(1)(a) and that suspended the initial 30 day period, giving MTN Mauritius a renewed 30 day period from the date when the reasons were provided to file its objections (rule 4(e)) and it could therefore not be said that MTN Mauritius was indeed deprived of the 30 day period within which to respond to the revised assessment.

(x) That, secondly, it was contended by MTN Mauritius that it must be made clear that the Commissioner is subject to the Constitution and the law and that the lack of probity and good faith encountered here by the SARS official will not be countenanced by our courts and the effective way of achieving that end, so the contention went, was to set aside the assessment in its entirety. However, here, one was not dealing with conduct that even remotely came close to conduct of the kind encountered in Pretoria Portland Cement Co Ltd v The Competition Commission 2003 (2) SA 385 (SCA) at para 71 where the court considered the conduct encountered there as an abuse of power. Here the court was concerned with no more than an official who simply misapprehended what was required and labouring under that misapprehension he fixed the dates in the belief that he was obliged so to do. Nothing in his conduct was clandestine or surreptitious. As regards MTN Mauritius's contention that the official, in acting as he did, was 'influenced by ulterior motives', however motive was irrelevant for, as Schreiner JA put it in National Director of Public Prosecutions v Zuma (Mbeki and another intervening) 2009 (1) SACR 361 (SCA) at para 37, in connection with arrests, the

best motive does not cure an otherwise illegal arrest and the worst motive does not render an otherwise legal arrest illegal and there thus appeared to be no logical or rational distinction that can be drawn between the error which underpinned the official's conduct and the simple clerical error postulated earlier.

(xi) That it followed that the appeal must fail and in the result it was dismissed with costs, such costs to include those consequent upon the employment of two counsel.

4.6 ITC 1872

The taxpayer was an inter vivos trust established in terms of a deed of trust ('the Trust Deed') that had been concluded on 15 March 2010 and had been registered with the Master of the High Court, Cape Town, on 7 September 2010.

Respondent was the Commissioner for SARS.

The taxpayer had launched an application with SARS seeking its approval as a public benefit organisation in terms of s 30(3) of the Income Tax Act as well as approval in terms of section 18A of the Income Tax Act in order to issue tax deductible receipts to donors.

The taxpayer, in order to qualify for the exemption from income tax on certain receipts and accruals in terms of section 10(1)(cN) of the Act, had to be approved by SARS in terms of s 30(3) read with the Ninth Schedule to that Act.

SARS had refused the taxpayer's application for approval and, aggrieved by such a decision, the taxpayer objected to SARS' decision to refuse the application and upon disallowance of its objection it lodged an appeal to the Cape Town Tax Court.

The dispute between the parties was whether the taxpayer met the requirements of section 30(3) of the Act and whether its sole or principal objective was the carrying on of public benefit activities listed in the Ninth Schedule to the Act in order for it to qualify for approval as a public benefit

organisation under section 30 and approval to issue tax deductible receipts under section 18A of the Act.

Section 10(1)(cN) of the Act provided for a partial exemption from normal tax of certain receipts and accruals of any public benefit organisation approved by SARS in terms of section 30(3) of the Act and to be approved as a public benefit organisation as contemplated in section 30 of the Act, the organisation, in the first instance, had to fall within the definition of a public benefit organisation as defined in section 30(1) of the Act and it should have as its sole or principal objective the carrying on of one or more approved public benefit activities listed in Part 1 of the Ninth Schedule to the Act and had to comply with the formal requirements set out in section 30(3) of the Act.

The taxpayer had been formed with the specific purpose to lodge an application for approval and, more particularly, approval in terms of section 18A of the Act to issue tax deductible receipts to donors.

In terms of the Trust Deed the objectives of the Trust were the 'provision of poverty relief to poverty stricken communities, community development and anti-poverty initiatives, training for actively poor persons to enable them to obtain employment or improve their employment, the advancement, promotion or preservation of arts, culture and custom, engaging in the conservation, rehabilitation or protection of the natural environment, the promotion, monitoring or reporting of development assistance aimed at benefiting the poor and needy.'

The taxpayer, in its application, had indicated that it would be performing the following public benefit activities listed in the Ninth Schedule, i.e. welfare and humanitarian entailing the provision of poverty relief; community development for poor and needy persons and anti-poverty initiatives; the advancement, promotion or preservation of the arts, culture or customs; and conservation, environment and animal welfare.

SARS contended that poverty relief was not defined in the Income Tax Act and therefore a narrow rather than a wide interpretation of the concept of 'poverty relief' should be attributed to the term 'poverty relief'. He contended

further that the actual activities undertaken by the Trust were the establishment of tourist routes and a website to market these routes and the services offered to route participants. The route participants were included irrespective of financial status and the majority of these participants did not qualify or fall within the scope of requiring poverty relief. SARS contended that the benefit contemplated was to a small and inclusive list of route participants and that the Trust's proposed public benefit activities were therefore not for the benefit of the needy and the poor or were not widely accessible to the general public as was required in terms of section 30 of the Act.

As regards the community development for poor and needy persons and anti-poverty initiatives, SARS contended that in interpreting this provision, all elements set out in the main paragraph of community development activity were required to be present, namely, 'poor', 'needy', and 'anti-poverty initiatives' and he contended that the activities must be directed at assisting persons in dire straits to survive.

SARS contended therefore that the activities contemplated by the Trust were not designed or will not be performed for the benefit of the poor and the needy or shall not be widely accessible to the general public.

As regards the advancement, promotion or preservation of the arts, culture or customs, SARS contended that the Trust must show that it will perform overt acts to advance, promote or preserve arts, culture or customs but the use of the internet to display and market attractions to expose tourist routes to potential tourists could not be regarded as advancing, promoting or preserving arts, culture or customs and for these reasons he contended that the contemplated activities were not designed to benefit the poor and the needy or would not be widely accessible to the general public.

SARS further contended that the Trust had to 'engage' in conservation of the natural environment and this required that the Trust must have the necessary infrastructure and skilled personnel to perform the functions for the protection of the environment.

SARS thus concluded that the proposed activities were not designed or would not be performed for the benefit of the poor and the needy or shall not be widely accessible to the general public.

SARS stressed that the crucial question before the court was whether the object of carrying on the proposed public benefit activities was the Trust's main or principal object and the Trust Deed was silent on what the Trust was actually authorised to do and how it should go about performing the proposed public benefit activities.

The taxpayer on the other hand contended that it had fulfilled all of the requirements set out in section 30 of the Income Tax Act to qualify for approval as a public benefit organisation and, in particular, it contended that it had used tourism as a platform to create and to sustain jobs in rural communities whilst at the same time promoting local culture and conservation of the natural environment and this it did by encouraging tourists to take off the beaten track self-drive travel routes to enable communities on those routes to benefit from tourism and hence it contended that its activities were aimed at bringing in tourists for the purposes of supporting poor people on those tourist routes and thus it was purely incidental that established business would benefit from the Trust's proposed public benefit activities.

The taxpayer further contended that it had satisfied the formal requirements for approval as a public benefit organisation as provided for in section 30(3) of the Act.

The taxpayer also contended that it proposed to advance, promote and preserve arts, culture and customs by encouraging tourists to visit off the beaten track routes, creating forums from local communities, mentoring and encouraging these forums, and conducting workshops for those persons and thereby assisting in creating markets for the products produced by these communities.

Finally, the taxpayer contended that many public benefit organisations were operated by unskilled volunteers with little or no infrastructure and that the

fact that the Trust did not have the infrastructure alluded to, was no reason for it not to be approved as a public benefit organisation.

