



JUTA'S TAX LAW REVIEW

JULY 2014

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Welcome to the July 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

LEGISLATION

Since the March 2014 issue of the Juta Tax Law Review, the following legislation has been promulgated, and the following bills have been passed:

Legislation

Division of Revenue Act (Act 10 of 2014) 26 April 2014

Bills:

Customs Control Bill (B45B of 2013) 19 March 2014

Customs and Excise Amendment Bill (B44B of 2013) 19 March 2014

Customs and Excise Amendment Bill (B44A of 2013) 4 March 2014

Customs Control Bill (B45A of 2013) 4 March 2014

Draft bills

SARS has published, for public information, the draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill, 2014 (explanatory memorandum). This Bill gives effect to rates and monetary threshold changes pertaining to income tax as well as customs and excise duties, as announced by the Minister of Finance in the 2014 Budget.

EXPLANATORY MEMORANDA

In May 2014, National Treasury released a document entitled 'A Review of the Taxation of Alcoholic Beverages in South Africa'.

In or about May of 2014 SARS released an undated 'Discussion Paper on the VAT Treatment of Loyalty Programmes'.

BINDING RULINGS

BINDING GENERAL RULINGS

BINDING GENERAL RULING: BGR 21 (VAT)

Effective date 11 March 2014

Affected legislation: Value Added Tax Act 89 of 1991

Provisions: Sections 20(4), (5), (5A) and ss 21(3), (8).

Executive summary: This ruling sets out the various options available to vendors regarding the address that must be reflected on a tax invoice or a credit or debit note issued to a recipient vendor or non-resident.

BINDING GENERAL RULING: BGR 22

Effective date 26 March 2014

Affected legislation: Income Tax Act 58 of 1962

Provisions: Sections 8(1)(a) and (c)

Executive summary: This ruling formalises an established practice contained in para 5.3.3 of Interpretation Note No 14 (Issue 3) dated 20 March 2013 entitled 'Allowances, Advances and Reimbursements', under the heading 'Deemed method' in relation to the amounts of a subsistence allowance that are deemed to be expended for business purposes.

BINDING GENERAL RULING: BGR 23

Effective date 26 March 2014

Affected legislation: Income Tax Act 58 of 1962

Provisions: Sections 8(1)(b)(ii) and (iii)

Executive summary: in the context of a travel allowance, the determination of the fuel cost to an employee who has a petrol or garage card.

BINDING CLASS RULINGS

BINDING CLASS RULING: BCR 44

Effective date 2 May 2014

Affected legislation: Income Tax Act 58 Of 1962; Securities Transfer Tax Act 25 of 2007.

Provisions: Section 1(1), definition of 'equity share'; section 8E and para 11(2)(b) of the Eighth Schedule to the Income Tax Act; section 2(1) of the Securities Transfer Tax Act

Executive summary: This ruling deals with the tax consequences of a repurchase of non-redeemable, non-participating preference shares.

BINDING PRIVATE RULINGS

BINDING PRIVATE RULING: BPR 162

Effective date: 3 March 2014

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

Provisions: Paragraphs 2 of the Eighth Schedule and 7(1) and (2) of the Tenth Schedule to the Income Tax Act; sections 1(1) definition of 'consideration' and 'fixed property', 9(3)(d) and (4) and 16(4)(a)(ii) of the VAT act

Executive summary: This ruling deals with the consequences on the sale of an oil and gas right and the timing as to when value-added tax will be payable in respect of the consideration accruing on the disposal of the exploration right.

BINDING PRIVATE RULING: BPR 163

Effective date: 12 March 2014

Affected legislation: Income Tax Act 58 of 1962

Provisions: Section 1(1) definition of 'dividend' and 'contributed tax capital', 10(1)(k)(i), 22b, 24j(2) and 64f(1)(a) and paras 35 and 43a of the Eighth Schedule.

Executive summary: This ruling deals with interest incurred on replacement loans and whether the loans retain their initial business purpose such that the interest on those loans qualifies for a deduction under s 24J(2). The ruling also deals with a share repurchase consideration received by a selling company and whether such consideration constitutes a dividend and is consequently exempt from dividends tax and income tax.

BINDING PRIVATE RULING: BPR 164

Effective date: 12 March 2014

Affected legislation: Income Tax Act 58 of 1962

Provisions: Sections 55(1), definition of 'donation' and 58(1), and para 38 of the Eighth Schedule.

Executive summary: The buyback of ordinary shares by a company at a purchase price in excess of their market value.

