Year-end Tax Update 2021

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The Tax Faculty

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Programme:

	Time
Session 1	09:00 to 10:20
Break	10:20 to 10:35
Session 2	10:35 to 11:45
Break	11:45 to 11:55
Session 3	11:55 to 13:00

Outline

- Part A
  - Tax legislation amendments
- Part B
  - Judgments
- Part C
  - SARS documents

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Main amendments considered -

Time of disposal from deceased estates

Change to long service awards

New anti-avoidance rule for loans between trusts

Exit tax on retirement fund interest

Other retirement benefit amendments

Restricted set-off of assessed losses

Amended limitation of interest deductions

New donations tax anti-avoidance provision

Curbing abuse of the Employment Tax Incentive

Refinements to the corporate reorganisation rules

VAT – temporary letting

Tax Administration amendments

Time of disposal rules for assets acquired from a deceased estate

- When a person dies, the Estate Duty Act (1955) provides for the assets of the person to be transferred to the estate of the deceased before the assets are distributed to their heirs. The act also provides for the executors to administer this estate, which includes preparing and submitting the liquidation and distribution (L&D) account to the Master of the High Court Office, and submitting the relevant tax returns – including payment of the estate duty – to SARS.
- Legally, the L&D account must remain open for inspection in the Master of the High Court Office for 21 business days. Once the L&D account is finalised, the personal right of the heirs to claim delivery of the assets is triggered.
- At present, there is uncertainty around when the heirs are regarded as having acquired an asset from the estate of the deceased. To clarify the time of disposal of this personal right, government proposes that the legislation be changed so that the disposal by the estate occurs on the date when the L&D account becomes final.

Taxation of a deceased estate ITA provisions since 1 March 2016

- Section 25(1): income received by or accrued to the executor of the deceased estate is taxed in the deceased estate.
- Section 25(2): the deceased estate of a person is deemed to have acquired assets (other than assets acquired by a resident surviving spouse) from the deceased person for an amount of expenditure incurred equal to the market value of the assets on date of death of the deceased person.
- Section 25(3): where the deceased estate disposes of an asset to an heir or legatee of that person (other than a resident surviving spouse), the asset is deemed to have been disposed of for an amount equal to the amount of expenditure incurred by the deceased estate in acquiring that asset; and the heir or legatee is treated as having acquired that asset for the same amount.

Time of disposal from deceased estates – s 25(3)

To clarify the time of disposal of the heir's personal right to claim delivery of the deceased estate assets -

> (c) that deceased estate must be treated as having disposed of that asset on the earlier of the date on which that asset is disposed of or on which the liquidation and distribution account becomes final.

Comes into operation on 1 March 2022 and applies in respect of liquidation and distribution accounts finalised on or after that date.

New definition in s 1: “liquidation and distribution account”

means the account required to be submitted by an executor to a Master in accordance with section 35 of the Administration of Estates Act, 1965 (Act No. 66 of 1965).

Comes into operation on 1 March 2022 and applies in respect of L&D accounts finalised on or after that date.

Long-service awards

The Income Tax Act permits an employer to grant a long-service award (in the form of an asset or a non-cash benefit) to an employee as a no value fringe benefit provided that the value of this award does not exceed R5000 (Paragraph 5(2) of the Seventh Schedule.)

> 'long-service' means an initial unbroken period of service of at least 15 years or any subsequent unbroken period of service of at least 10 years

Currently, employers recognise long service through awards in a variety of forms that could be considered non-cash benefits in terms of the Act.

Therefore, it is proposed that the current provisions of the Act be reviewed to consider other awards within the same limit granted to employees as long-service awards.

Change to long service awards

Amendments to:

- Paragraph (c) of the definition of "gross income”
- Seventh Schedule
  - Paragraph 5 - Acquisition of asset for less than MV
  - Paragraph 6 - Right of use of an asset
  - Paragraph 10 - Free or cheap services

Comes into operation on 1 March 2022 and applies in respect of years of assessment commencing on or after that date.

Long service awards
Definition of "gross income": Proviso to para (c)

addition of sub-paragraph:

> (vii) the provisions of this paragraph shall not apply in respect of any amount received by or accrued to or for the benefit of any person in respect of long service as defined in para 5(4) of the Seventh Schedule, to the extent that the aggregate value of an amount determined under this paragraph together with all amounts determined under para's 5(2)(b), 6(4)(d) and 10(2)(e) of the Seventh Schedule do not exceed R5 000.

Acquisition of asset for less than MV
Paragraph 5 of the Seventh Schedule

(b) any asset or gift voucher is given by an employer to an employee for long service, such value to be placed thereon shall be reduced by the lesser of the cost to the employer of all such assets so given to the employee during the year of assessment and R5 000:

Provided that the aggregate value of an amount reduced under this paragraph together with all amounts determined under para's 6(4)(d) and 10(2)(e) of this Schedule and paragraph (vii) of the proviso to paragraph (c) of the definition of 'gross income' in s 1 does not exceed R5 000.

Right of use of an asset
Paragraph 6(4) of the Seventh Schedule

no value if –

(d) such use is granted by an employer to an employee for long service as defined in para 5(4) to the extent that it does not exceed R5 000

Provided that the aggregate value of an amount determined under this paragraph together with amounts determined under para (vii) of the proviso to para (c) of the definition of 'gross income' in s 1 and para's 5(2)(b) and 10(2)(e) of the Seventh Schedule does not exceed R5 000.

Free or cheap services
Paragraph 10(2) of the Seventh Schedule

no value if

(e) any services granted by an employer to an employee for long service as defined in para 5(4) to the extent that it does not exceed R5 000

Provided that the aggregate value of an amount determined under this paragraph together with all amounts determined under para (vii) of the proviso to para (c) of the definition of 'gross income' in s 1 and para's 5(2)(b) and 6(4)(d) of the Seventh Schedule does not exceed R5 000.

Anti-avoidance rule for loans between trusts

Proposed amendment to s 7C - would also apply to any loan, advance or credit that

a trust

directly or indirectly provides to a trust in relation to which

any beneficiary or the founder of the borrowing trust and
any beneficiary or the founder of the lending trust

is a connected person.

Amendment withdrawn.

Hybrid debt anti-avoidance rules (s 8F)

Hybrid debt anti-avoidance rules aim to curb the unfair use of hybrid debt instruments or hybrid interest to gain tax benefits.

To ensure that instruments that exhibit equity features or returns that exhibit dividend features do not benefit from interest deduction, the Act deems any returns to be in specie dividends paid by the issuer on which the issuer must pay dividends tax if no dividends tax exemption applies. The provision does not deem the return to be an in specie dividend for the recipient of the return.

These anti-avoidance rules may be overreaching as the return would be regarded as interest and thus also be taxable for the recipient, leading to economic double taxation. It is proposed that the tax legislation be amended to address this concern.

Hybrid instruments – s 8F & 8FA

Amended to explicitly extend the deeming provision to apply to the holder of a tainted instrument or recipient of tainted return.

> (2) Any amount that is incurred by a company or accrues to a person in respect of interest on or after the date that [the] an instrument becomes a hybrid debt instrument is
>
> (a) deemed to be a dividend in specie in respect of a share that is declared and paid by that company to the person to whom that amount accrued on the last day of the year of assessment of that company during which it was incurred; [and]
>
> (b) not deductible; and
>
> (c) deemed to be a dividend *in specie* in respect of a share that accrues to that person on the date contemplated in paragraph (a).

Comes into operation on the date on which the Taxation Laws Amendment Act, 2021, is promulgated and applies in respect of amounts incurred or accrued on or after that date.

Hybrid instruments

S 50A (Withholdihg tax on interest) also amended to exclude interest that is deemed to be a dividend in specie under s 8F or 8FA.

Comes into operation on 1 January 2022 and applies in respect of amounts paid on or after that date.

Lump sum retirement benefits after ceasing to be a resident

Budget 2021: At issue is the tax treatment of a retirement interest when an individual ceases to be a SA tax resident, but retains his/her investment in a SA retirement fund, and only later accesses the fund benefit when s/he dies or retires.

Section 9(2)(i) deems such amounts to be from a SA source and the lump sum is therefore still potentially taxable in SA, if received by a non-resident.

However, tax treaties between SA and other countries typically provide that retirement benefits are taxed only in the country of residence. Thus, if the person is a resident of the other country, the retirement fund interest will be subject to tax in that country and SA would forfeit its taxing rights.