Judge Yekiso held the following:

As to the points raised in limine

(i) That in regard to the determination of certain issues raised by way of points in limine, once the court had heard argument on those points, it was of the view that it could not uphold the points raised in limine and hence proceeded on the basis that the appeal would be determined on the basis of the facts and the documentation presented to the Commissioner for SARS from the date that the application was launched up to the date that the objection was disallowed, duly amplified by the specified oral evidence.

As to the onus of proof

(ii) That in matters of this nature the taxpayer bears a burden to prove that the decision to disallow an objection is incorrect and section 102 of the Tax Administration Act under the heading 'Burden of Proof' provides that a taxpayer bears the burden of proving whether a decision that is subject to objection and appeal under a Tax Act is incorrect.

(iii) That section 102(f) of the Tax Administration Act, properly interpreted, raises a statutory presumption in favour of the correctness of a decision made by the Commissioner and the onus is placed on the taxpayer to show that the decision by the Commissioner is incorrect. This appears to be the approach adopted in such authorities as CIR v Goodrick 12 SATC 279 where it was held that what is required of the taxpayer to discharge this onus is affirmative evidence that satisfies a court upon a preponderance of probabilities that the amount is not taxable.

(iv) That it has further been held in authorities such as Auto Protection Insurance Company Ltd v Hanmerstrudwick 1964 (1) SA 349 (A) that the mere fact that evidence placed before the court by the taxpayer has not been contradicted does not mean that same should be

accepted as such and the evidence of a person on whom the onus rests can be so improbable that the onus has not been discharged.

As to the taxpayer's approval as a public benefit organisation

(v) That it was accepted that applications for approval in terms of section 30 of the Income Tax Act should be strictly scrutinised and this approach did not mean that a narrow rather than a wider view should be taken as to what constitutes public benefit activity. Where a narrow sector of the public may benefit from an exemption, as for example, farmers who receive certain tax benefits in terms of the Income Tax Act, then the provisions should indeed be interpreted narrowly. However, the ambit of section 30 of the Act is to encourage activities that will benefit the general public and, with this in mind, the net should be thrown fairly wide to encourage and promote the carrying on of all and any bona fide public benefit activity provided always that the organisation seeking approval complies with the requirements as set out in section 30 of the Act and provided further that the proposed public benefit activity falls within the framework set out in the Ninth Schedule to the Act and that Schedule provided a framework of activities to be undertaken in order to qualify for approval in terms of section 30 of the Act.

(vi) That the evidence tended to suggest that the Trust's website was extremely professional and on par with other commercial websites and the use of a website in the promotion of the proposed travel routes should not be viewed negatively as, the better the website, the more internet traffic it will generate and the more actual tourism it may attract, the more likely it will yield the achievement of the Trust's stated objective of poverty relief, job creation and other similar objectives.

(vii) That the public benefit activities listed under the heading 'welfare and humanitarian' are not restricted only to activities that assist persons in dire straits to survive and that heading covers other activities such as rehabilitation of prisoners, conflict resolution, promotion of human rights and many other activities of like nature and that these activities

integrate a much wider spectrum of activities than assistance of persons in dire straits to survive.

(viii) That the proposed public benefit activities that the Trust undertakes to do are benevolent in nature and that no one connected to the Trust or employed by the Trust was likely to receive undue benefit other than reasonable remuneration contemplated in s 30 of the Act.

(ix) That, on the balance of probabilities, the public benefit activities and modus operandi of the Trust met the requirements of 'public benefit activities' as contemplated in Part 1 of the Ninth Schedule to the Income Tax Act.

(x) That the court was not persuaded that the object of the Trust was merely to establish tourism routes as the Commissioner had suggested and it was satisfied that the Trust's contemplated activities could very well be regarded as promoting arts, culture or customs. It was also not necessary for the Trust to have the kind of infrastructure or skilled personnel as referred to by the Commissioner for it to properly engage in conservation of the natural environment. Moreover, the creation of awareness in the local communities of the importance of preservation of fauna and flora and the marketing of these attractions to tourists very well meets the requirements contemplated in para 7(a) of the Ninth Schedule to the Act.

(xi) That nowhere is the Income Tax Act prescriptive as to how those objectives contemplated in the Ninth Schedule should be achieved and in the instance of this matter, it is anticipated that the Trust would be dependent on donor funding to achieve its objectives and without donor funding the Trust is unlikely to achieve the objectives set out in its founding instrument. Corporate sponsors tend to have stringent conditions as regards how the funds they donate in discharge of their social responsibilities are spent and applied. Moreover, if the Trust acts contrary to the objectives set out in its founding documents, funds will just simply dry up.

(xii) That, accordingly, the stated objectives of the Trust and its proposed day-to-day activities fell squarely within the framework of those activities listed in the Ninth Schedule which the Trust proposed to undertake and hence this was a matter in which the Commissioner should have approved the Trust's application in terms of section 30 of the Act so that, on the basis of such approval, the Trust would have been in a position to claim tax exemption in terms of section 10(1)(cN) of the Act.

As to the perceived deception of the Commissioner

(xiii) That it was quite evident on the basis of excerpts of correspondence cited in the judgment that the Commissioner was all along well aware that ABC and the Trust were two entities and that the management and administration of these two entities were intertwined. Whatever misrepresentation that came about or, whatever confusion that came about, arising from the submission of the audited financial statement to the Commissioner as being those of the Trust, was not intended to deceive the Commissioner but that such confusion arose due to the fact that the administration and management of ABC and that of the Trust was intertwined and undertaken by the same personnel and, in any event, the perceived deception of the Commissioner was not part of the grounds on which the Commissioner had disallowed the Trust's objection.

As to the s 18A exemption

(xiv) That the Trust not only sought the Commissioner's decision to refuse its application for approval as a public benefit organisation to be overruled, but it also sought an order that the Commissioner be directed to grant the Trust authority to issue tax deductible receipts in terms of section 18A of the Income Tax Act.

(xv) That section 18A of the Act enables the donors to claim a tax deduction in respect of a donation made to a public benefit organisation which has been approved by the Commissioner in terms of section 30 of the Act and only public benefit organisations that have

been approved by the Commissioner in terms of section 30 of the Act may be issued with authority to issue tax deductible receipts to donors on the basis of which such donors may claim a tax deduction arising from such donations. However, section 18A(1)(a)(ii)(aa) of the Act requires the public benefit organisation seeking such tax exemption status to carry on such public benefit activities in the Republic and that such activity should be a public benefit activity contemplated in Part 11 of the Ninth Schedule. Section 30 of the Act has no such territorial restriction with regard to the location of the beneficiaries to such public benefit activity.

(xvi) That an authority to issue a tax deductible receipt in terms of section 18A of the Act has an effect of reducing the tax base in the Republic and the donors of such donations are issued with tax deductible receipts on the basis of which they can claim a tax deduction based on such donations and it therefore makes sense that only activities carried on within the Republic should be allowed to reduce the South African tax base and unless the Trust satisfies the Commissioner that the contemplated public benefit activities will be exclusively carried out in the Republic, it cannot be issued with authority to issue tax deductible receipts in terms of s 18A of the Act.

4.7 GM van der Merwe & others v C:SARS & others

First Applicant (GM van der Merwe) had been arraigned on eleven counts of fraud and several of the charges against him had alleged that he had contravened the provisions of the Income Tax Act or the VAT Act.

GM van der Merwe and Second Applicants were also the First and Second Respondents respectively in a preservation order application brought in terms of s 163(4)(a) of the Tax Administration Act 28 of 2011.

Second Applicant had anticipated the return day of the aforementioned application and the parties were awaiting the decision of the court. (See further C: SARS v C-J Van der Merwe 76 SATC 138).

