



## JUTA'S TAX LAW REVIEW

March 2016

### **Dear Subscriber to Juta's Tax publications**

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](mailto:sallcock@juta.co.za)).

Kind regards

**The Juta Law Marketing Team**

## **LEGISLATION**

Rates and Monetary Amounts and Amendment of Revenue Laws Act 13 of 2015 promulgated in *Government Gazette* 39421 of 17 November 2015.

Tax Administration Laws Amendment Act 23 of 2015 promulgated in *Government Gazette* 39586 of 8 January 2016.

Taxation Laws Amendment Act 25 of 2015 promulgated in *Government Gazette* 39588 of 8 January 2016.

The Department of Trade and Industry has announced the commencement of the Special Economic Zones Act, 2014 and the Regulations under this Act in *Government Gazette* 39667 with effect from 9 February 2016.

## **BILLS**

25 August 2015 – Rates and Monetary Amounts and Amendment of Revenue Laws Bill B15B of 2015 (later promulgated as Act 13 of 2015).

28 October 2015 – Tax Administration Laws Amendment Bill B30 of 2015 (later promulgated as the Tax Administration Laws Amendment Act 23 of 2015).

25 November 2015 – The Taxation Laws Amendment Bills B29A and B29B were approved by the Standing Committee on Finance on 25 November. The bill has been promulgated as the Taxation Laws Amendment Act 25 of 2015.

26 February 2016 – Revenue Laws Amendment Bill B4 of 2016.

## **DRAFT BILLS**

24 February 2016 – Release of the Rates and Monetary Amounts and Amendment of Revenue Laws Bill 2016.

24 February 2016 – Release of the Rates and Monetary Amounts and Amendment of Revenue Laws (Administration) Bill.

24 February 2016 – Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill.

## **RELEASE OF 2015 TAX STATISTICS**

10 November 2015 – The National Treasury and SARS have jointly released the 2015 Tax Statistics [1].

## **REGULATIONS**

*Government Gazette* 39668 of 9 February 2016 – Regulation R160 [2] was promulgated under s 257 of the Tax Administration Act 28 of 2011 Act for the purposes of s 70(4), listing the organs of state or institutions to which a senior SARS official may lawfully disclose specified information. This Regulation replaces, with effect from its date of publication, Regs 93 and 94 published in *Government Gazette* 37307 dated 14 February 2014.

## NOTICES

Promulgation in *Government Gazette* 39490 of 17 December 2015 [3] of a notice by the Minister of Finance fixing R1 million as the limit of the jurisdiction of the Tax Board in appeals in terms of s 109(1)(a) of the Tax Administration Act 28 of 2011, with effect from 1 January 2016.

Notice in *Government Gazette* 39650 of 3 February 2016 [4] of reportable and excluded arrangements for purposes of ss 35(2) and 36(4) of the Tax Administration Act 28 of 2011.

Notice in *Government Gazette* 39575 of 6 January 2016 [5] determining the returns of information to be submitted by third parties in terms of the Tax Administration Act 28 of 2011, and replacing previous notices in this regard.

Notice in *Government Gazette* 39571 of 31 December 2015 [6] determining the date in terms of para 9(2) of the Fourth Schedule on which the new employees' tax deduction tables as prescribed in terms of para 9(1) of the Fourth Schedule come into operation.

Notice in the *Government Gazette* 39275 of 9 October 2015 (notices 953 [7], 954 [8], 955 [9], 956 [10], 957 [11], 958 [12], 959 [13], 960 [14] and 961 [15]) by the Department of Trade and Industry of a decision to approve applications received for the Tax Allowance Programme in terms of s 12I(19)(d).

Notice in the *Government Gazette* 39433 of 23 November 2015 (notices 1154 [16], 1155 [17], 1156 [18], 1157 [19] and 1158 [20]) by the Department of Trade and Industry of a decision to approve applications for the Tax Allowance Programme in terms of s 12I(19)(d) of the Income Tax Act 58 of 1962.

