TAX UPDATE

For period: April 2023 to June 2023

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1. FOREWORD

The purpose of this update is to summarise developments that occurred during the second quarter of 2023, specifically in relation to Income Tax and VAT. Johan Kotze, a Tax Executive at Shepstone & Wylie Attorneys, has compiled this summary.

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

Please take some time and consider the tax cases.

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

Enjoy reading on!

2. MEDIA STATEMENT – PUBLICATION OF THE RENEWABLE ENERGY INCENTIVES IN THE INITIAL BATCH OF THE 2023 DRAFT TAXATION LAWS AMENDMENT BILL FOR PUBLIC COMMENT

The National Treasury and the SARS publish on 21 April 2023, for public comment, the draft legislative amendments to give effect to the two renewable energy tax incentives, announced in the 2023 Budget. These proposals assist in partially addressing the country's energy crisis and encourage private investment into expanding electricity generation.

This initial batch of the 2023 draft Taxation Laws Amendment Bill (TLAB) covers these two specific tax amendments, and are urgent, due to the proposed early effective dates for implementation, and to enhance certainty for individuals and businesses that would like to immediately invest in renewable energy.

The publication of the initial batch of the 2023 draft TLAB enables an early, and additional, public comment process, that will enable the more detailed second round process of public comment when these provisions are incorporated in the more comprehensive 2023 draft TLAB in July 2023. This initial batch of the 2023 draft TLAB is intended to solicit comments on the following two specific and urgent amendments and serves as notice to taxpayers for earlier effective dates of the proposed amendments.

- Expansion of the renewable energy tax incentive

  Under the enhanced renewable energy tax incentive, taxpayers who are conducting businesses will be able to claim a 125 % tax deduction (in the first year) for qualifying capital expenditure in respect of all renewable energy projects, with no threshold on generation capacity. The enhanced incentive will be available for a period of two years and apply to investments in renewable energy projects brought into use for the first time on or after 1 March 2023 and before 1 March 2025.

- Rooftop solar tax incentive

  With respect to the rooftop solar tax incentive, individuals will be able to receive a tax rebate to the value of 25 % of the cost of any new and unused solar PV panels, up to a maximum of R15 000. The rooftop solar tax incentive will be available for a period of one year and will apply to new and unused solar PV panels that are acquired by the individual and brought into use for the first time on or after 1 March 2023 and before 1 March 2024.

3. MEDIA STATEMENT - PUBLICATION OF GAZETTED NOTICE ON TAX EXEMPTION OF BULKING PAYMENTS TO FORMER MEMBERS OF CLOSED RETIREMENT FUNDS IN TERMS OF PARAGRAPH 2D OF THE SECOND SCHEDULE TO THE INCOME TAX ACT

The National Treasury and SARS published on 5 May 2023 the gazetted Notice (Government Gazette no. 3356 dated 3 May 2023) on tax exemption of bulking payments to former members of closed retirement funds in terms of Paragraph 2D of the Second Schedule to the Income Tax Act.

The Notice is aimed at ensuring a consistent tax treatment in respect of all bulking payments by providing a tax exemption in terms of Paragraph 2D of the Second Schedule to the Act in respect of bulking payments made by the fund administrators to former members of closed retirement funds, provided that they meet requirements specified in the notice. Since the Government does not wish to condone non-compliance, this will be the last opportunity availed in this regard to rectify the error.

The gazetting of the Notice follows a publication of the draft Notice for public comment on 6 March 2023. Taxpayers and stakeholders were given 30 days to

submit their written comments, and the closing date for comments was 6 April 2023.

4. MEDIA STATEMENT - PUBLICATION OF THE DRAFT LEGISLATION FOR THE 'TWO PORT' RETIREMENT SYSTEM FOR PUBLIC COMMENT

The National Treasury and SARS today, publish for public comment the revised 2023 Draft Revenue Laws Amendment Bill and 2023 Draft Revenue Administration and Pension Laws Amendment Bill. These draft bills provide the necessary legislative amendments required to implement the first phase of the 'two-pot' retirement system, they also take into account public comments received on the 2022 Draft Revenue Laws Amendment Bill published on 29 July 2022, and make provision for the name change from the word 'pot' to the word 'component' in the bills to be introduced formally by the Minister in Parliament. However, the word 'pot' is still used in the colloquial form to describe the reform itself.

The revised 2023 Draft Revenue Laws Amendment Bill incorporates the following key tax proposals that were mentioned in Chapter 4 of the 2023 Budget Review:

- Implementation date of the 'two pot' retirement system:

  It is proposed that the legislative amendments to the 'two-pot' retirement system should take effect on 1 March 2024.

- Proposal for seed capital:

  This makes provision for access by the member of the retirement fund to a portion of the available balance in the retirement fund on implementation date of the 'two-pot' retirement system, i.e., 1 March 2024. In order to limit the adverse effect on liquidity, it is proposed that seed capital should be calculated as ten percent of the benefit accumulated in the 'vested component' as at 29 February 2024, limited to R25 000, whichever is the lesser. It is important to note that when the member of the retirement fund

withdraws the seed capital, it will be subject to the normal tax rates in the hands of the member.

- Legislative amendments to include defined benefit funds in an equitable manner:
- Defined benefit funds do not refer to contributions made by a member to the defined benefit fund to determine benefits, but rather uses a defined formula to calculate benefits due to a member on retirement. To treat defined benefit funds equitably, it is proposed that changes be made in the revised draft bill to allow defined benefit funds to calculate the one third contributions to the 'savings component' based on one-third of the member's pensionable service increase, and two-thirds contributions to the 'retirement component' based on two-thirds of the member's pensionable service increase with effect from 1 March 2024.
- Treatment of legacy retirement annuity funds:

  It is proposed that changes be made in the revised draft bill to make provision for the exemption of legacy retirement annuity fund policies from the provisions of the 'two-pot' retirement system, as the inclusion of the legacy retirement annuity fund policies in the 'two-pot' retirement system would require a re-design of these historically acquired legacy retirement annuity fund policies.

As indicated in Chapter 4 of the 2023 Budget review, legislative amendments dealing with withdrawals from the retirement component if a member of the retirement fund is retrenched and has no alternative source of income will be considered in the second phase of the implementation of the 'two-pot' retirement system. Further complementary measures may also be considered in the second phase, to ensure that the primary objectives for saving for retirement is not compromised, and to protect the liquidity of such funds at all stages. Members of funds should be encouraged to only exercise the withdrawal option as a last resort, and to try and preserve their savings for retirement for when they retire.

The 2023 Draft Revenue Administration and Pension Laws Amendment Bill

contains consequential legislative amendments to the Pension Funds Act, 1956 (Act No. 24 of 1956) to ensure the smooth implementation and administration of the 'two pot' retirement system.

5. RENEWABLE ENERGY INCENTICE – DRAFT TAXATION LAWS AMENDMENT BILL, 2023 (INITIAL BATCH)

Insertion of section 6C in Act 58 of 1962

1. (1) The following section is hereby inserted in the Income Tax Act, 1962, after section 6B:

'6C Solar energy tax credit

(1) In determining the normal tax payable by any natural person, there must, subject to subsection 4, be deducted an amount to be known as the solar energy tax credit, equal to the amount of the rebate determined under subsection 2.

(2) (a) The solar energy tax credit applies in respect of cost actually incurred by the natural person —

(i) for the acquisition of any new and unused solar photovoltaic panels, the generation capacity of each being not less than 275W; and

(ii) if the solar photovoltaic panels referred to in subparagraph (i) are brought into use for the first time,

by that person on or after 1 March 2023 and before 1 March 2024.

(b) The amount of the solar energy tax credit allowed to the natural person referred to in paragraph (a) must—

(i) be 25% of the actual cost of the solar photovoltaic panels described in paragraph (a); and

(ii) I n aggregate be limited to an amount not exceeding R15 000.

(3) A solar energy tax credit will only be allowed under subsection (1) if —

(a) the solar panels are installed and mounted on or affixed to a residence mainly used for domestic purposes by the natural person referred to in subsection(2)(a);

(b) the installation is connected to the distribution board of such residence; and

(c) an electrical certificate of compliance issued in terms of the Electrical Installation Regulations, 2009, is issued to the natural person in respect of the installation.

(4) Where more than one person actually incur any cost in respect of the acquisition of a solar photovoltaic panel, the amount of the cost for purposes of subsection (2)(b)(i) must be an amount that bears to the total amount in respect of the acquisition of that solar photovoltaic panel in subsection (2)(a) the same ratio as the amount of the cost incurred by the natural person bears to the total amount of the costs incurred for that acquisition.

(5) Where before 1 March 2025, a person disposes of a solar photovoltaic panel that qualified for a deduction in terms of this section, other than by way of disposing of the residence to which the solar photovoltaic panel is affixed, the amount of the solar energy tax credit allowed under subsection (1) in respect of that panel must be deemed to be an additional amount of normal tax payable by that person in the year of assessment during which the solar photovoltaic panel is disposed of.

(6) No deduction shall be allowed under this section in respect of any asset in respect of which an allowance has been granted to the taxpayer under section 12B or 12BA.

(2) Subsection (1) is deemed to have come into operation on 1 March 2023 and applies in respect of years of assessment commencing on or after 1 March 2023 Insertion of section 12BA in Act 58 of 1962

2. (1) The following section is hereby inserted in the Income Tax Act, 1962, after section 12B:

'12BA Enhanced deduction in respect of certain machinery, plant, implements, utensils and articles used in production of renewable energy—

(1) In respect of any new and unused machinery, plant, implement, utensil, or article owned by the taxpayer as purchaser in terms of an agreement contemplated in paragraph (a) of the definition of 'instalment credit agreement' in section 1 of the Value Added Tax Act and which was or is brought into use for the first time by that taxpayer for the purpose of that taxpayer's trade on or after 1 March 2023 and before 1 March 2025 to be used by that taxpayer in the generation of electricity from—

(a) wind power;

(b) photovoltaic solar energy;

(c) concentrated solar energy;

(d) hydropower to produce electricity; or

(e) biomass compromising organic wastes, landfill gas or plant material,

a deduction calculated in terms of subsection (2) shall be allowed in respect of the year of assessment during which the abovementioned assets are brought into use:

Provided that where any machinery, pant, implement, utensil, article or improvement for which a deduction is allowed under this subsection is mounted on or affixed to any concrete or other foundation or supporting structure and—

(i) the foundation or supportive structure is designed for such machinery, plant, implement, utensil, article or improvement and constructed in such manner that it is or should be regarded as being integrated with the machinery, plant, implement, utensil, article or improvement;

(ii) the useful life of the foundation or supporting structure is or will be limited to the useful life of the machinery, plant, implement, utensil, article or improvement mounted thereon or affixed thereto; and

(iii) the foundation or supporting structure was brought into use on or after 1 March 2023 and before 1 March 2025,

the foundation or supporting structure shall be deemed to be part of the machinery, plant, implement, utensil, article or improvement mounted thereon or affixed thereto.

(2) The deduction contemplated in subsection (1) is equal to an amount of 125% of the cost incurred by the taxpayer for the acquisition of the asset.

(3) For the purposes of this section, the cost to a taxpayer of any asset acquired by that taxpayer shall be deemed to be the lesser of the actual cost to the taxpayer or the cost which a person would, if that person had acquired the asset under a cash transaction concluded at arm's length on the date which the transaction for the acquisition of the asset was in fact concluded, have incurred in respect of the direct cost of acquisition of the asset, including the direct cost of the installation or erection thereof.

(4) No deduction shall be allowed under this section in respect of—

(a) any asset which has been let by the taxpayer under a lease other than an operating lease as defined in section 23A (1), unless —

(i) the lessee under such lease derives in the carrying on of his or her trade amounts constituting income for the purposes of this Act; and

(ii) the period for which the asset is let under such lease is at least 5 years or such shorter period as is shown by the taxpayer to be the useful life of the asset;

(b) any asset the ownership of which is retained by the taxpayer as a seller in terms of an agreement contemplated in paragraph (a) of the definition of 'instalment credit agreement' in section 1 of the Value Added Tax Act; or

(c) any asset in respect of which an allowance has been granted to the taxpayer under section 12B.

(5) Where before 1 March 2026, a taxpayer disposes of an asset contemplated in subsection (1), there shall be included in the taxpayer's income 25% of the cost of that asset referred to in subsection (2) that is recovered or recouped during the current year of assessment, in addition to the inclusion of amounts in terms of

section 8(4)(a).

(2) Subsection (1) is deemed to have come into operation on 1 March 2023 and applies in respect of years of assessment commencing on or after 1 March 2023.

6. RENEWABLE ENERGY INCENTICE – DRAFT EXPLANATORY MEMORANDUM ON THE DRAFT TAXATION LAWS AMENDMENT BILL, 2023 (INITIAL BATCH)

1. INCOME TAX: INDIVIDUALS, SAVINGS AND EMPLOYMENT

1.1 SOLAR ENERGY TAX CREDIT

[Applicable provision: New section 6C and section 25 of the Income Tax Act, No. 58 of 1962 ('the Act')]

I. Background

The tax system does not generally allow for deductions in respect of personal consumption, for example, expenses incurred in respect of a motor vehicle used for private purposes or expenses incurred in respect of a salary paid to a domestic worker. However, in certain circumstances, either for purposes of encouraging individuals to save for retirement or for philanthropic purposes or in instances where the expenditure is directly linked to employment income, the Act allows individuals who derive employment income and or passive income a credit or deduction in respect of the following expenses, namely:

- Contributions to retirement funds
- Medical scheme contributions and other medical expenses
- Donations to approved Public Benefit Organisations

- Home office expenses under certain qualifying criteria
- Wear and tear in respect of certain assets
- Amounts received for services rendered that are subsequently refunded
- Bad and doubtful debts that are related to employment subject to certain conditions
- Legal costs under certain qualifying circumstances

On the other hand, an individual who carries on a business is also eligible for all the deductions and allowances provided in the Act in respect of his or her business expenses.

II. Reasons for change

In response to the severe energy crisis experienced by the country, Government is proposing various policy measures to the renewable energy mix to improve energy efficiency and lower pressure on the grid. In order to encourage households to invest in clean electricity generation capacity which can supplement electricity supply, in the 2023 Budget, Government proposed a rooftop solar tax incentive for individuals who invest in solar photovoltaic (PV) panels.

III. Proposal

It is proposed that individuals who pay personal income tax be granted a solar energy tax credit which will apply as follows:

A. Solar PV panels eligible for the solar energy tax credit

The solar energy tax credit will only apply to the following solar panels:

- New and unused solar PV panels acquired by the individual and brought into use for the first time by the individual on or after 1 March 2023 and before 1 March 2024.

- Solar PV panels with a minimum generation capacity of each being not less than 275W.
- Solar PV panels that form part of a system that is connected to the distribution board of a residence that is mainly used by an individual for domestic purposes.
- Solar PV panels installation for which an electrical certificate of compliance is issued to the individual in terms of Electrical Installation Regulations, 2009.

B. Time period for the solar energy tax credit

In order to encourage individuals to invest in clean electricity generation capacity as soon as possible, the solar energy tax credit will only be available:

- for a period of 1 year and will apply to new and unused solar PV panels that are acquired by the individual and brought into use for the first time on or after 1 March 2023 and before 1 March 2024.

C. Amount of the solar energy tax credit allowed as a deduction

The amount of solar energy tax credit allowed as a deduction to an individual is as follows:

- 25% of the cost of the solar PV panels described above, up to a maximum of R15 000

D. Meaning of residence for solar energy tax credit

As indicated above, the energy tax credit applies to new and unused solar PV panels that are installed at a residence that is mainly used by an individual for domestic purposes. This implies that the energy tax credit will apply to individuals who:

- Own, rent or occupy residences and acquire new and unused solar PV panels for installation at residences that are mainly used for domestic purposes.

- Incur the cost to acquire the solar PV panels.

E. Limitation of solar energy tax credit in respect of assets granted an allowance in terms of section 12B or 12BA

In order to ensure that there is no duplication of tax incentives in respect of a solar PV panel:

- the energy tax credit shall not be allowed for a solar PV panel in respect of which an allowance is granted in terms of section 12B or 12BA of the Act.

F. Recoupment of solar energy tax credit on the sale of solar PV panels

Where an individual sells a solar PV panel on or before 1 March 2025 that qualified for a solar energy tax credit:

- the amount of the solar energy tax credit that was allowed as a deduction in respect of the solar PV panel will be regarded as an additional amount of normal tax payable by that individual in the year of assessment in which he or she sells the solar PV panel.

However, there will be no recoupment of the amount of the solar energy tax credit that was allowed as a deduction if the individual disposes of or vacates the residence to which the solar PV panel is affixed.

IV. Effective date

The proposed amendments will be deemed to have come into operation on 1 March 2023 and apply in respect of years of assessment commencing on or after 1 March 2023.

2. INCOME TAX: BUSINESS (INCENTIVES)

2.1 ENHANCED DEDUCTION IN RESPECT OF CERTAIN MACHINERY, PLANT, IMPLEMENTS, UTENSILS AND ARTICLES USED IN THE PRODUCTION OF RENEWABLE ENERGY

[Applicable provision: New section 12BA and section 12E of the Income Tax Act, No. 58 of 1962 ('the Act')]

I. Background

In 2004, Government introduced an accelerated depreciation allowance for investments in biodiesel and biofuels in section 12B of the Act. To encourage investments in renewable energy, Government proposed to extend this accelerated depreciation allowance to other forms of environmentally friendly energy sources in 2005. These environmentally friendly energy sources included the generation of electricity from wind, sunlight (later referred to as solar power), gravitational water force to produce electricity of not more than 30 megawatts (later referred to as hydropower) and biomass comprising organic waste, landfill gas or plants. The assets used in the production of electricity using the above-mentioned power sources were eligible to benefit from a tax depreciation write-off of 50%, 30%, :20% over three years.

In 2012, further amendments were made to the Act to allow necessary and integrated supporting structures, with respect to assets that are used in renewable energy generation to benefit from a tax write-off of 50%, 30%, :20% over three years.

In 2015, Government sought to further encourage the independent generation of electricity through renewable energy sources to alleviate the then projected electricity shortages in the country. In particular, changes were made to increase the uptake of small-scale embedded solar photovoltaic (PV) energy production to ease the pressure on the national electricity grid. In this regard, assets used for embedded solar PV renewable energy with a generation capacity not exceeding 1 000 kW or 1

MW were made eligible for an accelerated depreciation of a 1 year period of 100%.

II. Reasons for change

Given the country's continued struggle to produce reliable electricity through the national grid, Government is proposing to enhance the attractiveness of the tax incentive to encourage greater private investment in renewable energy. To encourage rapid private investment to alleviate this energy crisis, in the 2023 Budget Review, Government proposed to temporarily enhance the current renewable energy tax incentive available in section 12B of the Act.

III. Proposal

Government proposes to enhance the current renewable energy tax incentive as follows:

A. Assets eligible for the enhanced renewable energy tax incentive

The enhanced renewable energy tax incentive will apply to the following currently eligible renewable energy sources under section 12B of the Act used to produce electricity, without regard to any electricity generation limits contained under the current incentive as set out in section 12B of the Act:

- Wind power
- Photovoltaic solar energy
- Concentrated solar energy
- Hydropower to produce electricity
- Biomass compromising organic wastes, landfill gas or plant material

The enhanced renewable energy tax incentive will also apply to the following currently qualifying supporting structures under section 12B of the Act to which the above-mentioned assets are mounted on or are affixed to:

- the foundation or supporting structure is designed for the above-mentioned asset and constructed in such a manner that it is or should be regarded as being integrated with that asset;
- the useful life of the foundation or supporting structure is or will be limited to the useful life of the asset mounted thereon or affixed thereto;
- the foundation or supporting structure was brought into use on or after 1 March 2023 and before 1 March 2025.
- the foundation or the support structure shall be deemed to be part of that asset mounted thereon or affixed thereto.

B. Time period for the enhanced renewable energy tax incentive

The enhanced accelerated allowance is intended to encourage businesses to embark on investments in assets used in renewable energy production sooner rather than later, to assist in alleviating pressure on the national electricity grid. As such, it is proposed that the enhanced renewable energy tax incentive should be available:

- for a period of 2 years and apply to new and unused above-mentioned assets brought into use for the first time on or after 1 March 2023 and before 1 March 2025.

C. Rate of depreciation for the enhanced renewable energy tax incentive

Unlike the current renewable energy tax incentive available in section 12B of the Act that can be claimed over a period of three years at a rate of 50%, 30%, :20% (other than for small-scale solar PV projects), it is proposed that an upfront higher-than-cost deduction should apply as follows:

- 125% of the cost incurred with reference to the cost of all eligible assets is proposed.

D. Limitation of enhanced renewable energy tax incentive in respect of assets granted an allowance in terms of section 12B of the Act

To ensure that there is no duplication of tax incentives in respect of the enhanced renewable energy tax incentive:

- the enhanced renewable energy tax incentive in respect of any qualifying asset is only allowable in terms of the new section 12BA and not in terms of section 12B of the Act.

