



JUTA'S TAX LAW REVIEW

October 2014

Dear Subscriber to Juta's Tax publications

Welcome to the October 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 July 2014 issue of the Juta Tax Law Review, the following legislation has been promulgated and the following bills have been passed:

The Customs Duty Act 30 of 2014 was promulgated on 10 July 2014 (GG 37821) and, in terms of s 229 of the Act, it will come into force on the date when the Customs Control Act takes effect in terms of s 944(1) of the latter Act.

The Customs Control Act 31 of 2014 was promulgated on 23 July 2014 (GG 37862; to come into effect at a later, but as yet unspecified date).

Customs and Excise Amendment Act 32 of 2014 was promulgated on 23 July 2014 (GG 37863; to come into effect on a date determined by the President by proclamation in the *Government Gazette*).

RULES

The *Government Gazette* 37819 of 11 July 2014 contains Rules promulgated under s 103 of the Tax Administration Act 28 of 2011, prescribing the procedures to be followed in lodging an objection and appeal against an assessment or a decision subject to objection and appeal referred to in s 104(2) of the Act, and rules of procedures for alternative dispute resolution, the conduct and hearing of appeals, applications on notice to a Tax Court and Transitional Rules.

On 11 August 2014 SARS released the Customs and Excise Rules under the Customs and Excise Act 91 of 1964 with amendments up to 8 August 2014.

On 4 August 2014 SARS released the second batch of Customs Control Rules under chapters 11, 20 and 24 of the Customs Control Act 2014 and on 1 August SARS released the schedule to the Rules, as amended.

EXPLANATORY MEMORANDA GUIDES

On 3 September 2014 SARS released a Guide on the Urban Development Zone Tax Incentive (Issue 4)

On 18 September 2014 a draft Guide on the Taxation of Special Trusts was released for public comment by 17 October.

MANUALS

On 12 August 2014 SARS released Issue 4 of the Manual on the Promotion of Access to Information Act 2000.

DOUBLE TAXATION AGREEMENT AND PROTOCOLS

Lesotho's renegotiated Double Tax Agreement was signed on 18 September 2014 in Maseru.

Lichtenstein has ratified the Tax Information Exchange Agreement.

Lesotho has ratified the VAT Mutual Administrative Assistance agreement.

BINDING RULINGS

BINDING GENERAL RULINGS

BINDING GENERAL RULING 24

Effective date: 2 September 2014

Affected legislation: Income Tax Act 58 of 1962

Provisions: Section 18A, s 37C(3) and s 37C(5).

Executive summary: An amount claimed under s 18A that is deemed to be a donation for the purposes of s 37C(3) or (5) will qualify for deduction notwithstanding the fact that a receipt in terms of s 18A(2) has not been issued.

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'; s 8E and para 11(2)(b) of the Eighth Schedule to the Income Tax Act; s 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.

[Note by editor: This ruling was replaced on 20 May 2014 to provide for textual changes and additions to the original ruling for improved clarity.]

BINDING PRIVATE RULINGS

BINDING PRIVATE RULING 174

Effective date: 29 July 2014

Affected legislation: Income Tax Act 58 of 1962

Provisions: Section 1(1), definition of 'gross income' and para 11(1)(d) read with paras 20(1)(h)(i) and 80(1) of the Eighth Schedule to the Act.

Executive summary: This ruling deals with the income-tax and capital-gains consequences of cash contributions received by a share incentive trust and the vesting of shares acquired by the trust for the benefit of qualifying employees.

BINDING PRIVATE RULING 175

Effective date: 30 July 2014

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

Provisions: Sections 11(a), 23(g), and 24j of the Income Tax Act; the s 1(1) definition of 'enterprise', 7(1)(a) and 12(a) of the VAT Act.

Executive summary: This ruling deals with the income-tax and VAT implications of the purchase of debtors' books from businesses across various industry sectors.

BINDING PRIVATE RULING 176

Effective date: 31 July 2014

Affected legislation: Income Tax Act 58 of 1962

Provisions: The s 1(1) definition of 'foreign investment entity'.

