

JUTA'S TAX LAW REVIEW

November 2016

Dear Subscriber to *Juta's Tax Law Review* 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

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LEGISLATION

No legislation has been enacted since the last issue of the Juta Tax Law Review.

BILLS

The following Bills were tabled in the National Assembly on 26 October 2016:

Taxation Laws Amendment Bill [Bill 17—2016]

Tax Administration Laws Amendment Bill [B18—2016]

Rates and Monetary Amounts and Amendment of Revenue Laws Bill [B19—2016]

Rates and Monetary Amounts and Amendment of Revenue Laws (Administration) Bill [B20—2016]

DRAFT BILLS

The following draft Bills were tabled in the National Assembly. In part, these draft Bills foreshadow amendments to fiscal legislation that give effect to proposals contained in the Budget Speech and the Budget Review of 2016:

8 July 2016 – Release of the first batch of draft Taxation Laws Amendment Bill, 2016

8 July 2016 – Draft Tax Administration Laws Amendment Bill, 2016

20 July 2016 – Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill, 2016

20 July 2016 – Draft Rates and Monetary Amounts and Amendment of Revenue Laws (Administration) Bill, 2016

4 October 2016 – Release for public comment of the second batch of the Draft Taxation Laws Amendment Bill, 2016

Explanatory Memoranda

20 July 2016 – Publication of a draft Explanatory Memorandum on the Special Voluntary Disclosure Programme in respect of offshore assets and income.

REGULATIONS

8 July 2016 – *Government Gazette* 40128, GN R819: publication of a regulation in terms of s 70(4) of the Tax Administration Act, 2011 and promulgated under s 257 of the Act which lists the organs of state or institutions to which a senior SARS official may lawfully disclose specified information.

4 October 2016 – SARS has released for public comment draft regulations in terms of s 12T(8) of the Income Tax Act on the requirements for tax-free investments.

Applications to transfer blocked funds abroad

18 August 2016 – A reminder has been posted on the SARS website of the requirement that, in terms of the South African Reserve Bank exchange control regulations, a taxpayer who has formalised emigration with the Reserve Bank will be regarded as non-resident by SARS. All the remaining assets of that person are then brought under the control of an authorised dealer in a blocked account. If such a person wishes to transfer funds abroad from the blocked account, a Tax Compliance Status (TCS) application must be completed, disclosing that the amount in question consists of blocked funds.

VOLUNTARY DISCLOSURE PROGRAM

20 July 2016 – Publication of a SARS media statement regarding the Revised Special Voluntary Disclosure Programme in respect of offshore assets and income.

4 October 2016 – Launch of the Special Voluntary Disclosure Programme. SARS has issued a media statement, announcing that the SARS Voluntary Disclosure Programme (VDP) is being administered under the Tax Administration Act 2011 with effect from 1 October 2012. Subject to legislative approval in due course, the Special Voluntary Disclosure Programme (SVDP) commenced on 1 October 2016, and is scheduled for a period of nine months ending on 30 June 2017. The SVDP is intended for individuals and companies who have not in the past disclosed tax and exchange control defaults in relation to offshore assets. A preliminary SVDP guide has been made available online and will be periodically updated.

SARS Strategic Plan

5 September 2016 – Publication of SARS Strategic Plan 2016-2017 and 2020-2021.

GUIDES

DRAFT GUIDES

12 August 2016 – Draft Guide to the Special Voluntary Disclosure programme.

GUIDES

21 July 2016 – Guide on the Taxation of Franchisors and Franchisees

26 July 2016 - Draft Guide on the Taxation of Professional Sports Clubs and Players

16 August 2016 – Guide to the Employment Tax Incentive

15 September 2016 – Publication of VAT 404 Guide for Vendors

19 September 2016 – Publication of Basic Guide for Public Benefit Organisations (issue 2)

19 September 2016 - Basic Guide to Tax Deductible Donations (Issue 2)

27 September 2016 – VAT 409 Guide for Fixed Property and Construction

28 September 2016 – VAT 420 Guide for Motor Dealers

28 September 2016 – Transfer Duty Guide

SARS Common Reporting Standards

2 September 2016 – publication of FAQ Guide to (draft) SARS Common Reporting Standards.

The background to the release of this Guide is as follows. After consulting with affected financial institutions, SARS has now provided guidance on the Common Reporting Standards (CRS) Regulations by way of a FAQ Guide in a question and answer format. The initial draft of the Guide was distributed at a CRS workshop in February 2016.