E. Interaction between enhanced renewable energy tax incentive in section 12BA of the Act and deduction for small business cooperations in section 12E of the Act

To clarify the interaction between section 12BA of the Act dealing with the enhanced renewable energy tax incentive and section 12E of the Act dealing with deductions for small business cooperations:

- the deduction in respect of small business cooperations in section 12E shall not apply in respect of an asset in respect of which the enhanced renewable energy tax incentive is granted in terms of section 12BA of the Act.

F. Recoupment of enhanced renewable energy tax incentive

Where a taxpayer sells an asset or in any other manner recovers or recoups the purchase price of the asset on or before 1 March 2026 in respect of which an enhanced renewable energy tax incentive is granted:

- 25% of the amounts recovered or recouped shall be included in the taxpayer’s income.
- the above inclusion of 25% is in addition to the amounts included in terms of recoupment provisions in section 8(4)(a) of the Act.

IV. Effective date

The proposed amendments will be deemed to have come into operation on 1 March 2023 and apply in respect of years of assessment commencing on or after 1 March 2023.

7. RENEWABLE ENERGY INCENTICE – EXPLANATORY MEMORANDUM TO THE NOTICE ISSUED IN TERMS OF PAR. 2d OF THE SECOND SCHEDULE TO THE INCOME TAX ACT

1. BACKGROUND

In 2008, changes were made to paragraph 2C of the Second Schedule to the Income Tax Act, 1962 (Act no 58 of 1962) (the Act) to make provision for the Minister of Finance to prescribe an event by notice in the Government Gazette in terms of which the so called 'bulking settlement payments' by the retirement funds will qualify for income tax exemption.

Consequently, on 1 March 2009, the Minister of Finance published a notice in Government Gazette No. 32005 (GG 32005) prescribing an event referred to in paragraph 2C of the Second Schedule to the Act in terms of which bulking settlement payments qualified for income tax exemption.

2. REASONS FOR CHANGE

When the changes were made in 2008 to paragraph 2C of the Second Schedule to the Act and when the notice was issued by the Minister of Finance in GG 32005 on 1 March 2009, some retirement funds were no longer registered. The fund administrators could not pay the above-mentioned bulking settlement payments to the relevant retirement fund to be distributed to its former members due to the retirement funds already being deregistered. These bulking settlement payments are currently still held by the respective fund administrators.

In view of the fact that changes made in 2008 to paragraph 2C of the Second Schedule to Act made provision for the Minister of Finance to prescribe an event by notice in the Government Gazette in terms of which the bulking settlement payments will qualify for income tax exemption only applied to former members of active/registered retirement funds, further changes were required in the Second Schedule to the Act to make provision for tax exempt treatment of bulking settlement payments to former members of deregistered funds.

Consequently, in 2019, changes were made in the Second Schedule to the Act by inserting a new paragraph 2D through section 49 of the Taxation Laws Amendment Act, 2019 (Act 34 of 2019), allowing the Minister of Finance to issue a notice in the Government Gazette making provision for the payment of bulking payments currently held by fund administrators on behalf of deregistered funds to qualify for tax exemption, provided that they meet the criteria to be determined by the Minister of Finance in the notice. In view of the fact that Government does not wish to condone non-compliance, in 2019, when the changes were made in paragraph 2D of the Second Schedule to the Act, Government stated in the Explanatory Memorandum to the Taxation Laws Amendment Act, 2019 (Act 34 of 2019) that the proposed notice will be the last opportunity provided in this regard to rectify the error.

3. PROPOSAL

In order to ensure consistent tax treatment in respect of bulking settlement payments, it is proposed that the Minister issue a notice on tax exemption of bulking settlement payments to former members of deregistered retirement funds in terms of paragraph 2D of the Second Schedule to the Act, provided that they meet the following criteria determined by the Minister of Finance in the notice:

- bulking settlement payments relate to amounts that became due and payable by the administrator of retirement funds to the retirement funds before 1 January 2008, and;
- such bulking payments have not been allocated due to the fact that the funds have been deregistered; and
- the administrator of the retirement funds has entered into an agreement with the Financial Sector Conduct Authority to make such bulking settlement payments directly to the former members of the deregistered funds.

In view of the fact that Government does not wish to condone non-compliance, this will be the last opportunity availed in this regard to rectify the error. As such, it is proposed that once the bulking payments are finalised, the provisions relating to bulking payments in paragraphs 2C and 2D of the Second Schedule to the Act should be repealed

4. EFFECTIVE DATE

The amendments will come into operation on 3 May 2023.

8. DRAFT MEMORANDUM ON THE OBJECT OF THE DRAFT REVENUE ADMINISTRATION AND PENSION LAWS ADMENDMENT BILL, 2023

BACKGROUND TO BILL

South Africa has different retirement fund vehicles available to individuals who wish to save for retirement, namely, pension funds, pension preservation funds, provident funds, provident preservation funds and retirement annuity funds. Historically, these funds had differing tax treatments for contributions to the funds, as well as differing rules as relates to withdrawals from these funds. In an attempt to promote retirement

savings, the retirement savings regime has, since 2012, undergone some significant reforms. These reforms include, inter alia, harmonising the tax treatment of contributions to the different types of funds (which came into effect from 1 March 2016) and increasing preservation at retirement by harmonising the requirement for annuitisation upon retirement across all retirement funds (which came into effect from 1 March 2021).

Government now wishes to focus on pre-retirement preservation. In accordance with the current retirement regime individuals are able to make full withdrawals from their pension or provident fund when they cease employment. Further to the above, individuals are also able to make once-off withdrawals from their pension preservation or provident preservation fund(s). What is of concern for Government is the fact that many of the above-mentioned withdrawals are taking place irrespective of the tax rates applied upon withdrawal.

Government has two primary concerns with the design of the current retirement regime. The first is the lack of preservation pre-retirement, which Government has highlighted in previous discussion papers. The ability for pension and provident fund members to access their retirement interest when terminating employment can create the incentive for fund members to terminate employment as a means of gaining access to those funds, thus prematurely terminating the ability to preserve these funds until normal retirement age is, per the fund rules, attained. 1.4 The second concern is that some households in financial distress have assets within their retirement fund(s) that are not accessible in case of emergencies or financial hardship. This has become more prominent since the onset of the COVID-19 pandemic, with numerous calls for financially distressed individuals to be given access to their retirement funds to alleviate their financial hardship.

OBJECTIVE OF BILL

The Revenue Laws Amendment Bill, 2023, provides for the amendments to the Income Tax Act, 1962 (Act No. 58 of 1962) (‘the ITA’), which gives

effect to the policy objectives noted in paragraph 1 above, and the detailed legislative proposals to give effect to the policy objectives are set out in the Explanatory Memorandum on the Revenue Laws Amendment Bill, 2023 ('the RLAB')

The Revenue Administration and Pension Laws Amendment Bill, 2023 ('the Bill') provides for certain amendments to the Pension Funds Act, 1956 (Act No. 24 of 1956) ('the PFA') which are necessary to enable retirement funds to be able to appropriately implement the amendments to the ITA which are contained in the RLAB.

9. NEW TAX COURT RULES – 10 MARCH 2023

RULES PROMULGATED UNDER SECTION 103 OF THE TAX ADMINISTRATIONACT, 2011 (ACT NO. 28 OF 2011), PRESCRIBING THE PROCEDURES TO BE FOLLOWED IN LODGING AN OBJECTION AND APPEAL AGAINST AN ASSESSMENT OR A DECISION SUBJECT TO OBJECTION AND APPEAL REFERRED TO IN SECTION 104(2) OF THAT ACT, PROCEDURES FOR ALTERNATIVE DISPUTE RESOLUTION, THE CONDUCT AND HEARING OF APPEALS, APPLICATION ON NOTICE BEFORE A TAX COURT AND TRANSITIONAL RULES

In terms of section 103 of the Tax Administration Act, 2011, I, Enoch Godongwana, the Minister of Finance, after consultation with the Minister of Justice and Correctional Services, hereby prescribe in the Schedule hereto, the rules governing the procedures to lodge an objection and appeal against an assessment or decision under Chapter 9 of the Act, the procedures for alternative dispute resolution and the conduct and hearing of appeals before a Tax Board or Tax Court.

These Rules repeal the Rules published in Government Gazette No.37819 of 11 July 2014 and take effect from the date of publication.

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9.2. Rule 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:

'appeal' means an appeal under section 107(1) by a taxpayer against an assessment to the tax board or tax court in the manner, under the terms and within the period prescribed in the Act and these rules;

'appellant' means a taxpayer who has noted an appeal 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 submit, lodge, 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 email 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.

9.3. Rule 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 SARS 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, including an electronic 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, SARS 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.

9.4. Rule 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.

9.5. Rule 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 or shortened 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 or shortened 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 or shortened period ends.

9.6. Rule 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.

9.7. Rule 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).

9.8. Rule 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 80 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) set out the grounds of the objection in detail including—

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

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

(iii) submitting 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's 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 80 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 in respect of an objection lodged within the 80 day period 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, if required, an application to SARS for an extension of the period for objection under section 104(4).

9.9. Rule 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

9.10. Rule 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.

9.11. Rule 10 – Appeal against assessment

(1) A taxpayer who wishes to appeal against the assessment to the tax board or tax court 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 appeal on a new ground not raised in the notice of objection under rule 7 unless it 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.

9.12. Rule 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; and

(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, by notice, the clerk to set the matter down before the tax board under rule 26.

9.13. Rule 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 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 directed, 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.

9.14. Rule 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.

9.15. Rule 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.

9.16. Rule 15 – Period of alternative dispute resolution

(1) The period within which the alternative dispute resolution proceedings under this rule is 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 proceedings are resolved under rule 23 or 24 or terminated under rule 25.

(2) The period referred to in subrule (1) interrupts the periods prescribed for purposes of proceedings under rule 11 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).

9.17. Rule 16 – Appointment of facilitator

(1) A person appointed as a facilitator of alternative dispute resolution proceedings under this Part:

(a) may be a SARS official;

(b) must be a person of good standing who has appropriate experience in the field of tax;

(c) must comply with the duties under rule 17; and

(d) must be acceptable to both parties.

(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 referred to in subrule (1) within 15 days after the commencement date of the proceedings under rule 15, 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.

9.18. Rule 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 independent and impartial;

(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.

9.19. Rule 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.

9.20. Rule 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.

9.21. Rule 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 a meeting deliver a report within five days 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 a final report to the taxpayer and SARS within 10 days of the cessation of the proceedings.

9.22. *Rule 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 arties, 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.

9.23. *Rule 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 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) 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.

9.24. Rule 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, 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 SARS.

(3) Where an agreement in respect of all the issues in dispute 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.

9.25. Rule 24 – Resolution of dispute by settlement

(1) Where the parties have agreed to the ADR process and 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, 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 in respect of all the issues in dispute 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.

9.26. Rule 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.

9.27. Rule 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), 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.

(4) 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.

9.28. Rule 27 – Subpoenas and dossier to tax board

(1) At the request of either party after notice to the other party, or if a tax board so 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 and must not constitute an abuse of process.

(3A) If a party is of the view that a subpoena requested by or issued at the request of the other party does not meet the criteria set out in subrule (3) and seeks the withdrawal of -

(a) the request to the clerk to issue the subpoena, the requesting party and the clerk must be so informed and if the requesting party does not withdraw the request for the subpoena, the clerk must inform the requesting party to apply to the tax board for the issue of the subpoena; or

(b) the subpoena already issued by the clerk, the clerk and the requesting party must be so informed, and if the requesting party does not agree to withdraw the subpoena, the clerk must inform the party to apply to the tax board for the withdrawal of the subpoena,

and the clerk must set down the application before the tax board in accordance with rule 26(2) and (3) for a hearing and appropriate order by the chairperson.

(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.

9.29. Rule 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.

9.30. Rule 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.

9.31. Rule 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 may provide reasons 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.

9.32. Rule 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(5);

(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 include in the statement a new ground of assessment or basis for the partial allowance or disallowance of the objection unless it 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.

9.33. Rule 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 it was requested to make discovery under rule 36(1); or

(b) the statement by SARS under rule 31.

(2) The statement must set out a clear and concise statement of—

(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 include in the statement a new ground of appeal unless it constitutes a ground of objection against a part or amount of the disputed assessment not objected to under rule 7.

9.34. Rule 33 – Reply to statement of grounds of opposing 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 35(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.

9.35. Rule 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.

9.36. Rule 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.

9.37. Rule 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.

9.38. Rule 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.

9.39. Rule 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 may take place at a venue agreed between the parties.

(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.

9.40. Rule 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's 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

unless the parties commit to an earlier available date.

(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 or within such shorter period as may be agreed by the parties and the registrar under rule 4(1)(a) before the hearing of the appeal.

9.41. Rule 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's notice of disallowance of the objection;

(e) the appellant's notice of appeal;

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

(i) SARS's 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.

9.42. Rule 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.

9.43. Rule 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.

9.44. Rule 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 and must not constitute an abuse of process.

(3A) If a party is of the view that a subpoena requested by or issued at the request of the other party does not meet the criteria set out in subrule (3) and seeks the withdrawal of-

(a) the request to the registrar to issue the subpoena, the requesting party and the registrar must be so informed and if the requesting party does not withdraw the request for the subpoena, the registrar must inform the requesting party to apply to the tax court for the issue of the subpoena under Part F; or

(b) the subpoena already issued by the registrar, the registrar and the requesting party must be so informed, and if the requesting party does not agree to withdraw the subpoena, the registrar must inform the party to apply to the tax court for the withdrawal of the subpoena under Part F.

(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.

9.45. Rule 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 10 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.

(8) If the tax court makes a decision under section 129(2)(a) or (b) and no appeal is lodged by SARS under section 133, SARS must issue the assessment to give effect to the decision of the tax court within a period of 45 days after receipt of a copy of the tax court's decision by the registrar.

9.46. Rule 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).

9.47. Rule 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 in full 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 part-heard, 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.

9.48. Rule 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.

9.49. Rule 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 for 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.

9.50. Rule 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 SARS 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.

9.51. Rule 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, must be brought within 20 days after the date of the cause of the application unless the parties agree to a longer period under rule 4(1) or the tax court otherwise directs under rule 52(1), and 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.

9.52. Rule 51 – Application provided for in Act or rules

(1) A procedural application to the tax court provided for in section 117(3) of the Act or these rules must, unless the tax court directs that it be heard as part of the appeal, 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.

9.53. Rule 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 ~~in~~ 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 party whose request for a subpoena to be issued by the clerk of the tax

board is denied pursuant to rule 27(3A) by the chairperson of the tax board or opposed by the other party under rule 43(3A) and the request for the issue of a subpoena by the other party is not withdrawn or a party seeks the withdrawal of a subpoena already issued by the registrar, the requesting party of a subpoena opposed by the other party or the opposing party seeking a withdrawal of an issued subpoena, may apply to the tax court under this Part for the issue, refusal or withdrawal, as the case may be, 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.

9.54. Rule 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 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.

9.55. Rule 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.

9.56. Rule 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—

(a) made 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.

9.57. Rule 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.

9.58. Rule 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 must be supported by a founding affidavit that contains the facts upon which the applicant relies for relief.

(2) An application must be brought within the period prescribed in rule 50(4), 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.

9.59. Rule 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.

9.60. Rule 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.

9.61. Rule 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.

9.62. Rule 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.

9.63. Rule 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 matter 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.

9.64. Rule 63 – Application for set down by respondent

(1) If the applicant fails to apply to the registrar to set the matter down 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.

9.65. Rule 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.

9.66. Rule 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 or the rules promulgated under section 103 of the Act on 11 July 2014 in Government Gazette No. 37819 and repealed by these rules with effect from the date of publication.

9.67. Rule 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 or rule 32, as the case may be, of the previous rules has been delivered, SARS may deliver a reply to the statement under rule 33.

9.68. Rule 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.

9.69. Rule 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.

10. NOTICES / REGULATIONS

10.1. Table of interest

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

DATE FROM	DATE TO	RATE
1 November 2020	28 February 2022	7,00%
1 March 2022	30 April 2022	7,25%
1 May 2022	30 June 2022	7,50%
1 July 2022	31 August 2022	7,75%
1 September 2022	31 October 2022	8,25%

1 November 2022	31 December 2022	9,00%
1 January 2023	28 February 2022	9,75%
1 March 2023	30 April 2023	10,50%
1 May 2023	30 June 2023	10,75%
1 July 2023	Until change in the Public Finance Management Act rate	11,25%

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

DATE FROM	DATE TO	RATE
1 September 2020	31 October 2020	3,25%
1 November 2020	28 February 2022	3,00%
1 March 2022	30 April 2022	3,25%
1 May 2022	30 June 2022	3,50%
1 July 2022	31 August 2022	3,75%
1 September 2022	31 October 2022	4,25%
1 November 2022	31 December 2022	5,00%
1 January 2023	28 February 2023	5,75%
1 March 2023	30 April 2023	6,50%
1 May 2023	30 June 2023	6,75%
1 July 2023	Until change in the Public	7,25%

	Finance Management Act rate	

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

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

DATE FROM	DATE TO	RATE
1 August 2020	30 November 2021	4,50%
1 December 2021	31 January 2022	4,75%
1 February 2022	31 March 2022	5,00%
1 April 2022	31 May 2022	5,25%
1 June 2022	31 July 2022	5,75%
1 August 2022	30 September 2022	6,50%
1 October 2022	30 November 2022	7,25%
1 December 2022	31 January 2023	8,00%

1 February 2023	31 March 2023	8,25%
1 April 2023	31 May 2023	8,75%
1 June 2023	Until change in Repo rate	9,25%

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

10.2. VAT264 declaration for the supply of second hand goods form was enhanced

The VAT264 form has been modernised to make it easier and simpler for vendors to complete. It has also been updated to align with the recent VAT amendment contained in the Taxation Laws Amendment Act, 2022.

10.3. VAT Registration – Supply of Electronic Services by Foreign Suppliers and Foreign Intermediaries

14 April 2023 – Section 23(1A) of the Value-Added Tax Act, 1991, was amended, with effect from 5 January 2023, to ease the administration burden for a foreign supplier of electronic services and a foreign Intermediary (an Intermediary who is not a resident of the Republic), by introducing an exception when calculating the R1 million threshold.

This exception applies where the said value of taxable supplies made has exceeded R1 million, in a consecutive period of 12 months, solely as a consequence of abnormal circumstances of a temporary nature. In such instance, there is no requirement for a Foreign Supplier of electronic services or a Foreign Intermediary to register for South African VAT.

10.4. Dispute Resolution Enhancements

24 April 2023 –SARS released system enhancements to improve its efficiency and effectiveness in resolving tax disputes. These enhancements will also ensure that only the tax in dispute is considered for suspension of payment.

The most significant system changes to be implemented include:

- **Calculation of disputed amount**

  On submission of an appeal the calculation of the value of the amount disputed will be automated.

  This will reduce the time taken in internal allocations, improve the accuracy of suspensions of payment and assist internal reporting on disputed debt.

- **Updating taxpayer contacts**

  Taxpayers will now be able to amend their contact details for purposes of their tax dispute on eFiling.

  This will facilitate earlier engagement by SARS and allow taxpayer to include the contact details of their representative chosen for purposes of resolving the tax dispute.

- **Request for Remission**

  The request for remission functionality has been extended to include remission requests for provisional underestimation penalties levied in terms of paragraph 20(1) of the Fourth Schedule to the Income Tax Act.

  This functionality is now aligned to the applicable legislation.

- **Request for Reasons**

  New automated Request for Reasons outcome letters have been implemented.

  Previously if SARS agreed that reasons for the assessment had to be supplied, manual letters were issued.

- **Objections**

  Where SARS requires additional substantiating documents to enable it to consider an objection, it is now able to issue up to three (3) requests to the taxpayer for the supply of the requested documents.

  This will ensure that most of the dispute related information gathering is done during the objections phase of a tax dispute.

- **Appeals**

  Automated letters have been introduced for appeals administration for Alternative Dispute Resolution (ADR) have been implemented as follows:

  - Notice confirming that an appeal is suitable for ADR;
  - Notice extending the period of ADR proceedings;
  - Notice terminating the ADR proceedings; and
  - Notice confirming the outcome of an appeal.

In addition to the above various internal processes have been streamlined to reduce resolution times of especially appeals in ADR proceedings. The enhancements to taxpayer contact details and automated notices will greatly improve communication with taxpayers.

