



JUTA'S TAX LAW REVIEW

MARCH 2013

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Welcome to the March edition of *Juta's Tax Law Review*. We thank you for your constructive suggestions and comments about this electronic review.

SOME POINTS ABOUT THE CASE NOTES:

The case notes, classified by subject, are not intended as comprehensive summaries of the various judgments referred to. Rather, their focus is to identify those aspects most likely to be of interest to tax practitioners, and to provide a concise evaluative commentary.

Following each case note is a link to the full text (when available) of the judgment on Juta Law's website. The successive reviews and judgments are incorporated in your Juta's Tax Library, providing a comprehensive record of tax case law.

Please continue to send feedback to the publisher, Steve Allcock (sallcock@juta.co.za)

Kind regards

The Juta Law Marketing Team

LEGISLATION

Since the November 2012 issue of the Juta Tax Law Review the following legislation has been promulgated:

- Tax Administration Laws Amendment Act 21 of 2012 (promulgated 20 December 2012)
- Taxation Laws Amendment Act 22 of 2012 (promulgated 1 February 2013)

EXPLANATORY MEMORANDA

- Memorandum on the Objects of the Tax Administration Laws Amendment Bill, 2012 (This memorandum appears at the end of the Tax Administration Laws Amendment Bill B35 of 2012.)
- Explanatory Memorandum on the Taxation Laws Amendment Bill, 2012 (10 December 2012, WP -'12)

BINDING RULINGS

Binding general rulings

[There have been no binding general rulings for this period—eds.]

Binding private rulings

BINDING PRIVATE RULING: BPR 127

This ruling deals with the granting of relief from double taxation of interest received or accrued from a Zambian source in the hands of a resident of South Africa.

Effective date: 21 November 2012

Affected legislation: Income Tax Act 58 of 1962

Provisions: Sections 1(1) (definition of 'gross income'), 5, 10, 24J and 108 and para 5 of article xii of the convention between the government of the Union of South Africa and the government of the Federation of Rhodesia and Nyasaland (which is now of application to Zambia) for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income.

Executive summary:

This ruling provides relief from double taxation in respect of interest received by or accruing to a South African resident from a Zambian source.

BINDING PRIVATE RULING: BPR 128

Effective date: 10 December 2012
Affected legislation: Income Tax Act 58 of 1962
Provisions: Sections 1(1) (definition of 'financial instrument') and 41(1) (definitions of 'associated group of companies' and 'foreign financial instrument holding company').

Executive summary:

This ruling deals with the disposal of equity shares in a foreign company, taking into account the calculation of the prescribed portion of assets held by that foreign company as contemplated in the definition of 'foreign financial instrument holding company' in s 41(1) of the Act and the relevance to para 64B of the Eighth Schedule to the Act.

Binding private ruling: BPR 129

Effective date: 10 December 2012
Affected legislation: Income Tax Act 58 of 1962
Provisions: Sections 64D (definition of 'beneficial owner') and 64F(a).

Executive summary:

This ruling deals with the exemption from dividends tax of dividends received by a company as a result of being the beneficial owner of such dividends that were paid in respect of that company's own shares.

Binding Private Ruling: BPR 130

Effective date: 13 December 2012
Affected legislation: Income Tax Act 58 of 1962
Provisions: Section 1(1) (definition of 'gross income') and paras 1, 3, 4, 11, 20, 33, 35 and 38 of the Eighth Schedule to the Act.

Executive summary:

This ruling deals with the capital gains tax consequences of the sale of mining rights.

BINDING PRIVATE RULING: BPR 131

Effective date: 11 January 2013
Affected legislation: Income Tax Act 58 of 1962
Provisions: Section 8C and paras 2 and 11A of the Fourth Schedule to the Act.

Executive summary:

This ruling deals with the vesting date of a restricted equity instrument acquired by employees in respect of their employment.

BINDING PRIVATE RULING: BPR 132

Effective date: 14 January 2013
Affected legislation: Income Tax Act 58 of 1962
Provisions: Sections 41(2) and 42 and paras 11(1)(g) and 12(5) of the Eighth Schedule to the Act.

Executive summary:

This ruling deals with the disposal of a business as a going concern by a trust to a company, in exchange for shares in the company, and whether the transaction will qualify for the relief provided for under s 42 of the Act.

BINDING PRIVATE RULING: BPR 133

Effective date: 15 January 2013
Affected legislation: Income Tax Act 58 of 1962; Transfer Duty Act 40 of 1949
Provisions: Section 64FA(1)(c) and para 51A of the Eighth Schedule to the Act; s 9(20) of the Transfer Duty Act.