15 December 2015 – Release of a draft notice in terms of s 29 of the Tax Administration Act 28 [21] of 2011 requiring the persons specified in the Schedule to keep and retain the records, books of account or documents prescribed in the Schedule.

24 February 2016 – *Government Gazette* 39724 Government Notice 191 [22] – determination of the daily amount in respect of meals and incidental costs for purposes of s 8(1) of the Income Tax Act 58 of 1962.

## CUSTOMS AND EXCISE

The second draft of the Customs Control Rules [23] made under the Customs Control Act 31 of 2014 has been published for public comment to be provided on or before 1 April 2016.

## VOLUNTARY DISCLOSURE PROGRAM

24 February 2016 – Media statement [24] by SARS of a Special Voluntary Disclosure Programme in respect of off-shore assets and income.

## EXPLANATORY MEMORANDA

4 December 2015 – Release by National Treasury of an Explanatory Memorandum on the Taxation Laws Amendment Bill 29 of 2015 [25].

17 December 2015 – Release by SARS of a draft memorandum on the objects of the Tax Administration Laws Amendment Bill 30 of 2015.

24 February 2016 – Release by SARS of an Explanatory Memorandum on the Revenue Laws Amendment Bill 2016 [26].

## RESPONSE DOCUMENTS

4 December 2015 – Release of a response document on the Taxation Laws Amendment Bill and the Tax Administration Laws Amendment Act [27].

## GUIDES

### *DRAFT GUIDES*

20 January 2016 – SARS has released a draft tax guide for micro-businesses 2015/2016 [28]. Comments have been invited by no later than 26 February 2016.

7 January 2016 – SARS has released a draft guide to the taxation of franchisors and franchisees [29]. Comments have been invited by no later than 12 February 2016.

## GUIDES

18 November 2015 – SARS has published a Guide to the determination of medical tax credits and benefits (issue 6) [30].

13 January 2016 – SARS has published a Comprehensive Guide to Capital Gains Tax [31].

29 February 2016 – SARS has published a Tax Guide for Recreational Clubs (issue 3) [32].

## REMOVAL OF A GUIDE

The Guide to the disposal of a residence from a company to a trust has become obsolete as a result of legislative changes, and has been removed from the SARS website.

## TAX ADMINISTRATION ACT

### BINDING RULINGS

### *BINDING GENERAL RULINGS*

#### **BINDING GENERAL RULING (VAT) 11 (ISSUE 2)** [33]

**Effective date:** 23 February 2016

**Affected legislation:** Value-Added Tax Act 89 of 1991

**Provisions:** Sections 9, 10 and 20: use of an exchange rate

**Executive summary:** This ruling prescribes the foreign exchange rate that must be used when issuing tax invoices, debit notes or credit notes and determining the output tax due where the consideration for the standard-rated supply is in a foreign currency. Also prescribed is the exchange rate that should be applied to determine the consideration in rands for the purposes of complying with ss 20(4), (5) and 21(3) as well as for determining the vendor's output tax liability.

**BINDING GENERAL RULING (VAT) NO 12 (ISSUE 2) [34]****Effective date:** 25 February 2016**Affected legislation:** Value-Added Tax Act 89 OF 1991**Provisions:** Section 1(1) definition of 'input tax'

**Executive summary:** The purpose of this ruling is to arrange for the amount motor dealers may deduct as 'input tax' with regard to a second-hand vehicle traded-in under a non-taxable supply.