Section 163(1) of the Act provides that a senior SARS official may 'authorise an ex parte application to the High Court for an order for the preservation of any assets of a taxpayer or other person prohibiting any person . . . from dealing in any manner with the assets to which the order relates.'

Section 163(4)(a) provides that the court to which an application for a preservation order is made may make a provisional preservation order having immediate effect and simultaneously grant a rule nisi calling upon the taxpayer or other person upon a business day mentioned in the rule to appear and to show cause why the preservation order should not be made final.

However, on 11 February 2014 Mr Justice Davis had, by means of a court order made on 11 December 2013, authorised an inquiry by virtue of the provisions of Part C of Chapter 5 of the Tax Administration Act.

First Respondent, being the Commissioner for SARS, had brought the aforementioned ex parte application and on the same day Davis J made an order that 'Adv PJJ Marais SC, a member of the Pretoria Bar, be designated to act as the presiding officer for the purpose of the inquiry in terms of Part C of Chapter 5 of the Tax Administration Act 28 of 2011 . . . which inquiry is identified and defined herein.'

The aforementioned court order then set out the purpose and ambit of the inquiry and also contained a paragraph providing that access to the court file in the application would be restricted in that the court file and its contents would be kept in a locked cabinet or safe.

Applicants then brought an application in the Western Cape High Court for a rule nisi / temporary interdict preventing the Second Respondent from commencing with the said inquiry pending the final outcome of an application to have the aforesaid order reviewed and set aside, alternatively, to declare the relevant provisions of the Tax Administration Act which may authorise such an inquiry notwithstanding the fact that civil and/or criminal proceedings had commenced, unconstitutional and invalid.

The said application also requested that Third Respondent allow the Applicants and other interested parties access to the court file to enable the aforesaid review application to be made.

Section 50 of the Act provided that a judge may, on application made ex parte by a senior SARS official grant an order in terms of which a specified person is designated to act as presiding officer at the inquiry referred to in the section.

Furthermore, a senior SARS official may authorise a person to conduct an inquiry for the purposes of the administration of a tax Act (s 50(3)).

A judge may grant the order referred to in s 50(2) if satisfied that there are reasonable grounds to believe that a person has failed to comply with an obligation imposed under a tax Act or has committed a tax offence and relevant material is likely to be revealed during the inquiry which may provide proof of the failure to comply or of the commission of the offence.

Applicants contended that Davis J did not have authority to order an inquiry in circumstances where civil and criminal proceedings relating to the subject-matter of the inquiry were underway and if that was not what was meant in the Act, it was unconstitutional to the extent that it permitted inquiries in such circumstances.

Section 58 provided that an inquiry is not suspended by pending or contemplated civil or criminal proceedings against or involving the person in the inquiry or another person whose affairs may be investigated in the course of the inquiry.

Judge Veldhuizen held the following:

(i) That the interim interdict was clearly sought to suspend the inquiry for the purpose of bringing an application to review and set aside the order of Davis J or to have the relevant provisions of the Tax Administration Act declared unconstitutional and the Applicants also sought access to the court file to enable the aforesaid application to be made.

(ii) That one could not view the word ‘pending’ in isolation and it should be given a meaning having regard to the section as a whole and hence the word ‘pending’ in section 58 of the Act meant that an inquiry must continue even during civil or criminal proceedings unless a court ordered otherwise.

(iii) That it followed that the fact that civil or criminal proceedings involving any one of the Applicants had commenced did not lead to the exclusion of such an Applicant from the ambit of section 58 of the Act and there was no reasonable prospect of the Applicants’ contention being upheld.

(iv) That it was common cause that First Respondent had, subsequent to the granting of the inquiry application, refused to grant First Applicant access to the court file underlying the application and Applicants had sought an order giving them general access to the court file. However, it was true that it was contended that Applicants were not able to identify any documents while they did not know what the court file contained but they should, at least, attempt to do so even if it was in broad terms as the file may contain information regarding a person or persons whose information was protected by the provisions of the Income Tax Act.

(v) That Applicants’ attack on the constitutionality of section 58 of the Act turns on the interpretation of the section and not on the contents of the court file. Moreover, the interpretation contended for by the Applicants had no prospect of being upheld and, in consequence, their application for access to the court file also could not succeed.

Application dismissed with costs.

5. INTERPRETATION NOTES

5.1 Income Tax – Assessed loss: Companies: The 'trade' and 'income from trade' requirements – No. 33(4)

This Note clarifies when a company may forfeit its right to carry forward its assessed loss from the preceding year of assessment as a result of it:

- not carrying on a trade during the current year of assessment, or
- having carried on a trade during the current year of assessment, but not deriving any income from trade during that year of assessment.

Under section 20(1)(*a*) a company that does not carry on a trade during a year of assessment forfeits the right to carry forward its assessed loss from the immediately preceding year of assessment (the 'trade' requirement). A further question arises whether a company that has traded during the current year but has derived no income from trade during that year is denied the opportunity to carry forward its assessed loss from the preceding year (the 'income from trade' requirement).

SARS is of the view that section 20 contains a trade requirement and an income from trade requirement. Both these requirements must be satisfied before an assessed loss may be carried forward. SARS does, however, accept that this may have some unintended results.

In dealing with the problem SARS will accept that as long as the company has proved that a trade has been carried on during the current year of assessment, the company will be entitled to set off its balance of assessed loss from the preceding year, notwithstanding the fact that income may not have accrued from the carrying on of that trade. This concession is limited to cases in which it is clear that trade has been carried on. SARS will apply an objective test in order to determine that a trade has in fact been carried on. It will not be sufficient that there was a mere intention to trade or some preparatory activities. The fact that no income was earned during the year

of assessment must be incidental or result from the nature of the trade carried on by the company.

5.2 Income Tax – Pre-trade expenditure and losses – No. 51(3)

This Note provides guidance on the deduction of pre-trade expenses (sometimes also called start-up costs) under section 11A.

New business formation is vital to the economy. Before the introduction of section 11A only certain pre-production interest [section 11(*b*A)] and certain finance charges [section 11(*b*B)] were permitted as a deduction for start-up costs incurred before the commencement of trade. Sections 11(*b*A) and 11(*b*B) have been deleted since the release of the first issue of this Note.

While this Note provides general guidance on the application of section 11A, the facts and circumstances of each case must be considered in determining when and if pre-trade expenses will qualify for a deduction under this section.

5.3 Income Tax – Allowance for future expenditure on contracts – No. 78

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

The nature of a taxpayer's business may be such that the taxpayer receives amounts under a contract that will be used to finance expenditure to be incurred in the future in performing under that contract. An anomaly arises when the income is received in one year and the expenditure is incurred in a subsequent year of assessment.

In the absence of section 24C the income would be fully taxable in the year received without any deduction for future expenditure. The non-deductibility

of the expenditure is attributable to most sections requiring that the expenditure be actually incurred before a deduction can be allowed [for example, section 11(*a*)] and, in addition, section 23(*e*) which specifically prohibits the deduction of income carried to any reserve fund or capitalised in any way.

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

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

Although Section 24C was originally intended for taxpayers entering into building and manufacturing contracts, it does not mean that the section cannot be applied to taxpayers entering into other types of contracts. *Galgut J* stated the following:

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

Section 24C has been and can be applied to business in industries other than building and manufacturing provided the detailed requirements of the

section are met. For example, the section has been applied to the motor industry, the financial industry, publishers and share block schemes.

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

A decision made by the Commissioner under section 24C is subject to objection and appeal.