Proposed new provision: s 9HC

Withdrawn

Other retirement benefit amendments

Allowing members to use retirement interest to acquire annuities on retirement.

Transfer between retirement funds by members who are 55 years or older.

Clarifying the calculation of the fringe benefit in relation to employer contributions to a retirement fund.

Retirement benefits: annuities

S 1 definition of "pension fund"

- Not more than 1/3 of the total value of the retirement interest may be commuted for a single payment
- remainder must be paid in the form of an annuity (including a living annuity), a combination of annuities (including a combination of methods of paying the annuity) or a combination of types of annuities
- except where
  - 2/3 of the total value does not exceed R165 000,
  - the employee/member is deceased or
  - the employee elects to transfer the retirement interest to a pension preservation fund or a retirement annuity fund

Provided further that in the case where the remaining balance is utilised to provide or purchase more than one annuity, the amount utilised to provide or purchase each annuity must exceed R165 000

Comes into operation on 1 March 2022 and applies in respect of annuities purchased on or after that date.

See BGR 58 – Published 4 November 2021.

Similar amendments to

‘Pension preservation fund’

‘Provident fund’

‘Provident preservation fund’

‘Retirement annuity fund’

Employer contributions to a retirement fund - Seventh Schedule para 12D

An anomaly arises in instances where a retirement fund provides both a retirement benefit in relation to a 'defined contribution component' and a risk benefit.

The current interpretation of the legislation would result in the classification of the total contribution to the fund as a 'defined benefit component' subject to valuation under para 12D(3) of the Seventh Schedule, as well as the issuance of a contribution certificate, because risk benefits are not classified as a 'defined contribution component'.

Risk benefits will be included as a 'defined contribution component' to ensure that the fringe benefit value of employer contributions to defined contribution retirement funds that also provide risk benefits will be based on the actual contribution.

Assets received in exchange for services rendered

Definition of "gross income" in s 1 includes any amount received in exchange for services rendered:

> Para (c): any amount, including any voluntary award, received or accrued in respect of services rendered or to be rendered or any amount (other than an amount referred to in s 8(1), 8B or 8C) received or accrued in respect of any employment or the holding of any office:
>
> > Provided that –
> >
> > > (i) the provisions of this paragraph shall not apply in respect of any benefit or advantage in respect of which the provisions of paragraph (i) apply;
> > >
> > > (ii) any amount received by or accrued to or for the benefit of any person in respect of services rendered or to be rendered by any other person shall for the purposes of this definition be deemed to have been received by or to have accrued to the said other person.

Assets received in exchange for services rendered (cont.)

Inclusion applies regardless of whether the amounts are capital or revenue in nature.

Considers awards for services rendered.

“In respect of”= by virtue of: implies a link/connection between the services and the amount received/accrued. The link may be direct or indirect (ITC 1439).

Services may be rendered in a different year, eg rendered in year 1 whereas payment is made in year 2. Inclusion: earlier of receipt or accrual.

Assets disposed of for less than full value

S 54: Donations tax is levied on the value of any property disposed of (whether directly or indirectly and whether in trust or not) under any donation by any resident.

S 55 definitions:

> "donation" means any gratuitous disposal of property including any gratuitous waiver or renunciation of a right.
>
> "fair market value" , means –
>
> > (a) the price which could be obtained upon a sale of the property between a willing buyer and a willing seller dealing at arm's length in an open market; or
> >
> > (b) in relation to immovable property on which a bona fide farming undertaking is being carried on in the Republic, the amount determined by reducing the price which could be obtained upon a sale of the property between a willing buyer and a willing seller dealing at arm's length in an open market by 30%.

Assets disposed of for less than full value – s 58

Where any property has been disposed of for a consideration which in the opinion of the Commissioner, is not an adequate consideration that property shall for the purposes of this Part be deemed to have been disposed of under a donation:

> Provided that in the determination of the value of such property a reduction shall be made of an amount equal to the value of the said consideration.

Anti-avoidance to curb cession of a right to receive an asset

Budget 2021: Schemes have been devised to transfer rights to assets to a trust before any value attaches to the right, thereby avoiding both income tax (due to the inclusion of the value of the asset in gross income) and donations tax (arising on the value of the asset donated to the trust).

These schemes entail a service provider (e.g., an employee or independent contractor) ceding the right to receive or use an asset to be received from the person to whom the services are rendered or are to be rendered. The right is generally ceded to a family trust for no consideration.

In these instances, the service provider will be able to circumvent

- the gross income provisions as the asset would have been ceded to the trust before a value can be attached to it; and
- donations tax, as it appears as though they are disposing of a worthless asset and are therefore not liable for donations tax until the services have been rendered and the employer transfers the asset to the cessionary.

Moreover, the service provider will not be entitled to the asset and therefore cannot be regarded as having disposed of it.

Amendments seek to address these kinds of schemes.

Disposal of the right to receive an asset – s 57B

Applies where—

(a) a person ('the employee') has agreed to render services to another person ('the employer');

(b) the whole or part of the compensation for those services is to be paid by the employer in the form of an asset as defined in paragraph 1 of the Eighth Schedule; and

(c) prior to the employee becoming entitled to that asset, that employee disposes of the right to the asset to another person.

57B(2)

Where subsection (1) applies—

(a) that disposal must be disregarded and that employee must be treated as having acquired that asset on the date that it would otherwise have been received by or accrued to him or her for an amount of expenditure equal to the amount included in that employee's gross income under paragraph (ii) of the proviso to paragraph (c) or under paragraph (i) of the definition of 'gross income'; and

(b) that employee must be treated as having disposed of that asset to that other person by way of donation for an amount received or accrued equal to the expenditure contemplated in subsection (2)(a), and that other person must be deemed to have acquired that asset for expenditure equal to that same amount.

Effect of s 57B

Disregard the disposal of the right. The employee is treated as having acquired that asset on the date that it would otherwise have been received by or accrued to him/her for an amount of expenditure equal to the amount included in that employee's gross income under para (ii) of the proviso to para (c) of the definition of 'gross income'; and

The employee is treated as having disposed of the asset to the other person by way of donation for an amount received or accrued equal to the expenditure contemplated in s 57B(2)(a), and the other person must be deemed to have acquired that asset for expenditure equal to that same amount.

Effective date – s 57B

Comes into operation on 1 March 2022 and applies in respect of the disposal of the right to receive an asset on or after that date.

Primary residence exclusion
Amended para 48 of the Eighth Schedule

Continued ordinary residence

A natural person or a beneficiary of a special trust **or a spouse of that person or beneficiary** must for purposes of para 47 be treated as having been ordinarily resident in a residence for a continuous period (not exceeding two years), if that **natural** person, **beneficiary or spouse** did not reside in that residence during that period for any of the following reasons —

Primary residence exclusion
Amended para 49 of the Eighth Schedule

Non-residential use

Paragraph 49 of the Eighth Schedule to the Income Tax Act, 1962, is hereby amended by the substitution for subparagraph (b) of the following subparagraph:

> (b) where that **natural** person [or], a beneficiary of that special trust **or a spouse of that natural person or beneficiary** used the residence referred to in subparagraph (a) or a part thereof for the purposes of carrying on a trade for any portion of the period on or after the valuation date during which that person or special trust held that interest,

Tax incentives

Learnership allowance – s 12H

- Sunset date extended to 31 March 2024 (was 31 March 2022)

Urban development zones – s 13quat

- Sunset date extended to 31 March 2023 (was 31 March 2021)

Curbing abuse of the Employment Tax Incentive

Amended definitions in the ETI Act, 2013:

"employee"; and

"monthly remuneration".

Proviso added to s 6 ("Qualifying employee"):

Comes into operation on 1 March 2022~~1~~ and applies in respect of years of assessment commencing on or after that date.

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Amended definition of “employee” - s 1

“employee” means a natural person -

(a) who works for another person and in any other manner directly or indirectly assists in carrying on or conducting the business of that other person;

(b) who receives, or is entitled to receive remuneration from that other person; and

(c) **who is 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, 1997 (Act No. 75 of 1997),**

but does not include an independent contractor.