BINDING PRIVATE RULING: BPR 165

Effective date: 18 March 2014

Affected legislation: Income Tax Act 58 of 1962

Provisions: Sections 1(1), definition of 'hotel keeper' and 13*bis* subject in relation to the letting of accommodation where the provision of meals is outsourced.

Executive summary: This ruling deals with the letting of accommodation to students on the basis that the owner of the building outsources the provision of meals in the on-site cafeteria to a third party caterer, and whether this trade falls within the definition of 'hotel keeper' as defined in s 1(1) of the Act.

BINDING PRIVATE RULING: BPR 166

Effective date: 1 April 2014

Affected legislation: Income Tax Act 58 of 1962

Provisions: Paragraph 1 definition of 'disposal' and para 11 of the Eighth Schedule in relation to the change of place of incorporation (and thus of its domicile) of a controlled foreign company.

Executive summary: This ruling deals with a change of domicile of a controlled foreign company and whether such a change will be regarded as a 'disposal' as defined in para 1 and as envisaged in para 11 of the Eighth Schedule.

BINDING PRIVATE RULING: BPR 167

Effective date: 2 April 2014

Affected legislation: Income Tax Act 58 of 1962

Provisions: Sections 1(1), definition of 'gross income' and para (a) of the definition of 'trading stock', 11(a) read with 23(g) and 22(1)(a).

Executive summary: This ruling deals with the income tax consequences for a company that issues debentures to investors, the value of which tracks the price of specified quantities of a precious metal as reference assets.

BINDING PRIVATE RULING: BPR 168

Effective date: 17 April 2014

Affected legislation: Income Tax Act 58 of 1962

Provisions: Sections 42(7) and 45(2) and (3)

Executive summary: This ruling deals with the effect of s 42(7) on the disposal of assets in terms of an 'intra-group transaction' as defined in s 45(1) when the disposal will take place within 18 months of the assets having been acquired in terms of an 'asset-for-share transaction' as defined in s 42(1).

BINDING PRIVATE RULING: BPR 169

Effective date: 9 May 2014

Affected legislation: Income Tax Act 58 of 1962

Provisions: Section 13quin.

Executive summary This ruling deals with the deduction of a commercial building allowance in respect of a unit, as contemplated in the Sectional Titles Act 95 of 1986.

BINDING PRIVATE RULING: BPR 170

Effective date: 30 May 2014

Affected legislation: Income Tax Act 58 of 1962

Provisions: Section 8C(7)

Executive summary: This ruling deals with the question whether a condition imposed on an employee to sell back shares over a period of time to his employer (at market value on termination of employment) will result in the shares being regarded as 'restricted equity instrument[s]' as contemplated in s 8C(7).

BINDING PRIVATE RULING: BPR 171

Effective date: 9 June 2014

Affected legislation: Income Tax Act 58 of 1962; Securities Transfer Tax Act 25 of 2007

Provisions: Section 44 and para 11 of the Eighth Schedule to the Income Tax Act; section 8(1)(a)(ii) of the Securities Transfer Tax Act.

Executive summary: This ruling deals with the income tax and securities transfer tax consequences for the parties concerned in a proposed amalgamation transaction intended to extinguish a layer of companies considered unnecessary in a holding structure.

BINDING PRIVATE RULING: BPR 172

Effective date: 25 June 2014

Affected legislation: Income Tax Act 58 of 1962

Provisions: Section 12B

Executive summary: This ruling deals with the deduction allowed in respect of the cost of machinery, plant, implements, utensils or articles owned and used in the generation of electricity from solar energy

BINDING PRIVATE RULING: BPR 173

Effective date: 2 July 2014

Affected legislation: Income Tax Act 58 of 1962

Provisions: Section 19 and para 12A of the Eighth Schedule to the Act

Executive summary: This ruling deals with the income tax consequences arising from the repayment of a shareholder loan from the proceeds of a new issue of ordinary shares in a company

NEW AND RE-ISSUED INTERPRETATION NOTES

INTERPRETATION NOTE: 77

Effective date: 4 March 2014

Affected legislation: Income Tax Act 58 of 1962:

Provisions: Paragraphs 2(b), 2(e), 2(h), 6, 10 and 13(1) of the Seventh Schedule.

Executive summary: This note deals with the determination of the value of the taxable benefit arising from the private or domestic use by an employee of employer-provided or employer-owned telephone or computer equipment (including cellular telephones, laptops, tablets, modems, removable storage devices, printers and software) or telecommunication services; and the taxability of any allowance or reimbursement granted by the employer to the employee for the employee's privately-owned equipment or service contract which is used by the employee for purposes of the employer's business

DRAFT INTERPRETATION NOTE

SARS has issued a draft interpretation note explaining the treatment in terms of s 7(1)(a), 11(1)(a) and 11(2)(l) of the Value-Added Tax Act 89 of 1991 of the treatment of various supplies to foreign hunters, including hunting services, taxidermy services, the supply of a trophy as well as the subsequent export of the trophy by professional hunters and taxidermists to foreign residents.