Executive summary: The income-tax implications of financial instruments not issued by a 'listed company', as defined, and the application of the words 'for investment purposes' in the definition of 'foreign investment entity' in s 1(1) of the Act.

BINDING PRIVATE RULING 177

Effective date: 31 July 2014

Affected legislation: Income Tax Act 58 of 1962

Provisions: The s 1(1) definition of 'gross income', s 11(g) and s 11(h).

Executive summary: This ruling deals with the income-tax consequences for the lessor, lessee and sub-lessee of land, where the sub-lessee is obliged to effect improvements on the land under a sub-lease and no such express obligation to effect improvements is placed on the lessee by the main lease.

BINDING PRIVATE RULING 178

Effective date: 14 August 2014

Affected legislation: Income Tax Act 58 of 1962

Provisions: The s 1(1) definitions of 'company', 'equity share', 'foreign company', 'group of companies' and 'share', and ss 42 and 45.

Executive summary: This ruling deals with the income tax aspects of the corporate restructuring of a multi-national group of companies.

BINDING PRIVATE RULING 179

Effective date: 15 August 2014

Affected legislation: Income Tax Act 58 of 1962

Provisions: The s 1(1) definition of 'gross income' and 7(1) and paras 11(1), 35(1), 40 and 55 of the Eighth Schedule.

Executive summary: This ruling deals with an investment by a resident in a single premium unit-linked life insurance policy with an insurer registered in Liechtenstein.

NEW AND RE-ISSUED INTERPRETATION NOTES

Interpretation Note 75 (issue 2; issue 1 has been archived)

Effective date: 22 September 2014

Affected legislation: Income Tax Act 58 of 1962

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

Executive summary: The exclusion of certain companies and shares from a 'group of companies' as defined in s 41(1)

Interpretation Note 79 (replacing Practice Note 32 dated 7 October 1994)

Effective date: 22 September 2014

Affected legislation: Income Tax Act 58 of 1962

Provisions: Sections 25, 25C and 26 and paras 2, 3, 4 and 9 of the First Schedule and para 40 of the Eighth Schedule.

Executive summary: This interpretation note provides guidance on the valuation of produce held and not disposed of by nursery operators at the beginning and at the end of each year of assessment. It also examines the capital gains tax consequences of the disposal of produce.

Draft Interpretation Note

A draft interpretation note on additional investment and training allowances for Industrial Policy Projects in terms of s 12I was issued on 18 September 2014 and comments have been invited, which must be provided not later than 14 November 2014.

PRACTICE NOTES

On 22 September 2014 Practice Note 32 of 1994, issued on 7 October 1994 (valuation of stock: nurserymen), was archived and has been replaced by Interpretation Note 79.

CASE LAW

SUPREME COURT OF APPEAL

MTN International (Mauritius) Ltd v CSARS (Case No 275/2013; Supreme Court of Appeal; reported as 2014 (76) SATC 217; 14 March 2014)

Background

This was an appeal from the North Gauteng High Court.

Facts

The South African Revenue Service had issued what professed to be an assessment on the last day before the original assessment was due to prescribe in terms of s 79(1) of the Income Tax Act 58 of 1962.

Issue

Whether the manual determination of the due date in terms of the assessment by a SARS official had been irregular and unlawful and whether the assessment was consequently invalid.

Decision

The fact that the due date specified in the assessment had been incorrectly fixed would not affect the validity of the assessment; the additional assessment thus did not fall to be set aside and the appeal was dismissed.

CSARS v Mobile Telephone Networks Holdings (Pty) Ltd (Case No 966/2012; Supreme Court of Appeal; reported as 2014 (76) SATC 205; 7 March 2014)

Background

This was an appeal from a decision of the Full Court of the Gauteng High Court.

Facts

The appellant, a holding company, derived its primary income from dividends received from its subsidiaries and it loaned funds to its subsidiaries, on which interest was payable. The appellant had also incurred audit fees payable to a professional firm and fees in respect of its computer system.

Issue

The deductibility of the audit fees, and the fees paid in respect of its computer system in terms of s 11(a) of the Income Tax Act 58 of 1962.