Executive summary:

This ruling deals with the capital gains tax and transfer duty consequences, for both the transferor and transferee, in respect of a residence to be transferred out of a company to a natural person who is a qualified transferee for purposes of the relief measures provided for under the relevant legislation.

BINDING PRIVATE RULING: BPR 134

Effective date: 23 January 2013
Affected legislation: Income Tax Act 58 of 1962; Exchange Control Amnesty and Amendment of Taxation Laws Act 12 of 2003
Provisions: Section 10B(2)(a) of the Income Tax Act; s 4 of the Exchange Control Amnesty and Amendment of Taxation Laws Act.

Executive summary:

This ruling deals with the income tax consequences of an election made by a person under s 4(1) of the Exchange Control Amnesty and Amendment of Taxation Laws Act that deemed such a person to be the holder of any foreign asset which was held on 28 February 2003 by a discretionary trust that is not a resident of South Africa.

BINDING PRIVATE RULING: BPR 135

Effective date: 7 February 2013
Affected legislation: Income Tax Act 58 of 1962
Provisions: Sections 1(1) (definition of 'gross income' para (h)), 11(g) and 11(h).

Executive summary:

This ruling deals with the income tax consequences, for both the lessor and the lessee, of a long-term lease agreement in terms of which the lessee will be obliged to effect improvements on immovable property without any claim for either compensation for the improvements or for the removal thereof on termination of the lease.

Binding class rulings

BINDING CLASS RULING: BCR 036

Effective date: 29 November 2012
Affected legislation: Income Tax Act 58 of 1962
Provisions: Sections 10(1)(B), 10(1)(k)(i)(ee) and 25BA.

Executive summary:

This ruling deals with the tax treatment that is applicable in respect of reserves held by a collective investment scheme in securities that will be distributed to unit-holders in the scheme.

BINDING CLASS RULING: BCR 037

Effective date: 23 January 2013
Affected legislation: Income Tax Act 58 of 1962; Securities Transfer Tax Act 25 of 2007.
Provisions: Section 46 of the Income Tax Act; s 8(1)(a)(iv) of the Securities Transfer Tax Act.

Executive summary:

This ruling deals with the question whether the transfer of equity shares held by a company to the shareholders of that company, in an unbundling transaction, will be exempt from dividends tax and securities transfer tax.

NEW INTERPRETATION NOTES

The following new interpretation notes have been issued since November 2012:

INTERPRETATION NOTE NO: 68 (Issue 2)

Effective date: 7 February 2013
Affected legislation: Tax Administration Act 28 of 2011
Provisions: Chapter 12 and Schedule 1

Executive summary:

This Interpretation Note deals with provisions of the Tax Administration Act that did not commence on 1 October 2012 when the Act came into operation except for certain provisions relating to interest. This Interpretation Note provides guidance on the identification of those interest provisions that have not come into operation. Issue 1 of this Note omitted to include ss 64B(9) and 64K(6) of the Income Tax Act 58 of 1962 in Annexure B, and this oversight has been corrected in this issue of the Note.

INTERPRETATION NOTE: NO 69

Effective date: 12 February 2013
Affected legislation: Income Tax Act 58 of 1962
Provisions: Section 26 and the First Schedule

Executive summary:

This Note provides guidance on the application of selected sections of the Act and paragraphs of the First Schedule to persons carrying on game-farming operations, its primary focus being the provisions applicable to livestock. It is not intended to deal with farming in general and it replaces Practice Note 6 dated 30 July 1999.

CASE LAW

SUPREME COURT OF APPEAL

HR Computek (Pty) Ltd v CSARS [2012] ZASCA 178 (29 November 2012)

In an appeal to the tax court in terms of the Value-Added Tax Act, the taxpayer is limited to the grounds set out in the notice of objection to the assessment in question

Background

The taxpayer had objected to an additional assessment issued by SARS in respect of value-added tax.

Facts

An audit by SARS of the affairs of HR Computek (Pty) Ltd revealed that the company had under-declared and in consequence had underpaid the value-added tax that ought to have been remitted to the South African Revenue Service in terms of the Value-Added Tax Act 89 of 1991.