See SARS Draft Interpretation Note – Meaning of “employee” for purposes of the ETI Act

Amended definition of "monthly remuneration"

(a) where an employer employs and pays remuneration to a qualifying employee for at least 160 hours in a month, means the amount paid or payable to the qualifying employee by the employer in respect of a month; or

(b) where the employer employs a qualifying employee and pays remuneration to that employee for less than 160 hours in a month, means an amount calculated in terms of s 7(5):

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 s 34(1)(b) of the Basic Conditions of Employment Act, 1997, must be disregarded.

Proviso added to s 6 (“qualifying employee”)

Provided that the employee is not, in fulfilling the conditions of their employment contract during any month, mainly involved in the activity of studying,

unless the employer and employee have entered into a learning programme as defined in s 1 of the Skills Development Act, 1998, and,

in determining the time spent studying in proportion to the total time for which the employee is employed, the time must be based on actual hours spent studying and employed.

Limitation of assessed loss set-off – s 20

Explanation:

Over the past few years, there has been an international trend to restrict the use of assessed losses and reduce the corporate income tax rate.

To improve the country's competitiveness, reduce the appeal of base erosion and profit shifting, encourage investment and promote economic growth, the Minister of Finance announced (in the 2020 Budget Review) Government's intention to restructure the corporate income tax system over the medium term by broadening the base and reducing the corporate income tax rate in a revenue neutral manner.

In line with the 2020 Budget announcement, in the 2021 Draft TLAB, Government has proposed broadening the corporate income tax base by restricting the offset of the balance of assessed losses carried forward to 80 per cent of taxable income.

Assessed losses - s 20(1)(a)

There shall be set off against the income of such person ..

(i) that is a company, any balance of assessed loss incurred by that person in any previous year which has been carried forward from the preceding year of assessment, to the extent that the amount of such set-off does not exceed **the higher of R1million and 80%** of the amount of taxable income determined before taking into account the application of this provision;

(ii) that is not a company ... (as before).

Comes into operation on the date on which the rate of tax in respect of the taxable income of a company is first reduced after announcement by the Minister of Finance in the annual National Budget and applies in respect of years of assessment commencing on or after that date.

Limitation of interest deduction

Explanation:

Rules that limit interest deductions in respect of debts owed to persons not subject to tax were introduced in 2013, and apply in respect of amounts of interest incurred on or after 1 January 2015. The main aim of these rules is to limit excessive interest deductions in respect of debts owed to persons not subject to tax in South Africa, if the debtor and the creditor are in a controlling relationship.

On 26 February 2020, Government published a discussion document titled "*Reviewing the Tax Treatment of Excessive Debt Financing, Interest Deductions and Other Financial Payments*" to conduct a review of the current interest deduction limitation in respect of debts owed to persons not subject to tax, in line with the OECD/G20 BEPS Action 4 recommendations. The review highlighted that the elements of the current rules required reviewing. 2021 Amendments address the above-mentioned issues.

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Amendments to s 23M

- Expanded definition of “interest”
- 40% replaced with 30% (i.e. adjusted TI x 30%)
- Refined inclusion of back-to-back loans
- REITs
- Recognition of withholding tax on interest

Effective date – s 23M

Comes into operation on the date on which the rate of tax in respect of the taxable income of a company is first reduced after announcement by the Minister of Finance in the annual National Budget and applies in respect of years of assessment 55 commencing on or after that date.

Transfer pricing – s 31

2019 Amendment to include “associated enterprises”: effective date extended to 1 January 2023

Clarifying the definition of contributed tax capital – s 1

- Contributed tax capital (CTC) is a notional and ring-fenced amount derived from contributions made as consideration for the issue of a class of shares by a company. It is reduced by any capital amount that the company subsequently transfers back to one or more shareholders of that class of shares (commonly known as a capital distribution) using the CTC received.
- No shareholder within a particular class of shares may receive CTC in excess of an amount per share that is derived by dividing the total CTC by the number of shares in that class immediately before the capital distribution.
- Some companies are allocating CTC on the basis of an alleged "share premium" contributed by a particular shareholder but not by all shareholders within the same class of shares. To curb this abuse, it is proposed that changes be made to clarify the principle that shareholders within the same class of shares should share equally in the allocation of CTC as a result of a distribution.

Interaction between value shifting and corporate reorganisation rules - ss 24BA, 40CA

- The asset-for-share base cost rule in s 40CA prescribes that the base cost of assets acquired by a company in exchange for its shares is equal to the sum of the market value of the shares it issued plus the amount of any capital gain triggered under s 24BA to ensure that there is no double taxation on the future disposal of the assets.
- The corporate reorganisation rules allow for the tax-neutral transfer of assets between companies and qualifying persons. Qualifying asset-for-share transactions are subject to s 24BA and such transfers are also subject to the rollover base cost rules under s 42. This raises an anomaly in the application of these rules as the capital gain triggered under s 24BA is only added to the base cost outside of the corporate reorganisation rules. (Section 40CA applies where s 42 does not apply.)
- To address this anomaly, it is proposed that the tax legislation be changed to allow taxpayers to treat the capital gain as an additional base cost when applying the corporate reorganisation rules.

Paragraph (b) added to s 40CA

Where a company acquires any asset, as defined in para 1 of the Eighth Schedule—

(a) from any person in exchange for shares issued by that company, that company must be deemed to have actually incurred an amount of expenditure in respect of the acquisition of that asset which is equal to the sum of—

(i) the market value of the shares immediately after the acquisition; and

(ii) any deemed capital gain determined in terms of s 24BA(3)(a) in respect of the acquisition of that asset; or

(b) in terms of an asset-for-share transaction as contemplated in s 42, a substitutive share-for-share transaction as contemplated in s 43 or an amalgamation transaction as contemplated in s 44 in respect of which a deemed capital gain is determined in terms of s 24BA(3)(a) in respect of the acquisition of that asset—

(i) by that company; or

(ii) by any person that acquired that asset from that company in terms of any transaction contemplated in Part III of Chapter II,

that company or that other person must be deemed, in addition to the amount of expenditure for which the asset is deemed to have been acquired by that company or that other person as a result of the application of s 42(2)(b), 43(2)(b) or 44(2)(a)(ii)(aa), to have incurred an amount of expenditure equal to that deemed capital gain on the date of that asset-for-share transaction, substitutive share-for-share transaction or amalgamation transaction.

Comes into operation on 1 January 2022 and applies in respect of any acquisition of an asset on or after that date.

VAT on temporary letting of residential property
- s 18(1) of the VAT Act

2021 Budget statement:

> Property developers are entitled to deduct input tax on the VAT costs incurred to build residential property for sale. However, where the developer is unable to sell the residential property and temporarily leases it out until a buyer is found, the developer is required to make an output tax adjustment based on the open market value of the property when the property is let for the first time.
>
> An announcement was made in the 2010 Budget Review to investigate and determine an equitable value and rate of claw-back for developers as the current treatment is disproportionate to the exempt temporary rental income. However, no subsequent changes were made to the VAT Act. It is proposed that the VAT Act be amended to resolve this matter.

VAT treatment of temporary letting of immovable property

- Change of use from taxable to non-taxable: s 18(1) adjustment
  - Output tax = OMV x 15/115
- Section 18B provided temporary relief but was scrapped from 1 January 2018.
- Second concern: how to treat subsequent disposal of the property (after change of use)
- BGR 55 (10 September 2020): The subsequent sale of a dwelling in respect of which the developer was required to have declared the deemed supply under s 18(1) or 18B(3), is not subject to VAT. Transfer Duty will apply.

Proposed new s 18D

- Where fixed property consisting of any dwelling and such fixed property –
  - is developed by a vendor who is a property developer wholly for the purpose of making taxable supplies or is held or applied for that purpose by that vendor; and
  - is subsequently *temporarily applied* by that vendor in accordance with s 12(c),
- the property is deemed to have been supplied by that vendor by way of a taxable supply for
  - Consideration = adjusted cost to the vendor (s 10(29)); and
  - Time of supply: tax period in which the agreement for letting and hiring of the accommodation in a dwelling comes into effect (s 9(13)).

Proposed new s 18D (cont.)