Decision

The audit fee had been incurred for a dual or mixed purpose and had to be apportioned into a deductible and a non-deductible component. As to the fee paid in respect of the computer system, insufficient evidence had been laid before the court for a determination to be made on deductibility and the Commissioner could not be faulted for having disallowed that fee in its entirety.

CASE LAW

High Court

Coltrade International CC v CSARS (Case No 45213; Gauteng Division, Pretoria; [2014] ZAGPPHC 697; 12 September 2014)

Background

Appeal against a tariff determination in terms of the Customs and Excise Act 91 of 1964 against a tariff determination by the Commissioner in terms of s 47(9)(a) of the Act.

Facts

The applicant was an importer of coconut milk, coconut milk and coconut powder.

Issue

Whether the Commissioner had erred in its classification of those products for purposes of the imposition of the tariff provided for in the Act.

Decision

The appeal was upheld and an order was made as to the proper tariff determination and tariff heading.

Kluh Investments (Pty) Ltd v CSARS (Case No A48/2014; Western Cape Division, Cape Town; [2014] ZAWCHC 141; 9 September 2014)

Background

An appeal against a decision of the Cape Tax Court.

Facts

The taxpayer had disposed of a certain plantation and SARS had issued an additional assessment in respect of that disposal.

Issue

Whether the taxpayer had been engaged in farming operations for the purposes of the First Schedule to the Income Tax Act 58 of 1962 and whether the affirmative decision of the Cape Tax Court in this regard should be reversed.

Decision

The appeal was upheld and the additional assessment was set aside.

Capstone 556 (Pty) Ltd v CSARS (Case No A49/14; Western Cape Division, Cape Town; [2011] ZAWCHC 432; 26 August 2014)

Background

The taxpayer had received an assessment to income tax. and had applied to the Commissioner to suspend the obligation to pay the disputed tax in issue pending the decision of the Tax Court.

Facts

The Commissioner had declined to grant the requested suspension; the taxpayer had applied to the High Court for an order prohibiting SARS from enforcing payment of the disputed assessment pending a further appeal; the High Court had declined to grant such an order.

Issue

This was an application for leave to appeal against the prior order of the High Court, dismissing the taxpayer's application for an order prohibiting SARS from taking any steps to enforce payment of the assessed tax pending the outcome of the appeal to the Tax Court against the disputed assessments.

Decision

The application for leave to appeal was dismissed.

Huang v CSARS; In Re CSARS; In Re Huang (Case No SARS 1/2013; Gauteng Division, Pretoria; [2014] ZAGPPHC 563; 13 August 2014)

Background

SARS was of the view that the appellants had infringed provisions of the Income Tax Act 58 of 1962, the Value Added Tax Act 89 of 1991 and/or the Tax Administration Act 28 of 2011, or that there were reasonable grounds to believe that the appellants had committed certain offences in terms of the said Acts.

Facts

Pursuant to an ex parte application by SARS, heard in chambers, a High Court judge had issued a search and seizure warrant in respect of the appellants in terms of the Tax Administration Act 28 of 2011.

Issue

Whether the High Court should reconsider and set aside the aforesaid warrant in terms of the Tax Administration Act.

Decision

The court dismissed the application.

CSARS v Krok (Case No 1319/13; North Gauteng High Court; reported as 2014 (3) SA 453, [2014] 2 All SA 66, 76 SATC 119; 31 January 2014)

Background

This was an application to the Gauteng High Court for the confirmation of a provisional preservation order previously granted by the court in terms of s 163 of the Tax Administration Act 28 of 2011.

Facts

The Australian Tax Office had formally requested the South African Revenue Service, in terms of the double tax agreement between Australia and South Africa, to render assistance in collecting tax that was owing to the Australian fiscus.

Issue

Did the provisional preservation order previously granted by the court in respect of the taxpayer's South African assets fall to be set aside or should it be confirmed?

Decision

The court confirmed the provisional preservation order.

CSARS v C-J van der Merwe (in re CSARS v GW van der Merwe) (Case No 13498/13; Western Cape Division, Cape Town; reported as (2014) 76 SATC 138; 28 February 2014)

Background

This was an application to the High Court for the confirmation of a provisional preservation order in terms of s 163 of the Tax Administration Act 28 of 2011.