10.5. Income Tax Returns to be submitted

Per the Government Gazette and Notice No. 3540 of 14 June 2023:

Persons who must submit an income tax return

The following persons must submit an income tax return:

(a) Every company or other juristic person, which was a resident during the 2023 year of assessment that—

(i) derived gross income of more than R1 000;

(ii) held assets with a cost of more than R1 000 or had liabilities of more than R1 000, at any time;

(iii) derived any capital gain or capital loss of more than R1 000 from the disposal of an asset to which the Eighth Schedule of the Income Tax Act applies; or

(iv) had taxable income, taxable turnover, an assessed loss or an assessed capital loss;

(b) Every trust that was a resident during the 2023 year of assessment;

(c) Every company, trust or other juristic person, which was not a resident during the 2023 year of assessment, that—

(i) carried on a trade through a permanent establishment in the Republic;

(ii) derived income from a source in the Republic; or

(iii) derived any capital gain or capital loss from the disposal of an asset to which the Eighth Schedule to the Income Tax Act applies;

(d) Every company incorporated, established or formed in the Republic, but that was not a resident as a result of the application of any agreement entered into with the Government of any other country for the avoidance of double taxation during the 2023 year of assessment;

(e) Every natural person who during the 2023 year of assessment—

(i) was a resident and carried on any trade (other than solely in his or her capacity as an employee); or

(ii) was not a resident and carried on any trade (other than solely in his or her capacity as an employee) in the Republic;

(f) Every natural person who during the 2023 year of assessment—

(i) was a resident and had capital gains or capital losses exceeding R40 000;

(ii) was not a resident and had capital gains or capital losses from the disposal of an asset to which the Eighth Schedule to the Income Tax Act applies;

(iii) was a resident and held any funds in foreign currency or owned any assets outside the Republic, if the total value of those funds and assets exceeded R250 000 at any stage during the 2023 year of assessment;

(iv) was a resident and to whom any income or capital gains from funds in foreign currency or assets outside the Republic was attributed in terms of the Income Tax Act;

(v) was a resident and held any participation rights, as referred to in section 72A of the Income Tax Act, in a controlled foreign company;

(vi) was a resident and had taxable turnover; or

(vii) subject to the provisions of paragraph 3, at the end of the 2023 year of assessment—

(aa) was under the age of 65 and whose gross income exceeded R91 250;

(bb) was 65 years or older (but under the age of 75) and whose gross income exceeded R141 250; or

(cc) was 75 years or older and whose gross income exceeded R157 900;

(g) Subject to the provisions of paragraph 3, every estate of a deceased person that had gross income during the 2023 year of assessment;

(h) Every non-resident whose gross income during the 2023 year of assessment included interest from a source in the Republic to which the provisions of section 10(1)(h) of the Income Tax Act do not apply;

(i) Every person who is requested by SARS in writing to furnish a return, irrespective of the amount of income or nature of receipts or accruals of the person; and

(j) Every representative taxpayer of any person referred to in subparagraphs (a) to (i) above.

Persons not required to submit an income tax return

(1) A natural person or estate of a deceased person is not required to submit an income tax return in terms of paragraph 2(f)(vii) or (2)(g) if the gross income of the person during the 2023 year of assessment consisted solely of gross income described in one or more of the following subparagraphs:

(a) Remuneration paid or payable from one single source, which does not exceed R500 000 and employees' tax has been deducted or withheld in terms of the deduction tables prescribed by SARS;

(b) Interest (other than interest from a tax free investment) from a source in the Republic not exceeding—

(i) R23 800 in the case of a natural person below the age of 65 years at the end of the year of assessment;

(ii) R34 500 in the case of a natural person aged 65 years or older at the end of the year of assessment; or

(iii) R23 800 in the case of the estate of a deceased person;

(c) Dividends and the natural person was a non-resident throughout the 2023 year of assessment;

(d) Amounts received or accrued from a tax-free investment; and

(e) A single lump sum received from a pension fund, provident fund, pension preservation fund, provident preservation fund or retirement annuity fund, and tax has been deducted or withheld in terms of a directive issued by SARS.

(2) Subparagraph (1) does not apply to a natural person:

(a) who was paid or granted an allowance or advance as described in section 8(1)(a)(i) of the Income Tax Act other than an amount reimbursed or advanced as described in section 8(1)(a)(ii) or an allowance or advance referred to in section 8(1)(b)(iii) that does not exceed the amount determined by applying the rate per kilometre for the simplified method in the notice fixing the rate per kilometre under section 8(1)(b)(ii) and (iii) to the actual distance travelled;

(b) who was granted a taxable benefit described in paragraph 7 of the Seventh Schedule to the Income Tax Act; or

(c) who received any amount or to whom any amount accrued in respect of services rendered outside the Republic.

(3) A natural person is not required to submit an income tax return in terms of paragraph 2(f)(vii) if—

(a) the person is notified by SARS in writing that he or she is eligible for automatic assessment; and

(b) the person's gross income, exemptions, deductions and rebates reflected in the records of SARS are complete and correct as at the date of the assessment based on an estimate to give effect to automatic assessment.

Periods within which income tax returns must be furnished

Income tax returns must be submitted within the following periods:

(a) in the case of any company, within 12 months from the date on which its financial year ends; or

(b) in the case of all other persons (which include natural persons, trusts and other juristic persons, such as institutions, boards or bodies)—

(i) on or before 23 October 2023;

(ii) on or before 24 January 2024 if the return relates to a provisional taxpayer and is submitted by using the SARS eFiling platform; or

(iii) where accounts are accepted by SARS in terms of section 66(13A) of the Income Tax Act in respect of the whole or portion of a taxpayer's income, which are drawn to a date after 28 February 2023 but on or before 30 September 2023, within 6 months from the date to which such accounts are drawn.

Form of income tax returns to be submitted

The forms prescribed by SARS for the submission of income tax returns are obtainable on request via eFiling at https://www.sarsefiling.co.za or downloadable from the SARS website at https://www.sars.gov.za/find-a-form/.

Manner of submission of income tax returns

(1) Income tax returns must:

(a) in the case of a company, be submitted electronically by using the SARS eFiling platform;

(b) in the case of natural persons or trusts be submitted electronically:

(i) by using the SARS eFiling platform, provided the person is registered for eFiling; or

(ii) through the assistance of a SARS official at an office of SARS;

(c) in the case of institutions, boards or bodies be:

(i) submitted electronically by using the SARS eFiling platform, provided the person is registered for eFiling;

(ii) submitted electronically through the assistance of a SARS official at an office of SARS;

(iii) forwarded by post to SARS; or

(iv) delivered to an office of SARS, other than an office which deals solely with matters relating to customs and excise.

(2) Returns for turnover tax must be forwarded by post to SARS or delivered to an office of SARS, other than an office which deals solely with matters relating to customs and excise.

(3) SARS may agree that a person, who is required to submit a return in the manner prescribed in subparagraph (1) or (2), may submit the return in an alternative manner.

11. TAX CASES

11.1. Oppenheimer v The Commissioners for her Majesty's Revenue and Customs (85 SATC 89)

Respondents, being the Commissioners for Her Majesty's Revenue and Customs ('HMRC') had issued final closure notices to the Appellant, being Mr Jonathan Oppenheimer, under section 28A(1B) and (2) of the Taxes Management Act 1970 in relation to the tax years 2010/11, 2011/12, 2014/15, 2015/16 and 2016/17.

Mr Oppenheimer appealed the Closure Notices to the First-Tier Tribunal, Tax Chamber, on 31 May 2019.

The enquiry, Closure Notices and Discovery Assessments were predicated on remittances made to Mr Oppenheimer by the Harry Oppenheimer Family Continuity Trust in the period 2010/11 to 2016/17.

The total of the remittances in the relevant period was £20 159 139 and the additional tax was £10 119 586,05.

The amendments and assessments in terms of the Closure Notices were made on the basis that Mr Oppenheimer was Treaty resident in the United Kingdom ('UK') in the relevant period.

Mr Oppenheimer did not dispute that he was resident and ordinarily resident in the UK for the years 2010/11 and 2011/12 under the common law and under the statutory residence test for the years from 2014/15 onwards.

However, the basis of this appeal was Mr Oppenheimer's contention that on a proper application of Article 4(2) of the UK/Republic of South Africa Double Taxation Convention 2002 as amended by the 2010 protocol ('the DTC') he was Treaty resident in South Africa for each tax year in the relevant period.

The Tribunal had to determine in respect of each tax year during the relevant period:

- Whether the State with which Mr Oppenheimer's personal and economic relations (centre of vital interests) were closer were the UK or South Africa. If it was the UK, then he would be deemed to be Treaty resident solely in the UK and the appeal failed. If it was South Africa, then the appeal succeeded as he would be deemed to be Treaty resident in South Africa.
- If the centre of Mr Oppenheimer's vital interests could not be determined, the issue was whether Mr Oppenheimer had a habitual abode in South Africa. It was not disputed that he had a habitual abode in the UK in the relevant period. If he had a habitual abode in the UK only, he would be Treaty resident in the UK and the appeal failed. If he also had a habitual abode in South Africa, the appeal succeeded because he was a national only of South Africa.

The burden of proof was upon Mr Oppenheimer and he had to establish that his centre of vital interests was in South Africa, or, if that could not be determined that he had an habitual abode in South Africa and in both cases in each year in the relevant period.

Mr Oppenheimer was a fourth generation South African, having been born in Johannesburg. He was the great grandson of the founder of Anglo American Corporation of South Africa, which is now Anglo American plc, a British listed multinational mining company and since 1999 it has been headquartered in London. In 1982 his father, Mr Nicky Oppenheimer, Chairman of De Beers mining company, moved to London and from the age of 13 Mr Oppenheimer went to school and university in the UK. His parents bought him a flat in London for his 18th birthday which was held in a trust structure. He returned to South Africa to

undertake his one-year period of National Service and thereafter he returned to London to work for Rothschild Bank.

He married his US-national wife in June 1994 and then worked for De Beers in London until he and his wife relocated to Zimbabwe in May 1995 for an extended internship with Anglo American Corporation of Zimbabwe. Mr Oppenheimer had always maintained a home in RSA where his parents lived and where he spent a considerable amount of time, but in 2007 he and his family decided to move to the UK in order to send their children to preparatory school there and they also bought a listed country estate near London and spent considerable amounts of money restoring it as a family home.

Mr Oppenheimer was a beneficiary of the Harry Oppenheimer Family Continuity Trust from which he had received large remittances.

Mr Oppenheimer contended, on the facts of his case, that the taxing rights belonged most naturally to South Africa, because:

- the State with which his personal and economic relations were closer was South Africa and not the UK so that he was deemed by Article 4(2)(a) of the DTC to be a resident solely of South Africa for the purposes of the Convention, and
- if it was not possible to determine the State with which his personal and economic relations were closer:
    - he had habitual abodes both in South Africa and the UK;
    - in accordance with Article 4(2)(c) of the DTC he was deemed, for the purposes of the DTC, to be a resident solely of the State of which he was a national and that was South Africa.
- His personal and economic links, were, and always had been, closer to South Africa than anywhere else and he had had a habitual abode in South Africa since before the relevant period.

HMRC contended that Mr Oppenheimer was a South African national with historic links both to the UK and South Africa who voluntarily decided to move to the UK in

2007 with his wife and three children. They lived in the UK thereafter as a family and throughout the relevant period.

Although Mr Oppenheimer retained property and interests in South Africa he spent more time in the UK where he lived, and his centre of vital interests was in the UK. HMRC did not challenge his South African citizenship or residence, but purely his Treaty residence for tax purposes. If his centre of vital interests could not be determined as between the UK and South Africa, his sole habitual abode since his arrival in the UK in 2007, prior to the start of the 2010/11 tax year, and thereafter, was in the UK.

The agreed facts in the case were:

- Mr Oppenheimer was, at all material times, by reason of the provisions of par. 1 of Article 4 of the DTC, a resident of both Contracting States;
- Mr Oppenheimer had a permanent home available to him in both States for the purposes of par. 2(a) of Article 4;
- Mr Oppenheimer (while arguing that he also had a habitual abode in South Africa) accepted that he had an habitual abode in the UK for the purposes of para 2(b) of Article 4;
- HMRC accepted that Mr Oppenheimer's loyalty to, and love for, South Africa was undoubted.

Article 4 of the DTC provided, *inter alia*:

> '1. For the purposes of this Convention, the term '*resident of a Contracting State'* means any person who, under the laws of that State, is liable to tax therein by reason of that person's domicile, residence, place of management, place of incorporation or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof.
>
> 2. Where by reason of the provisions of paragraph 1 of this Article an individual is a resident of both Contracting States, then that individual's status shall be determined in accordance with the following rules:

(a) the individual shall be deemed to be a resident solely of the Contracting State in which a permanent home is available to the individual; if a permanent home is available to the individual in both States, the individual shall be deemed to be a resident solely of the State with which the individual's personal and economic relations are closer (centre of vital interests);

(b) if the sole residence cannot be determined under the provisions of subparagraph (a), the individual shall be deemed to be a resident solely of the State in which the individual has an habitual abode;

(c) if the individual has an habitual abode in both Contracting States or in neither of them, the individual shall be deemed to be a resident solely of the State of which the individual is a national;…'

Judge Scott held the following:

(i) That the court agreed with the analysis that 'vital' in the phrase 'centre of vital interests' meant 'necessary or essential' and that was defined as being '…the things, in other words, that are of greatest importance…' to Mr Oppenheimer and that meant that the court needed to find facts about Mr Oppenheimer's thinking, and, of course, that introduced a subjective element.

(ii) That the court agreed that Article 4.2(a) of the DTC was a composite test and, although the terms of the tiebreaker test in Pike 2 were different, the court adopted the wording at par. 39 in Pike 2: '…in each case it will be a matter of fact and degree as to whether a taxpayer's personal and economic relations, viewed as a whole, support ties closer to one contracting state than the other.' That was the approach that the court had adopted in regard to centre of vital interests.

(iii) That when considering habitual abode, one should look at whether living in each State is normal and it was suggested that the test should not merely be made for one year but a broad view should be taken over a number of years as to whether living in each State was habitual.

(iv) That Mr Oppenheimer was a straightforward witness, as indeed the court found that his father was also. In fact, although there were some discrepancies in their evidence, the court found that both father and son were very straightforward, credible and clear witnesses.

(iv) That the court accepted that the focus was on Isibindi and South Africa because it had never been disputed that Folly Farm was a habitual abode for Mr Oppenheimer. The onus of proof lay with him to establish that he had a habitual abode in South Africa; hence the focus on South Africa.

(v) That the court had to indeed look at the actions of Mr Oppenheimer and not just at where he was present at any given point or just at his family and his work, however work was defined. It was for that reason that the court looked at Mr Oppenheimer's lifestyle and work from a broader perspective. The tiebreaker only comes into play where a taxpayer was already resident in two States so the level of attachment goes beyond mere residence.

(vi) That the court knew that the family spent comparatively little time in South Africa in the Relevant Period and Mr Oppenheimer frankly admitted that. For that reason alone the court did not draw adverse inferences about the lack of production of diary entries, etc.

(vii) That the court had sufficient evidence to find that in any year in the Relevant Period Mr Oppenheimer spent less time in South Africa than in the UK but the court found that they certainly retained their possessions, including pets, in South Africa, and Isibindi was always available to them and fully staffed for their arrival. Tswalu was also available.

(ix) That the court found, prior to August 2007, Mr Oppenheimer's centre of vital interests was South Africa and, notwithstanding his education and internships based in the UK and the internship in Zimbabwe, the court found that at all relevant points until 2007 that had remained the case.

(x) That both parties were agreed that Mr Oppenheimer had permanent homes in both the UK and South Africa and the court agreed that the use of the word 'permanent' in Article 4.2(a) of the DTC did not colour the assessment

of the taxpayer's personal and economic relations and indeed those can change in the course of a year.

(xi) That Article 4 of the DTC refers only to personal and economic relations and neither it nor the Commentary referred to either 'employment' or 'ownership of assets'. 'Relations' is a straightforward and important word. Simply put, it is widely understood to mean the way people and/or things are connected. That is its ordinary everyday meaning. It is a very wide and flexible concept.

(xii) That the court found that Mr Oppenheimer's wife and the children were certainly a key relationship for him but that there were also other key relationships. He articulated it as follows: 'I think I am a family man who sees his obligations to both his family and to his commercial endeavours in a balance. This is not some sort of linear relationship which you can say this particular thing is ahead of something else…'

(xiii) That for Mr Oppenheimer work was essential and working remotely was the key and he and his wife worked together as a team with both of them having continuing and expanding interests and strong ties to South Africa before and during the Relevant Period. In summary the court agreed that Article 4 of the DTC was about relations, and as the court had said, that meant connections, so it was correct to say that the questions that the court have had to ask were more about 'who?' and 'what?' rather than 'when?' or 'where?'.

(xiv) That what was important to Mr Oppenheimer in the Relevant Period? Undoubtedly his wife and children but, just as they would rarely have been out of his thoughts, the court found that South Africa, its people, its culture, its politics, its place in Africa and the world would rarely have been out of his thoughts. The same could not be said of the UK. Although, of course he has friends in the UK, his closer links with his friendship base was with South Africa and it was interlinked with his various occupations and his political interests were closer to South Africa.

(xv) That, undoubtedly, Mr Oppenheimer had a longstanding and ongoing commitment to South Africa and an investment both in terms of his time, money (whether directly or not) and his emotions in its future as a nation and as an integral part of Africa. For all these reasons the court found that throughout the Relevant Period Mr Oppenheimer's personal and economic relations were closer to South Africa rather than the UK and therefore his appeal had to succeed.

(xvi) That the court then considered the issue of habitual abode in case it was wrong on the centre of vital interests. The court found that to be rather more difficult as the Commentary spoke about the 'frequency, duration and regularity of stays that are part of the settled routine of an individual's life and are therefore more than transient.' It also made it explicit that the test will not be satisfied by determining in which State the taxpayer spent more days.

(xvii) That the problem with South Africa was whether Mr Oppenheimer's stays in South Africa were part of the regular order of his life in each tax year. Mr Oppenheimer argued that at all times it remained his home regardless of how long he spent there; he only had to be there for some part of every year in issue. The onus of proof lay with Mr Oppenheimer.

(xviii) That, while Folly Farm in the UK was certainly a habitual abode, Mr Oppenheimer led a very peripatetic life travelling frequently and all over the globe and did not have a particularly settled routine in a conventional sense or in the sense described in the cases.

(xix) That the court certainly did find that, as and when Mr Oppenheimer visited South Africa, it would have been part of the regular order of his life to stay at Isibindi or Tswalu. Was that enough? His stays in South Africa could not be described as transient, in the context of his life where he was permanently on the move, as the number of days spent outside the UK demonstrated.

(xx) That of course Mr Oppenheimer did spend much greater time in the UK because of schooling, and in the US because of his wife and child but he could, and did, return to South Africa for important meetings and other matters including family, business, philanthropic, political and social activities. It was a normal, regular and important part of his life throughout the Relevant Period.

(xxi) That in the unusual facts of his life in the Relevant Period, his stays in both South Africa and the UK were both part of the settled routine of his life and were of sufficient frequency, duration and regularity to constitute habitual abodes in both countries.

(xxii) That, accordingly, the court found that Mr Oppenheimer did have a habitual abode in South Africa and as he was a national of that country, the answer to the tiebreaker was that he was Treaty Resident in South Africa during the Relevant Period.

(xxiii) That, for all these reasons, Mr Oppenheimer's appeal succeeded.

11.2. C:SARS v Wiese and Others (85 SATC 141)

During January 2007 Tullow Oil Plc and its subsidiaries ('the Tullow Group') undertook a restructure of its African operations. Prior to the restructure, the taxpayer formed part of the Tullow Group.

On 25 January 2007 the taxpayer sold its shares and claims in Energy Africa Holdings (Pty) Ltd ('EAH') to Tullow Overseas Holdings BV ('TOH').

Plaintiff, being the SARS, on 16 November 2012 had issued the taxpayer with a notice in terms of section 80J(1) of the Income Tax Act in which it made known its intention to make adjustments to the taxpayer's 2007 assessment pursuant to an audit that had been conducted into the tax affairs of the taxpayer. According to SARS the taxpayer was liable for CGT and STC in an amount of some R453 million and R487 million, respectively, on the basis that the transaction in question

amounted to, *inter alia*, an impermissible tax avoidance arrangement as defined in section 80L of the Income Tax Act.

According to SARS, the First Defendant on or about 19 April 2013 had instructed the Second Defendant to procure the distribution of the loan claim against Titan Share Dealers (Pty) Ltd ('TSD') to Titan Premier Investments (Pty) Ltd ('TPI') and the sale of the taxpayer to Friedshelf 1395 (Pty) Ltd.

On 15 April 2013 the attorney of the taxpayer addressed a letter to SARS disputing any tax liability on the grounds as relied upon by SARS being 'substance over form' and in the alternative under the general anti-tax avoidance rules (GAAR). The taxpayer's only asset during all relevant times was a loan claim against TSD in the amount of R216.6 million ('the loan claim').

According to the taxpayer, the transaction was not simulated and contended that the deemed dividend provision contained in section 64C(2)(a) of the Income Tax Act was not applicable and that the transactions under consideration did not constitute impermissible avoidance arrangements as envisaged in section 80A of the Income Tax Act. The main purpose, according to the taxpayer, was not to obtain a tax benefit, and therefore SARS was not entitled to invoke the provisions of section 80B of the Income Tax Act.

On 19 April 2013, before SARS had assessed the taxpayer to tax, penalties and interest, which eventually amounted to some R3.2 billion in total, the taxpayer had disposed of its only asset by making a distribution to the taxpayer's sole shareholder, Elandspad. From Elandspad it was immediately on-distributed to TPI, the holding company of Elandspad.

