



JUTA'S TAX LAW REVIEW

MARCH 2014

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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 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 November 2013 issue of the Juta Tax Law Review, the following legislation has been promulgated, and the following bills have been passed:

Rates and Monetary Amounts and Amendment of Revenue Laws Act 23 of 2013 promulgated on 2 December 2013 (Government Gazette GG 37104) [1]

Taxation Laws Amendment Act 31 of 2013 promulgated on 12 December 2013 (Government Gazette GG 37158) [2]

Merchant Shipping (International Oil Pollution Compensation Fund) Administration Act 35 of 2013 (assented to on 14 December 2013; promulgated on 18 December 2013 (GG 37174); date of commencement to be announced)

Tax Administration Laws Amendment Act 39 of 2013 promulgated on 16 January 2014 (Government Gazette 37236) [3]

Employment Tax Incentive Act 26 of 2013 (assented on 17 December 2013; Government Gazette 37185 dated 18 December 2013; date of commencement 1 January 2014 unless otherwise indicated) [4] .

The following Bills have been passed:

Customs Duty Bill B43 of 2013

Customs Control Bill B45 of 2013 [5]

EXPLANATORY MEMORANDA

On 15 January 2014 SARS released an Explanatory Memorandum on the Employment Tax Incentive Bill 2013. [6]

BINDING RULINGS

BINDING GENERAL RULINGS

BINDING GENERAL RULING: BGR 20 [7]

Effective date: 10 December 2013

Affected legislation: Income Tax Act 58 of 1962; Transfer Duty Act 40 of 1949

Provisions: Sections 10(1)(cn), 10(1)(cO) and 30B of the Income Tax Act; para 63A of the Eighth schedule to the Income Tax Act; s 9(1)(c) of the Transfer Duty Act.

Executive summary: This binding general ruling provides clarity on the interpretation of the expression 'substantially the whole' in ss 10(1)(cN), 10(1)(cO), 30B, and para 63A of the Eighth Schedule to the Income Tax Act and s 9(1)(c) of the Transfer Duty Act

BINDING PRIVATE RULINGS

BINDING PRIVATE RULING: BPR 157 [8]

Effective date: 18 November 2013

Affected legislation: Income Tax Act 58 of 1962

Provisions: Sections 25b, 10b(2)(a), 56(1)(g) and 7(8), and paras 20(1)(h)(vi) and 80(3) of the Eighth Schedule to the Act.

Executive summary: This ruling deals with the income tax consequences and the rules of attribution applicable to a distribution of foreign assets by two non-resident discretionary trusts to a beneficiary who was a South African resident and the donation by that resident of those assets to another non-resident trust

BINDING PRIVATE RULING: BPR 158 [9]

Effective date: 13 January 2014

Affected legislation: Income Tax Act 58 of 1962

Provisions: Paragraph 10(2)(b) of the Seventh Schedule to the Act

Executive summary: This ruling deals with transport services provided by an employer to convey employees between their homes in a foreign country and construction project sites in South Africa.

BINDING PRIVATE RULING: BPR 159 [10]

Effective date: 16 January 2014

Affected legislation: Income Tax Act 58 of 1962

Provisions: Sections 1(1), definition of 'trading stock', 41(1), 42 and 44(1).

Executive summary: This ruling deals with shares acquired in terms of an 'asset-for-share transaction' as defined in s 42(1) of the Act and whether the merger of involved parties will be an 'amalgamation transaction' as defined in s 44(1) of the Act.

BINDING PRIVATE RULING: BPR 160 [11](This ruling was replaced on 24 January 2014 owing to the amendment of point 6 of the ruling.)

Effective date: 22 January 2014

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

Provisions: Section 11(a) of the Act; sections 1(1), definition of 'consideration' and 20 of the VAT Act.

Executive summary: This ruling deals with incentive payments to be made in accordance with an incentive programme to be implemented for purposes of increasing trade.