**BINDING GENERAL RULING (VAT) 28 (ISSUE 2) [35]****Date:** 23 February 2016**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 on a tax invoice, credit or debit note in order to satisfy the requirements of ss 20(7) or 21(5) and the exchange rate that must be applied 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 GENERAL RULING (INCOME TAX) 30 [36]****Effective date:** 7 January 2016**Affected legislation:** Income Tax Act 58 of 1962**Provisions:** Section 29A

**Executive summary:** This ruling deals with the allocation of direct and indirect expenses within and between an insurer's funds. The ruling determines the allocation of direct and indirect operating expenses within and between the funds that are required to be established by insurers under s 29A and the subsequent deductibility of such operating expenses, and with the deductibility of expenses against transfers under s 29A(7).

**BINDING GENERAL RULING (INCOME TAX) NO 20 (ISSUE 2) [37]****Effective date:** 20 January 2016**Affected legislation:** Income Tax Act 58 of 1962; the Transfer Duty Act 40 of 1949**Provisions:** Sections 10(1)(cN), 10(1)(cO), 10(1)(cQ), 30B and 30C, and para 63A and 63B of the Eighth Schedule to the Income Tax Act; section 9(1)(c) of the Transfer Duty Act

**Executive summary:** This ruling concerns the interpretation of the term 'substantially the whole' in the aforementioned legislative provisions.

## ***BINDING PRIVATE RULINGS***

**BINDING PRIVATE RULING 210 [38]****Date:** 11 November 2015**Affected legislation:** Income Tax Act 58 of 1962**Provisions:** Sections 44 and 47

**Executive summary:** This ruling determines the tax consequences of a liquidation distribution followed immediately by an amalgamation transaction.

**BINDING PRIVATE RULING 211 [39]****Date:** 10 December 2015**Affected legislation:** Income Tax Act 58 of 1962**Provisions:** Sections 24I and 42

**Executive summary:** This ruling determines the consequences under s 24I for the transferor and transferee of intra-group loan assets, denominated in foreign currency, in terms of an asset-for-share transaction under s 42.

**BINDING PRIVATE RULING 212** [40]

**Date:** 10 December 2015

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

**Provisions:** Section 1(1) definition of 'gross income', 24J and paras 3, 4, 12A and 20(3)(b) of the Eighth Schedule to the Income Tax Act; sections 2 and 12(a) of the VAT Act

**Executive summary:** This ruling determines the tax consequences for the issuer of listed credit linked notes that are enhanced by the conclusion of a credit default swap as well as the tax consequences in the event of default.

**BINDING PRIVATE RULING 213** [41]

**Date:** 17 December 2015

**Affected legislation:** Income Tax Act 58 of 1962 (the Income Tax Act); Securities Transfer Tax Act 25 of 2007 (the STT Act)

**Provisions:** Sections 8(4)(a) and 19 of the Income Tax Act and para 12A of the Eighth Schedule to the Income Tax Act and s 1 of the STT Act – the definition of 'transfer'

**Executive summary:** This ruling determines the tax consequences of the repayment of inter-company loans out of the proceeds of a new share issue.

**BINDING PRIVATE RULING 214** [42]

**Date:** 22 December 2015

**Affected legislation:** Income Tax Act 58 of 1962

**Provisions:** Section 8EA

**Executive summary:** This ruling determines whether cumulative redeemable preference shares constitute 'third-party backed shares', as defined, and is a ruling on the interpretation and application of the provisions of s 8EA.

**BINDING PRIVATE RULING 215** [43]

**Date:** 22 December 2015

**Affected legislation:** Income Tax Act 58 of 1962

**Provisions:** Section 1(1) definition of 'gross income'; section 51A definition of 'service fee' and s 51B.

**Executive summary:** This ruling determines the source of satellite capacity fees and whether those fees, when they are paid, are subject to the withholding tax on service fees.

**BINDING PRIVATE RULING 216** [44]

**Date:** 5 January 2016

**Affected legislation:** Income Tax Act 58 of 1962

**Provisions:** Sections 1(1), definition of 'gross income', 8(4)(a), 8F, 8FA, 11(a), 19, 23(g), 24J, 24JB and para 12A of the Eighth Schedule to the Act

**Executive summary:** This ruling determines the income tax consequences for the issuer of specified instruments, the proceeds of which qualify as 'additional tier 1 capital' as defined in the Banks Act 94 of 1990.

