



JUTA'S TAX LAW REVIEW

NOVEMBER 2013

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Welcome to the November 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 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

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LEGISLATION

Since the June 2013 issue of the Juta Tax Law Review, the draft Tax Administration Laws Amendment Bill B40 – 2013, has been published for public comment. The Bill gives effect to matters presented by the Minister of Finance in the Budget Review 2013, as tabled in Parliament. On 26 October 2013, SARS released for public comment the draft Customs Duty Bill.

Other bills recently released include:

Taxation Laws Amendment Bill B39 – 2013

Employment Tax Incentive Bill B46 – 2013

EXPLANATORY MEMORANDA

On 4 July 2013, a draft Explanatory Memorandum on the Taxation Laws Amendment Bill, 2013 was released, providing background information on and a guide to the amendments contained in the Draft Taxation Laws Amendment Bill, 2013. On the same date, SARS released a clause by clause explanation of the draft Bill.

BINDING RULINGS

BINDING GENERAL RULINGS

There have been no further binding general rulings since the June Juta Tax Review

BINDING PRIVATE RULINGS

BINDING PRIVATE RULING: BPR 149

Effective date: 24 July 2013

Affected legislation: Income Tax Act 58 of 1962

Provisions: Section 1(1), definition of 'contributed tax capital' and 42; definition of 'asset for share transaction' and para 64B of the Eighth Schedule.

Executive summary:

This ruling deals with the tax consequences arising from the disposal of an equity share held in a foreign company to another foreign company in exchange for an equity share in that foreign company.

BINDING PRIVATE RULING: BPR 150

Effective date: 24 July 2013

Affected legislation: Income Tax Act 58 of 1962; Value-Added Tax Act 89 of 1991.

Provisions: Sections 1(1), definition of 'gross income'; s 11(a) read with s 23(g); 24C and s 24J of the Income Tax Act; section 71(1) of the VAT Act.

Executive summary:

This ruling deals with the income-tax consequences arising from a credit-linked deposit agreement entered into with a bank in order to raise funding.

BINDING PRIVATE RULING: BPR 151

Effective date: 13 August 2013

Affected legislation: Income Tax Act 58 of 1962

Provisions: Section 55(1) definition of 'donation' and paras 11 and 67(2) of the Eighth Schedule to the Act; section 4(*q*) of the Estate Duty Act 45 of 1955.

Executive summary:

This ruling deals with the donations tax, capital gains tax and estate duty consequences of the renunciation by a testator's descendants of their rights to benefit under a will under which the testator's surviving spouse also benefits.

BINDING PRIVATE RULING: BPR 152

Effective date: 13 August 2013

Affected legislation: Income Tax Act 58 of 1962

Provisions: Paragraphs 3, 11(1)(*b*), 35(1) and 38 of the Eighth Schedule.

Executive summary:

This ruling deals with the question whether the cancellation and extinguishment of a right to claim interest on a shareholder loan will trigger a capital gains tax liability in terms of the Eighth Schedule to the Act.

BINDING PRIVATE RULING: BPR 153

Effective date: 30 August 2013

Affected legislation: Income Tax Act 58 of 1962

Provisions: Section 1(1), definition of 'resident'.

Executive summary:

This ruling deals with the residency status of a non-resident natural person who intends applying for a temporary residence permit in the Republic of South Africa and whether the application for such a permit will result in the person's becoming ordinarily resident in South Africa for tax purposes.

BINDING PRIVATE RULING: BPR 154

Effective date: 03 September 2013

Affected legislation: Income Tax Act 58 of 1962

Provisions: Sections 11(*j*) and 45.

Executive summary:

This ruling deals with the tax consequences arising from the acquisition of a debtors' book under s 45 of the Act.

BINDING PRIVATE RULING: BPR 155

Effective date: 06 September 2013

Affected legislation: Income Tax Act 58 of 1962

Provisions: Paragraph 1, definition of 'production', 'oil and gas right' and 'oil and gas income' and para 5(2)(*b*) of the Tenth Schedule to the Act.

Executive summary:

This ruling deals with the income tax consequences for an oil and gas company in relation to expenditure to be incurred in the development of two oil and gas fields, including the refurbishment of a floating production unit (FPU) to produce oil and gas (the FPU Utilisation Project).

BINDING PRIVATE RULING BPR 156

Effective date: 03 October 2013

Affected legislation: Income Tax Act 58 of 1962

Provisions: Section 1(1) definition of 'gross income', paras (a) and (e).

Executive summary:

This ruling deals with the question whether and to what extent a pension annuity and a retirement fund lump-sum benefit, received by and accrued to a person who is not a resident of South Africa from a pension fund registered in South Africa, will be taxable in South Africa.

BINDING CLASS RULINGS

BINDING CLASS RULING: BCR 041

Effective date: 24 July 2013

Affected legislation: Income Tax Act 58 of 1962, s 1(1), definition of 'foreign dividend'.

Executive summary:

This ruling deals with the question whether dividends distributed by a foreign company will be foreign dividends as defined in s 1(1) of the Act.