According to SARS, in terms of section 64C(2)(a) of the Income Tax Act, the distributions were deemed to be dividends declared by the companies and paid to its shareholder.

SARS sought an order in the High Court declaring the Defendants liable, jointly and severally, to pay SARS the amount of R216.6 million in terms of sections 183 and 184 of the Tax Administration Act.

According to SARS, the Defendants had knowingly caused, or assisted in causing the taxpayer to dissipate a loan claim in that amount in favour of the taxpayer against TSD by declaring and transferring it as a dividend in specie to its holding company Elandspad.

SARS held the view that the Defendants did so in order to obstruct the collection of certain tax debts.

SARS further sought an order in the High Court to enable it to rely on the evidence tendered by the First, Second and Third Defendants at a tax inquiry held in 2015 and 2016 in terms of Part C of Chapter 5 of the Tax Administration Act for the purposes of proving its claim.

By agreement between the parties an order was granted separating the following questions of law and fact for determination by the court:

- Firstly, was the evidence in the transcript of the tax inquiry admissible in these proceedings and, if so, for what purpose was the evidence admissible?
- Secondly, whether the Secondary Tax on Companies (STC) and the Capital Gains Tax (CGT) as referred to in the Particulars of Claim were each a 'tax debt' for purposes of section 183 of the Tax Administration Act.

Section 183 of the Tax Administration Act provided at the relevant time:

> '183. Liability of person assisting in dissipation of assets – If a person knowingly assists in dissipating a taxpayer's assets in order to obstruct the collection of a tax debt, the person is jointly and severally liable with the taxpayer for the tax debt to the extent that the person's assistance reduces the assets available to pay the taxpayer's tax debt.'

SARS had contended in its amended Particulars of Claim that the Defendants had knowingly caused, or assisted in causing, the taxpayer to dissipate the loan claim by declaring and transferring it as a dividend in specie to its holding company, Elandspad, which in turn declared and transferred the loan claim as a dividend in specie to its own holding company TPI (the dissipation). Moreover, the dissipation was effected at a time when, to the knowledge of the Defendants, the taxpayer had

been assessed to income tax in the amount of R122 420 199.72 plus interest of R43 724 273 and was liable for STC in the amount of R487 205 316, being a total of R653 349 788.72 and these amounts constituted debts due to SARS which were then due, owing and payable for the purposes and in terms of section 169 of the Tax Administration Act (the tax debts).

SARS, on 21 August 2013, had addressed a finalisation of audit letter to the taxpayer in which the taxpayer's additional income tax liability for the 2007 year of assessment was fully described.

Subsequent to the conclusion of the sale of shares agreement in September 2013 the attorneys for the taxpayer had replied to the finalisation of audit letter wherein it advised SARS that the taxpayer disputed any liability and that the taxpayer did not have any cash or assets and could not pay the disputed tax.

SARS, on 24 October 2014, was informed that the taxpayer was dormant and in April 2016 the taxpayer was finally wound-up by an order of the High Court.

Judge Le Grange held the following:

As to whether there had been a 'tax debt' for purposes of section 183 of the Tax Administration Act

(i) That for the sake of expedience, the court first dealt with the question whether the STC and CGT as referred to in the Particulars of Claim were each a 'tax debt' for purposes of section 183 of the Tax Administration Act.

(ii) That, prior to the retrospective amendment of the term 'tax debt' in section 1 of the Tax Administration Act in 2014, the term 'tax debt' was defined as meaning 'an amount of tax due by a person in terms of a tax Act.' After the amendment effected by the Tax Administration Laws Amendment Act 39 of 2013, dated 16 January 2014, section 1 of the Act defined 'tax debt' as an amount referred to in section 169(1) of the Act and there defined as 'an amount of tax due or payable in terms of a tax Act is a tax debt due to SARS for the benefit of the national revenue fund.' The amendment also provided for the retrospective amendment of the definition of 'tax debt' to the date of commencement of the Tax Administration Act.

(iii) That the main distinction was that, in the section 1 definition the amount of tax was required to be 'due' whereas in the section 169(1) definition it was required to be 'due or payable'.

(iv) That the parties had agreed, that for the purposes of the current action, the definition of 'tax debt' in section 1 of the Tax Administration Act should be read as it applied prior to its retrospective amendment in 2014 and, according to SARS, this was to avoid the inevitable challenge to the constitutional validity of the retrospective application of the amendment to the section should SARS have adopted a contrary view.

(v) That in answering the question whether the contested term 'tax debt' as contemplated in section 183 of the Act required SARS to issue an assessment before invoking section 183, or could the contested term be read through the prism of section 169 of the Act which would allow SARS to issue a notice in anticipation of an adjusted assessment and thereafter determine the taxpayer's tax liability, the point of departure must be the language of the provision itself read as a whole, its context and purpose.

(vi) That SARS contended that the reference to a 'tax debt' as contemplated in section 183 of the Act should be read in context and reading it in its context and having regard to the manifest purpose of section 183, the section finds application in circumstances where an assessment was anticipated and not where the tax debt was in existence as such an interpretation would negate or seriously undermine the purpose of the section and could lead to absurd consequences.

(vii) That the Defendants contended that a 'tax debt' properly construed required SARS to issue an assessment to the taxpayer before it could invoke the provisions of section 183 of the Act. It was contended that a contingent liability was not a debt and as such a contingent tax liability could not qualify as a 'tax debt' under section 183 of the Act.

(viii) That it was obvious that the Legislature in enacting section 183 of the Act had a particular objective and purpose in mind and that was to hold a person(s) jointly and severally liable if he or she knowingly assisted in dissipating a taxpayer's assets in order to obstruct the collection of a tax

debt. The sting of the provision was therefore against parties other than the taxpayer. It was therefore important to interpret the words, sentences and concepts in section 183 in a manner that will give proper effect to that intention of the Legislature taking into account the context and structure of the provisions within the Tax Administration Act in order to elucidate the text.

(ix) That the provisions of section 183 of the Act were anchored in Chapter 11 of the Tax Administration Act which covered Part A to F under the main heading 'Recovery of Tax.' The phrase 'Debt due to SARS' was defined in the heading of section 169(1) of the Act and referred to an amount 'due or payable'. The latter had obviously a different meaning to that as defined in section 1 of the Act.

(x) That, read purposively, section 169(1) illuminated the meaning of the phrase 'tax debt' within the provisions of Chapter 11 and in the latter context there was an obvious distinction.

(xi) That the Defendants' contention that the contested term must be interpreted as contemplated in section 165 to 168 in Part C of the Tax Administration Act where those provisions envisaged a 'tax debt' in the context of an assessment that had been raised and as such only become due once an assessment had been made by SARS and the taxpayer notified of such assessment, was, in the court's view, unsustainable. Such an interpretation would not only be unbusinesslike but would also emasculate the very purpose of the Tax Administration Act as a whole.

(xii) That Chapter 11 dealt with the recovery of tax, and Part D thereof, wherein section 183 is nestled, dealt with the liability and collection of a tax debt from a party other than the taxpayer. In these circumstances, where the purpose and aim of the Tax Administration Act was to hold a third party liable, the notice as issued by SARS on 16 November 2012, which included the notice in terms of section 80J(1), was more than sufficient to fall within the true meaning of a 'tax debt' as contemplated in section 183. To interpret it differently, would undermine the purpose and context of section 183 and the Tax Administration Act as a whole.

(xiii) That it would also lead to absurd consequences, where, for instance, a party who knowingly assisted the taxpayer in dissipating assets where an assessment had been raised and a tax debt established 'due or payable' to SARS, would be struck by the section, but if the same person assisted the taxpayer, a day before the event that rendered the tax debt due or payable, disposed of the assets in order to obstruct the collection thereof, would escape liability. The same would apply where a party who intentionally assists in the dissipation of a taxpayer's assets in order to obstruct the collection of a future tax debt, even if that tax debt were objectively uncertain at the time of the assistance, would escape liability.

(xiv) That the above-mentioned were but a few scenarios that would permit a party to knowingly assist the taxpayer to dissipate assets with the intention of obstructing the collection of tax in circumstances where the taxpayer and that person anticipate a tax liability. In the court's view such an interpretation cannot be consistent with the Tax Administration Act as its efficacy would solely depend on timing.

(xv) That it followed that the meaning to be ascribed to the phrase 'tax debt' where it appeared in section 183 must prevail over that as defined in section 1 of the Act and must be read as reference to an amount of tax due or payable in terms of the Tax Administration Act as advanced by SARS.

(xvi) That, in view of the above interpretation, the suggestion that section 183 will yield two equally plausible constructions was unfounded. It followed that the application of the contra fiscum rule did not arise in these circumstances as section 183 dealt with liability of persons other than the taxpayer who knowingly assisted in dissipating assets in order to obstruct the collection of a tax debt.

(xvii) That, reading section 183 with section 169 that a tax debt is 'due and payable' will not lead to two irreconcilable constructions. In this instance, CGT and STC for which the taxpayer was subsequently assessed were amounts already owing at the time of the dissipation on 19 April 2013 under the Tax Administration Act. That was so as the assessing of a taxpayer to

tax was to retrospectively render the tax due and payable when it ought to have been paid.

(xviii) That, after considering the dictum in Singh v C:SARS 65 SATC 203, the court stated that a tax debt either existed or not, depending on various factors, for instance, whether there had been a capital gain or whether a taxpayer had made a taxable profit or not. A tax debt thus existed irrespective of whether the taxpayer or SARS had made an assessment. Therefore, where the taxpayer's liability to pay CGT and STC was disputed, a subsequent assessment establishes a liability for the payment of tax, that assessment has the effect of rendering the tax due and payable from the date on which the incorrect return was rendered or, where no return is rendered at all, when it ought to have been rendered.

(xix) That it followed that the Defendants who arranged the declaration of the dividend in specie could be held liable in terms of section 183 of the Tax Administration Act in the absence of an assessment at the time of the dissipation.

As to the admissibility of the tax inquiry transcript in these proceedings

(xx) That it was common cause that in terms of section 50 of the Tax Administration Act the First, Second and Third Defendants had testified at an inquiry into the affairs of the taxpayer. The record of that inquiry consisted of the transcribed evidence together with the documents to which reference was made during the testimony of the witnesses.

(xxi) That SARS had intended relying on the evidence tendered by the First, Second and Third Defendants at that inquiry, in the main trial. The Defendants held the view that the transcript of an inquiry under section 50 of the Tax Administration Act was inadmissible in subsequent civil proceedings against any of the Defendants, including against the Defendant who gave such evidence.

(xxii) That it was trite that in subsequent criminal and civil proceedings, the use of transcripts of inquiries obtained under statutory compulsion was different.

(xxiii) That in the Tax Administration Act sections 56 and 57 were the two provisions dealing with the admissibility of evidence obtained at an inquiry held in terms of Part C of Chapter 5 of the said Act.

(xxiv) That on a plain reading of sections 50 to 58 of the Act, the manifest purpose of its provisions was to obtain information for subsequent use by SARS. That information may be used, for example, to assess a taxpayer's tax liability. The information may be obtained from anyone to whom the Act applied and by virtue of international treaties, even from those to whom the Act did not directly apply. It made no sense at all to read the Act as, on the one hand, giving substantial powers of information gathering, investigation and inquiry and then to regard that evidence so obtained at an inquiry as inadmissible in subsequent court proceedings. To do so would undermine SARS's ability to carry out its duty to collect tax.

(xxv) That, moreover, in Part C of Chapter 5 of the Act, SARS may seek an order to, inter alia, convene an inquiry into the tax affairs of a taxpayer, which included the appointment of SARS, the recording of proceedings at the standard required to be used in a court of law, the right to have legal representation, the power of subpoena, the right to cross-examination, etc. The suggestion that the information so obtained is inadmissible, is simply untenable as it would mean that these inquiries would serve little purpose.

(xxvi) That our Higher Courts have dealt with the constitutionality in respect of admissibility of evidence and/or transcripts of inquiries in other legislation and there are striking similarities between those provisions and that of the Tax Administration Act. For instance, sections 417 and 418 of the Companies Act 61 of 1973 were instructive in this regard. From the case law presented it was evident that the constitutionality of sections 417 and 418 had been established.

(xxvii) That, as there were striking similarities between the abovementioned provisions and those of the Tax Administration Act, logic dictated that the evidence obtained in the investigative inquiry as contemplated in section 56(4) of the Act, was admissible and SARS may use such evidence given by the First, Second and Third Defendants in the main proceedings,

provided that such evidence was not used in criminal proceedings as contemplated in section 57(2) of the Act.

(xxviii) That, on a plain reading of the section, the purpose for which the evidence was admissible was to prove or disprove all relevant facts in issue in the current legal proceedings between the parties.

(xxix) That it followed that the separated issues fell to be decided in favour of SARS with costs, such costs to include the costs of two counsel.

11.3. Rennies Travel (Pty) Ltd v CSARS (85 SATC 261)

Rennies Travel (Pty) Ltd (Rennies) conducted a travel agency enterprise. Part of its business was to make arrangements for the international travels of its clients, including the sales of airline tickets for international flights. Rennies

- derived income in respect of this part of its business from three contractual sources, namely: a service fee charged to the client;
- a flat rate charged to the relevant airline in respect of the sale of an international airline ticket (standard commission); and
- additional or increased commission charged to the airline in the event of Rennies reaching targets of international airline ticket sales agreed with the airline (supplementary commission).

SARS had determined that Rennies was liable for the payment of VAT on the supplementary commission that it had earned during the period from February 2012 to December 2016 and accordingly issued additional VAT assessments to Rennies.

Rennies maintained that the supplementary commission had been earned in respect of a supply of services that attracted VAT at zero % (zero-rated) under section 11(2)(a) and (d) of the Value-Added Tax Act 89 of 1991 (the VAT Act).

SARS had rejected Rennies' objection to the additional assessments and Rennies then noted an appeal under the Tax Administration Act 28 of 2011 (TA Act).

The hearing of the appeal was preceded by alternative dispute resolution proceedings, which resulted in a written settlement agreement between the parties in terms of which the standard commission in question would be zero-rated and, in the result, the appeal to the Tax Court concerned only the additional VAT assessments in respect of the supplementary commission and interest thereon.

This issue eventually came before the Johannesburg Tax Court (per Twala J) where it was held for SARS, but the court granted leave to Rennies to appeal to the Supreme Court of Appeal.

The additional assessments referred to by the court were issued pursuant to a tax audit conducted by SARS and they related to both the standard commission and the supplementary commission that Rennies had received in respect of the period in question.

Rennies had received payment of the supplementary commission in question in terms of three agreements (the incentive agreements) which were entered into with international airlines with a South African corporate presence and the incentive agreements were with South African Airways, Air Mauritius and Virgin Atlantic Airways.

The standard commission was payable under separate agreements with these airlines.

The background to the incentive agreements was explained by Rennies' only witness who stated that by 2005 there had been an increase in volume-driven commission structures which agents negotiated on an airline-by airline basis and such agreements were based on meeting certain agreed targets of ticket sales revenue on that particular airline and these types of arrangement – referred to as supplementary commission – also helped agents to make up what was lost when the percentage of standard commissions was reduced.

The witness emphasised that despite this change of the remuneration structure, Rennies' services remained the same.

SARS had contended in the Tax Court that Rennies had received supplementary commission as incentives for promoting the sales of international airline tickets

above agreed targets, the payment of which was conditional upon Rennies achieving the predetermined sales targets.

A further issue dealt with by the court was the determination of the time permitted for lodgement of Rennies' notice of appeal in view of the conflicting provisions of the TA Act and the Rules of the Supreme Court of Appeal.

The Tax Court had granted leave to appeal to the Supreme Court of Appeal on 11 January 2021 and Rennies had lodged its notice of appeal on 24 February 2021.

Rule 7(1)(b) of the Rules of the Supreme Court of Appeal provided that a notice of appeal shall be lodged within a month of the granting of leave to appeal. On the strength of this sub-rule, and having had regard to the dies non period provided for in Rule 1(2)(b), the Registrar of the Supreme Court of Appeal reckoned that the notice of appeal had to be lodged by 16 February 2021 and consequently advised Rennies that it had to apply for the condonation of the late lodgment of the notice of appeal.

Rennies took the stance that the notice of appeal had been lodged timeously in terms of the provisions of the Tax Administration Act 28 and it nevertheless lodged an application for condonation conditional upon a finding that the notice of appeal had indeed been lodged out of time.

Section 137(1)(a) of the TA Act provided that should leave to appeal be granted, the Registrar of the Tax Court must notify Rennies that the appeal must be noted within 21 business days of the date of that notice. Rennies lodged the notice of appeal within 21 business days thereafter.

Judge van der Merwe held the following:

As to the lodgment of the notice of appeal

(i) That it was clear that the application of the provisions of the TA Act and the Rules of the Supreme Court of Appeal would produce different results as to whether Rennies' notice of appeal had been lodged late and consequently whether Rennies would have had to apply for the condonation of the late lodgment of the notice of appeal.

(ii) That the Rules of the Supreme Court of Appeal were made by the Rules Board in terms of section 6 of the Rules Board for Courts of Law Act 107 of 1985 and, as such, they constituted subordinate legislation. It was trite that in the event of conflict, national legislation must prevail over subordinate legislation.

(iii) That, in the result, Rennies' notice of appeal had been lodged timeously and condonation was not required.

<u>As to whether supplementary commission was to be zero-rated under section 11(2)(a) and (d) of the VAT Act</u>

(iv) That the Tax Court's approach in this matter was impermissible and wrong. It had held that the supplementary commission had been paid for the supply of the services of marketing and promotion of the sales of airline tickets for international travel. It said that the supplementary commission was payable because of successful marketing and promotion campaigns. As the court had demonstrated, the SAA and Virgin Atlantic agreements contained separate provisions in respect of marketing and promotional services and the Air Mauritius agreement made no such provision.

(v) That it was convenient to commence the analysis in this matter by stating the obvious, namely that in the context of this case VAT could only be payable on a supply of services as defined in the VAT Act. If there was no such supply of services, there could be no liability for VAT at all.

(vi) That it will be recalled that in the Tax Court SARS' case was that the supplementary commission was an incentive for promoting sales of airline tickets, the payment of which was conditional upon Rennies achieving the predetermined sales targets. However, in this court SARS submitted that the incentive was earned on meeting the revenue targets and not for arranging the transport of passengers. But these contentions did not identify a supply of services for which the incentive was paid. The meeting of a revenue target is not a supply of services. That payment of

supplementary commission was conditional upon reaching the targets, says nothing about the supply of services that it was paid for.

(vii) That SARS had correctly accepted that the services of arranging of the transport of international passengers were rendered through the sales of airline tickets. That formed the basis of the concession that the standard commission was zero-rated under section 11(2) of the VAT Act and the facts of this matter make clear that the supplementary commission was earned for exactly the same supply of services as the standard commission.

(viii) That once the agreed threshold was reached in terms of the relevant agreements, each ticket sold attracted both standard and supplementary commission. Put differently, in terms of these agreements the supplementary commission was paid for the sale of a particular volume of airline tickets. That the same services gave rise to more than one type of consideration could not alter the nature of the services.

(ix) That it followed that the supplementary commission fell to be zero-rated under section 11(2) of the Value-Added Tax Act and that the appeal had to succeed.

Appeal upheld with costs.

Rennies' February 2012 to December 2016 assessments set aside to the extent that they had imposed VAT at the standard rate on supplementary commission paid.

11.4. ITC 1962 – Onus, expenses not deductible

The taxpayer was a close corporation and the nature of its business was initially cleaning, construction and maintenance but was developed to concentrate on the construction of low-cost housing, including roads, bridges and the necessary infrastructure at the sites where the construction of the houses took place and it operated on the basis of contracts which were provided by various municipalities.

SARS had issued an additional income tax assessment on the taxpayer on 1 February 2016 and this assessment was in respect of the 2014 tax year which remained in dispute between the parties.

The taxpayer had been finally placed in liquidation on 26 February 2016 and prior thereto control of the taxpayer had been handed over to Ms E by her mother during the period between 2006 and 2007.

There were four aspects of the 2014 tax assessment which were in dispute:

- Management fees claimed by the taxpayer as a deduction in terms of section 11(a) of the Income Tax Act in the sum of R16 million and this was made up of management services claimed to have been provided to the taxpayer by two associated entities, AA in the sum of R12 million and BB in the sum of R4 million. Both these figures exclude Value-Added Tax and were expressed in the financial accounts of the taxpayer as 'Management Fees.'
- Whether SARS was entitled to impose interest in terms of section 89quat of the Income Tax Act and whether SARS should have remitted that interest.
- Whether SARS was entitled to impose an understatement penalty of 125% in terms of the Tax Administration Act.
- Whether the taxpayer or SARS should pay the costs of the appeal.

During the 2014 tax year the taxpayer was involved in the completion of contracts for the construction of low-cost housing, including all the accompanying necessary infrastructure and, to do so, the business needed construction vehicles and machinery. The sites were not 'green-field' sites and required demolition work to be carried out to clear the sites preparatory to building work starting.