Facts

SARS had previously secured a provisional order for the preservation of assets in respect of both the first and the second respondents. SARS contended that the second respondent (the daughter of the first respondent) owed taxes to SARS in her own right or held assets on behalf of the first respondent or that she had allowed her accounts to be used by the latter.

Issue

Whether the provisional preservation order should be confirmed.

Decision

The Commissioner had shown that a final preservation order was required against the second respondent to secure the collection of tax and that order was confirmed.

Shuttleworth v South African Reserve Bank (Case No 30709/10; North Gauteng High Court, Pretoria; reported as [2013] 3 All SAR 635 (GNP), 76 SATC 160; 17 September 2013)

Background

The applicant had emigrated from South Africa.

Facts

A ten per cent exit levy had been imposed in terms of Exchange Control Regulations on funds that the applicant was to remit out of the country.

Issue

The constitutionality of the ten per cent exit levy.

Decision

The decision to impose the levy derived from empowering provisions in the Currency and Exchanges Act 9 of 1933 and the regulations. It followed that the rules, circulars and rulings, issued by the Minister, were not unconstitutional. However, section 9(3) of the Act, giving the President extraordinarily wide powers, was inconsistent with the Constitution and certain regulations were also inconsistent with the Constitution and were therefore invalid to the extent defined in the judgment.

[Editor's note: the decision of the Supreme Court of Appeal in this matter (reported as Shuttleworth v South African Reserve Bank [2014] ZASCA 157) which was delivered on 1 October 2014 will be summarised in the next issue of the Juta Tax Law Review.]

Tax Court

ITC 1870 (2014) 76 SATC 97

Background

The Supreme Court of Appeal had handed down a judgment in CSARS v Custodial Services (Pty) Ltd 2012 (1) SA 522 (SCA), 74 SATC 61 determining inter alia the deductibility of certain costs in terms of the Income Tax Act 58 of 1962.

Facts

The interpretation of aspects of the Supreme Court of Appeal judgment was in dispute between the taxpayer and SARS.

Issue

Whether the reference in the Supreme Court of Appeal judgment to "further costs" related to an issue in the proceedings before that court.

Decision

The interpretation of a judgment can be effected only by a judge and not by a Tax Court; the Commissioner was directed to allow the deduction in question in terms of s 11(bA) of the Income Tax Act of the costs described as 'further costs' in the Supreme Court of Appeal judgment.

ABC (PTY) LTD v CSARS (VAT Case No 872; Cape Town Tax Court; reported as ITC 1871 (2014) 76 SATC 109; 2 December 2013)

Background

A vendor in terms of the Value-Added Tax Act 89 of 1991 had organised certain festivals and had received sponsorships which it publicised but the sponsors had not issued VAT invoices in respect of the goods and services rendered to the vendor.

Facts

The vendor in terms of the Value-Added Tax Act 89 of 1991 had claimed input tax deductions in respect of those goods and services.

Issue

Whether a vendor should be allowed to deduct input tax in respect of supplies despite the lack of tax invoices in respect of those supplies.

Decision

The vendor had failed to make out a case for relief and the appeal was dismissed.

AB TRUST v CSARS (Case No 13254; Cape Town Tax Court; reported as ITC 1872 (2014) 76 SATC 225; 22 January 2014)

Background

A trust had been duly registered with the office of the Master of the High Court.

Facts

The trust had sought approval from SARS as a public benefit organisation in terms of s 30 of the Income Tax Act 58 of 1962 read with the Ninth Schedule and SARS had declined to grant such approval.

Issue

Whether, on the facts of this matter, the trust satisfied the requirements of s 30(3) of the Income Tax Act and whether the trust also qualified to issue tax-deductible receipts in terms of s 18A of the Act.

Decision

The Commissioner should have granted the trust approval as a public benefit organisation, but unless the trust satisfied the Commissioner that its activities would be carried out exclusively in the Republic, it could not be issued with authority to issue tax-deductibility receipts in terms of s 18A of the Act.

Foreign Courts

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