SARS consequently revised the relevant VAT 201 returns that had been submitted by the taxpayer. The revised assessment reflected the capital amount on which VAT was payable, and levied additional tax at the rate of 200% in terms of s 60 of the VAT Act plus a penalty in terms of s 39(1)(a) of the VAT Act and interest on the capital amount in terms of s 39(1)(a)(ii) of the VAT Act.

The taxpayer, represented by its sole member, filed a notice of objection in respect of the revised assessment, using the standard form in this regard, namely form ADR1. In an addendum to the ADR1, the taxpayer stated the grounds of objection as follows:

1. Unfair application of procedural matters by SARS Special Investigations.
2. Excessive add tax of 200% plus penalties and interest charges
3. Interference of SARS Special Investigation officer into the affairs of the businesses including HR & Associates without any form of negotiations or consultations.
4. Reparations of damages caused by SARS interference and actions in the said businesses in order to put things right.
5. SARS contraventions of its own SARS CHARTER and SARS SSMO and Dispute Resolution processes.'

The taxpayer also attached a three-page letter, the primary focus of which was the conduct of one of the investigators in the employ of SARS.

SARS thereafter advised the taxpayer that its objection had been disallowed and stated the first reason for such disallowance, as follows:

'No objection to the quantum of additional vat output raised suggesting your acceptance of these figures. Revised additional vat assessments raised on the basis of vat invoices issued and payments received for services rendered'.

The taxpayer filed a notice of appeal by way of form ADR2 in respect of the disallowance of the objection.

In its statement of the grounds of assessment, in terms of rule 10 of the Rules provided for in s 107A of the Income Tax Act, SARS contended that—

'When the objection (Notice of Objection and the letter of the grounds of Objection) and the appeal (Notice of Appeal and the letter of the grounds of Appeal) [are considered], it is clear that the Appellant does not dispute liability for the capital amount.

The only amounts of the assessment that the Appellant objected to and appealed against were the levying of additional tax at 200%, interest and penalty'.

In response, the taxpayer filed a notice in terms of Rule 11 which, for the first time asserted that, in calculating its VAT liability, SARS had included the turnover figures of a related, but different legal entity, HR & Associates.

Issue

At the pre-trial conference, the parties agreed that the preliminary point to be argued was whether or not the taxpayer had objected to the capital amount in issue and that, if the court were to find that the taxpayer had not so objected, the taxpayer would not be entitled to raise that capital amount as an issue in the trial, unless leave to amend were granted.

Decision

The Johannesburg Tax Court had decided this preliminary point against the taxpayer, but granted leave to appeal to the Supreme Court of Appeal.

The Supreme Court of Appeal held that, in the circumstances, the conclusion of the Tax Court was unassailable, for the following reasons. Section 32 of the VAT Act identifies the subject-matter in respect of which the taxpayer may object, which includes an assessment in terms of s 31; the capital amount in issue was an assessment to tax in terms of s 31 to which the taxpayer ought to have objected, but he had failed to do so. It followed, said the court, that not having raised an objection to the capital assessment in its notice of objection, the taxpayer was now (as Rule 6(3)(a) makes clear) precluded from raising this issue on appeal before the Tax Court. When challenging the capital amount for the first time in its Rule 11 statement, the taxpayer had effectively raised a new objection.

The assessment had accordingly become final and conclusive and, since three years had now elapsed as envisaged in s 31A, the taxpayer could not now require SARS to revisit its assessment, even if the assessment was incorrect.

CASE LAW

High Court

MTN International (Mauritius) Ltd v CSARS (Case No 23203/11; North Gauteng High Court; not yet reported; 31 January 2013)

Whether the High Court has jurisdiction to determine the validity of an assessment to income tax.

Background

The taxpayer sought relief in the High Court by way of the setting aside of an additional assessment to income tax.

Facts

The taxpayer, a company registered in Mauritius, was a subsidiary of the MTN Group Ltd, a company listed on the Johannesburg Securities Exchange.

The taxpayer applied to the High Court in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) for the review of allegedly invalidating defects in the issuing by SARS of an additional tax assessment in terms of s 79 of the Income Tax Act.

The relief sought by the taxpayer in the High Court was an order setting aside the additional tax assessment in respect of certain years of assessment. Simultaneously, the taxpayer instituted proceedings in the Tax Court, contesting the additional assessment on the merits.

Issue

The general issue in these proceedings was the jurisdiction of the High Court and the Tax Court, respectively. The High Court proceedings raised the issue whether due process had been followed by SARS in issuing the additional assessments in question.

In particular, the question arose as to whether the High Court had jurisdiction to determine the validity of the assessment in question.