**BINDING PRIVATE RULING 217** [45]

**Date:** 21 January 2016

**Affected legislation:** Estate Duty Act 45 of 1955

**Provisions:** Sections 2, 3 and 4A

**Executive summary:** This ruling determines the estate duty implications for non-resident individual investors who invest in a linked investment plan in Country X with exposure to, inter alia, underlying South African assets.

**BINDING PRIVATE RULING 218** [46]

**Date:** 1 February 2016

**Affected legislation:** Income Tax Act 58 of 1962

**Provisions:** Section 1(1) definition of 'REIT'

**Executive summary:** This ruling determines the relevant year of assessment when considering whether a 'qualifying distribution' is made by a REIT.

**BINDING PRIVATE RULING 219** [47]

**Date:** 9 February 2016

**Affected legislation:** Income Tax Act 58 of 1962 (the Act) Securities Transfer Tax Act (the STT Act)

**Provisions:** Sections 25BB, 42, 44 and 56(1)(r) of the Act; section 8 of the STT ACT

**Executive summary:** This ruling determines the income tax and securities transfer tax consequences for the parties to the corporatisation of the Applicant and an amalgamation of the Applicant, followed by an asset-for-share transaction in respect of the minority unitholders.

**BINDING PRIVATE RULING 220** [48]

**Date:** 16 February 2016

**Affected legislation:** Income Tax Act 58 of 1962

**Provisions: sections:** Sections 15 and 36(11)

**Executive summary:** This ruling determines whether a contribution by a mining company to a trust pursuant to a perpetuity share incentive scheme will be deductible in terms of the specific dispensation afforded to mining entities.

**BINDING PRIVATE RULING 221** [49]

**Date:** 17 February 2016

**Affected legislation:** Income Tax Act 58 of 1962

**Provisions:** Section 12C(1)(a)

**Executive summary:** This ruling determines whether the cost of assets to be acquired and brought into use solely to construct roads will be deductible under s 12C of the Act.

**BINDING PRIVATE RULING 222** [50]

**Date:** 18 February 2016.

**Affected legislation:** Income Tax Act 58 OF 1962

**Provisions:** Section 6quat

**Executive summary:** This ruling determines whether the income tax and solidarity surcharge payable by a South African resident in Germany, as well as the trade tax payable by certain foreign partnerships in Germany, will qualify for a rebate under the provisions of s 6quat of the Act.

**BINDING PRIVATE RULING 223** [51]

**Date:** 19 February 2016

**Affected legislation:** Income Tax Act 58 of 1962

**Provisions:** Sections 8FA, 9I(2)(b) and (c), 20C(2) and 31(5)

**Executive summary:** This ruling determines the income tax consequences resulting from the acquisition by a company, that is a resident of South Africa, of shares in and loans of a foreign company for purposes of the headquarter company regime.

**BINDING PRIVATE RULING 224** [52]**Date:** 29 February 2016**Affected legislation:** Income Tax Act 58 of 1962**Provisions:** Section 1(1) (definition of 'gross income') and s 33

**Executive summary:** This ruling determines whether the profits of a company, that is not a resident of South Africa, from the operations of ships in international waters and South African ports, will constitute gross income as defined in s 1(1) of the Act.

## ***BINDING CLASS RULINGS***

**BINDING CLASS RULING 049** [53]**Date:** 3 February 2016**Affected legislation:** Income Tax Act 58 of 1962**Provisions:** Sections 11(a), 23(g) and 23L

**Executive summary:** This ruling determines the deductibility of insurance premiums incurred by a mine owner for an environmental maintenance programme guarantee issued to the Department of Mineral Resources.