As mentioned, the taxpayer, AA and BB were associated entities and were all managed and controlled by Ms E. The fleet of motor vehicles were owned by BB who provided drivers together with the vehicles and AA carried out the repair work. Up to the end of the 2014 tax year it had been agreed between the three entities that AA and BB would invoice the taxpayer annually for the services they rendered. AA employed some 30 to 40 employees, with BB employing 60 to 65 employees.

The taxpayer had also claimed as deductions various amounts described as 'charitable donations' and it was conceded that amounts totaling R11 million had been deducted in circumstances where there had been no compliance by the taxpayer with section 18A of the Income Tax Act.

The taxpayer had submitted its income tax return for the 2014 tax year and subsequent thereto SARS had notified the taxpayer that its tax return had been selected for verification in terms of section 40 of the Tax Administration Act and this was followed up by a formal letter and a request made to the taxpayer to provide certain relevant documents and information.

Thereafter, SARS requested a detailed list of documents and information from the taxpayer in terms of section 46 of the Tax Administration Act, but the taxpayer had not co-operated fully with the requests made over several years.

SARS considered the taxpayer to have behaved in a grossly negligent or reckless manner, because of its failure to provide proper documentation in respect of the management fees and its disregard of the requirements for claiming donations. The taxpayer was also considered a 'repeat case' because of its engagements on previous audits.

The taxpayer contended, in regard to the only two invoices provided to SARS, that the globular amounts reflected in the two 'management fees' invoices were sufficient information for SARS in order to prove the expenditure and the details pertained to AA and BB.

SARS, in response, contended that such invoices between related parties were insufficient as details were needed to prove that the work was done, containing the identification of the vehicles involved and when the work on those vehicles was performed.

Moreover, an acceptance by the taxpayer that the consideration for the services rendered by AA and BB could be used to reduce their loan accounts, did not entail an acceptance that the work had actually been done, as claimed.

SARS contended that Ms E was the controlling mind of all three entities, and must have realised that the initial indication to SARS was that the three parties were not

connected parties. Only after the Letter of Audit Findings had been sent by SARS and notwithstanding a demand for specific expenses to be provided, were the two invoices produced.

SARS submitted that the understatement penalty took into account that management fees of R16 million were claimed by the taxpayer without supporting documentation and the accounting records demonstrated a complete departure from the normal and reasonable standards. Moreover, the submission of claims of this nature without supporting documents was grossly negligent.

Judge Lopez held the following:

(i) That, with regard to the deduction of 'management fees', the onus was on the taxpayer to prove that an expense deducted was one which was actually incurred, and the evidence presented in that regard fell to be evaluated, and included the history of the negotiations between the taxpayer and SARS.

(ii) That the two invoices produced by the taxpayer in support of its claim for deduction of the management fees failed to provide the necessary proof of the alleged expenses incurred. In particular, an exact description of the 'management fees' was never given by the taxpayer and if services were rendered to the taxpayer, the details should have been included of claims for parts and details as to when repairs were done but this was never provided.

(iii) That Ms E was not a helpful witness with regard to establishing the true state of affairs at the taxpayer, and in explaining what was really done with all the money representing the items claimed as deductions.

(iv) That it would be fair to point out that Ms E emphasized that she was constantly engaged in ensuring that the building operations were being carried out smoothly, and the accounts were left to others. But that excuse can only be justifiable for short periods of time. Eventually every person who is the controlling mind of a large entity will want to know what the accounting records are demonstrating and in the court's view it would have been reckless for her not to have done so.

(iv) That when difficult questions were posed to Ms E about the representation of expenses to SARS, she would deflect the blame: stating that she could not recall the facts; or by saying that she did not know; or 'I see that' or 'if you say so'. She admitted having signed the annual financial statements of the taxpayer.

(v) That Ms E had no explanation for why there were no records of small payments for parts and she could not explain where the globular amounts claimed had come from. She conceded that the globular figures had not been paid to AA.

(vi) That the evidence of Ms E was also led in an unhelpful manner and her continued resort to blaming others for not replying to queries timeously, or at all, indicated that she either had no knowledge of the preparation of the accounting systems for which she was responsible, or simply did not care whether they were properly kept or not.

(vii) That, with regard to the section 89quat interest that was payable by the taxpayer, Ms E conceded that no grounds had been advanced by the taxpayer that the underpayment of the 2014 taxes had been beyond its control.

(ix) That, with regard to the understatement penalty, Ms E could easily have been assessed as falling into the 'intentional tax evasion' category. Her conduct in the matter of the charitable donations and the club, and the 'management fees' seemed to be arguably designed to evade the taxes payable. Her evidence in regard to the charitable donations was vague, argumentative, and her continued denials were simply not believable. Moreover, no detailed grounds of objection had been advanced to SARS with regard to the understatement penalty.

(x) That as far as the question of costs was concerned, the court was satisfied that it was unreasonable of the taxpayer to have persisted in this appeal, which, with regard to the first three of the four issues raised, had no prospects of success and this was more particularly so given the evidence of Ms E as to her method of running the company, her statement that

money was spent as they wished, and her apparent lack of interest in engaging with SARS personnel in order to ascertain the true financial position.

Appeal dismissed and the taxpayer to pay the costs of the application.

SARS' 2014 tax assessment confirmed.

11.5. Mobile Telephone Networks (Pty) Ltd v C:SARS (85 SATC 235)

Mobile Telephone Networks (Pty) Ltd (MTN) provided a range of services to customers and, as part of its offering, it sold what it referred to as 'pre-paid multi-purpose vouchers' (the pre-paid vouchers). Historically, the sale of the pre-paid vouchers was dealt with by MTN as falling under section 10(19) of the Value-Added Tax Act.

MTN, on 15 November 2017, sought a private binding ruling from SARS under section 41B of the VAT Act, to the effect that the sale of the pre-paid vouchers could thenceforth be dealt with as falling under section 10(18) of the VAT Act.

SARS on 4 April 2019, after an extensive exchange of correspondence, issued a private binding ruling to the effect that section 10(19), and not section 10(18), of the VAT Act applied.

MTN, aggrieved by the ruling, approached the Gauteng Division of the High Court, Pretoria (see 83 SATC 270) for an order declaring, inter alia, that the supply by MTN of pre-paid tokens or vouchers for a consideration denominated in Rand, entitling the holder to receive available services and products on the MTN mobile network, as selected by the holder, to the extent of the monetary value stated on or attributed to the tokens or vouchers (multi-purpose vouchers), constituted a supply as envisaged in section 10(18) of the VAT Act.

The High Court (per Hughes J) entertained the application for declaratory relief but dismissed the application with costs and it was against that order that MTN now appeals to the Supreme Court of Appeal, with the leave of the court.

Section 10(18) of the VAT Act in essence attracted VAT at the time the voucher is used by the customer to obtain goods or services rather than on its initial sale to the customer, i.e. at the time the voucher is supplied. In the latter instance, VAT is levied on the sale of a voucher but no further VAT is levied when the voucher is 'surrendered.'

MTN submitted that two types of vouchers supplied by it fell under the different sections concerned. The first type specified the goods which could be obtained by using the voucher. An example given was a data voucher. What was purchased was the right to use the volume of data purchased and could not be used to access anything else and this type of voucher fell under section 10(19). The second type were the pre-paid vouchers which had a rand value and could be used to access a wide range of services offered by MTN and these were not limited to specific services such as data and were 'typically referred to as 'airtime' vouchers' and these, it contended, fell under section 10(18) of the VAT Act.

In essence the appeal related to two main issues:

- The first was whether seeking a declaratory order was appropriate in the circumstances.
- The second was whether, if so, the ruling of SARS was incorrect.

SARS submitted that the procedure utilised by MTN was impermissible. One of the bases for that contention was that there were no provisions in the TA Act in terms of which to object to such a ruling, which had not yet taken effect.

SARS drew attention to the special machinery created by the Tax Administration Act for such disputes between SARS and taxpayers.

MTN submitted that its application was not one which, in effect, objected to the ruling but was a legitimate approach to the High Court for a declaration of rights.

SARS conceded that declaratory relief was competent in tax matters, but it contended that the ambit for the grant of declaratory relief in such matters was narrow and it submitted that the present matter did not meet the required criteria.

Judge Gorven held the following:

(i) That the appeal had to turn on whether MTN had made out a case for the High Court to entertain its application for declaratory relief.

(ii) That it was correct that courts have jurisdiction to grant a declaration of rights in tax matters as was done in C:SARS v Langholm Farms (Pty) Ltd 82 SATC 135 and Metcash Trading Ltd v C:SARS and Another 63 SATC 13 also made this clear. <u>However, the cases reviewed showed that proceedings for declaratory relief in tax matters were to be entertained only in limited circumstances</u>. All of them dealt with applications where there were <u>clear and uncontested facts</u>. That was the bare minimum requirement for a court to entertain declaratory relief. Even where that was the case, there were circumstances where a court will nevertheless decline to exercise its discretion to grant a declaratory order.

(iii) That, in other words, there were considerations other than the question concerning clear and uncontested facts which weighed with courts. A primary concern was the opening of the floodgates for applications to court where certainty is sought from the court prior to applying a new strategy.

(iv) That in the present matter, the first question was whether there was a clear, uncontested, sufficient, set of facts. The distinction between section 10(18) and section 10(19) of the VAT Act was clear. The latter applied where the goods or services to which the holder of the voucher was entitled were specified on the voucher or, where not specified, where usage or arrangement entitled the holder to such specified goods or services. On the other hand, section 10(18) applied where there was no specification of goods or services, either by indication on the voucher, or by usage or arrangement. The factual enquiry was whether the pre-paid vouchers fell into one category or the other. Without that enquiry rendering a clear answer, the grant of declaratory relief would not be warranted.

(v) That SARS had submitted that the factual position was far from clear and it said that MTN had dealt with the application largely in the abstract. It had not put up sufficient or clear facts to allow the court to finally determine the entitlement of MTN to apply section 10(18) rather than section 10(19) of the VAT Act. In the result SARS submitted that, on the facts presented, it was not clear what 'airtime' actually connoted and therefore the matter did not fall within the narrow purview of when a declaratory order would be entertained in tax matters.

(vi) That considerable difficulty had been experienced during argument in obtaining clarity on the nature of airtime as used by MTN and how the pre-paid vouchers functioned in practice. This also applies to the question of whether the services offered were specified by usage or arrangement. It seemed to the court that, at best, the factual position as to both of these aspects was distinctly opaque.

(vii) That this was not a matter where there is a set of clear, sufficient, uncontested facts. The present matter therefore differed markedly from those mentioned in the judgment where our courts have entertained applications for declaratory orders in tax matters.

(viii) That, in that regard, the High Court erred when it held that 'no…further facts or information would alter SARS's legal view' and that 'the applicant's declaratory application is properly before this court.'

(ix) That, in any event, even if the facts were clear and uncontested, it is doubtful whether this matter warranted the exercise of the discretion of the High Court to entertain the grant of declaratory relief. It was a classic case of MTN wishing to obtain clarity from the High Court on whether it could depart from its prior practice of treating the pre-paid vouchers as falling under section 10(19) and apply a new approach of treating them as falling under section 10(18).

(x) That it seemed to the court that the nature of the dispute lent itself more properly to resolution by use of the special machinery of the Tax Administration Act set up for that purpose and to hold otherwise might well result in a deluge of similar applications.

(xi) That for these reasons the court considered that the application for declaratory relief was not appropriate in this matter. That being the case, the second issue in the appeal as to whether the ruling was correct or not need not, indeed cannot, be decided. This all meant that, although the High Court incorrectly entertained declaratory relief, it was correct in dismissing the application.

Appeal dismissed with costs, use of two counsel was warranted.

11.6. ITC 1963 (85 SATC 246)

The taxpayer at all material times hereto conducted the business of property investment, property management and leased property for the purpose of earning rental income and property management income.

The taxpayer, during the 2016 year of assessment, had entered into loan agreements with two financial entities in terms of which it borrowed funds for the purposes of facilitating property development and investment, and in this regard it had contended that it incurred finance charges, consisting of raising fees, the debt origination fees, as well as the structuring fees for the 2016 tax period and were referred to as 'upfront fees' in the judgment.

The taxpayer, pursuant to the above, borrowed the funds in question in order to fund certain professional costs and expenses, plus interest thereon all associated with its Mall Redevelopment, which was a property redevelopment project undertaken with a view to earning rental income.

The taxpayer, in its income tax return for the 2016 year of assessment, claimed a deduction of the aforementioned finance charges in terms of section 24J of the Income Tax Act.

The taxpayer contended that the loan amounts together with the finance charges constituted the same total lending package and that the finance charges were directly connected to the loans and thus formed part and parcel of the total cost of borrowing and accordingly were 'related finance charges' as specified in section

24J which then defined 'interest' as including 'the gross amount of any interest or related finance charges, discount or premium payable or receivable in terms of or in respect of a financial arrangement.'

The taxpayer contended further that the finance charges were 'no more than part of the cost to the taxpayer of obtaining capital for use by it.' According to the taxpayer the finance charges were directly associated with the finance obtained.

SARS disallowed the deduction on the basis that the taxpayer had provided 'no or insufficient or relevant material' to support the deduction claimed for the finance charges in issue.

SARS contended that the parties to the agreements appreciated the difference between the finance charges which were payable upfront once the loans were advanced and the interest payable and the fact that interest and fees were dealt with separately in the agreements fortified the notion that 'interest' and 'fees' were separate and could not be seen and taken as one and the same thing as contended for by the taxpayer.

SARS had further imposed an understatement penalty of 50% attributed to what it had called an incorrect statement in a return and failure to take reasonable care in completing the return.

The taxpayer thereafter unsuccessfully objected to the assessment and, aggrieved by the decision of SARS, filed a notice of appeal to the Tax Court.

The issues for determination in this appeal were as follows:

- whether the taxpayer should be allowed deductions for finance charges as contemplated in section 24J of the Income Tax Act 58 of 1962 and, if so,
- whether the understatement penalty was correctly levied in terms of sections 222 and 223 of the Tax Administration Act.

Judge Molitsoane held the following:

<u>As to the applicable provisions of the law</u>

(i) That section 11(a) read with section 23(g) of the Income Tax Act provided for a general deduction formula and served as a guide to taxpayers to claim

deductions. On the other hand, section 24J of the Act provided a specific deduction provision for interest expenditure incurred notwithstanding that the interest would, inter alia, ordinarily not be deductible under the general formula already referred to.

(ii) That the taxpayer had a contractual obligation to pay interest on the loans from the two financial institutions concerned and there could be no dispute that the taxpayer as the borrower in the loan agreements was the issuer as defined in section 24J(1) of the Act. What this court was thus called upon to answer was whether the finance charges levied in respect of the loans from the two financial institutions constituted interest for the purposes of section 24J of the Act.

(iii) That, as a starting point, it had to be borne in mind that the Taxation Laws Amendment Act 15 of 2016, which came into operation on 19 January 2017 brought an amendment to the definition of 'interest' in section 24J(1) to allow for a deduction of 'similar finance charges' whereas prior to the said amendment section 24J(1) defined 'interest' as including 'related finance charges.' The period of assessment in this case was the year 2016. This was the period prior to the amendment and in this case this court was not concerned with the allowance of a deduction of 'similar finance charges' as set out in section 24J after the said amendment.

(iv) That the fact that the taxpayer had filed its 2016 income tax return after the commencement of Act 15 of 2016 had no bearing on the assessment in issue as the applicable period of assessment was prior to the commencement of Act 15 of 2016.

(v) That it was thus clear that the definition of 'interest' in section 24J of the Act during the period of the taxpayer's 2016 assessment remained in force until the commencement of Act 15 of 2016. SARS had relied, inter alia, heavily on the Explanatory Memorandum to Act 15 of 2016 to assert that the upfront fees did not constitute 'related finance charges' but this reliance was, in the court's view, misplaced for the reasons given in the judgment.

(vi) That in the court's view the Taxation Laws Amendment Act 15 of 2016 was not applicable to the taxpayer's 2016 assessment and by interpreting

'related finance charges' in the same way as 'similar finance charges' would offend the presumption against retrospectivity. There was nothing in that Act which came close to requiring that the said statute be applied retrospectively. The Explanatory Memorandum did not assist SARS and it therefore stood to reason that the 2017 amendment to section 24J in respect of the definition of 'interest' was irrelevant for the purposes of this appeal.

(vii) That it was disingenuous of SARS to contend that the Explanatory Memorandum sought to confirm 'what has always been the law'. In the court's view the Memorandum sought to explain the law post the amendment. Although we were not dealing with the concept of 'similar finance charges' it did appear that the amendment may be geared towards narrowing the interpretation of this concept. However, this Explanatory Memorandum did not assist SARS with reference to the 2016 assessment.

As to whether the upfront fees constituted 'related finance charges'

(viii) That in CIR v Genn & Co (Pty) Ltd 20 SATC 113 the court observed that it was 'not possible in the present case to justify a difference in treatment between the interest on the loans and the commissions; the circumstances show that in each case the commission together with the interest formed in effect one consideration which the company had to pay for use of the money for the period of the loan.' The court in that case went on further to say 'in deciding how the expenditure should properly be regarded the court clearly has to assess the closeness of the connection between the expenditure and the income-earning operations, having regard both to the purpose of the expenditure and to what it actually effects.'

(ix) That in the case before the court, the evidence in the court's view established that the upfront fees together with interest made up the cost of borrowing. The uncontested evidence was that should the upfront fees not have been paid, there could be no talk of any loan. It was for this reason that Mr Z [the taxpayer's witness] contended that the upfront fees were inextricably linked with interest. Like in the case of Genn, there could be no

reason to justify a difference in treatment between the interest on the loans and the upfront fees.

(x) That in C:SARS v South African Custodial Services (Pty) Ltd 74 SATC 61 the court found that the taxpayer could validly deduct all the fees on the basis that they were 'related finance charges' and were closely connected to the obtaining of the loan. The court in that case stated that it was of the view that the various fees were deductible in terms of section 11(bA) of the Act [as it then was] because of their closeness to the obtaining of the loans and the furtherance of [the taxpayer's] project; they qualified as related finance charges for purposes of the section. The various fees were also deductible because of their close connection to the obtaining of the loans and the furtherance of the [the taxpayer's] project.'

(xi) That the contention by SARS that upfront fees were not linked to the duration of the loans and the taxpayer was not liable to pay VAT on interest cannot be the basis to hold that the upfront fees were not related to finance charges. In any case interest is exempt in terms of the Value-Added Tax Act. The fact that they were dealt with separately from interest in the loan agreements cannot on that basis alone be a reason to treat them differently. The issue was whether they were, as finance charges, related to interest, which the court found they were.

(xii) That SARS further contended that the fees were not deductible because they were of a capital nature. The deduction in this case was sought under section 24J and not section 11(a) of the Act. Section 24J permitted a taxpayer to make a deduction of the interest incurred from carrying on any trade, if that amount was incurred in the production of income.

(xiii) That the taxpayer bore the onus to prove that the amount sought to be deducted was incurred in the production of income. The expenditure is regarded as being incurred in the production of income if same was closely related to the act which produced the said income.

(xiv) That the upfront fees used to finance the Mall Redevelopment project were incurred with the specific intent of earning rental from the additional retail space and this was, in the court's view, common cause.

(xv) That the expenditure incurred which was the subject of this dispute was directly related to the development project as a means of earning income and the finance charges were closely connected to the taxpayer's income earning structure.

(xvi) That, accordingly, the expenditure was incurred in the production of income and this brings to an end any notion that the upfront fees in issue were not incurred in the production of income.

(xvii) That SARS' belated argument that the related finance charges were not incurred for the purposes of the trade of the taxpayer could not be introduced as a new ground of assessment as it was raised four years after the assessment in question and this new ground flew in the face of Rule 31(3) which provided that 'SARS may not include in the statement a ground that constitutes a novation of the whole of the factual or legal basis of the disputed assessment, or which requires the issue of a revised assessment.'

(xviii) That raising this new additional ground in the Rule 31 statement amounted to a novation and could not be allowed hence the refusal to allow the amendment.

(xix) That, accordingly, the taxpayer was entitled to a deduction in terms of section 24J of the Income Tax Act 58 of 1962 and in view of this finding the adjudication of the issue of the understatement penalty fell away.

11.7. ITC 1964 (85 SATC 259)

The taxpayer had applied for default judgment in the Tax Court in terms of Tax Court Rule 56(1) read with section 129(2)(b) of the Tax Administration Act, after SARS, had failed to timeously deliver its statement of grounds of assessment and opposing the appeal in terms of Tax Court Rule 31 ('the Rule 31 statement').

The taxpayer had prayed for a final order, namely, that SARS' understatement penalty assessments, totaling some R175 million, be set aside.

SARS opposed the application for default judgment and brought a counter-application for condonation for the failure to file its Rule 31 statement timeously and the taxpayer, in turn, opposed SARS' application for condonation.