- When the vendor who is a developer subsequently supplies the property by way of a sale during the period that the property is temporarily applied, the supply is a taxable supply
  - Consideration = consideration contemplated in s 10(2).
  - Time of supply (s 9(3)(d)) is the earlier of –
    - date the property transfer is registered at the Deeds office; or
    - date of any payment towards the consideration.
- Input tax deduction = amount calculated under s 10(29) (s 16(3)(o)).
- New s 18D to come into effect from 1 April 2022

Definitions in s 18D

‘developer’

means a vendor who continuously or regularly constructs, extends or substantially improves fixed property consisting of any dwelling or continuously or regularly constructs, extends or substantially improves parts of that fixed property for the purpose of disposing of that fixed property after the construction, extension 50 or improvement; and

‘temporarily applied’

- means the application of fixed property or a portion of a fixed property in supplying accommodation in a dwelling under an agreement or more than one agreement for letting and hiring thereof which agreement or agreements relate to a combined total period not exceeding 12 months:
- Provided that ‘temporarily applied’ does not include the application of fixed property in supplying accommodation in a dwelling under an agreement for the letting and hiring thereof where any such agreement is for a fixed period exceeding 12 months, in which case this section will not apply, but the provisions of s 18(1) shall apply.

Tax Administration amendments

Tax-deductible donations - s 18A

SARS may require additional information to be provided.

S 18A(2)(a) expanded:

> (vii) such further information as the Commissioner may prescribe by public notice.

Refunds of dividends tax: dividends *in specie* – s 64LA

- SARS will only pay a valid refund of dividends tax if the claim is submitted within three years from the date of payment of a cash dividend. However, the corresponding period for a dividend in specie ends three years from the date of **payment of the tax**.
- The period within which a taxpayer may claim a dividends tax refund for dividends in specie will also be determined with reference to the date of payment of the dividend.
- Section 64LA(b):
  - both the declaration and the written undertaking are submitted to the company within three years after the date of payment of the ~~[tax]~~ dividend in respect of which they are made.

Withholding tax on royalties

Section 49F of the Income Tax Act is amended:

(1) If, in terms of s 49C, a foreign person is liable for any amount of withholding tax on royalties in respect of any amount of royalties that is paid to or for the benefit of the foreign person, that foreign person must pay that amount of withholding tax and submit a return by the last day of the month following the month during which the royalty is paid, unless the tax has been paid by any other person.

Administrative non-compliance penalties for non-submission of EMP501 returns

- SARS may impose a penalty for the non-submission of the six-monthly employees' tax returns by employers. The penalty is calculated as a percentage of the employees' tax for the period covered by the return (Fourth Schedule para 14(6)).
- Where the employees' tax for the period is not known to SARS, due to the non-submission of monthly or six-monthly returns, the penalty could only be imposed retrospectively.
- The amendment allows SARS to raise the penalty on an estimate of employees' tax with an adjustment once the actual employees' tax is known.

Para 14 of the Fourth Schedule

Added:

(7) If the total amount of employees'tax deducted or withheld, or which should have been deducted or withheld for the period described in subparagraph (3), is unknown, the Commissioner may estimate the total amount based on information readily available and impose the penalty under subparagraph (6) on the amount so estimated.

(8) Where, upon determining the actual employees' tax of the person in respect of whom the penalty was imposed under subparagraph (7), it appears that the total amount of employees' tax was incorrectly estimated under subparagraph (7), the penalty must be adjusted in accordance with the correct amount of employees' tax with effect from the date of the imposition of the penalty under subparagraph (6) read with subparagraph (7).

Provisional tax: years of assessment of 6 months or shorter – para's 21 & 23 of the Fourth Schedule

- Provisional taxpayers are required to make provisional tax payments within six months after the commencement of a year of assessment and then again by the end of the year of assessment.
- No provision for instances where a taxpayer had a short year of assessment, whether by reason of death, ceasing to be a tax resident, a company being incorporated during a year or a change of a company's financial year.
- A first provisional tax payment and return will not be required when the duration of a year of assessment does not exceed 6 months.
  - Para 21**(1A)** & 23**(2)** of the Fourth Schedule: Subparagraph (1)(a) does not apply where the duration of the year of assessment in question does not exceed a period of six months.

Penalty for underdeclaration of fringe benefits – para 17 of the Seventh Schedule

- Repeal of para 17(4).
  - Para 13 of the Fourth Schedule requires employers to issue IRP5/IT3(a) certificates to their employees. The certificate must reflect the total remuneration including the amount of any fringe benefit and allowance, and the sum of employees' tax (PAYE) deducted during that period. If the employer under-deducts PAYE and under-pays SARS as a result of understating taxable fringe benefits, SARS must impose a penalty of 10% on the underpayment.
  - Para 17 of the Seventh Schedule requires that the nature of the taxable benefit and the cash equivalent of the value thereof must be reflected on the Employees' Tax Certificate or a separate certificate. If an employer fails to comply with this requirement, SARS may impose a penalty equal to 10% of the amount by which the cash equivalent is understated.
  - Two separate penalties may thus be imposed for the same understatement. The proposed amendment removes this double penalty.

Estimated assessments – TAA s 95

- SARS may make an original, additional, reduced or jeopardy assessment based in whole or in part on an estimate, if the taxpayer
  - does not submit a return (s 95(1)(a)),
  - submits a return or relevant material that is incorrect or inadequate (s 95(1)(b)), or
  - does not submit a response to a request for relevant material after delivery of more than one request for such material (s 95(1)(c)).

- An assessment under s 95(1)(b), will be subject to objection and appeal in terms of s 104(1) of the Tax Administration Act.
- An assessment under s 95(1)(a) or (c), is only subject to objection and appeal in certain conditions – as per s 95(5).

S 95(5), (6) & (7) have been amended.

(5) an estimated assessment under s 95(1)(a) or (c), is only subject to objection or appeal if SARS decides not to make a reduced or additional assessment after the taxpayer submits the return or relevant material under s 95(6).

(6) a taxpayer in relation to whom an estimated assessment was made under s 95(1)(a) or (c), may within 40 business days from the date of the assessment, request SARS to make a reduced assessment by submitting a true and full return or the relevant material.

(7) **If reasonable grounds for an extension are submitted by the taxpayer**, a senior SARS official may extend the period referred to in s 95(6) within which the return or relevant material must be submitted, for a period not exceeding the relevant period referred to in s 99(1) **or 40 business days, whichever is the longest**.

The Tax Faculty

New s 95(8)

If SARS decides not to make a reduced or additional assessment under s 95(6), the date of the assessment made under 95(1)(a) or (c), for purposes of Chapter 9, is regarded as the date of the notice of the decision.

- Based on the proposed revised wording of ss 95(5) and (6), once a taxpayer submits the relevant material as required in terms of s 95(6), SARS has one of the following three options and the taxpayer may respond accordingly:

  - Option 1: After review SARS accepts the relevant material and makes a reduced or additional assessment as requested by the taxpayer
  - Option 2: After review SARS does not accept some of the relevant material and makes a reduced or additional assessment accordingly. In this instance, the reduced or additional assessment will be subject to objection and appeal in the ordinary course, since it replaces the assessment contemplated in section 95(1)(a) or (c)
  - Option 3: After review SARS does not accept any of the relevant material, does not make a reduced or additional assessment and relies on the assessment based on an estimate. In this regard the proposed new section 95(8) clarifies that, should SARS decide not to make a reduced or additional assessment, the taxpayer may object and appeal within the normal timeframes from the date of the decision.

Review of voluntary disclosure programme

Budget 2021 statement:

> The voluntary disclosure provisions will be reviewed in 2021 to ensure that they align with SARS' strategic objectives and the policy objectives of the programme.

No amendments but see SARS Draft Guide to the VDP

2021 Judgments

Court	Date	Parties Involved
CC	21 May 2021	*Clicks Retailers (Pty) Limited v CSARS*
SCA	26 March 2021	*Massmart Holdings Limited v CSARS**
	25 May 2021	*CSARS v Tourvest Financial Services (Pty) Ltd*
	16 Sept 2021	*Mukuru Africa (Pty) Ltd v CSARS*
	15 Oct 2021	*CSARS v Spur Group (Pty) Ltd*

Court	Date	Parties Involved
GHC	15 February 2021	*Medtronic International Trading SARL v CSARS*
GHC	11 March 2021	*ABSA Bank Limited and Another v CSARS*
WCHC	23 August 2021	*Peri Formwork Scaffolding Engineering (Pty) Ltd v CSARS*

Clicks Retailers (Pty) Limited v CSARS [2021] ZACC 11 (21 May 2021)

- Tax treatment of retail loyalty programmes that are common in South Africa; whether an allowance under s 24C of the Income Tax Act, 1962, is available to Clicks, a retailer which operates one such loyalty programme.
- On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Western Cape Division, Cape Town), the following order is made:
  - 1. Leave to appeal is granted.
  - 2. The appeal is dismissed.
  - 3. The applicant shall pay the respondent's costs, including the costs of two counsel.