NEW INTERPRETATION NOTES

The following new interpretation notes have been issued since June 2013:

INTERPRETATION NOTE 74

Effective date: 06 August 2013

Affected legislation: Income Tax Act 58 of 1962.

Provisions: Sections 11(d) and 8(4)(a).

Executive summary:

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

CASE LAW

SUPREME COURT OF APPEAL

No Supreme Court of Appeal decisions have been reported since the June Juta Tax Review

CASE LAW

High Court

Gaertner v Minister of Finance and CSARS (Case No 12632/12; Western Cape High Court; this (then unreported) decision which was covered in Juta's Tax Review, June 2013, has now been reported; see (2013) 75 SATC184.

MTN International (Mauritius) Ltd v CSARS (Case No 23203/11; North Gauteng High Court); discussed in Juta's Tax Review, March 2013, has now been reported; see (2013) 75 SATC 171.

CASE LAW

Tax Court

AB Mining (Pty) Ltd v CSARS (Case No 12906; Pretoria Tax Court; reported as ITC 1863 (2013) 75 SATC 125; 5 July 2012)

Background

This was an appeal against an assessment in respect of the years 2003–2006.

Facts

The taxpayer, a prospecting and mining enterprise, had entered into various transactions in the course of its business, the factual and tax aspects of which were contentious, and the taxpayer disputed the correctness of assessments issued by the Commissioner in this regard.

Issue

- (1) Whether the disposal of a certain mining dump, and the rights thereto, constituted a 'disposal' in terms of para 11 of the Eighth Schedule to the Income Tax Act 58 of 1962;
- (2) whether the disallowance of a deduction in respect of the depreciated value of certain shares was correct and whether certain office expenditure and salaries were deductible in terms of s 11(a);
- (3) whether the assessment to capital gains tax in the 2005 tax year was correct in relation to the alleged disposal of chrome tailings rights in the amount of R8 million;
- (4) whether SARS was correct in applying para 38 of the Eighth Schedule to the disposal of a 38% income share in the L Consortium in the 2005 tax year;
- (5) whether SARS was correct in applying s 58 to the severing of a relationship on the basis that there had been a deemed donation;
- (6) whether SARS's inclusion of certain management fees as an accrual in the 2006 tax year was correct;
- (7) whether certain overseas travel expenses incurred in 2003–2006 were deductible in terms of s 11(a);
- (8) whether penalties had been correctly imposed by SARS in terms of s 76 for the 2003–2006 tax years;
- (9) whether SARS was correct in imposing penalties and interest in terms of s 76;
- (10) whether SARS had correctly levied interest in terms of s 89(2);
- (11) whether the appellant's share of the expenditure in respect of the construction of the appellant's processing plant was deductible in terms of s 36.

Decision

It was held that, on the evidence, the appeal fell to be dismissed in its entirety, save in respect of the management fees, the accrual of which SARS was directed to recalculate in accordance with the findings of the court.

Mr A v CSARS (Case No 12524; Johannesburg Tax Court; reported as ITC 1864 (2013) 75 SATC 233; 20 November 2012)

Background

The invocation by SARS of the provisions of s 103(1) of the Income Tax Act 58 of 1962 in relation to a particular *inter vivos* trust, formed by the appellant, and the consequential assessment of the appellant, in his personal capacity, in terms of the Income Tax Act.

Facts

The appellant, an instrument technician, had previously rendered services via a labour broker. In respect of the years of assessment in issue, he had formed an *inter vivos* trust, of which he was the sole trustee, and the trust continued to provide such services to and render invoices to the same clients. The trust received income against which the appellant claimed expenses. An audit by SARS revealed that the trust had claimed exorbitant expenses, resulting in a declared loss in 2001, compounded by declared losses that had been carried forward from previous years.

Issue

Whether SARS was entitled, on the basis of s 103(1), to assess the appellant in his personal capacity in respect of amounts received by the trust for services rendered by the appellant on behalf of the trust in the years of assessment from 1998–2001.

Decision

It was held that all four elements of s 103(1) were present in relation to the series of transactions in issue; that the appellant had failed to discharge the onus of proof borne by him; and that SARS had been entitled to invoke and apply the provisions of s 103(1) in assessing the taxpayer, and to disallow the taxpayer's objections to the assessments. The appeal against the assessments was dismissed with costs.

A (Pty) Ltd v CSARS (Case No 847; Johannesburg Tax Court; reported as ITC 1865 (2013) 75 SATC 250; 13 November 2012)

Background

The liability for output tax of a vendor in terms of the Value-Added Tax Act 89 of 1991 in respect of VAT invoices that were issued on a 'pro forma' basis, where no supplies had in fact been made.

Facts

The appellant, a registered vendor in terms of the Value-Added Tax Act, had rented out certain commercial premises to three companies that were part of a corporate group. Only one of the companies had actually occupied the leased premises. The appellant had issued VAT invoices in respect of all three companies, and contended that the invoices in respect of two of the companies had been issued merely to oppose an application for the winding-up of the applicant, and that no supplies had in fact been made to two of the companies. The appellant argued that, in these circumstances, it was not liable for output VAT in respect of those two companies and that there had been no under-declaration of output VAT. The taxpayer also disputed that a certain letter issued by the Commissioner constituted an assessment.