The main issues for determination by the court were:

- Whether SARS had shown good cause for its default to timeously file the Rule 31 statement and whether the court should condone the late filing of SARS' statement in terms of Tax Court Rule 31 and direct that the appeal against the imposition of understatement penalties should proceed on the merits;
- If the failure was not condoned, whether default judgment in terms of Rule 56(1)(a) read with section 129 of the Tax Administration Act should be granted in favour of the taxpayer.
- Ancillary to the main issues, the court was also requested to consider whether the taxpayer's two applications to strike out in terms of Tax Court Rule 42 read with Uniform Rules 6(15) and 23(2) should succeed.

SARS had issued VAT assessments in respect of the taxpayer's November 2013 and July 2014 tax periods resulting in understatement penalties totaling some R175 million being imposed by SARS.

The taxpayer had objected to the assessments, but SARS had disallowed the objection which resulted in the taxpayer's notice of appeal against SARS' disallowance of objection letter.

Tax Court Rule 31(1)(d) granted SARS 45 business days to deliver its Rule 31 statement, calculated from the date on which the taxpayer had filed its notice of appeal.

Shortly before the expiry of the 45-day period on 1 August 2019 the parties agreed to pend litigation until further notice.

After the agreement was reached to suspend litigation, the parties attempted to settle the disputes in respect of the various tax issues.

SARS, almost two years later, on 12 April 2021 rejected the taxpayer's settlement proposal and on 15 April 2021 the taxpayer sent SARS a notice of default, purportedly in terms of Rule 56(1) in terms of which SARS was notified to file its Rule 31 statement within 45 days.

The taxpayer contended that SARS had failed to deliver its Rule 31 statement for a period of almost two years and that it had failed to give a full account of the reasons for the default.

The taxpayer contended that the requirements of Rule 56 had been met and requested the court to grant an order precluding SARS from raising the understatement penalties.

SARS disputed that it had been in default for two years and contended that there had been an agreement between the parties to suspend litigation, which only lapsed in April 2021.

SARS further submitted that the Rule 56 notice issued by the taxpayer was premature and defective and that the delay in filing the Rule 31 statement was slight and should be condoned.

Judge Windell held the following:

As to the agreement to suspend litigation

(i) That the court was satisfied that the agreement to pend litigation until further notice was already reached on 1 August 2019. Therefore, the objective facts clearly demonstrate that SARS was not, as alleged by the taxpayer, in default in filing its Rule 31 statement at the time the agreement was reached, and most definitely not for a period of almost two years.

(ii) That the court found that there was no default on the part of SARS prior to 21 June 2021 as there was an agreement in place that all litigation was pended, including the exchange of pleadings and this agreement was only terminated, at best for the taxpayer, on 15 April 2021, when the default notice was served.

<u>As to the validity of the Rule 56 notice</u>

(iii) That the court dealt firstly with the overlapping issue which was whether the default notice that was sent to SARS was in fact a notice as was envisaged in Rule 56.

(iv) That before an application for default judgment could be launched, the taxpayer had to meet the following jurisdictional requirements:

  (a) Prior to the delivery of the notice in terms of Rule 56(1)(a), SARS must have been in default with an obligation or failed to comply with a period prescribed under the Tax Court Rules;

  (b) The taxpayer has delivered a notice in terms of Rule 56(1)(a) of the Tax Court Rules; and

  (c) SARS has failed to remedy the default complained about in the Rule 56 notice.

(v) That it was clear that there must be a default prior to the delivery of a Rule 56 notice. If the taxpayer had wanted to rely on SARS' alleged failure to file a Rule 31 statement, it should have, after the expiry of the 45-day period, served a formal Rule 56(1) notice, in which it ought to have given SARS 15 days in which to file its Rule 31 statement. The 15-day period is the period afforded to a litigant in which to remedy its default as identified in the Rule 56(1) notice. Should the litigant being notified of its default, fail to remedy the default in the 15 days, the party serving the notice would have the necessary locus standi to launch an application as envisaged in Rule 56(1)(b).

(vi) That the taxpayer had failed to give SARS the further 15-day period as prescribed in Rule 56(1) and had instead elected to launch this default application. Therefore, the taxpayer's application for default judgment was premature and fatally defective.

(vii) That there was another reason why the default notice was not valid. The default relied on by the taxpayer in the notice, was the failure to advise whether alternative dispute resolution (ADR) proceedings would be appropriate and not SARS' failure to file a Rule 31 statement. The court

agreed with SARS that the case that the taxpayer was attempting to advance in the default application, was in fact in conflict with its 'Rule 56 notice.' The capital assessments were already subject to a tax appeal and the pleadings therein were closed. It was therefore evident that the dispute concerning the understatement penalties could never qualify for the ADR process. As a result, the default notice did not constitute a valid notice, nor was SARS placed in default thereby.

As to the condonation application: explanation for the default

(viii) That Rule 52(6) of the Tax Court Rules provided that a party who failed to deliver a statement as and when required under Rule 31, 32 or 33, may apply to the Tax Court for an order condoning the failure to deliver the statement and the determination of a further period within which the statement may be delivered.

(ix) That, having regard to the timeline, SARS was only in default for filing its Rule 31 statement for a short period of time. The delay was not as a result of any non-compliance on the part of SARS, but as a result of the conduct of SARS' attorney and counsel.

(x) That although a litigant cannot always escape the consequences of any default that arose out of the conduct of its legal representatives, there are certain instances where the non-compliance on the legal representative's part is not severe and not attributable to any fault of the litigant. In those circumstances, a court will be loath to close the doors of the court to such litigant. Specifically, where the blame on the part of the legal representative is slight and the prejudice to the litigant would be severe.

As to the prospects of success in the tax appeal

(xi) That on the question as to whether condonation should be granted, the factors relevant to a condonation enquiry included, were not limited to, the extent and the cause of delay, the prejudice to other litigants, the reasonableness of the explanation for the delay, the importance of the issues to be decided in the intended appeal, and the prospects of success.

None of these factors was however decisive; the enquiry was one of weighing each against the others and determining what the interests of justice dictated.

(xii) That the standard for considering an application for condonation is the interests of justice and whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case.

(xiii) That the interest of justice required that this dispute be adjudicated by an impartial forum, in accordance with the Tax Court Rules and the provisions of the Tax Administration Act. SARS' potential prejudice, should this court not grant condonation for the late filing of the Rule 31 statement, was manifest. SARS will be precluded from defending the imposition of the understatement penalties based on the understatements identified in the capital assessments in a Tax Appeal.

(xiv) That the opposition to the condonation application was unreasonable. The period for which condonation was sought was slight and the default was explained satisfactorily and there would be no significant prejudice to the taxpayer. Exercising the court's discretion, it found in favour of SARS and the application for condonation was granted with costs.

<u>As to the striking out application</u>

(xv) That the taxpayer had applied to strike out certain portions of SARS' answering affidavit in respect of the default application and SARS' entire replying affidavit in his condonation application. The applications were brought on the basis that the allegations therein constituted new matters, and/or were scandalous, and/or vexatious, and/or irrelevant. In addition, these allegations were argumentative.

(xvi) That none of the allegations sought to be struck out constituted vexatious, scandalous or irrelevant matter, as envisaged in Rule 6(15) of the Uniform Rules of Court. Furthermore, the taxpayer had failed to advance any basis on which it could be alleged to be prejudiced by any of the allegations detailed in SARS' replying affidavit.

Application for default judgment was dismissed with costs.

Application for condonation was granted with costs.

Application to strike out was dismissed. No order as to costs.

12. INTERPRETATION NOTES

12.1. Definition of 'Associated Enterprise' – No. 128

This Note provides guidance on the interpretation of the definition of 'associated enterprise' in section 31(1) of the Income Tax Act.

Section 66(1) of the Taxation Laws Amendment Act 20 of 2021 amended the effective date such that the inclusion of an 'associated enterprise' in section 31 comes into operation on 1 January 2023 and applies in respect of years of assessment commencing on or after that date.

The Act contains rules in section 31 which are aimed at preventing a reduction in the South African tax base as a result of the mispricing or incorrect characterisation of specified transactions, operations, schemes, agreements or understandings. Broadly, this is achieved by applying the arm's length principle to affected transactions, as defined in section 31(1), and requiring the persons specified in section 31(2) to calculate their taxable income or tax payable as if transactions, operations, schemes, agreements or understandings had been entered into on terms and conditions that would have existed had the persons been independent persons dealing at arm's length. In summary, affected transactions are transactions, operations, schemes, agreements or understandings directly or indirectly entered into or effected between or for the benefit of specified parties that are connected persons, 2 or, for years of assessment commencing on or after 1 January 2023, associated enterprises, in relation to one another and that contain any terms or conditions that differ from those that would have existed had the parties been independent persons dealing at arm's length.

Previously the definition of 'affected transaction' only included transactions, operations, schemes, agreements or understandings directly or indirectly entered between the specified parties that were connected persons in relation to one another. As such, the application of the transfer pricing rules contained in section 31 had the unintended consequence of not always capturing transactions between 'associated enterprises' which may not have fallen within the 'connected persons' definition. To correct this unintended consequence and to bring the legislation in line with international standards, the term 'associated enterprise' as contemplated in Article 9(1) has been inserted into section 31(1) and into the definition of an affected transaction with effect from years of assessment commencing on or after 1 January 2023. This will result in 'affected transactions' applying to both associated enterprises and connected persons in respect of years of assessment commencing on or after this date.

Broadly, section 31 deals with the tax payable by persons in respect of international transactions, operations, schemes, agreements or understandings and requires such transactions, operation, scheme, agreement or understanding to be based on the arm's length principle. Prior to the amendment of this section which included a definition of 'associated enterprise' and included that term in the definition of 'affected transaction', section 31 and the definition of 'affected transaction' only covered connected persons.

The exclusion of associated enterprises from section 31 effectively created a potential anomaly and unfair reduction in the tax base. As such, the 'associated enterprise' definition was inserted in section 31 in order to correct this potential irregularity.

12.2. Deduction and recoupment of expenditure incurred on repairs – No. 74 (Issue 3)

This Note provides guidance on the interpretation and application of section 11(d), which allows a deduction for expenditure incurred on repairs for the purposes of trade.

Expenditure on repairs to an asset not comprising trading stock is likely to be of a capital nature, particularly when it is not incurred at regular intervals. This is because the expenditure relates to the protection of a capital asset.

Expenditure of a capital nature does not qualify as a general deduction under section 11(a). Nevertheless, section 11(d) makes provision for the deduction of expenditure incurred on repairs for the purposes of trade provided the requirements are met.

For purposes of section 11(d) it is important to distinguish between a 'repair' and an 'improvement' since only expenditure incurred on repairs is deductible under section 11(d). No hard and fast rules can be provided for this distinction. Each case must be decided on its own facts.

In order for an asset to be repaired, there must be damage or deterioration to a part of the original asset or structure and the intention of the taxpayer must be to restore the asset or structure to its original condition. Because there are no set criteria as to what constitutes a repair and only principles derived from case law, each case will have to be determined on its merits.

The cost of repairs may be recovered or recouped under section 8(4)(a) provided that there is a causal link between the cost of the repairs and the amount received or accrued.

12.3. Understatement Penalty: Meaning of 'maximum tax rate applicable to the taxpayer' – No. 129

This Note provides clarity on the interpretation and application of the phrase 'maximum tax rate applicable to the taxpayer' used in section 222(5) when the tax rate applicable to the shortfall determined under subsections (3) and (4) is applied.

The TA Act provides for an understatement penalty to be imposed where a taxpayer has made an understatement. The main purpose of the understatement penalty regime is to deter behaviours that result in non-compliant reporting, and the

understatement penalty framework aims at ensuring consistent and equal treatment of taxpayers in comparable circumstances.

Section 222(2) stipulates that the highest understatement penalty percentage must be applied to each shortfall determined under subsections (3) and (4). Section 222(5) provides that the tax rate applicable to the shortfall determined under these subsections is the 'maximum tax rate applicable to the taxpayer, ignoring an assessed loss or any other benefit brought forward from a preceding tax period to the tax period'.

There is uncertainty as to how the 'maximum tax rate applicable to the taxpayer' may be applied to a taxpayer that has made an understatement and is in an assessed loss position. This Note provides clarity on the rate to be applied in circumstances where the taxpayer is in an assessed loss position after the understatement is corrected.

Section 222 imposes an understatement penalty in the event of an understatement by a taxpayer, except if the understatement is as a result of a bona fide inadvertent error.

The understatement penalty is determined by applying the highest applicable understatement penalty percentage in accordance with the table in section 223 to each shortfall. Each 'shortfall' is determined under section 222(3) as the sum of paragraph (a), (b) and (c) depending on the specific facts of the taxpayer for the respective tax period to determine the shortfall in tax.

Section 222(3)(c) provides for the determination of the portion of the shortfall in tax where a taxpayer is in an assessed loss position after the understatement is corrected. Since an assessed loss is not a tax liability section 222(5) provides that under these instances, the 'maximum tax rate applicable to the taxpayer', determined by ignoring an assessed loss or any other benefit brought forward from a preceding tax period to the tax period in which the understatement occurred, must be applied to determine the shortfall in tax.

Certain taxpayers are taxed either at a flat rate or a progressive rate of tax. The tax rate applicable to taxpayers subject to a flat rate of tax represents the 'maximum rate applicable to that taxpayer' for purposes of section 222(5).

For taxpayers that are taxed at a progressive rate of tax, the maximum tax rate applicable to the shortfall envisaged under section 222(3)(c) is the marginal tax rate applicable to the taxable income or taxable turnover that is established by, ignoring the assessed losses or any other benefit brought forward from a preceding tax period to the tax period in question.

The facts and circumstances of each taxpayer must be considered to determine what tax rate will apply when determining the 'maximum tax rate' for purposes of determining the shortfall in tax under section 222(3)(c).

12.4. Exemption for international aid received or accrued under an official development assistance agreement – No. 130

This Note provides guidance on the application of section 10(1)(yA) and the requirements that have to be met before an exemption can apply.

South Africa has for many years been receiving aid from developed countries usually in the form of ODA grants, discounted loans or discounted technical services. As a precondition to providing the aid under an ODA agreement, foreign donors often seek to have the ODA grants remain free from all taxes and duties in the recipient country to ensure that the full amount of the grant be spent as intended.

An ODA agreement is entered into between a foreign government and the government of South Africa. It therefore bears the stamp of the executive authority by virtue of section 231(3) of the Constitution.

This section reads as follows: 'An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces,

but must be tabled in the Assembly and the Council within a reasonable time.'

These agreements, however, do not override Parliamentary enacted legislation since only an act of Parliament can alter another act of Parliament. SARS can therefore not give effect to any exemption contained in an ODA agreement that is inconsistent with domestic tax law.

Before section 10(1)(yA) was introduced, the tax relief provisions within ODA agreements and their relationship to domestic tax law were not dealt with under a specific provision of general application and was considered on an ad hoc basis. In an attempt to provide certainty and clarity, section 10(1)(yA) was introduced. This section allows for a general exemption to be claimed on amounts received by or accrued to a person in consequence of an ODA agreement, provided that all the requirements of the section are satisfied. A taxpayer does not have to apply to SARS for the exemption. The exemption is automatic if all the requirements are met.

Since the terms of each ODA agreement are different and there is no uniform proforma agreement, this Note will not consider the ODA process and agreements in detail, but will highlight some general principles. The effects of a tax treaty, issues relating to value-added tax and the exemption of payroll taxes are also beyond the scope of this Note and will also not be considered.

When claiming an exemption under section 10(1)(yA), the following conditions must be satisfied:

- The agreement must be an ODA agreement that is binding under section 231(3) of the Constitution.
- The ODA project must be approved by the Minister.
- The ODA agreement must stipulate that the agency designated by the donor is exempt from normal tax in South Africa.

An exemption will be allowed only if all of the above requirements are met.

13. DRAFT INTERPRETATION NOTES

13.1. Meaning of 'employee' for purposes of the Employment Tax Incentive Act

This Note provides clarity on the interpretation and application of the definition of 'employee' read together with the proviso to section 6. The scope of this Note is restricted to arrangements entered into by parties, typically as part of a composite arrangement, in an attempt to claim the ETI for persons not meeting the definition of 'employee', specifically arrangements involving learning institutions. The Note therefore does not consider other scenarios in which the definition of 'employee' is critical for purposes of claiming the ETI.

No income tax or employees' tax implications such as fringe benefits are considered in this Note.

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

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

The aim of the incentive is to encourage employers to generate sustainable employment opportunities for young persons between the ages of 18 and 29, as well as for persons of any age in special economic zones, and in any industry identified by the Minister by notice in the Government Gazette. Government's aim is the generation of sustainable employment opportunities that enjoy protection under labour law legislation.

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

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

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

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

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

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

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

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

In the context of the ETI Act, a mere contractual relationship between two parties involving the payment of an amount by one party to the other is insufficient to meet the definition of 'employee' . The person must also work for the organisation that pays the remuneration for the work performed. The facts and circumstances of each case will be considered to determine whether the nature and extent of any work performed by the person is such that it does assist the organisation in carrying on and conducting its business and is an integral part of the organisation

14. BINDING PRIVATE RULINGS

14.1. BPR 389 – Bursaries awarded by a resident company

This ruling determines the income tax consequences resulting from bursaries awarded by a resident company in terms of two distinct bursary schemes to members of the general public and relatives of employees and former employees.

In this ruling references to sections are to sections of the Income Tax Act and references to paragraphs are to paragraphs of the Seventh Schedule to the Act applicable as at 31 January 2023. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the Act.

This is a ruling on the interpretation and application of:

- section 1(1) – paragraph (c) and (i) of the definition of 'gross income';
- section 1(1) – definition of 'relative';
- section 10(1)(q);
- paragraph 1 – definition of 'taxable benefit'; and
- paragraph 2 of the Seventh Schedule.

Parties to the proposed transaction

The Applicant: A resident company

Recipients: Individuals who are the recipients of bursaries awarded by the Applicant

Description of the proposed transaction

The Applicant carries on business in the manufacturing sector. Its operations are primarily located in a specific town in the Republic. The Applicant recognised the fact that there are children, in the community in which it operates, who are unable to pursue tertiary studies due to financial constraints.

The first bursary scheme

The Applicant established the first bursary scheme with the objective of

providing opportunities for tertiary studies in any field to candidates with sufficient merit. The first bursary scheme does not require Recipients to work for the Applicant for the period that the bursary is sponsored at a tertiary institution once their studies are completed. Members of the general public are eligible to apply for the bursary scheme, including relatives of employees and former employees but excluding employees of the Applicant.

As the bursary scheme has been operating for a long time there has never been any need to advertise this scheme. Potential applicants generally reside in the community in which the Applicant operates and have knowledge of the scheme by word of mouth. The dates for receiving applications for the bursary scheme are communicated to the employees and disseminated to the community. Applications are accepted, evaluated and awarded on a first come, first serve basis.

In the last three years of assessment on average 94% of bursaries awarded under this bursary scheme was awarded to relatives of persons who are employees of the Applicant while 4% of the bursaries was awarded to relatives of former employees.

The second bursary scheme

The Applicant established a second bursary scheme providing bursaries to qualifying students who have completed their first year of study in any field of engineering. The second bursary scheme requires bursary Recipients, at the discretion of the Applicant, to work for the Applicant for a period equal to the period for which the bursary was sponsored.

The Applicant advertises this bursary scheme by sending information regarding it to bursary offices of all universities across South Africa. During the last three years of assessment all the bursaries were awarded to applicants unrelated to employees and former employees of the Applicant.

Similar features of both the bursary schemes

The material characteristics of the abovementioned bursary schemes,

specifically the bursary allocation criteria, the application procedure, the conditions of the bursary, the financing thereof and the allocation committee that awards the bursaries, correspond in all respects.

- Both bursary schemes have, since their inception, been accessible to any member of the general public.
- Bursaries are allocated based on an academic and administrative testing scale. More specifically, bursaries granted in terms of the bursary scheme are allocated based on the balanced consideration of the following criteria:
  - academic performance;
  - financial need;
  - course requirements of the educational institution; and
  - a selection process based on assessments and interviews.
- A condition of both bursary schemes is that the bursary Recipient or their guardian will be obliged to reimburse the monies awarded in terms of the bursary if the Recipient fails to comply with the terms of the bursary agreement, including if the recipient's studies are discontinued for whatsoever reason.

Conditions and assumptions

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

Ruling

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

- Any bursary awarded by the Applicant under the first bursary scheme to a relative of an employee of the Applicant will constitute a taxable benefit in the hands of the employee for purposes of the Seventh Schedule to be included in paragraph (i) of the definition of 'gross income'. Paragraph (ii) of the proviso to section 10(1)(q) will apply in the determination of the taxable

benefit under paragraph 2 of the Seventh Schedule.

- Any bursary awarded under the second bursary scheme by the Applicant must be included in the gross income of the Recipient under paragraph (c) of the definition of 'gross income'. However, the amount to be included in gross income will be exempt under section 10(1)(q).

14.2. BPR 390 – Disposal in anticipation of liquidation

This ruling determines the tax consequences of a disposal, by a resident, of itsbusiness to its shareholder in anticipation of or in the course of liquidation of that company, as contemplated in section 47(1) of the Act.