Clicks Retailers (Pty) Limited v CSARS

[22] The crisp issue for determination in this matter is whether Clicks can claim an allowance under s 24C in respect of income it earns in terms of its loyalty programme.

Following this Court's decision in Big G, a s 24C allowance may be claimed either when the traditional same-contract requirement is met or when the income and the obligation to finance expenditure arise from two or more contracts that are so inextricably linked that they meet the requirement of "sameness".

Clicks Retailers (Pty) Limited v CSARS

[49]

- The two contracts relied on to found Clicks' claim for a s 24C allowance function in tandem to give effect to the loyalty programme.
- This functional relationship manifests in a number of factual and legal links between the two contracts, but these links do not render either contract dependent on the other for its existence, nor is their effect that income can only accrue to Clicks if both contracts are in place.
- The contract under which income accrues (the contract of sale) and the contract under which the obligation to finance future expenditure arises (the ClubCard contract) are simply too independent of each other to meet the requirement of contractual sameness.
- Whilst they may operate together within the context of the loyalty programme, and in that sense are inextricably linked or connected, this link is not sufficient to render the contracts the same for the purposes of s 24C.
- **The contracts therefore fall short of the sameness that is required by s 24C.**

Massmart Holdings Limited v CSARS
(Case no 84/2020) [2021] ZASCA 27 (26 March 2021)

- Capital Gains Tax (CGT);
  - taxpayer implementing a share incentive scheme for its key management personnel;
  - scheme conducted through a trust;
  - whether taxpayer suffering capital losses for CGT purposes by virtue of its dealings with, and in relation to, the trust.

Massmart Holdings Limited v CSARS

- Massmart, the holding company of the Massmart Group of Companies, established a Trust in 2000 to implement a share incentive scheme for its key management personnel.
- The Trust Deed was amended in 2003 to provide that –

  The trust shall not

  33.1.1. earn any income as a result of dividends declared from time to time by the company, the trust irrevocably having renounced its rights (insofar as it would otherwise have been entitled to receive dividends in respect of shares registered in its name) to receive any such dividends; and

  33.1.2. earn any net profits (being the aggregate of profits less the aggregate of losses) on the resale of shares acquired by it from beneficiaries or otherwise, the company being the vested beneficiary.

Massmart Holdings Limited v CSARS

- The Trust suffered capital losses between 2007 and 2013.
- Massmart claimed the capital losses (R954 million), initially on the basis that it was a vested beneficiary of the Trust.
- Later changed their argument in the Rule 32 statement.
- Ultimately -
  - "30. In a nutshell the appellant's case is as follows:
  - 30.1 When it issued instructions to the trustees of the Trust to offer specific share options to specific employees at specified prices (the strike price) the appellant acquired a jus in personam ad faciendum, i.e. a right to claim performance, against the trustees, requiring them to offer the share options as aforesaid. The right was an "asset" for CGT purposes.
  - 30.2 When this right was extinguished or discharged by performance by the trustees, the extinction or discharge thereof constituted a disposal in terms of paragraph 11(1)."

Massmart Holdings Limited v CSARS

The court considered, inter alia:

paragraph 4 of Eighth Schedule – Capital losses

paragraph 1 definition of an “asset”.

IT 13798

[66] The question is whether this right is an asset. This requires an investigation into the meaning of ‘right’ generally and specifically in the context of paragraph 1 (definitions) of the Eighth Schedule to the Act, which provides as follows:

> “‘asset” includes-
>
> (a) property of whatever nature, whether movable or immovable, corporeal or incorporeal, excluding any currency, but including any coin made mainly from gold or platinum; and
>
> (b) a right or interest of whatever nature to or in such property.’

Massmart Holdings Limited v CSARS

[17] But, even were it to be accepted that the right contended for is an asset as defined, there may well be a further insuperable difficulty in the way of Massmart. It is unclear when precisely, as contemplated by paragraph 4 of the Eighth Schedule of the Act a 'disposal' of the asset occurred.

The court dismissed Massmart's appeal, holding that Massmart purported to account for the Trust's losses in its books, despite the fact that at the outset they had received legal advice noting that they could not, by arrangement between them and the Trust, change the incidence of capital gains or losses.

Medtronic International Trading S.A.R.L. v CSARS
ZAGPPHC (33400/2019) (15 February 2021)

Applicant sought declaratory relief that -

1.1. the provisions ss 225 to 233 of the Tax Administration Act (TAA) relating to voluntary disclosure programmes (VDPs) do not prohibit a request for remission of interest in terms of s 39(7) of the Value-Added Tax Act, notwithstanding a VDP agreement having been entered into;

1.2 notwithstanding a prior VDP agreement having been entered into, the respondent has a statutory duty to consider, adjudicate and decide on a request for the remission of interest in terms of s 39(7)(a) of the VAT Act.

2. the following decisions of SARS be reviewed and set aside in terms of PAJA, alternatively the principle of legality, and remitted back to SARS for reconsideration, namely: ..

namely:

2.1. The decision set out in the respondent's letter dated 1 November 2018, of which the applicant was informed per e-mail on 20 November 2018, to refuse to consider the applicant's request for remission of interest in terms of s 39(7)(a) of the VAT Act;

2.2. Alternatively, the respondent's decision set out in its letter of 13 March 2019, of which the applicant was informed per e-mail on 28 March 2019, to refuse to withdraw its decision referred to in paragraph 2.1 above and to decide that it cannot consider the request for the remission of the interest levied.

3. the respondent be ordered to consider, adjudicate and decide on the applicant's request for remission of interest in terms of s39(7)(a) of the VAT Act, dated 12 October 2018, and inform the applicant of its decision within 15 days of the order being granted. SARS' decision may not be contrary to the declaratory relief as set out above; ...

Medtronic International v CSARS Facts

- Applicant's bookkeeper defrauded and falsified VAT returns between June 2004 and May 2017.
- Applicant applied for and was granted relief under the VDP provided for in the TAA.
- The parties entered into 2 voluntary disclosure agreements in June 2018 for the payment of VAT of R286m and interest of R171m (penalties of R172m had been waived).
- The applicant subsequently applied to SARS for a remission of interest under s 39(7)(a) of the VAT Act, as read with Interpretation Note 61. SARS refused the request.
- An objection was raised on behalf of the Applicant on 10 December 2018 to the refusal to accede to the request for remission of interest liability. SARS disallowed the objection on 25 March 2019 on the basis that " .. . as the agreements entered into between the Commissioner and the respective taxpayers remain in force, the Commissioner cannot consider the request for the remission of the interest levied."
- As a consequence, the Applicant launched review proceedings in terms of ss6(2)(d), 6(2)(e)(iii), 6(2)(f)(ii), 6(2)(g) and 6(3) of the Promotion of Access to Justice Act (PAJA).

Medtronic International v CSARS Judgment

The question of 'whether SARS may consider a request for the remission of interest in terms of s 39(7)(a) of the VAT Act once a taxpayer has agreed to pay such interest in terms of a VDP contemplated by s 230 of the TAA' … comes down to the respondent or the applicant's interpretation of s 39(7)(a) of the VAT Act and to an extent s 187(6) of the TAA.