In summary:

- Section 24C provides temporary relief, in the form of an allowance which reverses in the following year of assessment, to taxpayers that receive income in advance of incurring the expenditure related to the earning of that income.
- The Commissioner must be satisfied that:
    - the taxpayer's income in a particular year of assessment includes an amount of income received or accrued under a contract;
    - all or part of the advance income will be used to finance future expenditure which *will be incurred* by the taxpayer in performing the taxpayer's obligations under that contract; and
    - the future expenditure when incurred will qualify for a deduction or, in the case of the acquisition of an asset, will qualify for any deduction under the Act.
- The contract may be a written contract or a verbal contract; however, in the latter case it may be more difficult to prove the existence of a contract and the rights and obligations flowing from it.
- The words *'will be incurred'* indicate that the Commissioner must be satisfied that there is a high degree of probability and inevitability that the expenditure will be incurred by the taxpayer. A taxpayer must therefore be able to demonstrate that, although the expenditure is contingent at the end of the year of assessment in question, there is a high degree of certainty that the expense will in fact be incurred in a subsequent year. The facts of each case are critical. The degree of

certainty required is unlikely to be met if performance under the contract is *not* contractually obligatory but is only *potentially* contractually obligatory because of an act or event other than just the taxpayer's client or customer taking action.

- Assets already acquired do not represent future expenditure.
- Assets falling within the ambit of section 24C are those assets which will be acquired in order to perform under the specific contract giving rise to the advance income. The replacement of assets generally used in the taxpayer's trade fall outside the ambit of section 24C.
- The amount of the section 24C allowance is equal to the amount of advance income which the Commissioner is satisfied will be used to finance future expenditure.
- The section 24C allowance may not exceed the amount of income received or accrued under the contract in a particular year of assessment. The amount of income received or accrued in a current year includes the reversal of the previous year's section 24C allowance.
- The section 24C allowance is based on how much of the advance income will be used to finance future expenditure and may, therefore, never exceed the amount of income even if the contract is running at a commercial loss.
- It is not possible to be prescriptive on the methods used to calculate the amount of the section 24C allowance. However, in a number of cases the 'gross cost method' will be appropriate.
- Generally, the calculation of the section 24C allowance must be performed on a detailed contract-by-contract basis. However, there are limited circumstances in which it may be appropriate to perform the analysis at a higher level by taking a number of contracts into consideration.
- An assessment of whether section 24C is applicable must be performed annually taking into account up-to-date information.

- A decision made by the Commissioner under section 24C is subject to objection and appeal.

6. DRAFT INTERPRETATION NOTES

6.1 Additional investment and training allowances for industrial policy projects

Section 12I provides for the deduction of additional investment and training allowances from the income of a company carrying on an 'industrial project' which qualifies as an 'industrial policy project'.

This Note provides guidance on the interpretation and application of section 12I.

Section 12C(1)(a), read with paragraph (c) of the proviso to section 12C(1), allows for the deduction of the cost to a taxpayer of machinery or plant used by a taxpayer directly in a process of manufacture or any other similar process at a rate of 40:20:20:20 over four years. Section 12H, in turn, allows the taxpayer an additionaldeduction of R30 000 per learner in respect of any registered learnership agreement entered into between the learner and an employer.

Section 12I aims to encourage investment in industrial projects, predominantly large industrial projects, in order to improve productivity within the manufacturing sector and thus support South Africa's industrial strategy. This is done by allowing an additional investment allowance on manufacturing assets and an additional training allowance for the training of employees engaged in providing services in relation to the qualifying industrial policy project.

7. BINDING PRIVATE RULINGS

7.1 BPR 173 – Repayment of shareholders loan from proceeds of a new issue of ordinary shares

This ruling deals with the income tax consequences arising from the repayment of shareholder loan from the proceeds of a new issue of ordinary shares in a company.

In this ruling references to sections and paragraphs are to sections of the Act and paragraphs of the Eighth Schedule to the Act applicable as at 15 April 2014 and unless the context indicates otherwise, any word or expression in this ruling bears the meaning ascribed to it in the Income Tax Act.

This is a ruling on the interpretation and application of the provisions of:

- section 19; and
- paragraph 12A of the Eighth Schedule.

Parties to the proposed transaction

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

Management: The Management of the Applicant

Holdco: A foreign company that is the majority shareholder of the Applicant

Description of the proposed transaction

Holdco owns the majority of the issued share capital in the Applicant and the remaining issued share capital is owned by Management.

As at 31 March 2013, the Applicant owed an outstanding loan amount to Holdco. The loan was used to fund operational expenditure of the Applicant.

Holdco wishes to recapitalise the Applicant by way of a new issue of ordinary shares (the shares). The Applicant will use the cash so generated to repay the loan owed to Holdco in full.

Management will also have the option to subscribe for more shares in the Applicant.

Holdco will subscribe for the shares in terms of a Subscription Agreement to be entered into between the Applicant, Holdco and Management. It is, however, unlikely that any member of Management will subscribe for more shares in the Applicant.

On the date of subscription, Holdco will pay a subscription price in cash equivalent to the amount of the outstanding loan to the Applicant.

The shares will be of the same class as those currently in issue. The Applicant will issue the shares at par value as it has sufficient authorised but unissued shares.

The Applicant will issue share certificates to Holdco and will timeously repay the outstanding loan amount in cash to Holdco.

Conditions and assumptions

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

- The subscription price for the new issue of shares is to be settled in cash by Holdco.
- The loan amount owed to Holdco will be settled in cash, by the Applicant as contemplated in the proposed transaction.
- No ruling is issued on the past deductibility of the operating expenses and the applicability of section 31 to the facts.
- The Applicant must comply with the relevant regulations and sub-regulations under Regulation 31(5)(*b*) of the Companies Act, 71 of 2008.

Ruling

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

- Section 19 will not be applicable to the repayment of the shareholder loan, accordingly, there will be no recoupment in accordance with section 8(4)(*a*) to the extent that any amount of the shareholder loan

was used directly or indirectly to fund any expenditure for which a deduction or allowance was permitted in terms of the Act.

- Paragraph 12A will not be applicable to the proposed transaction.

7.2 BPR 174 – Receipts of an incentive trust and vesting of shares in qualifying employees

This ruling deals with the income tax and capital gains tax consequences arising from cash contributions received by a share incentive trust and the vesting of shares, acquired by it, for the benefit of qualifying employees.

In this ruling references to sections and paragraphs are to sections of the Act and paragraphs of the Eighth Schedule thereto applicable as at 11 June 2014 and unless the context indicates otherwise, any word or expression in this ruling bears the meaning ascribed to it in the Income Tax Act.

This is a ruling on the interpretation and application of the provisions of:

- section 1, the definition of 'gross income'; and
- paragraph 11(1)(*d*) read with paragraphs 20(1)(*h*)(i) and 80(1) of the Eighth Schedule.

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

The Applicant: A resident share incentive trust

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

Qualifying Employees: Senior management who will participate in a share incentive scheme

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

The Applicant will administer and facilitate a long-term employee incentive scheme for the Co-Applicant. The Co-Applicant will make cash grants to the Applicant which will be used to purchase shares of the Co-Applicant on the open market. The shares will be awarded in tranches to the Qualifying

Employees over time and at the relevant vesting dates the Applicant will transfer the shares to them.

Conditions and assumptions

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

Ruling

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

- The cash contributions received by the Applicant from the Co-Applicant will not constitute 'gross-income' as defined in section 1 in the hands of the Applicant.
- The vesting of the shares by the Applicant in the Qualifying Employees will constitute a disposal under paragraph 11(1)(*d*). The provisions of paragraph 20(1)(*h*)(i) will result in no capital gain being taken into account by the Applicant and the Qualifying Employees for purposes of paragraph 80(1).