In this ruling, references to sections and paragraphs are to sections of the relevant Acts and paragraphs of the Eighth Schedule to the Income Tax Act applicable as at 17 February 2023.

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

This is a ruling on the interpretation and application of:

- the Income Tax Act:
    - section 47; and
    - paragraph 12A(6)(e).
- the VAT Act:
    - section 8(25).
- the TD Act:
    - section 9(1)(l).

Parties to the proposed transaction

The Applicant: A listed resident company

The Co-Applicant: A resident company that is a wholly-owned subsidiary of the

Applicant

Description of the proposed transaction

The Co-Applicant, a wholly owned subsidiary of the Applicant, owns properties which it lets.

The Co-Applicant financed the purchase of the property by way of a secured mortgage loan, which the Applicant later repaid on behalf of the Co-Applicant, establishing an intercompany loan in favour of the Applicant.

The Co-Applicant will dispose of the aforementioned property and the associated commercial property business as a going concern to the Applicant in anticipation of the Co-Applicant's liquidation.

The proposed steps for implementing the proposed transaction are as follows:

- The consideration payable by the Applicant is to be set off against the balance of the outstanding intercompany loan.
- Within 36 months of the effective date of the disposal the Co-Applicant will take the steps contemplated in section 41(4) to liquidate, wind-up or deregister itself.
- The Co-Applicant will agree to deliver the business to the Applicant on the effective date, from when the ownership thereof shall pass to the Applicant, except for the property which will be transferred to the Applicant on the date of transfer.
- All the Co-Applicant's rights in terms of the lease agreements are also sold and made over to the Applicant. On the date of transfer the Co-Applicant will cede all its rights in terms of those lease agreements to the Applicant, and the Applicant, from date of transfer, will have all the rights and obligations as the landlord instead of the Co-Applicant in respect of the tenants.

Conditions and assumptions

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

assumptions:

- The Co-Applicant will take the steps contemplated in section 41(4) of the Act to wind-up, liquidate or deregister within 36 months of the liquidation distribution or within such further period as SARS may allow;
- The Co-Applicant will not at any stage withdraw or do anything to invalidate any step taken to liquidate, wind-up, deregister or finally terminate its existence; and
- The Applicant will make the required sworn statements or solemn affirmations that the acquisition of the immovable property complies with section 9(1)(l) of the TD Act.

Ruling

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

- The disposal of the immovable rental property by the Co-Applicant to the Applicant will constitute a 'liquidation distribution' in terms of paragraph (a) of that definition in section 47(1) of the Act.
- The Co-Applicant will be deemed to have disposed of the property at its base cost and no capital gains tax consequences will result from the transfer of the property for the Applicant and the Co-Applicant.
- The Applicant and the Co-Applicant will be treated as one and the same person for the purpose of determining the base cost, for the Applicant, in respect of the property.
- Section 47(5) of the Act will apply to the proposed transaction whereby the Applicant must disregard the disposal of its shares in the Co-Applicant on liquidation.
- The Applicant's assumption of the Co-Applicant's liability will not give rise to any capital gains, as contemplated in paragraph 12A(6)(e) of the Eighth Schedule to the Act.
- No transfer duty will be payable on the transfer of the property from the Co-

Applicant to the Applicant, as contemplated in section 9(1)(l)(iii) of the TD Act.

- The disposal of the property from the Co-Applicant to the Applicant is not subject to value-added tax as the Co-Applicant and the Applicant are deemed to be one and the same person in terms of section 8(25) of the VAT Act for the purposes of such sale.

14.3. BPR 391 – Tax consequences of the termination of an en commodandite partnership

This ruling determines the tax consequences for the partners in an en commandite partnership (the Partnership) following the termination of the Partnership and associated distribution of partnership assets in accordance with their interests in the Partnership.

In this ruling, references to paragraphs are to paragraphs of the Eighth Schedule to the Income Tax Act applicable as at 28 February 2023. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the Act.

This is a ruling on the interpretation and application of:

- paragraph 1 – definitions of 'asset', 'disposal' and 'value shifting arrangement'; and
- paragraph 11.

Parties to the proposed transaction

The Applicant: A resident private company that is the limited partner in the Partnership

GP: A resident private company that is the general partner in the Partnership

Investco: A resident private company

Description of the proposed transaction

The purpose of the Partnership is to acquire and hold shares (Investco Shares) in the share capital of Investco. The Investco Shares currently constitute 27.01% of the issued ordinary share capital of Investco. The Partnership is not permitted to make any other investments or engage, directly or indirectly, in any other business or undertaking of any nature whatsoever (unless otherwise agreed between the partners in writing).

The Applicant and GP hold the investment in the Investco Shares via the Partnership as capital assets.

The interests of the partners in the Partnership are as follows:

- GP holds a 15% interest in the Partnership, that is a 15% undivided share in the Investco Shares; and
- The Applicant holds an 85% interest in the Partnership, that is an 85% undivided share in the Investco Shares.

The partnership agreement provides that all amounts received by the Partnership from time to time net of expenses and provisions for anticipated expenses are apportioned among the partners in the above ratio.

The Partnership will continue for an indefinite period unless it is dissolved as a consequence of the occurrence of one of the events described in the partnership agreement. None of these events have occurred nor are any expected to occur.

The Applicant wishes to dissolve the Partnership in order that each partner can obtain a direct investment in Investco rather than holding its investment through the Partnership.

The Applicant will seek to dissolve the partnership agreement in one of the following ways:

- By mutual agreement with GP; or
- Failing such mutual agreement, either:
    - by notice to GP dissolving the Partnership; or

- by an order of the High Court of South Africa dissolving the Partnership.

There will not be any change to each partner's bundle of rights in the Investco Shares pre- and post-dissolution of the Partnership as a result of the termination of the Partnership.

After the dissolution of the Partnership and the division of the Investco Shares between the partners:

- The Applicant will hold 22.96% of Investco directly; and
- GP will hold 4.05% of Investco directly.

No payments will be made by the Applicant to GP nor will any payments be made by GP to the Applicant in connection with the dissolution of the Partnership or the division of the Investco Shares between the partners, other than professional or legal fees associated with the termination of the Partnership.

Conditions and assumptions

This binding private ruling is subject to the additional condition and assumption that in terminating the Partnership the Investco Shares are distributed to the partners strictly in accordance with their interests in the Partnership.

Ruling

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

- The dissolution of the Partnership pursuant to the termination of the partnership agreement, which will result in the Applicant taking ownership of 85% of the Investco Shares, will not be treated as a 'disposal' as defined in paragraph 1 of the Eighth Schedule.
- The proposed dissolution of the Partnership will not constitute a 'value shifting arrangement', as defined.

14.4. BPR 392 – Sale of shares in a controlled foreign company (CFC)

This ruling determines the tax consequences for a resident shareholder disposing of its shares in a CFC.

In this ruling, references to sections are to sections of the Income Tax Act applicable as at 1 March 2023. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the Act This is a ruling on the interpretation and application of:

- section 9D(2A); and
- section 9H(3)(b).

Parties to the proposed transaction

The Applicant: A resident company

Company B: A non-resident company, which is wholly owned by the Applicant

Description of the proposed transaction

The Applicant is the holding company for a group of companies and holds various subsidiaries and associates through various intermediary holding companies.

Company B is a CFC and holds the European group entities, which constitute various chains of CFCs.

The Applicant proposes to dispose of its interest in Company B (and thereby the underlying European entities therein), to a connected non-resident person in the group.

The result of the disposal will be that the European entities held by the Applicant will cease to be CFCs.

Conditions and assumptions

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

<u>Ruling</u>

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

- The deemed disposal as contemplated in section 9H(3)(b) must be considered when calculating the net income of the CFC for purposes of section 9D(2A).
- No regard must be had to the deemed disposal of assets as contemplated in section 9H(3)(b) for purposes of calculating the normal tax as contemplated in paragraph (i)(aa) of the second proviso to section 9D(2A).
- The net income calculated under the provisions of section 9D(2A) will be deemed to be nil, as contemplated in paragraph (i)(aa) of the second proviso to section 9D(2A), in the event that:
    - the CFC realised a taxable loss resulting in zero taxes on income payable by the CFC to all spheres of government of any country other than the Republic; and
    - zero normal tax would have been payable on taxable income of the CFC had the CFC been a resident for that foreign tax year.

14.5. BPR 393 – Income tax consequences resulting from consecutive asset-for-share transactions

This ruling determines the income tax consequences resulting from two consecutive asset-for-share transactions in terms of which two separate business operations of a resident company will be disposed of as part of a restructuring within a group of companies.

In this ruling references to sections and paragraphs are to sections of the Income Tax Act and paragraphs of the Eighth Schedule to the Act applicable as at 10 March 2023.

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

This is a ruling on the interpretation and application of:

- section 1(1) – definition of 'trading stock';
- section 41(1) – definition of 'capital asset';
- section 42(1) – paragraph (a) of the definition of 'asset-for-share transaction';
- section 42(2), (7) and (8); and
- paragraph 1 of the Eighth Schedule to the Act – definition of 'asset' and 'capital asset'.

Parties to the proposed transaction

The Applicant: A resident company

Company X: A resident company that is the holding company of the Applicant and the group of companies of which the Applicant forms part of

New Holdco: A newly-formed resident company that is wholly-owned by the Applicant

Subco A: A newly-formed resident company that is wholly-owned by New Holdco which will be carrying on the business of a financial services provider

Subco B: A newly-formed resident company that is wholly-owned by New Holdco which will be carrying on an insurance business

Description of the proposed transaction

The Applicant carries on the business of a financial services provider and also conducts a separate insurance business.

The current shareholding structure is as follows:

- Mr X, the founder of the Applicant holds all the equity shares in Company X.
- Company X in turn holds all the equity shares in the Applicant.
- The Applicant will incorporate and hold all the equity shares in New Holdco

and New Holdco will in turn incorporate Subco A and Subco B.

The Applicant proposes to restructure its business operations by separating and transferring the financial services and insurance businesses out of the Applicant into new separate entities, namely Subco A and Subco B respectively, to be held by a new holding company, New Holdco.

The financial services business and the insurance business will be sold as two separate going concerns in terms of two separate asset-for-share transactions as defined in paragraph (a) of the definition of that term in section 42(1). No active business be conducted by the Applicant after the proposed restructuring has been completed.

Steps of the proposed transaction:

- Step 1A

  The Applicant will sell its cash and loan books at market value to Subco A on loan account. This transaction will not be done in terms of section 42.

- Step 1B

  The remainder of the financial services business assets that will then be held by the Applicant will be transferred from the Applicant to New Holdco as a going concern in terms of an asset-for-share transaction as provided for in section 42.

- Step 1C

  New Holdco will in turn immediately transfer the financial service business assets as a going concern in terms of an asset-for-share transaction as provided for in section 42 to Subco A.

- Step 1D

  The insurance business assets that are currently held by the Applicant will be transferred by the Applicant to New Holdco as a going concern in terms of an assetfor-share transaction as provided for in section 42.

- Step 1E

New Holdco will in turn immediately transfer the same insurance assets as a going concern in terms of an asset-for-share transaction as provided for in section 42 to Subco B.

- Step 2

  A large number of unrelated black economic empowerment investors will subscribe for approximately 32% of the share capital (equity shares) in New Holdco. New Holdco will utilise the proceeds to subscribe for additional equity shares in Subco A.

  After the subscription for shares, Subco A will apply a portion of the subscription proceeds to settle the loan account that originated as a result of the disposal under Step 1A of the cash and loan books by the Applicant to Subco A.

- Step 3

  After the completion of the transactions envisaged in Step 2, it is anticipated that after a period exceeding 18 months, that:

  - The Applicant will unbundle its shareholding in New Holdco in terms of section 46 as a dividend in specie to Company X.
  - The Applicant will in due course be liquidated or amalgamated with another group company once all its debts have been paid.

Conditions and assumptions

This binding private ruling is subject to the additional condition and assumption that the market values of the assets transferred under the section 42 transactions will exceed their base costs.

Ruling

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

- The proposed transactions contemplated under Steps 1B, 1C, 1D and 1E respectively will meet the requirements of paragraph (a) of the definition of 'asset-for-share transaction' in section 42(1).

- Based on the specific facts of this application, New Holdco will hold the financial services assets and the insurance assets acquired from the Applicant under Steps 1B and 1D on capital account even though these assets will be disposed of to Subco A and Subco B respectively shortly after their acquisition.
- The facts and circumstances of this matter, taking into account the proposed steps after the acquisition of the financial services and insurance assets of the Applicant are very specific and, in the context of the corporate rules contained in Part III of Chapter II of the Act, indicate that New Holdco will not deal with the assets as trading stock.
- Section 42(7) will apply to the asset-for-share transactions under Steps 1C and 1E in terms of which New Holdco will transfer the financial services and the insurance assets to Subco A and Subco B respectively in exchange for the issue of shares in terms of an asset-for-share transaction as defined in paragraph (a) of that term in section 42(1). No gain or loss will arise on those disposals as the assets disposed of will be deemed to be disposed of at their base costs or tax costs under section 42(2).
- Section 42(8) will not apply to the future disposal of the consideration shares received under Steps 1B, 1C, 1D and 1E of the proposed section 42 transactions.

14.6. BPR 394 – Instalment sale agreements and their sale to a non-resident

This ruling determines the income tax treatment of amounts received by the Applicant on instalment sale agreements and on the sale or cession of the receivables to a non-resident at a discount.

In this ruling references to sections are to sections of the Act applicable as at 25 April 2023. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the Act.

This is a ruling on the interpretation and application of:

- section 1(1) – definition of 'gross income';
- section 11(a);
- section 23(g);
- section 24(1);
- section 24J(1) – definition of 'interest'; and
- section 50A – definition of 'interest'.

Parties to the proposed transaction

Applicant: A resident company

Co-Applicant: A non-resident company

Description of the proposed transaction

The Applicant sells goods to its customers.

The goods with which this ruling is concerned are sold on instalment and on standard terms. Instalments are paid on a monthly basis over specified periods.

The Applicant sells its goods at a discount to their cost price in order to entice purchasers to become customers.

The Applicant calculates the sale price by applying a discount to the cost price and then adding a cost recovery amount as part of cost of sales to the resulting amount. The purpose of this formula is to ensure that, although the Applicant will sell the goods at a loss, the loss will be mitigated by adding a cost recovery amount to the discounted amount. Those cost of sales items appear in an annexure to the ruling which was issued to the Applicant.

The Applicant raises value-added tax on the sale price.

The Applicant will, from time to time, sell and cede to the Co-Applicant receivables arising from goods sales at a pre-agreed discount to the face value of the accounts receivable. The Applicant and Co-Applicant will enter into two agreements:

- a sale of receivables agreement; and
- a deed of indemnity.

The sale of receivables agreement provides for a 'Dilution Event', which occurs when:

- there is a material change to the terms of the underlying customer contract with the Applicant which affects the collectability of the receivable; or
- the Applicant releases a debtor from payment or waives the right to collect any unpaid balance of a receivable from a debtor.

Upon the occurrence of a 'Dilution Event', the Applicant will be required to accept back any affected receivables. The consideration payable in that event is calculated as the gross amount of the receivables less any amounts already collected and paid over by the Applicant to the Co-Applicant.

In terms of the deed of indemnity the Applicant gives certain undertakings to the Co-Applicant. The Applicant will give a 'Payment Undertaking' to the Co-Applicant against two items:

- any and all losses directly arising as a result of the 'Default Rate' of the receivables exceeding the 'Maximum Default Rate'. In that event, the Applicant must pay a fixed portion of the relevant monthly gross amount to the Co-Applicant; and
- any direct loss, costs or expense suffered or incurred by the Co-Applicant or a transferee arising out of the failure by any customer to pay in full any receivable owed by it where such failure is due to the invalidity or unenforceability of the receivables where there will not be double counting (i.e. there will not be a transfer back of receivables as well as an indemnity payment).

The sale of receivables agreement provides that the Co-Applicant shall pay or procure payment of the purchase amount in respect of account receivables acquired by it from the Applicant no later than the date falling two business days after accepting the sale/cession offer.

The Applicant will act as a collection agent on behalf of the Co-Applicant. It will receive payments from its customers and pay them over to the Co-Applicant.

The proceeds from the sale/cession of the receivables will be used by the Applicant as part of its normal working capital.

Conditions and assumptions

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

Ruling

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

- The Applicant must include the sale price of goods sold on instalment in its gross income in accordance with section 24(1).
- No portion of the sale price of goods must be excluded from gross income and dealt with as interest under section 24J.
- The proceeds that will be received by or will accrue to the Applicant from the subsequent sale/cession to the Co-Applicant of the receivables that arose from the sale of goods on instalment to customers will not be included in the Applicant's 'gross income' as defined in section 1(1).
- Any loss resulting from the face value of any receivable being discounted in terms of the sale/cession of the abovementioned receivables to the Co-Applicant will be deductible by the Applicant under section 11(a) read with section 23(g).
- The difference between the face value of the receivables recoverable by the Co-Applicant and the discounted amount paid by the Co-Applicant will constitute interest as defined in section 24J and for purposes of Part IVB of Chapter II.
- The indemnity amounts relating to the 'Default Receivables' breaching the 'Maximum Default Rate' will, if payable by the Applicant, be deductible under section 11(a) read with section 23(g).

No ruling is issued on the tax consequences of the 'Dilution Event' which would entitle the Co-Applicant to re-transfer 'Default Receivables' to the Applicant.

15. BINDING CLASS RULINGS

15.1. Transfer of funds held in trust to a 'beneficiary fund' – No. 84

This ruling determines the tax consequences of the transfer of assets of a vesting trust to a 'beneficiary fund'.

In these ruling references to sections and paragraphs are to sections of the Income Tax Act and paragraphs of the Eighth Schedule to the Act applicable as at 9 May 2022. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the Act.

This is a ruling on the interpretation and application of:

- section 55(1) – definition of 'donation';
- section 58(1);
- paragraph 35; and
- paragraph 38.

Class

The class members to whom this ruling will apply are beneficiaries of the applicant referred to below.

Parties to the proposed transaction

The applicant: An umbrella trust registered in terms of the Trust Property Control Act 57 of 1988 for the purpose of, amongst others, managing various sub-trusts for the benefit of beneficiaries of each sub-trust.

The beneficiary fund: A 'beneficiary fund' as defined in section 1(1) of the Pension Funds Act 24 of 1956 (the PFA), with the objective to, on behalf of its beneficiaries,

receive, administer, invest and pay benefits referred to in section 37C of the PFA, which have become payable on the death of a member of a transferor fund (being a trust or a 'pension fund organization' as defined in the PFA) in order to provide for the education, maintenance, advancement and wellbeing of a deceased member's dependent beneficiaries.

Description of the proposed transaction

The applicant receives death and disability benefits paid out on the death of a member of a transferor retirement fund paid pursuant to a pension fund's obligations as contemplated in section 37C of the PFA for the benefit of deceased fund members' minor beneficiaries. Each beneficiary's money is managed in a sub-trust designated in the name of the deceased fund member concerned or the beneficiary.

The applicant is a vesting trust and each beneficiary has a vested right to the income and capital of the sub-trust. The applicant pays benefits to the beneficiaries for their care, maintenance and education until they reach a predetermined age (referred to as the 'Fixed Date' in the trust deed), subject to the trustee's discretion as to the extent of such payments, which are paid out of the income and/or capital of the subtrust. Upon reaching the Fixed Date the beneficiaries are entitled to payment of the capital of the sub-trust.

Upon the death of the beneficiary, benefits payable under the trust vest in the estate of the beneficiary or, failing the receipt of an inventory from the Master of the High Court, in the guardian's fund.

The beneficiary fund has the same purpose and goals as the applicant.

The applicant proposes to transfer all of the qualifying assets and business of the trust (i.e. all assets and business that fall within the scope of business of the beneficiary fund) to the beneficiary fund to reduce costs and improve the regulatory oversight applicable to the relevant qualifying assets and business.

The proposed transfer will take place in terms of section 14 of the PFA and the trustees of the applicant will make the transfer acting in terms of a provision of the applicant's trust deed which provides that '*the trustees may in their discretion*

transfer any of the trust assets, including any liabilities and any obligations towards Beneficiaries to any other trust, beneficiary fund or any other approved fund, the aims of which are substantially the same as this Trust.'

Regarding the termination of a sub-trust, the trust deed provides that '*upon the distribution or transfer of all the trust assets of a sub-trust, such sub-trust shall cease and shall cease to form part of the trust.*'

Upon the transfer of all the assets of a sub-trust to the beneficiary fund, in terms of the proposed transaction, the beneficiary will become a member of the beneficiary fund with a fund credit equal to the value of the assets transferred to the beneficiary fund. The beneficiary fund is required to maintain a separate sub-account for each beneficiary to account for the capital it received for the beneficiary, record investment returns and expenses attributable to the beneficiary's account and payment of benefits to the beneficiary.

The trustees of the beneficiary fund have a discretion to pay the benefits out of the income and/or the capital of the fund. Upon reaching the predetermined age the beneficiaries have a right to payment of their fund benefit.