Medtronic International v CSARS Order

1. The provisions of Chapter 16, Part B, s 225 to 233 of the TAA relating to voluntary disclosure programmes do not prohibit a request for remission of interest in terms of s 39(7) of the VAT Act notwithstanding a VDP agreement having been entered into;

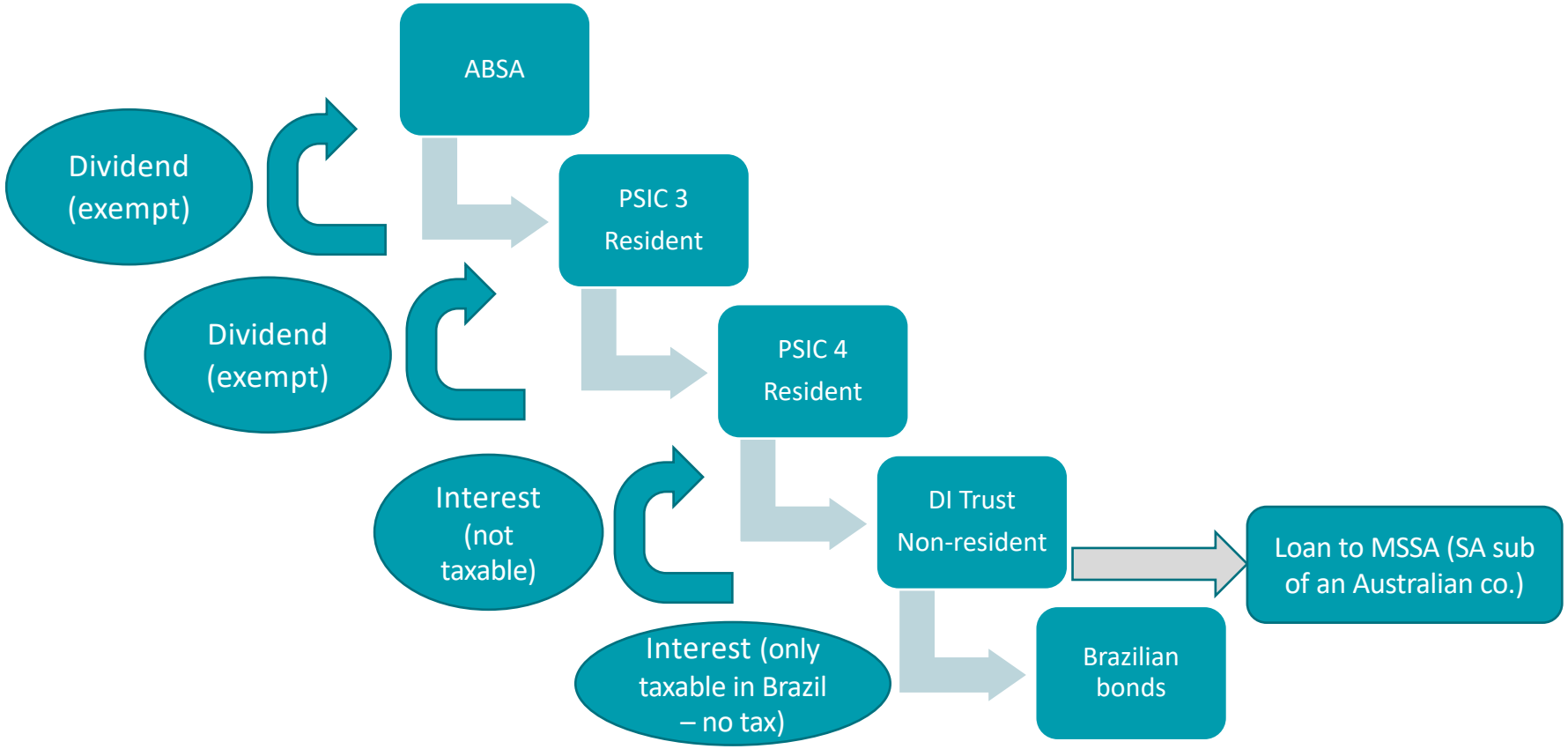
- notwithstanding a prior VDP agreement having been entered into, the respondent has a statutory duty to consider, adjudicate and decide on a request for the remission of interest in terms of section 39(7)(a) of the VAT Act.

ABSA Bank Limited and another v CSARS
(2019/21825 [P]) [2021] ZAGPPHC (11 March 2021)

ABSA sought review of 2 decisions made by SARS:

- Refusal to comply with a request by ABSA to withdraw s 80J notices in respect of each applicant about a specific transaction. Section 80J(3)(b) contemplates a withdrawal of the notice upon consideration of a taxpayer's response to the notice. Section 9 of the TAA was invoked by ABSA to demand withdrawal. SARS did not comply with the request. Instead, it determined a tax liability for ABSA as contemplated in s 80J(3)(c).
- Issuing letters of assessment to each of the applicants in respect of a tax liability imposed in terms of s 80B on ABSA in respect of the alleged arrangement. The letters of assessment were issued while the review on the first decision was pending.

ABSA Bank Limited v CSARS



ABSA Bank Limited v CSARS
Judgment (cont.)

Was ABSA a "party" to an "impermissible arrangement"?

[39] The fundamental issue is whether ABSA's conduct demonstrated that it was a party to an " impermissible arrangement". The section requires a taxpayer to 'participate or take part'.

Such conduct requires volition. A taxpayer has to be, not merely present, but participating in the arrangement. The fact that it might be the unwitting recipient of a benefit from a share of the revenue derived from an impermissible arrangement cannot constitute "taking part" in such an arrangement. SARS elides the notion of sharing with participation ... This is incorrect.

ABSA Bank Limited v CSARS
Judgment (cont.)

Did ABSA receive a tax benefit as required by s 80A?

[42] Whether a tax liability was evaded is determined by the "but for" test applied to a future anticipated tax liability (ITC 1625 59 SATC 383; *Hicklin v CIR* 1980 (1) SA 481 (A) at 492fft).

[43] SARS' rationale was articulated in the passages cited above. In my view, there is no plausible link demonstrated between ABSA and the supposedly nefarious transactions. On the “but for” test the question must be posed: but for the purchase of preference shares in PSIC 3, how might an anticipated tax liability be evaded? No foundation is set out that demonstrates such a result. Thus, the conclusion is irrational.

ABSA Bank v CSARS
Conclusions

[48] That premise was incorrect in law because the factual premise did not establish that ABSA was a party to such arrangement nor that it had an intention to escape an anticipated tax liability nor that it received relief from a tax liability as result of acquiring preference shares in PSIC 3.

[49] The letters of assessment were issued on the factual premise of the s 80J notice and their fate is indistinguishable from that of the s 80J notices.

[50] The decision to refuse to withdraw the s 80J notices and the issue of the letters of assessment is reviewed and set aside.

[51] It is appropriate that an order be made withdrawing the s 80J notices.

PERI Formwork Scaffolding Engineering (Pty) Ltd v CSARS [2021] ZAWCHC 165 (23 August 2021)

- Penalty for late payment of PAYE and interest thereon
- Due date for payment
- Reasonable ground for late payment?

PERI Formwork v CSARS Facts

- December EMP201
- Business reopened 3 Jan 2018
- 7 Jan 2018 fell on a Sunday
- Payment of R10m due to be made on 3 Jan 2018 but insufficient cashflow as debtors had not paid on time
- Arranged R5m overdraft 5 Jan 2018 but still short of R138 262
- Payment could not be released on time – payment made on 8 Jan 2018

TAA s 217: Remittance of penalty

(3) In the case of a penalty imposed under s 213, SARS may remit the penalty, or a portion thereof, if SARS is satisfied that —

- the penalty has been imposed in respect of a 'first incidence' of the non compliance described in s 210, 212 or 213, or involved an amount of less than R2 000;
- reasonable grounds for the non-compliance exist; and
- the non-compliance in issue has been remedied.

PERI Formwork v CSARS

[66] In my view, s 217(3) envisages a mechanism to come to the assistance of an aggrieved first incidence non-complying tax payer, who has in addition, satisfied two further requirements, most notably, that they have satisfied SARS that reasonable grounds exist for the non-compliance.

In this instance, a factor which SARS failed to consider, which could, in my view, render it as a reasonable ground, is the manner in which the Appellant, when it realised that it would be unable to comply with the payment instruction on 3 January 2018, attempted to rectify the deficiency.

... evidences reasonable grounds for the penalty imposed to be have been remitted, especially given the fact that it was a first incidence of non- compliance.

In the circumstances, I am of the view that the appeal must succeed.

CSARS v Tourvest Financial Services (Pty) Ltd [2021] ZASCA 61 (25 May 2021)

- Tourvest - a licensed dealer in foreign exchange, trading under the name American Express Foreign Exchange.
- 52 branches countrywide and a head office, with a centralised treasury division that procures stock of foreign currency and sets the exchange (buy and sell) rate at which the branches may transact with customers.
- A margin is built in to the quoted rates. The rate is set by taking the market exchange at any given time and adding a percentage mark-up thereto.
- The branches buy from - or sell to - customers at the exchange rate set by the treasury division, which is continually subject to change as the currency markets fluctuate.
- Tourvest also charges a commission, based on a percentage of the transaction value. VAT is levied on the commission

ABC (Pty) Ltd v CSARS (JHB Tax Court Case no. VAT 1626: 3 March 2020)

VAT Act: whether the Appellant was entitled to certain input tax deductions.