CASE LAW

SUPREME COURT OF APPEAL

Association of Meat Importers and Exporters v International Trade Administration Commission (Case No 769, 770, 771/12; Supreme Court of Appeal; reported as [2013] 4 All SA 253, 76 SATC 9; 13 September 2013)

Background

Schedule 2 of the Customs and Excise Act 91 of 1964 provides for the imposition of various anti-dumping duties.

Facts

Various such anti-dumping duties had been imposed in respect of the appellant.

Issue

This decision concerned the validity of anti-dumping duties provided for in, and imposed in terms of, the Customs and Excise Act 91 of 1964, and the date on which such duties terminated.

Decision

It was held that the anti-dumping duties in question had ceased to exist and that a declaration of invalidity was thus incompetent.

Smith Mining Equipment (Pty) Ltd v Commissioner for South African Revenue Service
(Case No 728/2012; Supreme Court of Appeal; reported as (2014) 76 SATC 49; 1 October 2013)

Background

The determination of the correct tariff heading for imported goods in terms of the Customs and Excise Act 91 of 1964.

Facts

The appellant had imported a specific utility vehicle.

Issue

The correct classification of the vehicle for the purposes of customs duty.

Decision

The appellant contended that the vehicle in question had the main distinguishing features summarised in the explanatory notes to the heading in question; however, the only evidence in this regard had been struck out at the instance of appellant; the court a quo had thus been correct in upholding the appeal.

SARS v Pretoria East Motors (Pty) Ltd (Case No 291/12; Supreme Court of Appeal; 12 June 2014)

Background

Appeals against assessments to tax in terms of the Income Tax Act 58 of 1962 and the Value-Added Tax Act 89 of 1991.

Facts

This was an appeal against the dismissal of an objection to an assessment to additional income tax and value-added tax.

Issue

What must be proved by a taxpayer in order to discharge the statutory onus of proof in such an appeal.

Decision

Where the SARS auditor has based an assessment on the taxpayer's accounts and records, but has misconstrued them, it is sufficient for the taxpayer to explain the nature of the misconception, point out the flaws in the analysis, and explain how those records and accounts should properly be understood. If there are underlying facts in support of that explanation that SARS wishes to place in dispute, then SARS should indicate clearly what those facts are so that the taxpayer is alerted to the need to call direct evidence on those matters.

SARS v Terraplas South Africa (Pty) Ltd (Case No 375/2013; Supreme Court of Appeal; 23 May 2014)

Background

The proper approach to tariff interpretation in terms of the Customs and Excise Act 89 of 1991.

Facts

The respondent conducted business as an importer and distributor of products described as 'terratile (terraflor) pitch protection tiles' and 'terrtrak plus temporary driveable roadway tiles', which were imported from the United Kingdom.

Issue

The appropriate tariff classification for those tiles, being plastic interlocking tiles for the protection of turf surfaces in stadiums.

Decision

Plastic interlocking tiles for protection of turf surfaces in stadiums are not a floor covering as contemplated in the tariff heading in question, and the novelty of an article is not a relevant consideration.

CASE LAW

High Court

Commissioner for South African Revenue Services v Miles Plant Hire (Pty) Ltd (Case No 23533/2013; North Gauteng High Court; reported as (2014) 76 SATC 1; 3 October 2013)

Background

The statutory power of the Commissioner in terms of section 177(1) of the Tax Administration Act 28 of 2011 to institute proceedings for the sequestration, liquidation or winding-up of a person for a tax debt.

Facts

The taxpayer had submitted objections to certain tax assessments, and these had been disallowed.

Issue

Whether the winding-up proceedings initiated by SARS had been premature.

Decision

Section 177(3) of the Tax Administration Act gives the court a discretion, where there is a pending tax dispute, to permit the tax to be recovered in liquidation, winding up or sequestration proceedings, and the issue in this case was the time when that discretion had to be exercised. It was held that a disputed tax debt was not recoverable during winding-up proceedings unless permitted by the court before which such proceedings were served and it was held that the Commissioner in this case be granted leave to institute winding-up proceedings and that the taxpayer be placed under a final order of winding-up.

Aquazania (Pty) Ltd v Commissioner for South African Revenue Service (Case No 29658/09; North Gauteng High Court; reported as (2014) 76 SATC 54; 4 May 2011)

Background

The determination of the appropriate tariff in terms of the Customs and Excise Act 91 of 1964.