7.3 BPR 175 – Debt purchase transactions

This ruling deals with the purchasing by the Applicant of debtors books from businesses across various industry sectors.

In this ruling references to sections are to sections of the relevant Acts applicable as at 5 March 2014 and 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 provisions of:

- section 11(*a*) read with section 23(*g*) of the Income Tax Act;
- section 24J(1), (2), (3), (4) and (4A) of the Income Tax Act; and
- sections 1, definition of 'enterprise', 7(1)(*a*) and 12(*a*) of the VAT Act.

Parties to the proposed transaction

The Applicant: A company incorporated in and a resident of South Africa that wishes to acquire debtors books from Sellers

Sellers: Companies incorporated in and residents of South Africa wishing to dispose of their debtors books, with Seller A as the first proposed client

Description of the proposed transaction

The Applicant is a close corporation currently providing limited financial consulting services. It intends engaging in the on-going purchase of debtors on the books from numerous Sellers across all industry sectors (debtors). The Applicant is not part of a group of companies.

Individual debtors will be purchased on a monthly basis. The Applicant submitted the estimated number of individual debtor purchase transactions it anticipates to enter into, within the next three years to SARS. After entering into a contract with a Seller, the Applicant will carry out a risk assessment (by employing credit risk assessors) of the Seller and its debtors to identify whether its book debts would be suitable for the invoice discounting service.

If the Applicant is not satisfied with the risk profile an invoice will be generated by the Applicant for an administration fee in order to cover the costs of this risk assessment process and the contract will be cancelled by agreement. If the Applicant is satisfied with the Seller's risk assessment then no invoice for the administration fee will be generated and the Applicant will engage in the invoice discounting service with that Seller.

Proposed invoice discounting transactions will be carried out as follows:

- The ordering party (the debtor of the Seller) will place an order for goods or services with the Seller. The Seller will supply the goods or service and issue a tax invoice to the debtor. In terms of the supply arrangement between the Seller and the debtor, payment is required to be made by the debtor within a stipulated time frame (i.e. generally 60 or 90 days from the date of statement).

- The Seller will require short term funding to manage its business, therefore, the Seller intends on-selling some of its debtors to the Applicant at a discounted price rather than to wait for the amounts owing by the debtors to become due and payable.
- In order to purchase the debtors from the Seller, an agreement is to be entered into on the following material terms:
    - The Applicant agrees to purchase existing and all future debts of selected debtors.
    - The Applicant undertakes to purchase all right, title and interest to the debts at a discounted price.
    - On purchase of the debtors, the Seller will cede the debtors to the Applicant and will make certain warranties that the debtors can be sold.
    - The Seller will confirm that it is registered for VAT on an invoice basis under section 15(1) of the VAT Act or that it is not registered for VAT.
    - The debtors will be purchased with full recourse in the event:
        - of a dispute by the debtor that the debt is not due;
        - that there is a counter claim; or
        - if the debtor has not paid the Applicant within 10 days after the due payment date.
    - The purchase price of the debtor will be paid by the Applicant to the Seller as agreed to.
    - The debtor will pay the Applicant instead of the Seller on the due payment date in terms of the payment terms agreed between the debtor and the Seller.
    - The Applicant has no right to the early redemption of the debt.

Even though the transaction will be ‘with-recourse’, the Applicant will, at its discretion and where possible, endeavour to take out insurance against non-payment of the debt by the debtor.

The Applicant's gross profit (interest) will be the discount negotiated, which is the difference between the value of the debt purchased and the price paid for that debt.

In order to fund the business operations of the Applicant, the Applicant will receive loans from two related parties. The capital and interest of the loans will have a fixed repayment term repayable monthly. Interest will be charged at a market related interest rate.

Conditions and assumptions

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

- Each invoice discounting transaction in relation to a specific debt will be treated as a separate 'instrument' for purposes of section 24J of the Act;
- The requirements of section 24J of the Act will be adhered to.
- Each invoice discounting transaction will be concluded at a discount and will be purchased from an unrelated party.

Ruling

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

Income Tax

- The gross profit (interest) earned on each invoice discounting transaction will be included in the Applicant's gross income by virtue of section 24J(3) of the Act in accordance with the 'alternative method' as defined in section 24J(1).
- If a debtor defaults and all recovery methods have been exhausted, the Applicant will make an 'adjusted loss on transfer or redemption of an instrument', as defined in section 24J(1) of the Act which is then deemed to have been incurred by the Applicant under section 24J(4)(*b*).
- To the extent that an amount for such instrument has been included in the income of the Applicant under section 24J of the Act, such amount

will be allowed as a deduction from the income of the Applicant as holder during such year of assessment under section 24J(4A)(*a*).

- The remaining loss, not recovered, will be deductible under section 11(*a*) read with section 23(*g*) of the Act.
- The interest incurred by the Applicant on the loans to fund its working capital requirements will be deductible under section 24J(2) of the Act.

Value-Added Tax

- The Applicant's activity of purchasing debtors and collecting money from the debtors is not in the furtherance of an enterprise, therefore, no output tax or input tax shall be applicable;
- The supply of services by the Applicant for which it receives payment in the form of a credit assessment fee, will be subject to VAT if the Applicant is a vendor.

7.4 BPR176 – Financial instruments not issued by a 'listed company' as defined, application of the words 'for investment purposes'

This ruling deals with financial instruments not issued by a 'listed company' as defined and the application of the words 'for investment purposes' in the definition of 'foreign investment entity' in section 1 of the Income Tax Act.

In this ruling references to sections are to sections of the Act applicable as at 11 June 2014 and 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 the provisions of the definition of 'foreign investment entity' in section 1.

Parties to the proposed transaction

The Applicant: A company incorporated in and a resident of Country X

Co-Applicant 1: A company incorporated in and a resident of Country X

Co-Applicant 2: A company incorporated in and a resident of South Africa

The General Partner: A company incorporated in and a resident of Country X

The Foreign Manager: A company incorporated in and a resident of Country X

Description of the proposed transaction

The Applicant, Co-Applicant 1 and the General Partner plan to enter into a partnership agreement to constitute a partnership (the Foreign Partnership) under the laws of Country X. The intention of the Foreign Partnership is to make long term equity and equity related investments in accordance with its investment guidelines. The Foreign Partnership will be funded by way of contributions from the Applicant and Co-Applicant 1, and will be tax transparent in Country X and South Africa.

The General Partner will appoint the Foreign Manager on behalf of the Foreign Partnership, who will subcontract Co-Applicant 2 to render investment management services in South Africa.

In terms of the proposed partnership agreement, the stated purpose of the Foreign Partnership is to deliver attractive, long term risk adjusted returns by making long term equity and equity related investments in accordance with its investment guidelines and may engage in any and all activities necessary or incidental to the accomplishment of its purpose.

The assets of the Foreign Partnership may include financial instruments listed on formal exchanges which have not been recognised by the Minister of Finance as contemplated in paragraph (*c*) of the definition of 'recognised exchange' in paragraph 1 of the Eighth Schedule to the Act.

Conditions and assumptions

This ruling is subject to the additional condition and assumption that the Foreign Partnership will be a 'foreign partnership' as defined in section 1.

Ruling

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

- A financial instrument issued by a foreign listed company that does not qualify under paragraph (*b*)(ii)(*aa*) of the definition of 'foreign investment entity' (because the foreign stock exchange has not been recognised by the Minister of Finance as contemplated in paragraph (*c*) of the definition of 'recognised exchange' in paragraph 1 of the Eighth Schedule) may be considered and qualify under paragraph (*b*)(ii)(*bb*) of the definition of 'foreign investment entity' if that financial instrument is traded by members of the general public and a market for that trade exists.
- The amounts, financial instruments and rights to be held by the Applicant and Co-Applicant 1 will fall within the meaning of the words 'for investment purposes' as required under paragraph (*b*) of the definition of 'foreign investment entity'.
- No ruling is made on the capital or revenue nature of any amount, financial instrument or right realised, or the source of any amount arising out of any such realisation.