A makes mixed supplies: some taxable and some exempt.

September 2013 VAT period: A claimed a VAT refund in the amount of R24million by applying the direct attribution method as opposed to the turnover apportionment method it previously applied from July 2008 to August 2013.

SARS rejected A's assessment and raised an additional assessment of R24m in April 2016, plus penalties (R2,4m) and interest (R5,6m).

The Tax Court found that 'on the facts and evidence before us this [commission/fee] is the only payment that the customer makes to the [respondent] for the exchange of currency'.

VAT Act

- Section 16(3)(a), read together with the definition of "input tax" in s1, allows the deduction of input tax where the goods or services concerned are acquired by the vendor wholly for the purpose of consumption, use or supply in the course of making taxable supplies or, where the goods or services are acquired by the vendor partly for such purpose, to the extent (as determined in accordance with the provisions of s 17) that the goods or services concerned are acquired by the vendor for such purpose.
- Section 12(a): the supply of a financial service is exempt from VAT
- Section 2(1)(a): the activity of the exchange of currency is a financial service.
- proviso to s 2(1) excludes from "financial services" the activity of the exchange of currency to the extent that the consideration payable for the activity is any fee or commission.

CSARS v Tourvest Financial Services (Pty) Ltd

[16] ... the proviso creates a mixed supply out of an identified activity, rather than causing the activity to lose its exempt status in its entirety. Accordingly, the effect of the proviso in the present context is merely to add a taxable element to what is, and at its core remains, an exempt financial service.

It turns the activity into a partly exempt and a partly taxable supply. That being so, any tax paid on goods and services acquired by the respondent must be apportioned and only the part attributable to the taxable supply may be deducted as input tax.

The respondent's attempt to claim the entire VAT charge as deductible input tax must therefore fail.

Mukuru Africa (Pty) Ltd v CSARS [2021] ZASCA 116 (16 September 2021)

- Appeal from the Tax Court
- Apportionment of VAT under s 17(1) of the VAT Act

- Mukuru, a registered vendor, commenced business on 1/2/2014
- Provides money-transfer and bureau de change services, as well as mobile phone credits.
- makes both taxable and exempt supplies and incurs expenditure in acquiring goods and services for the purpose of use, consumption or supply in the making of those supplies.
- the input VAT incurred must therefore be apportioned in terms of s 17(1) of the VAT Act.

Section 17(1)

- Where goods or services are acquired or imported by a vendor
- partly for consumption, use or supply in the course of making taxable supplies and partly for another intended use,
- the extent to which any tax which has become payable in respect of the supply to the vendor or the importation by the vendor... of such goods or services ... is input tax,
- shall be an amount which bears to the full amount of such tax ..., the same ratio (as determined by the Commissioner in accordance with a ruling as contemplated in Chapter 7 of the Tax Administration Act or s 41B)
- as the intended use of such goods or services in the course of making taxable supplies bears to the total intended use of such goods or services...

Proviso (iii) to s 17(1)

- where a method for determining the ratio referred to in this subsection has been approved by the Commissioner,
- that method may only be changed with effect from a future tax period, or from such other date as the Commissioner may consider equitable and such other date must fall –

  (aa) in the case of a vendor who is a taxpayer as defined in s1 of the Income Tax Act, within the year of assessment as defined in that Act; or

  (bb) in the case of a vendor who is not a taxpayer as defined in s 1 of the Income Tax Act, within the period of 12 months ending on the last day of February, or if such vendor draws up annual financial statements in respect of a year ending other than on the last day of February, within that year, during which the application for the aforementioned method was made by the vendor.

Method of apportionment

BGR 16 prescribes the standard turnover-based method (STB method) of apportionment as the default method of apportionment, which applies to all vendors who have not obtained an alternative ruling from SARS.

- On 20 February 2017, Mukuru applied to SARS for a ruling under s 41B of the VAT Act to permit the use of a 'transaction count (TC)' ratio to apportion its mixed-purpose input VAT deductions for the tax periods commencing 1 February 2014.
  - On 24 July 2018, SARS approved the TC method for use by Mukuru (the July 2018 ruling) - for the period commencing 1 March 2016, but not in respect of the earlier period from 1 March 2014 to 29 February 2016.
  - SARS took the view that proviso (iii) precluded it from approving the TC ratio for use in any period prior to 1 March 2016. Mukuru objected against SARS decision.

[13] Relying on what was styled a ‘condition’ in BGR16, Mukuru argues that, given the nature of its business, it was not ‘fair and reasonable’ for it to use BGR16.

- The ‘condition’ in BGR 16 reads
  - ‘The vendor may only use this method if it is fair and reasonable. Where the method is not fair and reasonable or inappropriate, the vendor must apply to SARS to use an alternative method.’
- Mukuru argued that because BGR16 did not apply to it, the July 2018 ruling did not constitute a change to an existing apportionment method and therefore, proviso (iii) does not apply, to preclude the retrospective operation of the July 2018 ruling.

VAT Guide for Vendors (VAT 404)

‘The only approved method which may be used to apportion VAT incurred for mixed purposes without specific prior written approval from the Commissioner, is the turnover-based method.

This method applies by default in the absence of a specific ruling obtained by the vendor to use another method as there is usually a fairly good correlation between the turnover of a business and the resources (or inputs) which are employed to produce that turnover.’

[17] In any event, it is not open to a vendor to simply ignore a SARS' ruling or to unilaterally apply its own method of apportionment.

- What is more, in terms of BGR16, if the method prescribed is not fair and reasonable or appropriate, the vendor must apply to SARS for a fair, reasonable and appropriate ruling.
- It does not provide, as Mukuru appears to suggest, that from the commencement of its operations, no approved apportionment method applied to it.
- Nor did it provide for Mukuru to simply unilaterally assume its own apportionment; one not sanctioned by SARS.
- The remedy for any unfairness and unreasonableness or inappropriateness is for a vendor to apply to the SARS for an alternative method of apportionment, not to regard BGR16 as pro non scripto.

[19] cont.

- When SARS approved the change of method in response to Mukuru's application, it had no power to do so retrospectively, to a date earlier than 1 March 2016. It follows that the Tax Court was correct in its conclusion that:
- '. . . The STB method set out in BGR16 was the only ratio applicable to the appellant until its private binding ruling had been issued in 2017 and proviso (iii) to s 17(1) expressly precluded SARS from issuing a ruling that had effect from a date earlier than 1 March 2016.'

CSARS v Spur Group (Pty) Ltd [2021] ZASCA 145 (15 October 2021)

Payment of a contribution to an employees' share incentive scheme trust:

i. whether there was a sufficiently close connection between the contribution and the taxpayer's income producing operations so as to qualify for a deduction under s 11(a) of the Income Tax Act; and

ii. if the connection between the contribution and the taxpayer's production not close or immediate enough to justify the deduction, was SARS precluded from raising additional assessments in respect of the taxpayer's 2005-2009 years of assessment by operation of the period of limitations provided in s 99(1) of the Tax Administration Act.

Background

- Spur is the main operating entity in the Spur Group of companies. It is a wholly owned subsidiary of Spur Corporation Limited (Spur HoldCo).
- On 30 November 2004, Spur HoldCo established the Spur Management Share Trust (the trust), a discretionary trust of which, Spur HoldCo was the sole capital and income beneficiary.
- The Trust Deed was amended on 13 December 2010 to permit the participants to benefit from dividends received by the trust. However, Spur HoldCo remained the sole capital beneficiary.
- On 7 December 2004, Spur concluded a contribution agreement with the trust in terms of which an amount of R48 million was contributed to the trust.
- The trust acquired 1 000 preference shares in NewCo, which were redeemed five years later in December 2009. The R48million was returned to the trust and remained in the trust.

- Spur claimed a contribution of R48 million it made to the trust in Dec 2004 as a deduction from its income under the general deduction formula (s 11(a)).
- The deduction was spread over the period of the anticipated benefit to be derived from the payment, from 2005 to 2012, in terms of s 23H as follows:
  - R3 462 265 in 2005;
  - R6 924 531 for the years 2006 to 2011;
  - and R3 462 265 in 2012.