**BINDING CLASS RULING 050** [54]**Date:** 9 February 2016**Affected legislation:** Income Tax Act 58 of 1962 (the Act); Securities Transfer Tax Act 25 of 2007 (the STT Act)**Provisions:** Sections 9C, 42 and 44(6) of the Act and s 8 of the STT Act

**Executive summary:** This ruling determines the income tax and securities transfer tax consequences for the unitholders in a listed REIT of an amalgamation of the REIT, followed by an asset-for-share transaction.

**BINDING CLASS RULING 051** [55]**Date:** 16 February 2016**Affected legislation:** Income Tax Act 58 of 1962**Provisions:** Sections 8C, 10(1)(k), 25B, and 64F(1)(l)

**Executive summary:** This ruling determines the taxability of dividends accruing to a trust that will, in turn, distribute those dividends to its beneficiaries pursuant to an employee share incentive scheme.

## ***INTERPRETATION NOTES***

### ***DRAFT INTERPRETATION NOTES***

**DRAFT INTERPRETATION NOTE** [56]**Date:** 18 March 2016**Affected legislation:** Income Tax Act 58 of 1962**Provisions:** Section 12L

**Executive summary:** This Note deals with the deduction for energy-efficiency savings.



### **DRAFT INTERPRETATION NOTE 34 (ISSUE 2) [57]**

**Date:** 29 February 2016

**Affected legislation:** Income Tax Act 58 of 1962

**Provisions:** Section 10(1)(o)

**Executive summary:** This Note provides guidance on the circumstances under which s 10(1)(o)(i) exempts the remuneration derived by a person as an officer or crew member of a ship from normal tax.

### **DRAFT INTERPRETATION NOTE 16 (ISSUE 2) [58]**

**Date:** 26 February 2016

**Affected legislation:** Income Tax Act 58 of 1962

**Provisions:** Section 10(1)(o)

**Executive summary:** This Note discusses the interpretation and application of the foreign employment remuneration exemption in s 10(1)(o)(ii).

## **NEW AND RE-ISSUED INTERPRETATION NOTES**

### **INTERPRETATION NOTE 86 [59]**

**Date:** 8 December 2015

**Affected legislation:** Income Tax Act 58 of 1962

**Provisions:** Section 12I

**Executive summary:** This Note deals with additional investment and training allowances for industrial policy projects.

### **INTERPRETATION NOTE 87 [60]**

**Date:** 19 February 2016

**Affected legislation:** Income Tax Act 58 of 1962

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

**Executive summary:** This Note provides guidance and clarity on the interpretation and application of s 9I which deals with headquarter companies. Section 9I was initially inserted into the Act with effect from years of assessment commencing on or after 1 January 2011. The Note also briefly discusses the provisions of the Act that provide special tax relief for headquarter companies, as well as the specific anti-avoidance rules that are designed to prevent misuse or abuse of those provisions.

### **INTERPRETATION NOTE 88 [61]**

**Date:** 19 February 2016

**Affected legislation:** Income Tax Act 58 of 1962

**Provisions:** Section 11(nA)

**Executive summary:** This Note provides guidance and clarity on the tax implications where amounts were included in a person's taxable income and subsequently refunded.

## CASE LAW

### SUPREME COURT OF APPEAL

***Medox Ltd v Commissioner for South African Revenue Service*** [62] (Case No 20059/2014; Supreme Court of Appeal; 27 May 2015; (2014) 77 SATC 233)

#### **Background**

The principles and process for contesting a tax assessment in legal proceedings.

#### **Facts**

The taxpayer company had not timeously objected to an assessment. After the expiry of the statutory prescriptive period of three years, the taxpayer applied to court for a declaratory order that the assessment in issue was void.

#### **Issue**

Whether an assessment can be challenged by applying for a declaratory order that it is void.

#### **Decision**

The court refused to grant the declaratory relief applied for and declined to make a finding as to whether the court a quo had jurisdiction to adjudicate the application.

