



JUTA'S TAX LAW REVIEW

July 2015

Dear Subscriber to Juta's Tax publications

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

No further legislation has been enacted since the March issue of the JTLR.

DRAFT BILLS

On 5 June 2015 National Treasury released for public comment the First Batch of the 2015 Draft Taxation Laws Amendment Bill together with an Explanatory Memorandum.

BILLS

On 3 June 2015 the Rates and Monetary Amounts and Amendment of Revenue Laws Bill [B15 of 2015] was introduced in the National Assembly.

There has been no further legislation since the March issue of the JTLR.

GENERAL

On 6 March 2015 SARS published Table A and B of the average exchange rates.

On 6 March 2015 SARS published updated Customs and Excise Rules.

On 16 March 2015 SARS issued notice 212 on reportable arrangements in terms of s 35(2) of the Tax Administration Act 28 of 2011.

INTERNATIONAL TAXATION

On 30 March 2015 SARS released a Mutual Assistance Agreement on VAT with Swaziland which came into force on 27 January 2015.

On 21 May 2015 in GG 38747 SARS released a VAT Mutual Assistance Agreement with Lesotho which came into force on 29 October 2014.

GUIDES

On 26 March 2015 SARS issued a *Guide to Taxation in South Africa 2014/2015*.

On 26 March 2015 SARS released a *Guide on Tax Rates, Duties and Levies* (issue 11).

On 27 March 2015 SARS issued a *Tax Guide for Small Businesses 2014/2015*.

On 27 March 2015 SARS issued a VAT 413 *Guide for Estates*.

On 31 March 2015 SARS issued a *Draft Guide on the Taxation of Foreigners working in South Africa*.

On 31 March 2015 SARS issued a VAT 404 *Guide for Vendors*.

On 15 April 2015 SARS released *The ABC for CGT for Individuals* (issue 8) and *The ABC for CGT for Companies* (issue 6).

On 31 May 2015 SARS released a draft *Comprehensive Guide on Capital Gains Tax* (issue 5).

On 5 June SARS issued a guide on the United States Foreign Account Tax Compliance Act (FATCA).

TAX ADMINISTRATION ACT

On 31 March 2015 SARS issued notice 295 setting out the addresses to which a document, notice or request must be delivered in terms of the rules under s 103 of the Tax Administration Act 28 of 2011. Separate addresses are stipulated for notices to SARS, the Tax Board, the Tax Court and the High Court, respectively.

BINDING RULINGS

BINDING GENERAL RULINGS

Draft rulings

SECOND DRAFT BINDING GENERAL RULING (VAT)

Effective date: This draft was released on 12 March 2015

Affected legislation: Value-Added Tax Act 89 of 1991

Provisions: Sections 11(1)(j) and 13(3), para 7(a) of Schedule 1 and items 12 and 13 in part B of Schedule 2

Executive summary: This ruling deals with the VAT treatment of the supply and importation of fruit and vegetables and sets out the applicable rate of VAT. This ruling was released as a draft in 2014 and SARS received requests to delay finalisation in order to allow for additional submissions. SARS agreed to issue an updated draft for a second round of comments. Additional submissions had to be made on or before 31 May 2015. This ruling will withdraw BGR 18 (VAT).

Rulings

BINDING GENERAL RULING (VAT) 4 (issue 3)

Effective date: 27 March 2015

Affected legislation: Value-Added Tax Act 89 of 1991

Provisions: Section 1(1); definition of 'input tax'

Executive summary: This ruling deals with the apportionment methodology, as envisaged in s 17(1), that a municipality must use to determine the amount of VAT which may be deducted as input tax on any goods or services acquired for a mixed purpose. This ruling replaces and withdraws BGR 4 (Issue 2) dated 25 March 2013.

BINDING GENERAL RULING (VAT) 16 (issue 2)

Effective date: 30 March 2015

Affected legislation: Value-Added Tax Act 89 of 1991

Provisions: Section 17(1)

Executive summary: This ruling prescribes the method to be used in determining the ratio contemplated in s 17(1), which provides for the extent to which a vendor may deduct tax payable on goods or services acquired partly for the purpose of making taxable supplies and partly for some other purpose, for example exempt supplies or private use.