SARS' argument

- Spur made the contribution to the trust, of which Spur HoldCo was the sole beneficiary.
- Spur HoldCo was the only party to have benefited directly from the contribution as the trust distributed the preference share capital and the preference share dividends to its beneficiary, Spur HoldCo.
- The participants were thus not the beneficiaries of the contribution.
- No causal link at the time of the contribution.
- The contribution therefore not expenditure incurred in the production of Spur's income as required by s 11(a); only an indirect and insufficient link between the expenditure and any benefit from the incentivisation of Spur's key staff.

[31] The contribution of R48 million was used, wholly, to subscribe for preference shares in NewCo.

Only the trust held the NewCo preference shares, and only it was entitled to the return of the R48 million contribution, plus the preference dividend on those shares.

The participants had no right to any part of the contribution, nor to the preference dividends that flowed from the investment thereof.

[32] Importantly, in terms of the trust Deed, only Spur HoldCo would, as capital beneficiary, have any right to the ultimate delivery of the R48 million contribution and any yield therefrom.

- The participants were neither capital nor income beneficiaries of the trust at that stage
  - they might have become entitled to dividends accruing to the trust from 2010 onwards, following upon an amendment to the trust deed to this effect, but this fact was irrelevant as the concern was in relation to what was done when the contribution of R48 million was made in 2004.

The prescription issue

- SARS raised additional assessments on 28 July 2015 in respect of Spur's 2005-2009 years of assessment.
- The original assessments were raised on
  - 31 May 2007 (2005),
  - 7 August 2007 (2006),
  - 12 May 2009 (2007),
  - 24 February 2010 (2008) and
  - 16 January 2010 (2009).

Section 99(1) of the TAA

- Provides that the Commissioner may not make an assessment more than three years after the date of the original assessment by SARS, but
- except where (s 99 (2)(a)) in the case of assessment by SARS the fact that the full amount of tax chargeable was not assessed, was due to –
  - Fraud;
  - Misrepresentation; or
  - Non-disclosore of material facts.

- SARS alleged that the amount of tax chargeable in terms of the additional assessments were not so assessed by SARS in the 2005- 2009 years of assessments due to misrepresentation and non- disclosure of material facts by Spur.
- In its 2005 income tax return (IT14), Spur had answered 'no' to the following questions:
  - Were any deductions limited in terms of s 23H?
  - Did the company make a contribution to a trust?
  - Was the company party to the formation of a trust during the year?
- In the 2006 income tax return, Spur answered 'no' to the question:
  - Were any deductions limited in terms of s 23H?
- Furthermore, in each of the 2005-2008 income tax returns, the amount of deductions claimed in respect of the contribution, which were limited by s 23H of the ITA, were disclosed by Spur under the category 'other deductible items' and not under the line item 'prepaid expenditure (as limited by s 23H)'.

Conclusion:

Spur had made false statements in the returns

> [63] I should also add that as a matter of policy, a court would be loath to come to the assistance of a taxpayer that has made improper or untruthful disclosures in a return. Clearly, this would offend against the statutory imperative of having to make a full and proper disclosure in a tax return.
>
> [64] In light of what I have stated above, I therefore find that the misrepresentations and non-disclosures by Spur caused the Commissioner not to assess Spur correctly within the three-year period after the original statements.

Thus, the appeal was upheld and the assessments raised by SARS for 2005 – 2012 were confirmed.

SARS Documents

New interpretation notes

Publication Date	No.	Subject	Relevant sections
02/03/2021	IN 114	Interaction between s 25B(1) and s 7(8)) in case of conflict, inconsistency or incompatibility	ss 25B(1) and 7(8)
23/04/2021	IN 115	Withholding tax on interest	ss 50A to 50H
23/04/2021	IN 116	Withholding tax on royalties	ss 49A to 49H
17/05/2021	IN 117	Taxation of the receipt of deposits	s 1(1) – Definition of "gross income"
04/11/2021	IN 118	VAT consequences of points-based loyalty programmes	s 1(1) Definitions "consideration", "input tax", and "supply"; ss 7 and 10

Binding general rulings

Publication Date	BGR No.	Subject	Relevant sections
6/4/2021	56	VAT: Application for a decision under s 72	S 72
20/10/2021	57	VAT: Whether the term “consideration” includes transfer duty for the purposes of calculating a notional input tax deduction on the acquisition of second-hand fixed property	S 1(1) Definition of “consideration”; para (*b*) of the definition of "input" tax; s 16(3)(*a*)(ii)(*aa*) and (*bb*) and 16(3)(*b*)(i)
04/11/2021	58	Purchase of different types of annuities at retirement	s 1(1) Definitions “pension fund”, “pension preservation fund”, “provident fund”, “provident preservation fund”; “retirement annuity fund”

Notices

Notice 474 (*Gazette* 44640): retirement annuity fund withdrawal

Notice 1461: fixed amount penalties

Retirement annuity fund withdrawal

Paragraph (b)(x)(cc) of the proviso to the definition of "retirement annuity fund"

Proviso (b): the rules of the fund must provide that a member who discontinues his or her contributions prior to his or her retirement date shall be entitled to –

(aa) an annuity or a lump sum benefit contemplated in paragraph 2(1)(a) of the Second Schedule payable on that date;

(bb) be reinstated as a full member under conditions prescribed in the rules of the fund;

(cc) the payment of a lump sum benefit contemplated in paragraph 2(1)(b)(ii) of the Second Schedule where that member's interest in the fund is less than an amount determined by the Minister by notice in the *Gazette* ..

- Notice 474 (*Gazette* 44640): the amount contemplated in para (b)(x)(cc) of the proviso must be an amount of **R15 000** (was R7 000) with effect from 1 March 2021.

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SARS Public Notice 1461
29 October 2021

Incidences of non-compliance that are subject to a fixed amount penalty in accordance with ss 210(1) and 211 of the TAA:

2.1 Failure by a natural person to submit an income tax return as and when required under a tax Act, for years of assessment commencing on or after 1 March 2006, where that person has, with effect from 1 December 2021 -

2.1.1 two or more outstanding income tax returns for years of assessment commencing on or after 1 March 2006 but ending on or before 29 February

2020; or

2.1.2 one or more outstanding income tax returns for years of assessment commencing on or after 1 March 2020.

SARS Public Notice 1461

Cont.

2.2 Failure by a natural person to submit an income tax return as and when required under the Income Tax Act, for years of assessment commencing on or after 1 March 2006, where that person has, with effect from 1 December 2022, one or more outstanding income tax returns.

SARS Website

The deadline for individual non-provisional taxpayers is 23 November 2021.

Taxpayers in the auto-assessment population, who neither accepted nor edited and submitted their simulated assessments by this date, will receive an original assessment based on an estimate in accordance with section 95 of the Tax Administration Act, 2011.

This assessment is not subject to objection and appeal. However, a taxpayer who is not in agreement with his or her assessment may file a complete and accurate tax return within 40 business days of the assessment date.

Such a return will be late, which means that normal late submission penalties and interest (where applicable) will apply. See the letter to stakeholders for more information.

To see an example of the reminder SMSs currently being sent, click here.

S 6B Medical credit: disability expenditure

Guide on the Determination of Medical Tax Credits (Issue 13)

Amended List of Qualifying Physical Impairment or Disability Expenditure – Effective from 1 March 2020

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PAYE on pension annuities

SARS Directives

Deceased estates

- Valuation of non-listed shares must be approved by SARS
  - Website notice

  - The Commissioner must approve the valuation of shares held by the deceased person in unlisted companies/close corporations or shareblock companies at the time of death. For the valuations to be done, valuation packs together with the Valuation Pack Checklist, must be provided to the Share Valuations Team at the following address estatesharevaluations@sars.gov.za. For more information, scroll down to the Share Valuations paragraph.

QUESTIONS?

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THANK YOU!

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DISCLAIMER:

Nothing in this presentation should be construed as constituting tax advice or a tax opinion. An expert should be consulted for advice based on the facts and circumstances of each transaction/ case. Even though great care has been taken to ensure the accuracy of the answer, neither SAIT nor The Tax Faculty accept any responsibility for consequences of decisions taken based on this query and answer. It remains your own responsibility to consult the relevant primary resources when taking a decision.

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