A briefing note was issued by SARS explaining that legislative amendments to the Tax Administration Act, 2011 had been effected in order to implement a scheme whereby SARS may require South African financial institutions to collect information under the OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters which encompasses the Common Reporting Standard that was endorsed by G20 Finance Ministers in 2014. The CRS is mentioned in the Tax Administration Act as an international tax standard, but is subject to changes that may be specified by the Minister of Finance in regulations issued under section 257. The CRS Regulations, as published by the Minister, are applicable as from 1 March 2016.

International

9 September 2016 – Publication of Government Notice 1001 in *Government Gazette* 40262 announcing an international tax agreement with Chile; the date of entry into force is 11 August 2016.

TAX ADMINISTRATION ACT

BINDING RULINGS

BINDING GENERAL RULINGS

BINDING GENERAL RULING (VAT) 36

Date: 24 October 2016

Affected legislation: Value-Added Tax Act 89 of 1991

Provisions: Section 16(2)(g); circumstances prescribed by the Commissioner for the application of s 16(2)(g).

Executive Summary: This ruling prescribes the circumstances under which the Commissioner will allow a vendor to use alternative documentary proof to substantiate the vendor's entitlement to a deduction under s 16(3).

BINDING PRIVATE RULINGS

BINDING PRIVATE RULING BPR 243

Date: 7 July 2016

Affected legislation: Income Tax Act 58 of 1962.

Provisions: Paragraph 1 – definition of 'asset' and para 11(1)(b) of the Eighth Schedule; the termination of a subcontracting agreement and the implementation of a toll manufacturing arrangement.

Executive summary: This ruling determines whether the termination of a subcontracting agreement, including a concomitant supplies plan between connected persons and the implementation of a toll manufacturing arrangement, will have capital gains tax consequences.

BINDING PRIVATE RULING: BPR 244

Date: 26 July 2016

Affected legislation: Income Tax Act 58 of 1962.

Provisions: Sections 1(1) – definition of 'trading stock', 13quin, 41(1) – definition of 'trading stock' and s 44; the disposal of an undivided interest in immovable property by way of an amalgamation transaction.

Executive summary: This ruling determines whether the proposed transaction will qualify as an 'amalgamation transaction' as defined in s 44(1) and whether the resultant company will qualify for the allowance under s 13quin.

BINDING PRIVATE RULING BPR 245

Date: 8 August 2016

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

Provisions: Section 1(1) of the Act – definition of 'gross income'; section 1(1) of the VAT ACT – definition of 'invoice'; sections 9 and 20; the time of accrual of short-term insurance premiums and the time of supply of security provided to the Master of the High Court.

Executive summary: This ruling determines the time of accrual of gross income and the time of supply of any service in relation to a guarantee policy for security issued to the Master of the High Court by a liquidator.

BINDING PRIVATE RULING BPR 246

Date: 24 August 2016

Affected legislation: Income Tax Act 58 of 1962.

Provisions: Sections 8(4)(a) and 19 and para 12A of the Eighth Schedule; debt reduction and capitalisation.

Executive summary: This ruling determines the tax consequences for the applicant of a proposed settlement of a shareholder's debt and the subsequent issue of preference shares.

BINDING PRIVATE RULING BPR 247

Date: 8 September 2016

Affected legislation: Income Tax Act 58 of 1962.

Provisions: Section 1(1) – definition of 'gross income' and para 1 – definition of 'remuneration' and para 2(1) of the Fourth Schedule and para 2(k) and (i) of the Seventh Schedule; employer contributions to foreign social and pension funds in respect of a non-resident.

Executive summary: This ruling determines the tax consequences of employer contributions to a foreign social and pension fund in respect of a non-resident person working in South Africa.

BINDING PRIVATE RULING BPR 248

Date: 15 September 2016

Affected legislation: Income Tax Act 58 of 1962

Provisions: Sections 8FA and 24J(2); the deduction of interest on asset-backed notes.

Executive summary: This ruling determines the deductibility of interest to be incurred in respect of notes issued by a special purpose vehicle where the capital receipts for the notes are to be invested in commercial debt.