BINDING PRIVATE RULING: BPR 161 [12]

Effective date: 5 February 2014

Affected legislation: Income Tax Act 58 of 1962

Provisions: Sections 11(a), 23(g), 54 and 58 and paras 2(1) and 11a(4) of the Fourth Schedule

Executive summary: This ruling deals with the income tax and employees' tax consequences for an employer and a trust through which an employee share scheme was to be implemented.

BINDING CLASS RULINGS

BINDING CLASS RULING: BCR 042 [13]

Effective date 7 February 2014

Affected legislation: Income Tax Act 58 of 1962

Provisions: Sections 1(1), definition of 'listed share' and 10b(2) (d)

Executive summary This ruling deals with the applicability of the definition of 'listed share' in s 1(1) to preferred securities issued to South African investors by a company registered in a foreign country and with issues concerning distributions to the class members.

BINDING CLASS RULING: BCR 043 [14]

Effective date 20 February 2014.

Affected legislation: Income Tax Act 58 of 1962.

Provisions: Section 1(1), definition of 'gross income'

Executive summary: This ruling deals with the antecedent cession of rights to future Production Rebate Credit Certificates (PRCCs) issued in terms of the Automotive Production and Development Programme (APDP).

NEW AND RE-ISSUED INTERPRETATION NOTES

The following new interpretation notes have been issued or re-issued since the November 2013 Juta Tax Review:

INTERPRETATION NOTE: 43 (Issue 5) [15]

Effective date: 17 February 2014

Affected legislation: Income Tax Act 58 of 1962

Provisions: Section 9C

Executive summary: This note deals with the circumstances in which certain amounts received or accrued from the disposal of shares are deemed to be of a capital nature

INTERPRETATION NOTE: 11 (Issue 2) [16]

Effective date: 5 February 2014

Affected legislation: Income Tax Act 58 of 1962

Provisions: Paragraph (jA) of the definition of 'gross income' in s 1(1)

Executive summary: This note provides guidance on the application and interpretation of para (jA) in the definition of 'gross income' and its interaction with other provisions of the Act.

INTERPRETATION NOTE: 65 (Issue 2) [17]

Effective date: 5 February 2014

Affected legislation: Income Tax Act 58 of 1962

Provisions: Section 22(8)

Executive summary: This note deals with the application and interpretation of s 22(8) which deems an amount to be included in income when trading stock is applied, distributed or disposed of in specified circumstances, otherwise than by sale at market value in the ordinary course of trade.

INTERPRETATION NOTE: 67 (Issue 2) [18]

Effective date: 14 February 2014

Affected legislation: Income Tax Act 58 of 1962

Provisions: Section 1(1), definition of a 'connected person'

Executive summary: This note provides guidance on the interpretation and application of the definition of a 'connected person' in s 1(1).

INTERPRETATION NOTE: 75 [19]

Effective date: 24 October 2013

Affected legislation: Income Tax Act 58 of 1962

Provisions: Sections 1(1) and 41(1).

Executive summary: This note provides guidance on the application of the proviso to the definition in s 41(1).

INTERPRETATION NOTE: 76 [20]

Effective date: 26 February 2014

Affected legislation: Income Tax Act 58 of 1962

Provisions: Section 1(1), definition of the term 'gross income'; Fourth Schedule to the Act, para 1 definitions: 'remuneration', 'employer', 'employee', 'provisional taxpayer', para 2(1)

Executive summary: This interpretation note deals with the tax treatment of tips for recipients, employers and patrons.

CASE LAW

SUPREME COURT OF APPEAL

Stabilpave (Pty) Ltd v SARS [21] (Case No 615/12; Supreme Court of Appeal; reported as Stabilpave (Pty) Ltd v SARS (2013) 75 SATC 347; 26 September 2013)

Background

The question whether SARS or the taxpayer bears the risk of loss in respect of a cheque posted to the taxpayer by SARS where the cheque is paid to an unauthorised party.