7.5 BPR177 – Improvements on land by sub-lessee under a sub-lease

This ruling deals with the income tax consequences for the lessor, lessee and sub-lessee of land, arising from an obligation on the sub-lessee to effect improvements on the land under a sub-lease while no such express obligation for improvements to be effected is placed on the lessee by the main lease.

In this ruling references to sections are to sections of the Income Tax Act applicable as at 6 June 2014 and 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 the provisions of:

- section 1, definition of 'gross income' paragraph *(h)*;
- section 11*(g);* and
- section 11*(h).*

Parties to the proposed transaction

The Applicant: A company incorporated in and a resident of South Africa that owns land on which improvements will be effected in terms of a lease agreement

The Lessee: A company incorporated in and a resident of South Africa that leases the land from the Applicant and sublets it to a Sub-lessee

The Sub-lessee: A company incorporated in and a resident of South Africa that has entered into a sub-lease agreement with the Lessee in terms of which it is obliged to effect improvements on the land

Description of the proposed transaction

The Applicant, the Lessee and the Sub-lessee are independent persons that are neither controlled by the same shareholders nor hold any interest in each other.

The Applicant will conclude a 99-year renewable notarial lease agreement (the main lease) with the Lessee in respect of the land. The main lease will provide amongst others that the Lessee is not under any obligation to effect any improvements on the land, but that the Lessee or its Sub-lessee) may do so at its own cost.

The main lease specifies the type of improvements to be effected and the time periods in which such improvements must be completed, if effected.

The Lessee will pay a monthly rental to the Applicant based on the developmental cost of any improvements effected on the land.

At the time of the conclusion of the main lease, the Lessee will conclude a further 99-year renewable notarial lease agreement (the sub-lease) contemporaneous with the main lease term with the Sub-lessee of the land.

The same terms as the main lease will apply except with regard to the obligation to make improvements and the sub-lease rental.

The sub-lease will provide that the Sub-lessee will be obliged to effect improvements on the land.

The rental for the sub-lease will be based on the developmental cost of the improvements effected on the land which increases by an additional amount after an agreed period of time.

Conditions and assumptions

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

Ruling

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

- The Applicant must include in its gross income, the fair and reasonable value of all improvements effected by the Sub-lessee as contemplated in paragraph *(h)*(ii) of the definition of 'gross income' in section 1.
- Having regard to the circumstances of this transaction and in particular the duration of the lease and sub-lease agreements, the Applicant will be entitled to an allowance under section 11*(h)*, determined by using the present value of the actual development cost arising from the performance of the Sub-lessee's obligations under the sub-lease, discounted at the rate of 6 per cent over the 99-year period of that lease.
- The Sub-lessee will be entitled to an allowance under section 11*(g)* over a 25 year period in respect of any expenditure actually incurred in effecting the improvements, provided the improvements are occupied or used by it in the production of its income.
- In the event that the proposed sub-lease is terminated before the expiry of the full 25 year period during which the section 11*(g)* allowance may be claimed, the unredeemed balance of this allowance as at the termination date may be deducted by the Sub-lessee from its income under section 11*(g)*(vii).

7.6 BPR178 – International corporate restructuring

This ruling deals with a corporate restructuring of a multi-national group of companies.

In this ruling references to sections are to sections of the Act applicable as at 23 April 2014 and unless the context indicates otherwise, any word or expression in this ruling bears the meaning ascribed to it in the Income Tax Act.

This is a ruling on the interpretation and application of the provisions of:

- section 1, the definition of 'company', 'equity share', foreign company', 'group of companies' and 'share';
- section 42; and
- section 45.

Parties to the proposed transaction

The Applicant: A company incorporated in and a resident of South Africa that holds 100% of the partnership interest in KG

The Co-Applicants:

KG: A German Kommanditgesellschaft (KG) partnership that is effectively managed in Germany

German Company: A company incorporated in and a resident of Germany that is effectively managed in Germany

Foreign Holdco: A company incorporated in and a resident of another Foreign Country that is effectively managed outside South Africa and is a wholly-owned subsidiary of SA Holdco

SA Holdco: A private company incorporated in and a resident of South Africa that holds 100% of the shares in the Applicant and Foreign Holdco

Target: A company incorporated in and a resident of the same country as Foreign Holdco

Description of the proposed transaction

Background information

The group to which the Applicant belongs (the Applicant group) has an investment in Germany. The investment is structured as follows:

- The Applicant is the limited partner in KG (KG is known as a 'GmbH & Co. KG', a subset of the German KG).
- KG owns all the issued shares of German Company.
- German Company owns all the issued shares of Target.

The shares in Target are held as a capital investment and do not secure any debt.

On the date of the proposed corporate restructuring the market value of the shares in Target will exceed their base cost in the hands of German Company.

The shares in German Company and the shares in Target are 'equity shares', as defined, for South African tax purposes.

KG, German Company, Foreign Holdco and Target are currently treated as controlled foreign companies (CFCs) by the Applicant group for purposes of section 9D.

From a German tax perspective, KG is tax transparent for German corporate income tax purposes but not for German trade tax purposes. In other words, the Applicant is liable to corporate income tax in Germany on the income derived by KG, but KG is liable for the German trade tax on their business income.

KG and German Company have formed a so-called tax consolidation, with the effect that the taxable income of German Company for each tax year is allocated to KG and the commercial (accounting) profit derived by German Company annually must be transferred to KG. The profit transfers are ignored for tax purposes in Germany.

The taxable income of German Company, allocated to KG, is subject to German corporate income tax in the hands of the Applicant and to German trade tax in the hands of KG, as described above.

The Applicant group has identified a commercial need, based on its foreign expansion initiatives, to consolidate certain non-German businesses under one single holding company in a specific foreign jurisdiction, to be held directly from South Africa. Given that Target is in the German group, there is a need to move it to such foreign jurisdiction. Target will remain a wholly-owned investment of the Applicant group in South Africa.

The shares in Foreign Holdco are 'equity shares', as defined, for South African tax purposes.

Proposed transaction steps

The parties propose to achieve the internal restructuring in the following manner:

- German Company sells its shares in Target to SA Holdco at market value and the consideration is settled by means of a loan note equal to the market value of Target, using the tax relief provided for in section 45.
- German Company transfers the loan to KG, which then transfers the loan to the Applicant. The Applicant distributes the loan as a dividend *in specie* to SA Holdco. The transfer between members of the tax consolidation is in settlement (in kind) of a contractual obligation to transfer profits.
- SA Holdco is then both the creditor and the debtor in terms of the loan, with the result that the loan is extinguished.
- SA Holdco capitalises Foreign Holdco with the Target shares in exchange for equity shares in Foreign Holdco, using the tax relief provided for in section 42.

<u>Conditions and assumptions</u>

This ruling is subject to the additional condition and assumption that the parties to the various transactions, taking advantage of the provisions of

sections 42 and 45, do not trigger any of the anti-avoidance provisions in section 42 or 45, with the exception of section 45(3A), which is the subject of ruling's 4th bullet herebelow.