BINDING GENERAL RULING 26

Effective date: 12 March 2015

Affected legislation: Value-Added Tax Act 89 of 1991

Provisions: Section 11(1)(j) and s 13(3); para 7(a) of Schedule 1 and item 12 in part B of Schedule 2

Executive summary: This ruling sets out the VAT treatment applicable to the supply and importation of herbs.

BINDING GENERAL RULING 27**Effective date:** 26 March 2015**Affected legislation:** Value-Added Tax Act 89 of 1991**Provisions:** Sections 20(4), (5), (7), 21(1) and (5)

Executive summary: This ruling sets out the circumstances and conditions under which a vendor need not issue a tax invoice, credit or debit note.

BINDING GENERAL RULING 28**Effective date:** 26 March 2015**Affected legislation:** Value-Added Tax Act 89 of 1991**Provisions:** Sections 20, 21 and 65

Executive summary: This ruling sets out the information that must be contained in a tax invoice, credit or debit note in order to satisfy the requirements of s 20(7) or 21(5), the exchange rate that must be applied in order to determine the amount of the VAT charged in the currency of the Republic and the manner in which prices must be advertised or quoted, for the supply of electronic services by an electronic services supplier.

BINDING CLASS RULINGS

BINDING CLASS RULING: 008**Effective date:** 16 October 2009**Affected legislation:** Income Tax Act 58 of 1962**Provisions:** Section 1, definition of 'gross income'; paragraph (i) and paras 2(i) and 12A of the Seventh Schedule to the Act

Executive summary: This ruling deals with the tax consequences for pensioners whose former employers purchase annuity policies from insurers in the pensioners' names in settlement of the employer's obligation to pay medical aid contribution subsidies to ensure that the pensioners continue to be members of medical aid schemes.

BINDING CLASS RULING 045**Effective date:** 24 March 2015**Affected legislation:** Income Tax Act 58 of 1962**Provisions:** Section 1(1) definition of 'gross income' paras (c), (f) and (i)

Executive summary: This ruling deals with the consequences for employees whose post retirement medical aid benefits will be cancelled and replaced with a once-off contribution to the employees' pension fund.

BINDING CLASS RULING 046**Effective date:** 16 April 2015**Affected legislation:** Income Tax Act 58 of 1962**Provisions:** Section 1(1), definition of 'foreign dividend'

Executive summary: This ruling deals with dividends distributed by foreign companies and whether they will be foreign dividends as defined in s 1(1) of the Act.

BINDING PRIVATE RULINGS

BINDING PRIVATE RULING 190**Effective date:** 9 March 2015**Affected legislation:** Income Tax Act 58 of 1962 (the Act); the Securities Transfer Tax Act 25 of 2007 (the STT Act)**Provisions:** Section 24J and paras 11(1)(a) and 35 of the Eighth Schedule to the Income Tax Act; s 1 of the Securities Transfer Tax Act, definition of 'transfer'**Executive summary:** This ruling deals with the issue and repurchase of ordinary shares. The proposed arrangement is based on contractual rights and restrictions established separately from any class provisions applicable to those shares in terms of the Applicant company's memorandum of incorporation.**BINDING PRIVATE RULING 191****Effective date:** 26 March 2015**Affected legislation:** Income Tax Act 58 of 1962**Provisions:** Sections 8E, 8EA, 19 and para 12A of the Eighth Schedule to the Act**Executive summary:** This ruling deals with the refinancing of current debt through preference share funding.**BINDING PRIVATE RULING 192****Effective date:** 28 May 2015**Affected legislation:** Income Tax Act 58 of 1962**Provisions:** Section 31 and s 50B read with s 50E**Executive summary:** This ruling deals with the question as to whether an adjustment made to taxable income or tax payable under s 31 can trigger withholding tax on interest levied under s 50B read with s 50E of the Act.**BINDING PRIVATE RULING 193****Effective date:** 15 June 2015**Affected legislation:** Income Tax Act 58 of 1962**Provisions:** Section 19 and in particular the definition of 'reduction amount' and paras 12A and 20(3)(b) of the Eighth Schedule to the Act**Executive summary:** This ruling deals with the repayment of shareholder loans by way of set-off. The loan outstanding from the subscription of a new issue of ordinary shares will be set-off against the amount outstanding under the shareholders loans.**BINDING PRIVATE RULING 194****Effective date:** 15 June 2015**Affected legislation:** Income Tax Act 58 of 1962; the Securities Transfer Tax Act 25 of 2007**Provisions:** Sections 1(1), definitions of 'gross income' and 'dividend', 18A, 54, 56(1)(h), 64D, definition of 'dividend', and paras 2(1), 11(1) and (2)(b) of the Eighth Schedule to the Income Tax Act; ss 2(1) and 6 of the Securities Transfer Tax Act**Executive summary:** This ruling deals with the disposal of shares by way of a share buy-back by a resident company from a non-resident person and a donation of shares by the same non-resident person to another resident company, in both cases for no consideration.**BINDING PRIVATE RULING 195****Effective Date:** 26 June 2015**Affected legislation:** Securities Transfer Tax Act 25 of 2007 (the STT Act); Income Tax Act 58 of 1962 (the Act)**Provisions:** Section 8(1)(a) of the STT Act; ss 1(1) definition of 'contributed tax capital', and 'permanent establishment', 40CA, and 42 and paras 2(1)(b) and 20(1)(a) of the Eighth Schedule to the Act.