Facts

The notice of assessment that had been sent to the appellant by the South African Revenue Service stated that the tax refund due to the appellant would be paid to the latter by way of a cheque that could be collected at the nearest Post Office or by way of an electronic transfer. SARS was not in possession of the appellant's banking details and therefore drew a cheque in favour of the appellant and posted it to the appellant. Before it could reach the appellant, the cheque (which had been crossed and marked 'not transferable') was stolen and paid out to a thief. The appellant then sued SARS for the amount of the tax refund due to it.

Issue

In issue was whether the appellant had assumed the risk that the cheque might be lost and, in particular, whether the notice contained in the tax assessment had given the appellant a choice as to the mode of payment and, if so, whether the appellant had made such a choice.

Decision

It was held that the assessment form had not given the appellant a choice as to the mode of payment to be adopted by SARS and that there had been no invitation, express or implied, to the appellant to furnish its banking details should it wish to be paid by way of electronic transfer and there was no cut-off date on or before which the appellant could furnish such details. It was held that the mere fact that a creditor knows or expects to be paid by way of a cheque to be sent by post or had made no objection in this regard, did not give rise to an implied request or election by the creditor to be paid in such a manner. It was accordingly held that the risk of loss of the cheque had not been assumed by the appellant, but remained with SARS, who had consequently not discharged its indebtedness by posting the cheque for the amount of the tax refund that was due to the appellant.

CASE LAW

High Court

Kadodia v CSARS [22] (Case No 6083/2012; KwaZulu-Natal High Court; reported as Kadodia v CSARS (2013) 75 SATC 313; 5 April 2013)

Background

An unsuccessful application to rescind a default judgment in favour of the South African Revenue Service for an amount of duty owing in terms of the Customs and Excise Act 91 of 1964 where the judgment had been secured by filing a statement in terms of s 114(1)(a) of the Act.

Facts

The applicant had underpaid customs duty owing to the State in terms of the Customs and Excise Act 91 of 1964. When no payment was forthcoming the Commissioner for the South African Revenue Service filed a statement with the Registrar of the High Court in terms of s 114(1)(a) of the Act, thereby obtaining judgment against the applicant, who then sought to rescind that default judgment.

Issue

Whether the applicant was entitled to a rescission of the default judgment that had been secured against him in terms of and via the process laid down in s 114(1)(a) of the Customs and Excise Act.

Decision

The applicant had not made out a defence to the claim, and had admitted the claim. There was consequently no dispute between the parties and no legal basis on which to rescind the default judgment, since the object of rescinding a judgment is to enable a real dispute to be aired.

Terraplas South Africa (Pty) Ltd v Commissioner for South African Revenue Service [23] (Case No 71629/2011; North Gauteng High Court; reported as Terraplas South Africa (Pty) Ltd v Commissioner for South African Revenue Service (2013) 75 SATC 319; 20 February 2013)

Background

A challenge, by way of an appeal to the High Court, in respect of the determination by the South African Revenue Service of the correct tariff in terms of the Customs and Excise Act 91 of 1964 for certain plastic tiles designed for a specific purpose.

Facts

The appellant, an importer of tiles, appealed in terms of the Act against a tariff determination by SARS in respect of certain goods imported by it, namely plastic tiles designed to cover and protect the turf floor in stadiums used for non-sporting events.

Issue

Whether SARS had applied the proper tariff heading for the payment of import duty on the tiles.

Decision

SARS's classification of the tiles in question for the purposes of the Act had been incorrect and was set aside, and the court issued a determination of the most appropriate tariff heading.

CASE LAW

Tax Court

A (Pty) Ltd v CSARS [24] (Case No 13003, Cape Town Tax Court, reported as ITC 1867 (2013) 75 SATC 273, 13 June 2013)

Background

An appeal to the Tax Court arising out of the assessment of the taxpayer to income tax on the proceeds of the sale of certain shares in terms of a transaction involving an indemnity and associated expenditure incurred and paid by the taxpayer.