In addition, the taxpayer sought to impugn the validity of the additional assessment in terms of PAJA on the grounds that SARS had acted *mala fide* in issuing the additional assessment which was consequently invalid.

SARS contended that, in terms of s 94 of the Income Tax Act, the production of a document issued by the Commissioner and purporting to be an extract from a notice of assessment is 'conclusive evidence of the making of such assessment' and that the validity of the assessment could therefore not be challenged.

Decision

In his judgment, Thlapi J took account of *dicta* of the Constitutional Court in *Metcash Trading Ltd v Commissioner, South African Revenue Service* 2001 (1) SA 1109 (CC) as to the competence of the superior courts to determine issues of law in order to give interim relief.

Thlapi J held that he was unable, in the present High Court proceedings, to determine the alleged *mala fides* of SARS in this matter because this would involve examining whether SARS had satisfied itself that it was, in the circumstances, proper to raise the additional assessment, and that this was an issue that had to be decided by the Tax Court. He therefore dismissed with costs the taxpayer's application to the High Court, in terms of PAJA, to impugn the validity of the assessment.

Rossi and Others v Commissioner for South African Revenue Service (Case No 2010/34417; South Gauteng High Court; 22 February 2011)

Whether the High Court has concurrent jurisdiction with the Tax Court.

Background

The decision of the South Gauteng High Court in *Rossi v Commissioner for South African Revenue Service* (2012) 8 SATC 387 has only now been reported in the law reports, although judgment was handed down on 22 February 2011.

Facts

The taxpayer (being out of time to initiate proceedings in the Tax Court) instituted proceedings in the High Court to contest liability to employees' tax.

Issue

This judgment was based solely on jurisdiction. The issues included whether the Tax Court has jurisdiction to adjudicate applications under s 102 of the Income Tax Act which provides for taxpayers to be refunded amounts that they had paid, in excess of what was properly chargeable under the Act. The ancillary question was whether a taxpayer who has failed to the remedies provided for in the Income Tax Act, has a right of recourse to the High Court on the basis that the latter court exercises concurrent jurisdiction with the Tax Court.

Decision

Satchwell J affirmed the principle laid down in *Van Zyl NO v The Master and Another* 1991 (1) SA 874 (E) that an assessment can be contested only in the manner provided for in the Income Tax Act (and now provided for in the Tax Administration Act), that is to say, by

lodging an objection and then, if the objection is turned down, appealing to the Tax Court in terms of s 83 of the Income Tax Act.

Satchwell J said that the motion court of the High Court (unlike the Tax Court, which is a specialist tribunal) is not specifically equipped to deal with disputed tax matters. Moreover, the High Court can give relief of an interlocutory nature only in respect of legal issues, and disputes of fact have to be determined by the Tax Court

Satchwell J rejected the contention that a taxpayer who has failed to utilise the remedies provided for in the Income Tax Act can have recourse to the High Court, on the basis that the latter court exercises concurrent jurisdiction with the Tax Court.

Bosch and Another v CSARS [2012] ZAWCHC 188 (Case No 91/2012; Western Cape High Court; not yet reported; 20 November 2012)

Judgment of Davis J

Judgment of Waglay J

Whether gains made by employees under a certain employee share incentive scheme were within the scope of s 8A of the Income Tax Act.

Background

The two appellants, Bosch and McClelland, had been employed by the Foschini Group and had participated in a deferred delivery employee share incentive scheme. In 2008, SARS raised additional assessments against the appellants and assessed them to tax in terms of s 8A of the Income Tax Act.

Facts

In terms of the deferred delivery employee share incentive scheme, the share options in question had to be exercised within 21 days. Delivery of the shares and payment for the shares was to take place in tranches over several years. The shares could not be disposed of prior to delivery, and they entitled their holders to neither dividends nor voting rights.

In terms of the scheme, if the shares, on delivery, had a market value that was less than the consideration then payable, the participating employees were entitled to sell their shares back to Foschini at their original purchase price. On termination of employment, the employee was obliged to sell his shares back to Foschini for the same amount, payable on delivery.

The intent of the scheme was that only gains made during the short exercise period would be taxable in the hands of the employees and that gains made prior to delivery would not be within the scope of s 8A and consequently would not be included in the employees' gross income.

Issues

SARS advanced two arguments in support of the assessments. Firstly, that the scheme involved a simulated transaction, as envisaged in the Supreme Court of Appeal decision in *CSARS v NWK Ltd* 2011 (2) SA 67 (SCA); secondly, that no unconditional sale had occurred when the option was exercised.