Executive summary: This ruling deals with the exemption from securities transfer tax of a share transfer in terms of an asset-for-share transaction under which the parties have elected that the relief provided for under s 42 of the Act will not apply.

INTERPRETATION NOTES

ARCHIVED INTERPRETATION NOTES

INTERPRETATION NOTE 18 (Issue 2)

Date: 31 March 2009

Affected legislation: Income Tax Act 58 of 1962

Provisions: Section 6*quat*

Executive summary: This note which provided for a rebate or deduction in respect of foreign taxes on income. This note was archived on 26 June 2015; see now Issue 3 of this note.

INTERPRETATION NOTE 46 (Issue 4)

Date: 6 November 2012

Affected legislation: Income Tax Act 58 of 1962

Provisions: Sections 1(1) (para (la) of the definition of the term 'gross income'), 10(1)(cN), 11, 11E and 30 of the Act

Executive summary: This note provided information and guidance on the amalgamation of amateur and professional sporting bodies carried out under s 125 of the Act. The note was archived on 23 June 2015 because the conditions and requirements relating to the amalgamation transactions explained in the note are no longer relevant.

DRAFT INTERPRETATION NOTES

DRAFT INTERPRETATION NOTE 63 (Issue 2)

Effective date: not stated

Affected legislation: Income Tax Act 58 of 1962

Provisions: Section 1(1), 6*quat*(4) and (4A), 6*quin*(4), 9A, 9D(6), 25D, 35A(5), 47J, 49H, 50H, 51H and 64N(4)

Executive summary: This interpretation note deals with the rules for the translation of amounts measured in foreign currencies other than exchange differences governed by s 24I.

DRAFT INTERPRETATION NOTE

Effective date: not stated

Affected legislation: Income Tax Act 58 of 1962

Provisions: Section 7(11)

Executive summary: This note will provide guidance and clarity on the treatment of maintenance orders and the tax-on-tax principle relating to maintenance orders that retirement funds pay while a member is still a contributing member and has not left the retirement fund. General Note 37 dated 31 October 2008 will simultaneously be withdrawn.

DRAFT INTERPRETATION NOTE

Effective date: not stated

Affected legislation: Income Tax Act 58 of 1962

Provisions: Section 1(1), definition of 'headquarter company', 6quat(1A) and (1C), 6quin(1), 9D(2), 9H, 9I, 10(1)(k)(i), 10B, 20C, 24I(3), 25D(4) and (7), 31(5), 41(1), 49D(c), 50D(1)(a)(i)(cc), 64E(1) and 64J(2); and paras 11(2)(b), 43(1A) and (6A) and 64B(2) and (4) of the Eighth Schedule

Executive summary: This note concerns aspects of headquarter companies.