***Commissioner for South African Revenue Service v CJ van der Merwe*** [63] (Case No 20152/2014; Supreme Court of Appeal; 28 May 2015; (2015) 77 SATC 405)

#### **Background**

The right to prosecute an appeal against a preservation order granted in terms of the Tax Administration Act 28 of 2011 where that right had not been timeously exercised.

#### **Facts**

A High Court had granted a preservation order against certain of the respondent's assets. The respondent wished to appeal against that order but had failed to do so timeously, and now sought the court's condonation in this regard.

#### **Issue**

Whether, in the circumstances of this matter, the court should grant condonation of the respondent's failure to timeously prosecute the appeal against the granting of a preservation order.

#### **Decision**

The court declined to condone the respondent's failure to prosecute the appeal timeously, holding that the respondent's explanation for his default in this regard was inadequate and that the delay could not be satisfactorily explained, from which it followed that the breach of the rules was of such a nature and the explanation offered was so unacceptable that condonation should not be granted, irrespective of the respondent's prospects of success, which were in any event poor.

## HIGH COURT

***Commissioner for South African Revenue Service v Africa Cash and Carry (Pty) Ltd*** [64] (Case No 49274/2014; Gauteng Division, Pretoria; 1 October 2014; (2015) 77 SATC 242)

#### **Background**

The power of the High Court to grant a preservation order in respect of a taxpayer's assets.

#### **Facts**

The Commissioner had obtained a provisional preservation order, granted in chambers in the Gauteng High Court, with a return day fixed for some six weeks thereafter, and appointing a *curator bonis*.

**Issue**

Did the Commissioner need to establish more than a prima facie case for the provisional preservation order to be confirmed on the return day?

**Decision**

The court confirmed the provisional preservation order, holding that a preservation order is not a tax collection step but merely preserves assets that can be realised at a later stage, and that the Commissioner need establish only prima facie that the respondent would, or was likely to, dissipate assets with the intention of defeating SARS's claim.

***South Atlantic Jazz Festival (Pty) Ltd v Commissioner for South African Revenue Service* [65] (Case No A 129/2014; Western Cape Division, Cape Town; (2015) 77 SATC 254)****Background**

The assessability to value-added tax in terms of the Value-Added Tax Act 89 of 1991 of services provided in a barter transaction.

**Facts**

Certain goods and services, that were in principle subject to VAT, had been rendered by way of a barter transaction.

**Issue**

The valuation, for purposes of value-added tax, to be placed on goods and services provided in a barter transaction and the power of the Tax Court to issue a determination in this regard.

**Decision**

The High Court ruled that, in barter transactions at arm's length, the value of the goods and services provided by the appellant taxpayer could be taken as being of the same value as the counter-performance rendered by the other party. Moreover, the sponsorship contracts in issue sufficed as proof of the appellant's entitlement to an input tax deduction. It was held that the Commissioner's decision not to allow a deduction in terms of the Value-Added Tax Act had been integral to the assessments and that the appellant had been exercising a right of appeal to the Tax Court, not a right to require a review and a setting aside of the decision. The Tax Court must therefore be taken to have the powers inherently necessary to fulfil its functions.

***Huang and Others v Commissioner for South African Revenue Service* [66] (Case No SARS 1/2013; Gauteng Division, Pretoria; 13 August 2014; (2015) 77 SATC 283)****Background**

A taxpayer's right to have the issuing of a search and seizure warrant reconsidered by the High Court.

**Facts**

The applicant had applied to the High Court for reconsideration of a search and seizure warrant that had been issued pursuant to an application by SARS in terms of ss 59 and 60 of the Tax Administration Act 28 of 2011. The applicant averred that the warrant had been improperly obtained through material non-disclosure and misrepresentations in the application.

**Issue**

The factors to be taken into account by the court in determining whether to set aside such a warrant.