BINDING PRIVATE RULING: BPR 249

Date: 27 September 2016

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

Provisions: Sections 1(1) – definition of 'contributed tax capital', 42, 44 and 46 of the Act, and paras 1 – definition of 'base cost', paras 13 and 20(1)(a) of the Eighth Schedule to the Act; section 1 – definition of 'security', ss 2(1) and 8(1)(a)(i), (ii) and (iv) of the STT Act; corporate group restructuring involving multiple transactions.

Executive summary: This ruling determines the tax consequences of a corporate group restructuring involving multiple transactions including successive asset-for-share transactions, an amalgamation transaction and unbundling transactions as contemplated in the Act.

BINDING PRIVATE RULING BPR 250

Date: 27 September 2016

Affected legislation: Income Tax Act 58 of 1962

Provisions: Section 29A(1) – definition of 'risk policy'; risk policies.

Executive summary: This ruling determines whether a life policy in respect of which the policyholder proposes to select the refund option, and in terms of which all paid premiums are refundable after 15 years without any claim against the life policy, constitutes a risk policy as defined in s 29A(1).

BINDING PRIVATE RULING BPR 251

Date: 6 October 2016

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

Section: Section 1(1) – definition of 'person' and 'company', 24BA, 41(1) – definition of 'equity share' and s 42 of the Act, and paras 10(b)(ii), 20, 31(1) and 35 of the Eighth Schedule to the Act ; section 1(1) – definition of 'security', and s 8(1)(a)(vi) of the STT Act.

Subject: The cancellation of a reinsurance agreement.

Summary: This ruling determines the tax consequences of the disposal of assets by a long-term insurer to a collective investment scheme (CIS) in securities in exchange for the issue of participation units in the CIS and the in specie transfer of such units pursuant to the cancellation of a reinsurance agreement.

BINDING PRIVATE RULING BPR 252

Date: 10 October 2016

Act: Income Tax Act 58 of 1962.

Section: Sections 54 and 58 and para 12A of the Eighth Schedule.

Subject: The donations tax and capital gains tax consequences of the part waiver of a loan and a reduction of the interest rate.

Summary: This ruling determines the donations tax and capital gains tax consequences of the waiver of part of a loan to an employee share trust and of the reduction to 0% of the interest rate on the remaining balance of the loan.

BINDING PRIVATE RULING BPR 253

Date: 19 October 2016

Act: Income Tax Act 58 of 1962.

Section: Sections 54 and 55(1) – definition of 'donation', ss 57 and 58

Subject: The donations tax consequences of a transaction to introduce a Black Economic Empowerment shareholder into a group.

Summary: This ruling determines whether the disposal of shares in a company at a discount and the subsequent acquisition of shares by the seller in the acquiring company at a nominal subscription price, in order to introduce the acquiring company into the seller's existing group structure for Black Economic Empowerment (BEE) purposes, will constitute a donation.

BINDING CLASS RULINGS

BINDING CLASS RULING BCR 054

Date: 21 July 2016

Affected legislation: Income Tax Act 58 of 1962.

Provisions: Paragraphs 2(a) and 5(1)–(2) and (3A) of the Seventh Schedule; employer-provided accommodation.

Executive summary: This ruling determines whether vacant stands to be acquired by qualifying employees from their employer will constitute 'immovable property' as contemplated in para 5(3A) of the Seventh Schedule to the Act.

BINDING CLASS RULING BCR 055

Date: 28 September 2016

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

Provisions: Sections 1(1) – definition of "gross income", 11(a), 23(g) and 23H of the Act; definitions of 'consideration', 'input tax', 'supply' and 'services', 7(1)(a), 10(23) and 21 of the VAT Act; the income tax and value-added tax consequences of a customer loyalty scheme.

Executive summary: This ruling determines the income tax and value-added tax consequences for suppliers making customer loyalty bonus payments.

INTERPRETATION NOTES

INTERPRETATION NOTE 9 (ISSUE 6)

Effective date: 26 July 2016

Affected legislation: Income Tax Act 58 of 1962.

Provisions: Section 12E

Executive summary: This Note is a guide to the interpretation and application of s 12E which makes provision for

accelerated depreciation allowances for a taxpayer that qualifies as a small business corporation. The Note does not address other sections in the Act that apply to a 'small business corporation' as defined in s 12E.

INTERPRETATION NOTE 90

Effective date: 15 August 2016

Affected legislation: Income Tax Act 58 of 1962.