Facts

The appellant had imported water dispensers.

Issue

The tariff heading appropriate to those water dispensers.

Decision

It was held that the appellant's contentions in regard to the tariff heading for the water dispensers in question had no merit, and that the Commissioner's determination of the appropriate tariff heading had been correct.

Chittenden NO v Commissioner of South Africa Revenue Services (Case No 12794/14; North Gauteng High Court; reported as [2014] ZAGPPHC 51; 3 March 2014)

Background

The applicant's tax clearance certificate was about to expire.

Facts

The applicant's application to SARS for a renewed tax clearance certificate had been refused.

Issue

Whether the applicant was entitled as of right to require SARS to issue a renewed tax compliance certificate.

Decision

It was held that a decision by SARS to issue or not to issue a tax clearance certificate constituted 'administrative action'; furthermore, that section 256(3) of the Tax Administration Act 28 of 2011 is peremptory in that this provision allows the Commissioner to issue a tax certificate "only if satisfied" that the requirements of the section are met, and that the applicant had failed to make out a case for such relief.

Medox Ltd v Commissioner for the South African Revenue Service (Case No 49017/11; North Gauteng High Court; 20 February 2014)

Background

The proper legal channels for contesting an income tax assessment.

Facts

SARS had issued assessments in respect of the applicant in terms of the Income Tax Act 58 of 1962.

Issue

The applicant sought an order declaring all income tax assessments that were issued in respect of the years of assessment following its 1997 year of assessment were null and void.

Decision

It was held that the applicant was not entitled to approach the High Court to declare the assessments void where it had not exhausted the internal remedies or remedies provided for in the Income Tax Act namely, the statutory objections and appeal processes as contemplated in s 81 read with s 107 of the Act.

Island View Storage Limited v Commissioner for the South African Revenue Services (Case No 12262/2012; KwaZulu-Natal High Court, Durban; 8 April 2014)

Background

An appeal against a determination in terms of the Customs and Excise Act 91 of 1964.

Facts

The applicant was in the business of storing ethanol which attracted excise duty when stored by the applicant's warehouse in terms of the Act. The applicant had discovered a loss of 35 839 kg of ethanol in its warehouse, which had been stolen by certain individuals.

Issue

Whether the determination by the Commissioner was correct that the stolen ethanol did not qualify for a rebate in terms of rebate item 624.50 in schedule 6 to the Customs and Excise Act 91 of 1964, and whether the determination in this regard should be set aside.

Decision

The court held that it was not persuaded that the Commissioner had been wrong in determining that ethanol stolen from the applicant's warehouse did not qualify as a rebatable item in terms of the Act and was also not persuaded that the applicant was entitled to any of the relief sought in the alternative.

DKR Auto v Commissioner for the South African Revenue Services (Case No 42604/2012; North Gauteng High Court, Pretoria; 13 March 2014)

Background

An application for an order setting aside the seizure by the Commissioner, in terms of 88(1)(c) of the Customs and Excise Act 91 of 1964, of a certain motor vehicle and for the vehicle to be returned to it in terms of section 89 of the Act; alternatively for the seizure to be reviewed and set aside in terms of the Promotion of Administrative Justice Act 3 of 2000.

Facts

A certain vehicle had been detained on 23 March 2011 by officials of the Commissioner in terms of section 88(1)(a) of the Act.

Issue

Whether the appellant had discharged the onus of proving the elements of its alleged right to reclaim the seized goods.

Decision

It was held that the appellant had failed to prove ownership of the vehicle, and that it had therefore not discharged the onus of establishing its *locus standi* to claim the vehicle or to institute a review of the Commissioner's decision to seize it.

A Company v Commissioner for the South African Revenue Services (Case No 16360/2013; reported as [2014] ZAWCHC 33; 17 March 2014)

Background

The nature and scope of legal advice privilege.

Facts

The applicants, three companies in a well-known group of companies, had applied for a declaratory order that certain content of two fee notes, rendered by their attorneys to the first applicant, was subject to legal advice privilege.

Issue

This decision concerned a claim by the applicants to legal professional privilege, and legal advice privilege in particular, that is to say, the privilege that covers communications between lawyers and their clients whereby legal advice is sought or given.

Decision

The court issued a declarator that certain defined portions of the applicants' attorneys' tax invoice dated 31 July 2008, were protected from disclosure by reason of legal advice privilege.

Tax Court

No decisions of the Tax Court have been reported since the March issue of *the Juta Tax Law Review*.

Foreign Courts

There have been no significant tax decisions by foreign courts since the March issue of the *Juta's Tax Law Review*.