**Decision**

It was held that, in deciding whether to set aside the warrant, a court must determine firstly, whether the objective jurisdictional facts had been present and, secondly, whether the discretion to issue the warrant had been exercised judicially. The application was dismissed.

***Fastjet Holdings (Pty) Ltd v The Minister of Finance and Others*** [67] (Case No 64901/2013; Gauteng Division, Pretoria; 25 June 2015; (2015) 77 SATC 337)

**Background**

A taxpayer's right to apply for a refund of customs duty in terms of the Customs and Excise Act 91 of 1964.

**Facts**

The appellant was applying for the refund of customs duty in terms of s 76(1)(d) of the Customs and Excise Act, alternatively on the basis of an enrichment claim, alternatively on the basis of a claim in contract.

**Issue**

The basis on which an applicant will be entitled to a refund of customs duty.

**Decision**

The court declined the application, holding that there had been justifiable reasons for the seizure of the cigarettes in question on account of non-compliance with the Act.

***Gainsford NO v Commissioner for South African Revenue Service*** [68] (Case No 55517/2014; Gauteng Division, Pretoria; 26 August 2015; (2015) 77 SATC 375)

**Background**

The provisions of s 163 of the Tax Administration Act 28 of 2011 regarding preservation orders.

**Facts**

The High Court had granted SARS a provisional preservation order in terms of s 163 of the Tax Administration Act to secure a debt owed to SARS. The *curator bonis* for the taxpayer had taken possession of the assets in question, which included certain shares. The shares in question had been the subject of a prior attachment by the Sheriff, at the instance of the trustees in an insolvent estate, to confirm or found jurisdiction.

**Issue**

The nature of possession required in attachment proceedings to found or confirm jurisdiction.

**Decision**

The High Court held that attachment to confirm or found jurisdiction was based on common law principles, not on statute. Such an order required some kind of restraint to be imposed on the asset so attached. It was held that, in the present case, the requisite element of possession or control was lacking. It followed that the *curator bonis* was entitled to take possession and control of the shares in question in terms of the preservation order.

***Lifman v Commissioner for South African Revenue Service*** [69] (Case No 5961/15; Western Cape Division, Cape Town; 17 June 2015; (2015) 77 SAC 383)

**Background**

SARS had taken a civil judgment against the applicant in terms of s 172 of the Tax Administration Act 28 of 2011.

**Facts**

The applicant had applied for an order setting aside the judgment on the grounds that ten days notice had not been given as required by s 172(1) of the Act.

**Issue**

The interpretation to be assigned to the expression 'notice' in the context of s 172(1) of the Tax Administration Act.

**Decision**

The court dismissed the application, holding that 'notice', in the sense defined in the Oxford Dictionary, had indeed been given in the light of all the background circumstances.

**Marshall NO v Commissioner for South African Revenue Service** [70] (Case No 39219/2014; 6 May 2015; Gauteng Division, Pretoria; (2015) 77 SATC 395)

### **Background**

Seven trustees of a trust had applied to the High Court for a declaratory order regarding the interpretation of s 8(5) of the Value-Added Tax Act 89 of 1991.

### **Facts**

The trust in question rendered services to the various health departments of provincial governments within the Republic.

### **Issue**

The issue to be determined was whether s 8(5) of the Act applied to services actually rendered and not only to services deemed to have been rendered and whether the services were subject to VAT at the standard rate of 14% in terms of s 7(1)(a) of the Act or whether the services qualified for zero-rating in terms of s 11(2)(n).

### **Decision**

It was held that s 8(5) of the Act applies not only to services deemed to be rendered but also to services actually rendered. It followed that services rendered by or on behalf of the trust to the various health departments of the provincial governments in the Republic qualified for zero-rating in terms of s 11(2)(n) of the Act.

## **TAX COURT**

**ITC 1877** [71] (2015) 77 SATC 269 (Case No IT 13451; 20 April 2015)

### **Background**

The 150% deduction provided for in terms of s 11D of the Income Tax Act 58 of 1962 for research and development expenditure.