There were thus two issues in this matter. Did the scheme involve a simulated transaction and did the delivery of the scheme shares to the appellants constitute an exercise of a right to acquire the shares that was within the scope of s 8A of the Income Tax Act?

Decision

In separate but concurring judgments, Davis J and Waglay J both rejected SARS's contention that the scheme involved a simulation (though they differed as to the interpretation of the *NWK* judgment) and held, further, that the delivery of the scheme shares to the participants did not involve the exercise of a right to acquire the shares in terms of s 8A.

The appeal was upheld and the additional assessments issued by SARS were set aside.

Terraplas South Africa (Pty) Ltd v CSARS (Case No 71629/2011; North Gauteng High Court; not yet reported; 20 February 2013)

Whether certain goods had been classified under the correct tariff heading for purposes of the Customs and Excise Act.

Background

This was a decision in respect of an appeal in terms of s 47(9)(e) of the Customs and Excise Act 91 of 1964 in respect of a tariff determination by the Commissioner for the South African Revenue Service.

Issue

The issue was the correct tariff heading for the goods in issue, namely plastic tiles designed for a specific purpose, and in particular whether those tiles were 'floor coverings'.

Decision

After considering the relevant sources of law that applied in matters of tariff determination and the principles of interpretation in this context, the court made a determination of the most appropriate tariff heading, and upheld the appeal against the Commissioner's determination.

CASE LAW

Tax Court

A Ltd v CSARS (Case No 12697; Western Cape Tax Court; 16 November 2012)

[This judgment is prefaced by the logo of the Western Cape High Court, but it seems that this is an error and that it is a judgment of the Tax Court—Eds.]

Whether an employee share incentive scheme fell foul of s 103 of the Income Tax Act.

Background

In 2000, A Ltd, a JSE-listed company, had implemented an employee share incentive scheme that provided for the future delivery of shares in A Ltd to its employees. ALS Ltd, a wholly-owned subsidiary, was established to hold the shares in A Ltd that had previously been purchased on the open market with an interest-free loan from another subsidiary of A Ltd.

In terms of s 89 of the now-repealed Companies Act 61 of 1973, ALS was not permitted to hold more than 10% of the issued shares of its holding company, A Ltd.

In order to ensure that ALS did not exceed the 10% limit, A Ltd had implemented a share buy-back from ALS in 2004.

In 2008, SARS issued an assessment to secondary tax on companies ('STC') in an amount of R213 911 343,91 as a result of dividend declarations during the period 2004–2006. The effect of the assessments was that SARS disallowed the exemptions from STC that had been claimed by A Ltd in terms of s 64B(5)(f) of the Income Tax Act on the grounds that these exemptions had been claimed pursuant to a transaction, operation or scheme as envisaged in s 103(1) of the Act. A Ltd objected to the assessment, and then appealed against the disallowance of the objection.

Issue

The issue was whether (the now-repealed) s 103 of the Income Tax Act was applicable. SARS averred that A Ltd had entered into a unitary scheme or series of transactions to avoid paying STC on the repurchase of the shares in question.

Decision

In his judgment, Desai J held that, in order for s 103 to be applicable, SARS bore the onus of proving the existence in the present matter of the following elements of that provision, namely that:

1. A Ltd had engaged in a transaction, operation or scheme within the scope of s 103(1);
2. the transaction in question had the effect of avoiding or postponing liability for tax;
3. the transaction had been entered into or carried out in a manner that would not normally be employed for *bona fide* business purposes other than obtaining a tax benefit; or that it had created rights or obligations that would not normally be created between persons dealing at arm's length under a transaction of the nature of the transaction in question; and
4. the transaction was entered into or carried out solely or mainly for the purpose of obtaining a tax benefit.

It was held that, on the evidence, including findings on credibility, SARS had failed to establish these elements, and that the Commissioner had not been justified in concluding that he was satisfied in regard to the requirements of s 103. In particular, it was held that the sale of shares by ALS Ltd to A Ltd was not part of a unitary scheme, as alleged by SARS, in which the scheme had commenced with the purchase by ALS Ltd of shares in A Ltd. The Commissioner said, the court, was required to prove that the alleged scheme had the effect of avoiding liability for STC, and such proof was lacking. The evidence established that A Ltd's purpose had not been to derive a tax benefit.

The appeal against the disputed STC assessments was consequently upheld and the assessments were set aside.