Provisions: Sections 1(1), definition of 'financial year' and 'year of assessment', s 66(13C), 89*quat*(1) and para 23 of the Fourth Schedule; year of assessment of a company; accounts accepted to a date other than the last day of a company's financial year.

Executive Summary: This Note is a guide to the application of s 66(13C) and the Commissioner's discretionary power to accept the financial accounts of a company for a period ending on a day that differs from the last day of the company's financial year. Section 3(1) provides in this regard that the powers and duties of the Commissioner by or under the provisions of the Act may be exercised or performed by the Commissioner or by any officer under the control, direction or supervision of the Commissioner. The counterpart to a year of assessment for a foreign company is a 'foreign tax year', as defined in s 1(1). The closing date of the financial accounts of a foreign company is outside the scope of this Note. Interpretation Note 19 (Issue 4) dated 15 February 2016 is a guide to the Commissioner's discretionary power to grant permission to a natural person or trust to submit financial accounts for a period that differs from the year of assessment ending on the last day of February.

INTERPRETATION NOTE: NO 91

Effective date: 21 October 2016

Affected legislation: Income Tax Act 58 of 1962.

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

Executive summary: This Note provides guidance on the interpretation and application of s 19 and para 12A which deal with the reduction of debt and with background debt relief which occurs, for example, in insolvency, business rescue, similar statutory proceedings or informal workouts, and can occur within or outside a group of companies.

INTERPRETATION NOTE 92

Date: 24 October 2016

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

Provisions: Sections 16(2)(f) and 16(3)(c) to (n)

Executive summary: This Note prescribes the documentary proof required under s 16(2)(f) that must be obtained and retained by a vendor (or the vendor's agent) to substantiate the vendor's entitlement to a deduction as contemplated in s 16(3)(c) to (n).

WITHDRAWAL OF INTERPRETATION NOTES

26 July 2016 – Interpretation Note 9 (Issue 5) has been archived and replaced by issue 6.

CASE LAW

SUPREME COURT OF APPEAL

Commissioner for South African Revenue Service v Kluh Investments (Pty) Ltd [2016] ZASCA 5; (2016) 78 SATC 177

Facts

The taxpayer company had sold a plantation of which it was the owner.

Issue

The legal criteria that determine whether, in relation to that plantation, the taxpayer had been carrying on farming operations as envisaged in the Income Tax Act 58 of 1962, thereby triggering the application of the provisions of the First Schedule to the Income Tax Act.

Decision

On the facts of this case, the taxpayer had not been carrying on farming operations because he had no right to the use of the land on which the plantation was growing, nor had the taxpayer any right to the yield of the plantation, nor to the income from the land or the plantation; moreover, the taxpayer had granted the use of the land and the plantation to another party to farm for the latter's own benefit and on its own behalf.

Commissioner for South African Revenue Service v Coltrade International CC [2016] ZASCA 53; (2016) 78 SATC 217

Facts

The taxpayer had imported certain products into South Africa.

Issue

Whether SARS had classified those products under the correct tariff heading for purposes of the Customs and Excise Act 91 of 1964.

Decision

It was held that it is well-established that the decisive criterion for the classification of goods for customs purposes is the objective characteristics and properties of the goods in question, and that the respondent's contentions in regard to the applicable tariff heading had been correctly upheld by the High Court.

Commissioner for the South African Revenue Service v Capstone 556 (Pty) Ltd [2016] ZASCA 2; (2016) 78 SATC 231 (SCA)

Facts

The taxpayer had made a considerable profit from the sale of some 17 million shares that it had acquired less than a year earlier in the course of a corporate restructuring.

Issue

The criteria that determine whether the proceeds of the sale of an asset (in this case, shares in a private company) are revenue or capital.

Decision

It was held that the purpose of the acquisition has to be determined objectively, and that the correct approach is not that of a narrow legalistic nature but one that takes account of the commercial operation as such, considered in its entirety from a commercial perspective. In the present case, the primary purpose of the acquisition of the shares in issue was to rescue a major business in the retail furniture industry by a long-term investment of capital for an indeterminate period involving considerable risk and an uncertain return, and that these factors were consistent with an investment of a capital nature as distinct from a purchase of shares as trading stock for resale at a profit. The court articulated the factors, other than the taxpayer's purpose, that must be taken into account in this context and held that the respondent had proved that the proceeds of the sale of the shares in issue were of a capital nature.