Issue

Whether the appellant was liable for output tax in respect of invoices issued in respect of rental where no supplies had been rendered in respect of those invoices.

Decision

It was held that the VAT invoices issued by the appellant complied in all respects with the requirements of the Act; that it did not avail the appellant to contend that certain of the invoices were fictitious; that liability for output tax was not dependent on whether the vendor elected to enforce payment by a lessee in terms of the lease; and that the appellant had not provided a credible explanation for the VAT invoices issued by it. The appeal was dismissed and the assessments issued by SARS were confirmed.

F-CC v CSARS (Case No 789; Pretoria Tax Court; reported as ITC 1866 (2013) 75 SATC 268; 10 September 2012)

Background

The jurisdiction of the Tax Court to review a decision by the Commissioner for the South African Revenue Service.

Facts

The appellant, a registered vendor in terms of the Value-Added Tax Act 89 of 1991, claimed that it had been unable to obtain full tax invoices from a supplier owing to a fraud perpetrated by an official in the employ of the supplier. The Commissioner declined to exercise his powers under s 20(7) to direct that one or more particulars, required in terms of the Act to be specified in a tax invoice, need not be contained in the invoice, or that a tax invoice need not be issued. The taxpayer lodged an objection in respect of the Commissioner's decision in this regard.

Decision

The Commissioner's decision in terms of section 20(7) was not a decision against which an objection could be raised. Such a decision could be challenged only by way of review. The Tax Court is a creature of statute and lacks jurisdiction to review such a decision. An application for such a review, in terms of the Promotion of Administrative Justice Act 3 of 2000, must be made to the High Court.

CASE LAW

Foreign

Ben Nevis (Holdings) Ltd & Metlika Trading Ltd v HM Revenue & Customs (Case No A3/2012/2201; Court of Appeal (Civil Division); [2013] EWCA Civ 578; 23 May 2013)

On 23 May 2013 the English Court of Appeal (Civil Division) dismissed the appeal by Ben Nevis (Holdings) Ltd and Metlika Trading Ltd against the judgment of the High Court of Justice reported in (2013) 75 SATC 49 (see Juta Tax Law Review November 2012).

Background

Ben Nevis (Holdings) Ltd owed the South African Revenue Service some R2,6 billion in terms of a judgment taken against the company by SARS.

Facts

Ben Nevis (Holdings) Ltd was a company incorporated in the British Virgin Islands and was owned and controlled by the South African based businessman, David King, or his trustees. That company was liable to SARS for taxes for the 1998, 1999 and 2000 years of assessment in a total amount, including penalties and interest, of R2,6 billion following the final determination of a tax appeal in the South African courts in October 2010.

On 4 March 2011 judgment was entered against Ben Nevis in proceedings in the Republic of South Africa for this amount. SARS contended that when King learned that SARS was investigating Ben Nevis's tax affairs, he procured the transfer of Ben Nevis's assets to Metlika, a company incorporated in the British Virgin Islands. SARS became aware that, as a result of these activities, a fund of approximately £7,8 million had been credited to a bank account in London in the name of Metlika Trading. In terms of a double tax agreement between South Africa and the United Kingdom, SARS requested the UK tax authorities for assistance in collecting the tax debt. Pursuant to that request, proceedings were issued in the English High Court in the form of a claim by the UK tax authorities, firstly, for judgment against Ben Nevis in respect of the tax debt in question, and, secondly, for relief against Ben Nevis and Metlika in terms of the provisions of the United Kingdom Insolvency Act relating to transactions in fraud of creditors. At the outset of the proceedings, the UK tax authorities successfully applied for a court order granting permission to effect service of the court process outside the jurisdiction of the UK courts and freezing the aforementioned deposit of £7,8 million, pending the outcome of the trial.

Ben Nevis and Metlika then applied to set aside that order and to strike out the proceedings on a number of grounds. On 20 July 2012, Pelling QC, sitting as a judge of the High Court in Manchester, handed down judgment dismissing that application. This judgment has been reported as *Revenue and Customs Commissioners v Ben Nevis (Holdings) Ltd* [2012] STC 2157 [2012] EWHC 1807 (Ch) also reported in (2013) 75 SATC 49 (see Juta Tax Law Review November 2012).

Issue

The present proceedings were an appeal against the aforementioned judgment. Ben Nevis and Metlika argued, inter alia, that the relevant provisions of the applicable double tax agreement between South African and the UK did not permit the cross-border collection of a tax debt (such as the debt in the present matter) that had become due prior to the date that the agreement came into force.

Decision

In his judgment in the Court of Appeal, Pelling QC said that he agreed with the interpretation of the applicable double tax agreement adopted in the court below, and dismissed the appeal. Lord Justice Jackson concurred as did Lord Justice Floyd.

SARS GUIDES

On 23 October 2013, SARS released a comprehensive guide to the ITR14 for companies.

On 22 August 2013, SARS released a comprehensive guide to the ITR 12 for individuals.

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