### **Facts**

The taxpayer, who was in the business of software research and development, had incurred research and development expenditure for customers who were in the business of freight forwarding, customs clearing and cargo transportation, which was designed inter alia to interface with SARS's customs operating systems to verify data relating to the import and export of goods.

### **Issue**

Whether the taxpayer was entitled to a 150% deduction for such research and development expenditure in terms of s 11D of the Income Tax Act.

### **Decision**

It was held that the expenditure in question related to 'management or internal business processes' and therefore did not qualify for a deduction in terms of s 11D.

**ITC 1878** [72] (Case No 13276; 15 May 2015; (2015) 77 SATC 349)

### **Background**

The principles governing the interpretation of double tax agreements.

### **Facts**

The appellant was an advisory group of companies, incorporated in the USA, with offices in ten jurisdictions which had entered into an agreement with a company based in and operating from South Africa.

### **Issue**

Whether the taxpayer was carrying on business in South Africa through a 'permanent establishment' as envisaged in the relevant double tax agreement.

## **Decision**

It was held that, since the taxpayer had a fixed place of business in the boardroom of the South African company, having been granted space in that boardroom which was equipped with tables and a telephone, it followed that the taxpayer was liable for taxation in South Africa as its operations fell within the scope of the expression 'permanent establishment' as provided for in the double tax agreement.

## **FOREIGN COURTS**

***G Bank Zimbabwe Ltd v Zimbabwe Revenue Authority*** (2015) 77 SATC 305 (High Court of Zimbabwe)

### **Background**

The appellant, a company carrying on business in Zimbabwe as a registered commercial bank, had resolved, through its board of directors, to undertake a voluntary retrenchment exercise involving the reduction of its staff complement by up to two hundred and fifty staff members owing to a drastic fall in the volume of business.

### **Facts**

The staff of the appellant were required to submit formal applications by 31 December 2009 for the attractive retrenchment package that was being offered, consisting of two months basic salary for every year served, with a ceiling of 21 months and the appellant reserved the right to approve or decline applications. A total of 74 staff members submitted applications and all were accepted by the appellant. The cost to the appellant of this voluntary retrenchment exercise for the 74 employees was US\$1 995 402. A further 27 staff members also submitted applications, all of which were accepted, and the appellant's gross outlay for these members of staff was US\$550 059. In its tax return for the tax year ending on 31 December 2009 claimed a deduction, in terms of s 15(2)(a) of Zimbabwe's Income Tax Act of US\$2 693 500 as expenditure incurred for the purpose of trade and for conducting its business and earning income in that year of assessment.

### **Issue**

The issue before the court was whether this expenditure, incurred by the appellant, satisfied the statutory criteria for deductibility, and if so whether the criteria were satisfied in respect of the 2009 tax year, as averred by the taxpayer.

### **Decision**

The High Court of Zimbabwe held that the costs of the staff retrenchments were deductible in terms of s 15(2)(a) and that the deduction was allowable in the year in which the expenditure was incurred, namely, when the taxpayer had incurred an unconditional legal obligation. It was further held that, where the obligation was conditional, the deduction was allowable in the year in which the condition was fulfilled. It was held that the commitment to pay the expenses of the proposed retrenchment was conditional on approval by the Minister, and that this condition had been fulfilled in January and February 2010. Consequently, the expenditure was incurred in the tax year ending 31 December 2010 and the Zimbabwe Revenue Authority had properly disallowed the deduction for the tax year ending on 31 December 2009.

## **DOUBLE TAX AGREEMENTS**

19 November 2015 – Announcement of a double tax agreement with Kenya with an effective date of 19 June 2015.

25 November 2015 – Announcement of a double tax agreement with Hong Kong with an effective date of 20 October 2015.

12 February 2016 – Announcement of a double tax agreement with Qatar with an effective date of 2 December 2015.