Ruling

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

- KG is a company, and hence a foreign company, for South African tax purposes.
- The Applicant, SA Holdco, KG and German Company form part of the same 'group of companies' as defined in section 1.
- The disposal of the Target shares by German Company to SA Holdco, on loan account, will qualify as an 'intra-group transaction' under paragraph (*b*) of the definition of 'intra-group transaction' in section 45(1) and will consequently qualify for the tax relief as set out in section 45.
- Section 45(3A) will not apply to deem the loan to have a base cost of nil in the hands of the holder of the loan, and therefore the loan will have a base cost equal to its face value. As this loan is distributed up the line to SA Holdco, the cessionary in each case will be able to access this face value as base cost.
- The profit transfer by German Company to KG under the tax consolidation, and the subsequent transfers of such profits up the line to SA Holdco where all such transfers are to be effected *in specie* by way of a cession of the loan, will not give rise to a liability for South African income tax, including capital gains tax.
- The contribution of the Target shares by SA Holdco to Foreign Holdco will qualify as an asset for share transaction under paragraph (*b*) of the definition of 'asset for share transaction' in section 42(1), and will consequently qualify for the tax relief as set out in section 42.

7.7 BPR179 – Single premium life insurance policy issued by an off-shore insurer

This ruling deals with an investment by a resident in a single premium unit linked life insurance policy with an insurer registered in Liechtenstein.

This is a binding private ruling issued in accordance with section 78(1) and published in accordance with section 87(2) of the Tax Administration Act No. 28 of 2011.

In this ruling references to sections and paragraphs are to sections of the Act and paragraphs of the Eighth Schedule thereto applicable as at 17 December 2013 and unless the context indicates otherwise, any word or expression in this ruling bears the meaning ascribed to it in the Income Tax Act.

This is a ruling on the interpretation and application of the provisions of:

- section 1, definition of 'gross income';
- section 7(1); and
- paragraphs 11(1), 35(1), 40 and 55 of the Eighth Schedule.

Parties to the proposed transaction

The Applicant: A natural person who is a resident of South Africa

The Insurer: A duly registered long-term insurer incorporated in and a resident of Liechtenstein

Description of the proposed transaction

The Applicant wishes to invest an amount in a Unit Linked Life Insurance Policy (the policy). The policy will be for an indefinite term, subject to a minimum period of 5 years and will provide insurance cover in the event of death.

The Applicant proposes subscribing for the policy to:

- insure against a fortuitous event, being death. The insured amount will constitute less than 1% of the total amount invested, should an insured event transpire;
- protect the Applicant's funds and privacy and for wealth management purposes; and
- provide rand-hedging in the event that the currency continues to weaken.

The proposed transaction is as follows:

- The Applicant proposes to transfer a cash amount into a bank account (custodian account) controlled and nominated by the Insurer.
- A small fraction of the cash amount will be allocated to provide life insurance cover (risk premium amount), while the remaining portion of the cash amount is to be invested in the policy which holds money market, bonds, shares or other investments.
- The Insurer will deduct fees, which comprise an initial fee and an on-going insurance fee, from the risk premium amount on an annual basis. The risk premium amount depends on the age of the Applicant.
- The Insurer will deduct the initial costs and applicable taxes from the remaining portion of the cash amount, and the net cash amount will be allocated to the custodian account. The net cash deposited in the custodian account will be used to purchase investments.
- The custodian account will operate for the entire term of the policy and may only be changed by the Insurer.
- The Applicant bears the risks and reaps the rewards associated with gains and losses in value of the investment portfolio. The value of the investment portfolio may fluctuate and no premium guarantee will be given.
- An asset manager, appointed by the Insurer, will manage the investment portfolio, whilst the investment strategy will be defined by the Applicant. No high risk strategies will be allowed.

- The Applicant may change the aforementioned investment strategy, provided that the Applicant can prove exceptional circumstances that warrant such a change. The Applicant will have no direct investment control over the management of the assets, as this will be the responsibility of the asset manager.
- Fees for the management of the investments and all costs in connection with the investment transactions, safekeeping and management of the investments will be charged to the custodian account. The fees are calculated according to actuarial rules applicable to the policy.
- The Applicant may surrender the policy at any time in full or in part in writing, subject to one month's notice although not earlier than the end of the first year. No cancellation fee will be charged by the Insurer.
- The Applicant will have to prove to the Insurer's satisfaction 'that there has been a change in intention' regarding the holding of the policy, if it is surrendered within a period of 5 years from inception.
- The surrender value of the policy shall correspond to the investment less any outstanding fees, costs and applicable taxes. All costs relating to liquidating the assets and transferring the surrender value will also be deducted from the surrender value.
- The Applicant can also, when surrendering the policy, request that the investment portfolio not be liquidated but transferred to the Applicant in whole or in part.
- The Applicant may restrict the transferability of, collateralise or assign the rights arising from the policy. A collateralisation or assignment will only be effective *vis-à-vis* the Insurer if it is notified in writing. A restriction on transferability will require the Insurer's consent.
- The death benefit amount is linked to the performance of the defined investment strategy. The Insurer will guarantee, as a life coverage, a

cash payment to the nominated beneficiary or the Applicant's estate, amounting to 1% of the value of the investments.

Conditions and assumptions

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

Ruling

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

- The investment assets are held on behalf of the Applicant. Any transfer of the investment assets to the Applicant upon the surrender of the policy will therefore not constitute a disposal for purposes of the Eighth Schedule.
- All amounts received or accrued in respect of the investments shall accrue to the Applicant.
- In the alternative, the provisions of section 7(1) will be applicable, on the basis that the amounts remain due and payable to the Applicant, whether the amounts will be credited in account or accumulated or capitalised or otherwise dealt with in the Applicant's name or on the Applicant's behalf.
- Any realisation or liquidation of the investment assets as a result of an election made by the Applicant upon the surrender of the policy will constitute a disposal of those assets on behalf of the Applicant in respect of which paragraph 35 will apply.
- In the event that the Applicant receives the 1% life cover payment, this pay-out will constitute proceeds and be taken into account when calculating a capital gain or loss for the Applicant. The provisions of paragraphs 40 and 55 will not be applicable.

8. BINDING GENERAL RULING

8.1 BGR 24 – Section 18A(2) receipt for purposes of a deduction as contemplated in section 37C(3) and (5)

This BGR provides certainty on the application of the deeming provisions in section 37C(3) and (5) as far as it relates to a deduction claimed under section 18A.

Section 37C incentivises the conservation of ecologically-viable areas by enabling taxpayers to claim various tax deductions for these endeavours.

The deductions as contemplated under section 37C(3) and (5) are linked to section 18A. In this regard, the deductible amounts are deemed to be a donation paid or transferred to the government for which a receipt has been issued under section 18A(2).

Section 18A(2) expressly prohibits a deduction under section 18A(1), unless the claim is supported by a receipt issued in accordance with section 18A(2). Uncertainty exists as to whether the legislation requires a receipt as envisaged in section 18A(2) to be furnished to SARS, for purposes of a deduction as contemplated in section 37C(3) or (5).

The law

Section 37C(3) provides for the tax deductibility of expenditure actually incurred by a taxpayer to conserve or maintain land owned by the taxpayer if the conservation or maintenance is carried out in terms of a declaration that has a duration of at least 30 years under section 20, 23 or 28 of the Protected Areas Act. The expenditure incurred is for purposes of section 18A deemed to be a donation by the taxpayer actually paid or transferred during the year to the government for which a receipt has been issued under section 18A(2).

Section 37C(5) provides amongst other things that if:

- land is declared a national park or nature reserve in terms of an agreement under section 20(3) or 23(3) of the Protected Areas Act; and
- the declaration is endorsed on the title deed of the land and has a duration of at least 99 years,

the declaration of the land without regard to any right of use retained by any taxpayer is deemed to be a donation of immovable property for purposes of section 18A to the government for which a receipt has been issued under section 18A(2) in the year of assessment in which the land is so declared.