DRAFT INTERPRETATION NOTE 1 (Issue 2)

Effective date: not stated

Affected legislation: Income Tax Act 58 of 1962

Provisions: Paragraphs 17 to 27 of the Fourth Schedule

Executive summary: This note, which deals with provisional tax estimates, was released as a draft in 2014. Owing to amendments promulgated in January 2015 which substantially changed the penalty provisions, SARS has issued this updated draft for a second round of comments.

DRAFT INTERPRETATION NOTE (no number stated)

Effective date: not stated

Affected legislation: Income Tax Act 58 of 1962

Provisions: Section 1(1), definitions of 'mining operations' and 'mining'

Executive summary: This note deals with the question of whether certain quarrying operations constitute mining operations.

DRAFT INTERPRETATION NOTE 6 (Issue 2)

Effective date: not stated

Affected legislation: Income Tax Act 58 of 1962

Provisions: Section 1

Executive summary: This note provides guidance on the interpretation and application of the term 'place of effective management' in determining the tax residence of a company.

NEW AND RE-ISSUED INTERPRETATION NOTES

INTERPRETATION NOTE 18 (Issue 3)

Date: 26 June 2015

Affected legislation: Income Tax Act 58 of 1962

Provisions: Sections 6quat, 6quin and 64N

Executive summary: This note provides for rebates and deductions for foreign taxes on income. Issue 2 of this note has been archived as from 26 June 2015.

INTERPRETATION NOTE 81 (Issue 2)

Effective date: 9 April 2015

Affected legislation: Value-Added Tax Act 89 of 1991

Provisions: Sections 7(1)(a), 11(1)(a) and 11(2)(l)

Executive summary: This note explains the VAT treatment of various supplies made to foreign hunters which includes hunting services, taxidermy services, the supply of a trophy and the subsequent export of the trophy. This note withdraws VAT Practice Note 13 dated 6 September 1994.

INTERPRETATION NOTE 82

Effective date: 25 March 2015

Affected legislation: Value-Added Tax Act 89 of 1991

Provisions: Sections 1(1), 17(2)(c) and 18

Executive summary: This note sets out the interpretation of the definition of 'motor car'; the general principle that VAT incurred on the acquisition of a motor car is not an input tax deduction; exceptions to the general principle, that is, the circumstances where an input tax deduction is allowed on the acquisition of a motor car; instances when input tax may be deducted on the acquisition of accessories, modifications and conversions to motor cars; and the application of a change in use adjustment to motor cars.

INTERPRETATION NOTE 83 (Issue 2)

Effective date: 9 April 2015

Affected legislation: Value-Added Tax Act 89 of 1991

Provisions: Sections 20(4), (5), (7), 21(1) and (5)

Executive summary: This note sets out the requirements that must be met in order for the Commissioner to apply the provisions of ss 20(7) and 21(5); this note withdraws VAT Practice Note 2 dated 25 September 1991; and replicates under s 5 paras 2 and 3 of Binding General Ruling 27 (VAT). VAT Practice Note 2 of 25 September 1991 has been withdrawn and archived.

INTERPRETATION NOTE 84

Effective date: 26 March 2015

Affected legislation: Value-Added Tax Act 89 of 1991

Provisions: Section 8(13), 9(3)(e), 10(17) and 16(3)(d)

Executive summary: This note clarifies what constitutes a bet and the VAT treatment of a bet.

INTERPRETATION NOTE 85

Effective date: 27 March 2015

Affected legislation: Value-Added Tax Act 89 of 1991

Provisions: Section 1(2)(l)

Executive summary: This note discusses the impact of the judgment of the Supreme Court of Appeal in the *Master Currency* case on the interpretation and the application of s 11(2)(l), with particular reference to the principles highlighted by the court.

CASE LAW

HIGH COURT

Chittenden NO v Commissioner for South African Revenue Service (Case No 12795/14; North Gauteng High Court, Pretoria; 3 March 2014; (2014) SATC 397)

Background

The appellant company had a large outstanding tax liability and had been the subject of business rescue proceedings. Its tax clearance certificate was about to expire.