Facts

The appellant, a wholly-owned subsidiary, and its holding company were special purpose vehicles. The appellant had been formed solely to hold the shares in FG (Pty) Ltd and its only obligations were those associated with the funding of the acquisition of those shares and the associated statutory compliance obligations. The appellant had been funded by the issue of preference shares and by a shareholders' loan advanced by the appellant's sole shareholder.

Issue

The primary issue was whether the proceeds of the sale of the FG shares were of a revenue or of a capital nature. The ancillary question was whether expenditure in respect of a so-called "equity kicker" in respect of loans which ultimately accrued to the appellant was to be excluded from the capital gain (if the gain on the disposal of the shares were held to be of a capital nature) or was deductible expenditure (if that gain were of a revenue nature).

Decision

The proceeds from the sale of the shares in FG (Pty) Ltd were of a revenue nature. The so-called 'equity kicker' and the indemnity liability qualified as deductions from the appellant's income and the interest that had been levied by SARS was remitted in terms of s 89quat(3) of the Income Tax Act 58 of 1962.

AB CC v CSARS [25] (Case No VAT 759, Pretoria Tax Appeal Court, reported as ITC 1868 (2013) 75 SATC 303, 3 May 2013)

Background

In an appeal against an assessment to value-added tax, the appellant sought, in its rule 11 statement, to rely on a ground not contained in its formal objection nor in its notice of appeal.

Facts

The appellant had been assessed to value-added tax in terms of the Value-Added Tax Act 89 of 1991 and had filed a notice of objection to the assessment and a notice of appeal. In its rule 11 statement, the appellant for the first time raised an issue not contained in the notice of objection or notice of appeal.

Issue

Whether the appellant was entitled, in its rule 11 statement, to raise a defence to the assessment that had not been contained in the notice of objection or the notice of appeal.

Decision

The principles laid down by the Supreme Court of Appeal in *Computeek (Pty) Ltd v CSARS* 75 SATC 104 at 111-112 precluded the Tax Court in the present matter from ordering the South African Revenue Service to revisit the assessment in question and that the court hearing the present matter could not declare the assessment invalid.

ABC (Pty) Ltd v CSARS [26] (Case No 13002, Cape Town Tax Court, reported as ITC 1869 (2013) 75 SATC 329, 19 August 2013)

Background

The appellant had disposed of a plantation and the South African Revenue Service had included in its gross income the proceeds of that disposal.

Facts

The appellant had purchased a plantation business and, in terms of the relevant agreement, the purchase price was attributed to the standing timber. The taxpayer contracted with a third party to manage the plantation. Some two years later, the appellant disposed of the plantation in terms of an agreement of sale in which the consideration for the plantation was considerably higher than its earlier purchase price.

Issue

Whether, given that the plantation had been managed by another person, the appellant had carried on farming operations as envisaged in s 26(1) of the Income Tax Act 58 of 1962.

Decision

On the evidence, the taxpayer had not discharged the onus of proving that it had not conducted a business of plantation farming and the proceeds of the sale of the plantation had therefore been correctly included in its gross income in terms of s 26(1) read with para 14(1) of the First Schedule to the Income Tax Act 58 of 1962.

CASE LAW

Foreign

There have been no significant judgments of foreign courts since the November Juta Tax Law Review.

SARS

On 4 December 2013 SARS published a Discussion Paper on contingent liabilities [27] in terms of the Income Tax Act; comments are due by 31 March 2014.

On 9 December 2013 SARS published Regulation 917 [28] in terms of s 12L of the Income Tax Act, 1962 on the allowance for energy efficiency savings.

On 10 December 2013 SARS published updated Tables A [29] and B [30] of the average exchange rates in terms of the Income Tax Act.

On 11 December 2013 SARS released a Tax Guide for Recreational Clubs (issue 2) [31].

On 4 February 2014 SARS updated the dividends tax tables for double tax agreements for Africa [32] and the rest of the world [33].

On 11 February 2014 SARS issued Table 3 [34] of the interest rate tables at which interest-free or low interest loans are subject to income tax.

On 17 February 2014 SARS issued a Tax Guide For Share Owners (issue 4) [35].

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