Section 18A(1)(*c*) provides for the tax deductibility of donations made to any government department of the Republic in the national, provincial or local sphere, carrying on an approved public benefit activity as set out in Part II of the Ninth Schedule. A taxpayer making a *bona fide* donation in cash or of property in kind to any entity listed under section 18A(1), is entitled to a deduction from taxable income if the donation is supported by the necessary section 18A receipt, which must include the details as set out in section 18A(2).

Ruling

An amount claimed under section 18A and that is for purposes of section 37C(3) or (5) deemed to be a donation, will qualify for deduction notwithstanding the fact that a receipt as prescribed in section 18A(2) has not been issued.

9. GUIDE TO THE URBAN DEVELOPMENT ZONE (UDZ) TAX INCENTIVE (Issue 4)

This guide is a general guide about the urban development zone (UDZ) tax incentive provided for in section 13*quat* of the Income Tax Act. It is not meant to deal extensively with the precise technical and legal aspects associated with the incentive, but is intended merely as a general guide for potential investors.

This guide is not an 'official publication' as defined in section 1 of the Tax Administration Act 28 of 2011 and accordingly does not create a practice generally prevailing under section 5 of that Act. It is also not a binding general ruling issued under section 89 of the Tax Administration Act.

The guide, amongst others, provides:

- general guidance regarding the application and interpretation of the provisions of the Act that pertain to the UDZ tax incentive;
- an overview of the income tax consequences associated with the disposal of a building on which the tax incentive was previously allowed or the ceasing of a taxpayer to use such a building solely for the purposes of that person's trade; and
- particulars of municipalities that have demarcated areas for purposes of the UDZ tax incentive, as well as the process of demarcation that was followed.

In line with many countries, South Africa has a number of urban areas that are impoverished and suffering from extensive urban decay. In order to address these concerns and maintain existing infrastructure, governments internationally have increasingly used tax measures to support efforts aimed at regenerating these urban areas.

In 2003, the Minister of Finance announced a tax incentive (the UDZ incentive) in the form of an accelerated depreciation allowance under section 13*quat* to promote investment in 16 designated inner cities, 15 of which now have demarcated UDZs within its boundaries. The core objectives of the incentive are to address dereliction and dilapidation in South Africa's largest cities and to promote urban renewal and development by promoting investment by the private sector in the construction or improvement of commercial and residential buildings, including low-cost housing units, situated within demarcated UDZs. The UDZ incentive also intends to encourage investment in highly populated areas, central business districts or inner city environments and areas with existing urban transport infrastructure for trains, buses or taxis.

The allowance, when claimed, reduces the taxable income of a taxpayer. Further, it is not limited to the taxable income of a taxpayer and can create an assessed loss. This deduction was originally only available until 31 March 2014 but has now been

extended for a further six years until 31 March 2020. Municipalities will be given the opportunity to apply for extensions to already existing designated zones and to apply for an additional demarcated UDZ in that municipal zone. Only areas which have a specific and necessary need for an extra zone will be granted UDZ status, and will be subject to Ministerial approval.

In summary:

- Section 13*quat* provides an accelerated depreciation allowance on the cost of the erection, extension, addition or improvement of any commercial or residential building or a part of a building.
- There are a number of requirements that must be met before the allowance is granted.
- A taxpayer that purchases a building or part of a building directly from a developer will be able to claim a UDZ incentive provided the developer did not claim any section 13*quat* allowance on the cost of the building or part of the building within the usage or rental period. In a situation in which the developer had used or rented the property for longer than three years after completion, the subsequent purchaser may not claim the UDZ incentive (even if the developer did not claim a deduction) as the developer will no longer constitute a 'developer' as defined.
- In the event of a purchase of a building or part of a building from a developer:
    - 55% of the purchase price of that building or part of a building, in the case of a new building erected, extended or added to by the developer; and
    - 30% of the purchase price of that building or part of a building, in the case of a building improved by the developer,

  will be deemed to be costs incurred by the person for the erection, extension, addition to or improvement of the building or part of the building.
- Depending on the type of development involved, that is, new, improved or low-cost, the UDZ incentive allowance is calculated at a different rate.
- A lessee that effects improvements to a UDZ building that is owned by a party contemplated in section 12N, will, as the deemed owner, be able to

claim a section 13*quat* allowance on the costs incurred in erecting, adding to, extending or improving such building.

- Taxpayers claiming the UDZ incentive must be in possession of the necessary UDZ forms, a location certificate and, if applicable, a certificate of occupation.
- Attention must be paid to all the reporting requirements provided under section 13*quat*.

10. DRAFT GUIDE ON TAXATION OF SPECIAL TRUSTS

The purpose of this guide is to assist users in gaining a more in-depth understanding of the taxation of special trusts.

This guide is not an 'official publication' as defined in section 1 of the Tax Administration Act 28 of 2011 and accordingly does not create a practice generally prevailing under section 5 of that Act. It is also not a binding general ruling under section 89 of Chapter 7 of the Tax Administration Act. Should an advance tax ruling be required, visit the SARS website for details of the application procedure.

This guide reflects the law as at the date of issue.

This guide has been prepared to assist those involved with special trusts to gain an understanding of the provisions of the Act relating to such special trusts, with particular reference to the income tax and CGT provisions. A brief summary of other taxes relating to special trusts has also been included.

A single rate of tax of 40% for trusts was introduced[1] with effect from the 2003 year of assessment to combat the practice of income splitting through the use of multiple trust structures. This higher rate of tax does not, however, apply to special trusts which are taxed under the same rate structure as natural persons.

The definition of 'special trust', upon its initial introduction into section 1, with effect from the 2002 year of assessment, only referred to a trust created solely for the benefit of 'a person' who suffers from a defined mental illness or a serious physical disability. Applying a strict interpretation, the reference to 'a person' arguably meant that a trust established for the benefit of more than one qualifying

beneficiary would not have constituted a 'special trust' as then defined. In addition, as is presently the case, to qualify as a 'special trust' the beneficiary's illness or disability must incapacitate that beneficiary from earning sufficient income for that person's maintenance, or from managing that person's own financial affairs. These trusts are referred to in this guide as **'type-A trusts'**.

The definition of 'special trust' in section 1 was extended[3] with effect from the 2003 year of assessment to also include certain trusts established by or under the will of a deceased person for the benefit of, amongst others, relatives of the deceased person when the youngest beneficiary is under the age of 21 years. These trusts are referred to in this guide as **'type-B trusts'**.

The definition of 'special trust' in section 1 was amended[4] with effect from the 2013 year of assessment as follows:

- In the case of a type-A trust, the reference to 'a person' was amended to refer to 'one or more persons' to allow for more than one person with a disability, subject to the requirement that those persons should be relatives in relation to each other, and to restrict the concession to a person or persons with a 'disability' as defined in section 18(3).
- In the case of a type-B trust, the requirement that the youngest beneficiary had to be under the age of 21 was amended so that the youngest beneficiary must now be under the age of 18 years.

The definition of 'special trust' insofar as it relates to a type-A trust was again amended with effect from the 2015 year of assessment to refer to a person or persons with a 'disability' as defined in section 6B(1).

The distinction between a type-A trust and a type-B trust is important because a type-A trust qualifies for certain relief from CGT while a type-B trust does not qualify for such relief. The definition of 'special trust' contained in paragraph 1 applies for CGT purposes only.

11. INDEMNITY

Whilst every reasonable care has been taken in the production of this update we cannot accept responsibility for the consequences of any inaccuracies contained herein or for any action undertaken or refrained from taken as a consequence of this update.