Facts

The company had applied to SARS for a new tax clearance certificate which SARS then refused to issue. The company applied to court for an order compelling SARS to issue a renewed tax clearance certificate.

Issue

Whether the appellant company was entitled, in terms of the Tax Administration Act 28 of 2011 to an order compelling SARS to issue a tax clearance certificate.

Decision

In terms of s 256(3) of the Tax Administration Act, the Commissioner may issue a tax clearance certificate only if satisfied that the requirements of this provision are satisfied, and s 256(3)(a) precludes the issuing of a tax clearance certificate where the taxpayer in question has an outstanding tax debt. It was held that the company was not entitled to the order sought. It was held that a decision on the issuing of a tax clearance certificate constitutes administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000 and that if the appellant company was dissatisfied with the decision and wished to challenge it, then review proceedings should be launched in terms of s 8 of that Act, and that in the interim SARS's decision remains in full force.

Capstone 556 (Pty) Ltd v Commissioner for South African Revenue Service 2014 (6) SA 195 (WCC), 77 SATC 1

Background

The appellant company and its sole shareholder were special purpose vehicles and the sole purpose of the appellant was to hold shares ('the JDG shares') in the JD group of companies.

Facts

The appellant company had transacted no business and held no directors' meetings and its only commercial obligations, other than those in issue in this case, were those associated with the funding required to pay for the JDG shares. The appellant had taken transfer of the JDG shares in December 2003 and had sold them in March 2004 in the course of a transaction involving associated expenditure and the giving of an indemnity. SARS had issued an additional assessment arising from the disposal by the appellant of certain JDG shares in the 2005 year of assessment.

Issue

Whether the proceeds of the disposal of the shares in question were of a revenue or a capital nature and whether the two amounts of expenditure in issue, one being a so-called 'equity kicker' and the other arising from an indemnity, were deductible from gross income.

Decision

It was held that the appellant had discharged the onus of proving that the JDG shares were capital in its hands and that the profits on disposal were fortuitous and thus of a capital nature. It was held that the 'equity kicker' had been a borrowing cost as envisaged in para 20(2)(a) of the Eighth Schedule to the Income Tax Act 58 of 1962 and that the indemnity settlement obligation was entirely separate from the acquisition of the JDG shares and that the cost was a cost of disposal, not acquisition.

Kluh Investments (Pty) Ltd v Commissioner for South African Revenue Service 2015 (1) SA 60 (WCC), 77 SATC 23

Background

The appellant company had disposed of a plantation during the 2004 tax year, the proceeds from the disposal of which were the subject of a disputed assessment to income tax.

Facts

The appellant had entered into an arrangement with another company, allowing the latter to conduct farming operations for its own account on the land and to maintain the existing farming system in accordance with best practice on the basis that it would return the plantation to the appellant intact when the agreement terminated.

Issue

The issue before the court was whether the appellant had been the party who was carrying on farming operations and, if so, whether the proceeds from the disposal of the plantation in question were derived from such farming operations.

Decision

For the carrying on of farming operations, there has to be conduct by the taxpayer apart from disposing of a previously-acquired plantation. In this particular matter, the other company involved had been the party carrying on farming operations for its own profit and loss; s 26(1) of the Income Tax Act 58 of 1962 was therefore not applicable in that it was not the appellant who had been carrying on farming operations. In the hands of the appellant, the proceeds of the disposal of the plantation were capital and not deemed income as envisaged in para 14 of the First Schedule to the Act.

Commissioner for South African Revenue Service v Bosch 2015 (2) SA 174 (SCA), 77 SATC 61

Background

The two respondents were senior employees of the Foschini group of companies.

Facts

Additional assessments had been issued to the respondents arising out of benefits received by them in terms of a share option scheme involving the granting of an option to purchase shares in a Foschini company and the deferred delivery of the shares if the taxpayers did not avail themselves of their right to dispose of the shares instead of taking delivery.

Issue

The issue before the court was whether s 8A(1)(a) of the Income Tax Act 58 of 1962 became applicable when the respondents paid the consideration for the shares and either received transfer or, if they elected to sell the shares, when they received the proceeds of the sale.