Conditions and assumptions

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

Ruling

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

- The proposed transaction will not constitute a 'donation' as defined in section 55(1).
- Section 58(1) will not be applicable to the proposed transaction.
- Paragraph 38 will not be applicable to the proposed transaction.
- The proposed transaction will constitute a disposal of the beneficiaries' rights in the individual assets of each sub-trust in exchange for rights in the beneficiary fund. For purposes of paragraph 35(1)(a) the proceeds in

respect of this disposal will comprise the market value of the interest in the beneficiary fund i.e. the value of the capital received by the beneficiary fund. Capital gains and losses on the disposal of each beneficiary's vested rights in the trust assets must be determined on an asset-by-asset basis and the proceeds described above must be allocated to each asset based on the market value of each asset disposed of.

15.2. *En commandite* partnerships investing in photo solar energy plants – No. 85

This ruling determines the deductibility of expenditure to be incurred by en commandite partners in investing in photovoltaic solar energy plants to be owned by the en commandite partnerships which will be installed at clients' premises in terms of power purchase agreements (PPAs).

In this ruling references to sections are to sections of the relevant Act applicable as at 7 December 2022. 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:

- section 12B(1)(h) and (2); and
- section 24H.

Class

The class members to whom this ruling will apply are the partners referred to in 4.

Parties to the proposed transaction

The applicant: A resident company which will be the general partner in multiple en commandite partnerships

The class Resident individuals, trusts or companies who will form part of the en commandite partnerships

Description of the proposed transaction

The applicant is a renewable energy utilities company with a focus on solar energy. The applicant proposes to set up multiple en commandite partnerships between the applicant as general partner and the limited partners for the purpose of enabling the limited partners to invest in solar energy generation assets that will be generating and selling electricity to end users in terms of PPAs entered into with clients.

Each partnership will be closed off and ring fenced in respect of projects to be invested into in a year of assessment. Each partnership will also be closed off once the number of partners reach 20 persons.

The applicant has its own funding as well as agreements with third parties who will provide funding to the limited partners of up to 95% of the acquisition value of the solar generation assets (generation assets) in terms of an instalment credit agreement (ICA). The salient terms of the ICA are as follows:

- the period of finance will not be less than 12 months;
- the amount financed will carry finance charges; and
- the generation assets financed will be security for the due compliance by the limited partners of their obligations under the agreement and will entitle the financier to the income generated by the generation assets in cases of default by a limited partner.

The applicant will sign PPAs with clients who will pay for the use of electricity generated by the generation assets owned or to be owned by the partnerships that are installed at the client's premises.

The partnerships will buy existing projects installed by the applicant or carry on the business of acquiring and installing generation assets for the specific purpose of generating and selling electricity in terms of the signed PPAs.

When a limited partner enters into a partnership the partner will sign a deed of adherence which details the value of the generation assets to be acquired. This value represents the capital contribution of the limited partner to the partnership.

The capital contribution will be used solely to purchase generation assets.

Each limited partner will pay over the monetary value of the generation assets to be acquired (their capital contribution) into the applicant's bank account. The financial service provider will likewise pay over the amount financed by the partner in terms of an ICA to the applicant's bank account.

The generation assets will be purchased by the partnership directly from the applicant. The generation assets will, if not already installed, be installed by a service provider appointed by the applicant which will then be managed by the applicant in terms of an outsourcing agreement as part of its portfolio of generation assets.

The partnerships will outsource all operations to the applicant, including any contracts with clients and suppliers for items such as insurance and maintenance. The applicant will receive management fees as the general partner and for all outsourced services provided to the partnerships.

The applicant will pay the profits made on the portfolio of generation assets owned by the partnerships to limited partners according to their proportionate share of their partnership interests, which is based on the value of their respective capital contributions over the life of the generation assets.

The generation assets will consist of the following types of assets:

- photovoltaic solar panels;
- voltage solar cells and panels;
- inverters;
- power optimizer;
- charge controllers;
- storage batteries;
- bi-directional utility meter;
- racking;

- distribution board;
- cabling; and
- foundations and / or supporting structures for the various equipment.

Conditions and assumptions

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

Ruling

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

- Each limited partner of an en commandite partnership will be regarded as having a proportionate interest in the generation assets acquired by the partnership based on their capital contribution to the partnership in relation to the total capital contribution made to the partnership.
- A limited partner will be entitled in terms of section 12B(2)(b) in respect of the acquisition by the partnership of photovoltaic solar energy generation assets not exceeding 1 megawatt (whether it be one or multiple projects) to the partner's proportionate share of a capital allowance of 100% of the cost of the assets in the year of assessment in which the assets are brought into use.
- A limited partner will be entitled in terms of section 12B(2)(a) in respect of the acquisition by the partnership of photovoltaic solar energy generation assets exceeding 1 megawatt (whether it be one or multiple projects) to the partner's proportionate share of a capital allowance of:
  - 50% of the cost of the assets in the year of assessment in which the assets are brought into use;
  - 30% of the cost of the assets in the second year of assessment; and
  - 20% of the cost of the assets in the third year of assessment.
- The cost of the foundations and structures designed for the installation of

the section 12B(1)(h) assets that meet the criteria set out in the proviso to section 12B(1) will qualify for the same deductions as the assets they relate to.

15.3. Waiver of debt by an employer relating to the unwinding of a share purchase scheme – No. 86

This ruling determines the tax consequences for the Participants (employees) of a share purchase scheme (Scheme) following the unwinding of the Scheme and the waiver of debt arising out of the Scheme.

In this ruling references to sections and paragraphs are to sections of the Act and paragraphs of the Fourth, Seventh and Eighth Schedules to the Act applicable as at 14 December 2022. 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:

- section 1(1) – paragraphs (c) and (i) of the definition of 'gross income';
- section 10(1)(nE);
- section 19;
- paragraph 2 of the Fourth Schedule;
- paragraph 2(h) of the Seventh Schedule;
- paragraph 12A; and
- paragraph 20(3)(b) of the Eighth Schedule.

Class

The class members to whom this ruling will apply are the employees referred to below.

Parties to the proposed transaction

The Applicant: A listed resident company

Participants: The qualifying employees of the applicant who participated in the Scheme and owe outstanding Scheme Debt due to the applicant

Description of the proposed transaction

In terms of an award under the Applicant's Scheme, Participants were offered debt in a particular amount, based on a multiple of the Participant's cost to company, grade, performance, retention- and attraction requirements and market benchmarks (Scheme Debt). The Scheme Debt was used to acquire ordinary shares in the Applicant (Scheme Shares). On acceptance of an award by a Participant:

- the Scheme Shares were acquired at market value by the Applicant on behalf of the Participants;
- ownership in the Scheme Shares vested immediately in the Participant but the Scheme Shares were pledged and ceded to the Applicant as security for the Scheme Debt;
- the Scheme Shares could be disposed of or otherwise encumbered at any time provided the Scheme Debt had been repaid or would be repaid upon such disposal or other encumbrance in respect of such Scheme Shares; and
- the Applicant discharged the purchase price for the Scheme Shares on the Participant's behalf and the Scheme Debt became owing by the Participant to the Applicant.

The outstanding balance due on the Scheme Debt bears interest from time to time. Distributions in respect of the Scheme Shares are applied firstly to any accrued and unpaid interest on the Scheme Debt. The balance may be applied to settle any income tax liability and reduce the Scheme Debt. Any residual amounts are paid to the Participant.

In instances where the distributions on the Scheme Shares are insufficient to service the interest on the Scheme Debt, any unpaid interest is capitalised to the Scheme Debt.

Save for one Participant, over the period of the Scheme, the dividends which have accrued to the Participants in respect of the Scheme Shares have been insufficient to service the interest incurred on the Scheme Debt, which was used to acquire the Scheme Shares, with the result that at present there is unpaid interest included in the outstanding balance owing under the Scheme Debt.

The current market price of the Scheme Shares is significantly below the original purchase price that was paid for the Scheme Shares, and the Scheme Debt exceeds the current market price of the Scheme Shares.

It is the intention of the board of the Applicant to unwind the Scheme in its entirety. Following JSE approval to amend the rules of the Scheme, in order to give effect to the unwinding and cancellation of the Scheme without detriment to the Participants, the following transaction steps will be followed to give effect to the proposed transaction:

- The Participants will sell their Scheme Shares in the market (or the Applicant will procure such sale on behalf of the Participants) and use the proceeds from the sale:
    - firstly, to repay any accrued but unpaid interest in respect of the Scheme Debt; and
    - then the balance, to repay a portion of the capital outstanding under the Scheme Debt in an amount equivalent to such remaining sale proceeds.
- The Applicant will waive the outstanding capital balance of the Scheme Debt (after the payments contemplated above) owing by the Participants. As such, the Participants will be released from their obligation to make any payments in respect of the outstanding capital balance of the Scheme Debt.

For each Participant, the proceeds from the Scheme Shares will exceed the accrued but unpaid interest of the Scheme Debt and will cover a portion of the capital outstanding under the Scheme Debt.

Conditions and assumptions

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

Ruling

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

- The amount of outstanding capital in respect of Scheme Debt waived by the Applicant will be exempt from income tax in the hands of the Participants under section 10(1)(nE).
- The Applicant does not have an obligation to withhold any amount of employees' tax under paragraph 2 of the Fourth Schedule in respect of the waiver by the Applicant of the outstanding capital of the Scheme Debt.
- Section 19 and paragraph 12A will not apply to the waiver by the Applicant of the outstanding capital in respect of the Scheme Debt. However, the amount of outstanding capital waived by the Applicant will reduce the base cost of the Scheme Shares for each Participant under paragraph 20(3)(b) of the Eighth Schedule.

16. BINDING GENERAL RULING

16.1. VAT treatment of non-executive directors – No. 47 (Issue 2)

For the purposes of this ruling:

- 'NED' means a non-executive director;
- 'non-resident' means a person that is not a 'resident of the Republic' as defined in section 1(1) of the VAT Act;
- 'remuneration' means remuneration as defined in paragraph 1 of the Fourth Schedule to the Act;
- 'section' means a section of the VAT Act;

- 'the Act' means the Income Tax Act 58 of 1962;
- 'VAT Act' means the Value-Added Tax Act 89 of 1991 and
- any other word or expression bears the meaning ascribed to it in the VAT Act.

Purpose

This BGR deals with the VAT treatment of the activities conducted by NEDs and clarifies whether those activities fall within the ambit of proviso (iii)(aa) or proviso (iii)(bb) to the definition of 'enterprise' in section 1(1).

This BGR must be read in conjunction with BGR 40, which provides clarity on whether director's fees for services rendered by NEDs fall within the definition of 'remuneration' in the Fourth Schedule to the Act.

Background

It is stated in BGR 40, that as a result of certain amendments in 2007 to the exclusions contained in the definition of 'remuneration' in the Fourth Schedule to the Act, some uncertainty developed as to whether the amounts payable to an NED are subject to the deduction of employees' tax. This uncertainty also extends, by implication, to the application of proviso (iii) to the definition of 'enterprise' in section 1(1) which excludes the activities of an employee, but includes the activities of a so-called 'independent contractor'.

The question therefore arises as to whether NEDs should be regarded as:

- employees or deemed employees under the Fourth Schedule to the Act so that their income is subject to employees' tax; or
- independent contractors that may be liable to register for VAT if their fees for services rendered exceed the VAT registration threshold of R1 million in any consecutive period of 12 months; or
- being subject to both employees' tax and VAT.

Application of the law – employee or independent contractor?

The courts have highlighted a number of factors to be taken into account to distinguish between an employment contract (employee) and a contract for services (independent contractor). However, as there is no absolute test which can be applied to distinguish between the two types of contract, for the purposes of this BGR and proviso (iii) to the definition of 'enterprise':

- an employee is a person who commits his or her productive capacity to another person (the employer) in terms of an employment contract; and
- an independent contractor is a person who commits his or her labour to the recipient (employer) to produce a given result in terms of a contract for services.

The VAT treatment of employees and independent contractors is dealt with in proviso (iii) to the definition of 'enterprise' in section 1(1).

Proviso (iii)(aa) to the definition of 'enterprise' refers to the services rendered by a person (employee) to an employer under an employment contract. This is a reference to the services of a so-called 'common law employee'. The effect is that such services can never qualify as an enterprise activity. As such, the employee cannot register for VAT and will not charge VAT on any salary, wages, commission or similar amount which is paid or payable by the employer in that regard.

Proviso (iii)(bb) to the definition of 'enterprise' refers to the services rendered by an 'independent contractor' to the employer (recipient) under a contract for services in circumstances where such enterprise is carried on independently of the recipient. In other words, the activities of the service provider show the hallmarks of an independent business (enterprise) activity carried on by that person as opposed to the services rendered by an employee under an employment contract. In addition, even if a person is an employee as contemplated in proviso (iii)(aa), that person is not necessarily prevented from conducting enterprise activities outside of the employment contract as contemplated in proviso (iii)(bb). In such a case, that person may be liable to register and charge VAT in respect of such enterprise activities carried on independently.

The fact that certain independent contractors such as labour brokers or personal service providers are deemed to earn 'remuneration' under the Fourth Schedule to the Act does not affect the independent nature of that person's activities for VAT purposes. It is therefore incorrect to conclude that an independent contractor must be regarded as an employee for VAT purposes merely because that person's income is deemed to be 'remuneration' which is subject to employees' tax under the Fourth Schedule to the Act. The income earned by NEDs does not, in any event, fall within the ambit of those deeming provisions. However, an NED may voluntarily request that employees' tax be deducted from any directors' fees which are paid to him/her.

Similarly, the fact that a non-resident NED earns 'remuneration' under the Fourth Schedule to the Act does not affect the independent nature of that non-resident NED's activities under proviso (iii)(bb) to the definition of 'enterprise' and any potential liability for that person to register for VAT in the Republic. However, the focus of attention in such cases will be on how the NEDs services are rendered. For example, a non-resident NED will be carrying on an enterprise if the services are physically performed in the Republic on a continuous or regular basis, or if the services are conducted on a continuous or regular basis through a fixed or permanent place in the Republic.

Section 23(4)(b) provides that if a person has not applied for registration in terms of Chapter 3 of the Tax Administration Act 28 of 2011, that person is regarded as a vendor with effect from the date on which that person first became liable to be registered. However, when considering the circumstances of a particular case, SARS may exercise a discretion to determine a later date from which the person concerned should be a vendor, as may be considered equitable in the circumstances.

Ruling

VAT treatment of non-executive directors

It is concluded in paragraph 3.2 of BGR 40 that an NED is not considered to be a common law employee. This is based on the view that the services must be

supplied independently and personally by the NED. Any director's fees paid or payable to an NED for services rendered in that capacity is therefore not regarded as 'remuneration'. It follows that for VAT purposes an NED is treated as an independent contractor as contemplated in proviso (iii)(bb) to the definition of 'enterprise' in section 1(1) in respect of those NED activities.

Liability of non-executive directors to register and account for VAT

An NED that carries on an enterprise in the Republic is required to register and charge VAT in respect of any director's fees earned for services rendered as an NED if the value of such fees exceed the compulsory VAT registration threshold of R1 million in any consecutive 12-month period as provided in section 23(1). This rule applies whether the NED is an ordinary resident of the Republic or not.

An NED may also choose to register for VAT voluntarily under section 23(3) if the value of such fees does not exceed the compulsory VAT registration threshold prescribed in section 23(1).

NEDs that are already registered as vendors, but have neither levied VAT nor accounted for output tax in respect of any fees earned as an NED, must start charging and accounting for VAT on such fees by no later than 1 June 2017.

Equitable date of registration

Any NED that carries on an enterprise in the Republic and has exceeded the R1 million compulsory VAT registration threshold as contemplated above that has not registered for VAT as at the date of this BGR must apply for registration by no later than 1 June 2017. The effective date of such registration (liability date) as determined by SARS under section 23(4)(b) in such cases must be no later than 1 June 2017.

16.2. Meaning of 'month' in the definition of 'monthly definition' and section 6(g) for employers remunerating employees on a weekly or fortnightly basis – No. 47 (Issue 2)

For the purposes of this ruling:

- 'EMP201' means the employees' tax return;
- 'ETI' means employment tax incentive;
- 'ETI Act' means the Employment Tax Incentive Act 26 of 2013;
- 'monthly remuneration' means 'monthly remuneration' as defined in section 1(1);
- 'section' means a section of the ETI Act; and
- any other word or expression bears the meaning ascribed to it in the ETI Act.

Purpose

This BGR clarifies the meaning of 'month' in the definition of 'monthly remuneration' and section 6(g) for eligible employers remunerating employees on a weekly or fortnightly basis.

Background

Section 2 provides that an employer eligible to receive the ETI relating to a qualifying employee in respect of a month may reduce the employees' tax payable by that employer in an amount determined under section 7. The meaning of a 'month' is fundamental to establish firstly whether an employer is eligible to claim the ETI and secondly to determine the ETI. The definition of 'monthly remuneration' and various sections in the ETI Act refer to a month.

The word 'month' is, however, not defined in the ETI Act and it is therefore necessary to refer to the Interpretation Act 33 of 1957 in which 'month' is defined as 'a calendar month'. CollinsDictionary.com defines 'calendar month' as 'one of the twelve months of the year'. A calendar month may vary in duration between 28

and 31 days. A calendar month can therefore not be specified in terms of a fixed number of days, but one has to have regard to the calendar.

Subject to meeting all the other requirements under the ETI Act, an eligible employer is entitled to claim the ETI only in the month in which the monthly remuneration is paid or payable to a qualifying employee. The term 'monthly remuneration' means:

- the amount paid or payable to a qualifying employee in respect of a month if the employer employs and pays remuneration to the qualifying employee for at least 160 hours in a month, or
- an amount determined under section 7(5) if the employer employs and pays remuneration to the qualifying employee for less than 160 hours in a month.

provided that in determining the remuneration paid or payable, an amount other than a cash payment that is due and payable to the employee after having accounted for deductions in terms of section 34(1)(b) of the Basic Conditions of Employment Act 75 of 1997, must be disregarded.

Section 6(g) stipulates that a qualifying employee7 must receive monthly remuneration in an amount less than R6 500.

Interpreting the reference to 'month' in the definition of 'monthly remuneration' and section 6(g) as a calendar month results in practical challenges if employees are paid on a weekly or fortnightly rather than a monthly or other basis. Depending on how the payroll is split, a week at the end or beginning of a calendar month may extend over two calendar months. A portion of the week's wage will relate to the one calendar month's remuneration and the other portion to the following calendar month's remuneration for ETI purposes. A misalignment between applying different periods for claiming the ETI and reporting for employees' tax creates a risk for employers as well as SARS.

The practical challenges resulting from using different periods relating to the ETI and employees' tax can be resolved by applying the reference to 'month' in the definition of 'monthly remuneration' and section 6(g) as set out in the ruling below. Applying the reference to 'month' in this definition and section 6(g) differently from

the reference to month in all the other sections in the ETI Act may affect eligibility to claim the ETI in some instances. See the Annexure for examples demonstrating such an application.

Ruling

Eligible employers paying employees on a weekly or fortnightly basis may apply a month referred to in the definition of 'monthly remuneration' and section 6(g) to align with the period used for purposes of employees' tax. Employers electing to use this method must apply it consistently throughout all periods during which weekly or biweekly payrolls are run. Should an employer at any time decide to revert to a calendar month, this ruling will no longer be available to such an employer.

Reference to 'month' in any other section of the ETI Act is interpreted and applied to mean a 'calendar month'.

17. GUIDES

17.1. Draft Guide to the Employment Tax Incentive (Issue 5)

The employment tax incentive was introduced by the Employment Tax Incentive Act 26 of 2013 which was promulgated on 18 December 2013. This Act has since been amended on a number of occasions. This guide provides general guidance on the incentive.

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

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

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

The ETI is an incentive that may be claimed by eligible employers and is aimed at encouraging such employers to employ young employees between the ages of 18 and 29, and employees of any age in SEZs and in any industry identified by the Minister by notice in the Government Gazette. The ETI commenced on 1 January 2014 and will end on 28 February 2029.

The ETI will be subject to continuous review of its effectiveness and impact in order to determine the extent to which its core objective of reducing youth unemployment is achieved.

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

The ETI Act has since promulgation been amended on a number of occasions. One such amendment is the Taxation Laws Amendment Act 34 of 2019[3] which introduced section 7A with retrospective effect to enable the Minister, by way of an announcement in the national annual budget, to alter the:

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

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

necessary legislation giving effect to that announcement within that period of 12 months.

The Disaster Management Tax Relief Act 13 of 2020 also introduced temporary amendments to various sections in the ETI Act. These amendments provided only temporary relief and will not be considered in this guide.

In order to curb apparent abuse of the ETI, amendments to the definition of 'employee', 'monthly remuneration' and section 6 (qualifying employees) were introduced by the Taxation Laws Amendment Act 20 of 2021.

These amendments are effective from 1 March 2022 and applicable in respect of years of assessment commencing on or after that date.

18. INDEMNITY

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