HIGH COURT

New Adventure Shelf 122 (Pty) Ltd v Commissioner for South African Revenue Service Case No: 7007/2015; 17 February 2016; (2016) 78 SATC 190

Facts

The proceeds of the disposal of an asset had been taken into account by SARS in determining the taxpayer's capital gain for a particular year of assessment. In a later year of assessment, part of those proceeds became irrecoverable as a result of the cancellation of the disposal agreement.

Issue

Should the assessment for the year of disposal be re-opened in order to re-determine, in respect of that year, the taxpayer's capital gain from the disposal.

Decision

The Western Cape High Court held that a capital gain or loss falls to be determined in respect of a particular year of assessment and that where the taxpayer, in a subsequent year, ceases to be entitled to part of the proceeds of the disposal as a result of the cancellation of the agreement in issue, the re-determination of the capital gain does not replace the original determination for the year of disposal.

Commissioner for the South African Revenue Service v Brown (2016) 78 SATC 255 SARS

Facts

Professing to act in terms of its powers under s 46(4) of the Tax Administration Act 28 of 2011, SARS had issued the respondent (an individual who was not a registered taxpayer) with a so-called 'lifestyle questionnaire' to be completed and returned. In the present proceedings, SARS was applying to the High Court for an order directing the respondent to furnish a response.

Issue

Whether requiring the taxpayer to complete and return the lifestyle questionnaire was within SARS's statutory powers.

Decision

The Eastern Cape High Court held that the information sought in the questionnaire was 'relevant material' and that the issuing of the questionnaire fell within the scope of 'the administration of a tax Act'. It was held that the jurisdictional facts cited in s 46 had been established and that SARS's right to institute civil proceedings to enforce compliance with the request was ancillary to its statutory powers relating to the administration of a tax Act. It was held that the decision to issue the questionnaire was not 'administrative action' as envisaged in the Promotion of Administrative Justice Act as the decision merely involved a preliminary investigation by SARS and did not adversely affect the respondent's rights; nor did the investigation itself constitute administrative action. It was held that the Commissioner had provided sound reasons for the decision to issue the questionnaire. The court issued an order directing the respondent to respond to the lifestyle questionnaire within two weeks.

TAX COURT

ITC 1883 (2016) 78 SATC 225 (Case No: 0038)

Facts

The taxpayer had lodged an objection to assessments 65 days after the effluxion of the 30 day deadline for such lodgement, as laid down in the rules promulgated under s 103 of the Tax Administration Act 28 of 2011. The assessments were in respect of unemployment insurance, the skills development levy, employees' tax, secondary tax on companies, income tax and value-added tax.

Issue

Were there 'exceptional circumstances' that had resulted in the delay in lodging the objection? At the relevant time, s 104 of the Tax Administration Act provided that the period prescribed in the Rules could be extended by a senior SARS official if satisfied that reasonable grounds existed for the delay in lodging the objection, but that the period could not be so extended for more than 21 days unless a senior SARS official was satisfied that 'exceptional circumstances exist which gave rise to the delay in lodging the objection'.

Decision

The South Gauteng Tax Court held that the taxpayer bore the onus of satisfying the court of the existence of such exceptional circumstances and that the taxpayer in this matter had failed to discharge such onus since the factors put forward were neither unusual nor causally related to the delay.

ITC 1884 (2016) 78 SATC 272 (Case No: VAT 1237)**Facts**

Section 39(7) of the Value-Added Tax Act 89 of 1991 used to provide that a VAT vendor could apply for remission of both the interest and the penalty that had been imposed where SARS was paid after the end of the month during which the VAT in question should have been paid. This provision was amended by the Taxation Laws Second Amendment Act 18 of 2000 with the result that, from 1 April 2010, the basis on which the Commissioner could such remit interest was changed.

Issue

The issue before the Durban Tax Court was whether a decision by the Commissioner not to remit such interest was required to be taken in terms of s 39(7) as that provision stood before the amendment, or as the provision stood after the amendment.

Decision

It was held that the provisions of s 39(7), as amended, applied to the remission of interest that had been imposed in respect of this taxpayer by the Commissioner in terms of s 39(1)(a)(ii) of the Act. The court ordered the matter to be remitted to the Commissioner for reconsideration.

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