Decision

The court rejected the Commissioner's argument that the contracts in question had been subject to a condition that the respondents remained employees within the group until the date of delivery of the shares. The court also rejected the Commissioner's argument that there had been a simulation and rejected the argument based on substance over form.

TAX COURT

Background

The taxpayer was a wine farmer and a member of a farming co-operative.

Facts

The taxpayer had delivered his grape harvest to the co-operative during the tax year in issue where they had been 'pooled', that is to say, crushed and mixed with grapes of a similar type delivered by other members of the co-operative.

Issue

The issue for determination by the court was whether, having delivered his grapes to the co-operative where they had been so 'pooled', the taxpayer could be said to have 'produce held and not disposed of' which would then be brought into account as his closing stock.

Decision

It was held that, after the taxpayer had delivered the grapes to the co-operative, they remained his property after they had been crushed and pressed and that he did not dispose of them until the end of the tax year in which the grapes were finally processed into wine and sold. Consequently, the grapes delivered by the taxpayer to the co-operative were closing stock of his farming operations and should have been reflected as such in his income tax return.

FOREIGN COURTS

Z Co (Pvt) Ltd v Zimbabwe Revenue Authority (2015) 77 SATC 82 (High Court of Zimbabwe)

Background

The appellant company was registered with the Tobacco Industry and Marketing Board as a tobacco merchant. The appellant purchased tobacco both at auction and under contract, then processed, packaged and marketed the tobacco for manufacturers, and exported it.

Facts

A US dollar amount had been deposited with the Reserve Bank of Zimbabwe for the purchase of tobacco by the appellant in August 2008. After such purchases, a balance of some US\$2.2 million remained. Thereafter, some US\$1 million of this amount went missing, having been lost in the hands of the exchange control authority.

Issue

The issue before the court was whether the misappropriation by a third party of the approximately US\$1 million was deductible as an expense or loss suffered by the appellant in the course of trade or business or in the production of income as envisaged in terms of Zimbabwe's Income Tax Act.

Decision

It was held that the loss of the money in issue was a risk inherent in the appellant's business, was fortuitous expenditure not of a capital nature that had been incurred in the ordinary course of business, and was therefore deductible in terms of s 15(2)(a) of Zimbabwe's Income Tax Act.

REGULATIONS IN TERMS OF ACTS ADMINISTERED BY SARS

Regulation 343 in Government Gazette 38729 dated 23 April 2015 in terms of s 11D(6)(b) of the Income Tax Act 58 of 1962 relates to certain categories of research and development that are deemed to constitute the carrying on of research and development.

Regulation 344 in Government Gazette 38730 is a regulation in terms of para (e) of the definition of 'research and development' in s 11D(1) of the Income Tax Act 58 of 1962 regarding the criteria for clinical trials in respect of a deduction for research and development expenditure.

Regulation 346 in Government Gazette 38732 of 23 April 2015 is a regulation in terms of para (d) of the definition of 'research and development' in s 11D(1) regarding additional criteria for multisource pharmaceutical products.

Regulation 362 in Government Gazette 38744 dated 28 April 2015 is a regulation in terms of items (a) and (c) of the definition of 'determined value' in para 7(1) of the Seventh Schedule to the Income Tax Act, 1962 regarding retail market value in respect of right of use of motor vehicle.

Regulation 447 in Government Gazette 38836 of 29 May 2015 is in respect of the requirements for registration as a VAT vendor.

DOUBLE TAX AGREEMENTS

On 17 June 2015 SARS released a double tax agreement with Mauritius, (see GN 471 published in GG 38862 of 17 June 2015) which came into force on 28 May 2015. This agreement has been approved by Parliament.

TAX INFORMATION EXCHANGE AGREEMENTS

The following Tax Information Exchange Agreements ('TIEAs') have been signed:

A TIEA with St Kitts and Nevis was signed on 7 April 2015, but has not been ratified.

A TIEA with Lichtenstein came into force on 23 May 2015; see Government Gazette 38812 dated 27 May 2015 and it has been approved by Parliament.

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