

JUTA'S TAX LAW REVIEW

June 2017

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Welcome to the June 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

There has been no fiscal legislation since the last Juta Tax Law Review.

BILLS

No fiscal Bills have been promulgated since the last issue of the Juta Tax Law Review

MEDIA RELEASES AND STATEMENTS

27 February 2017 – By September 2017 the South African Revenue Service had committed to the automatic exchange of tax information with the revenue authorities of over 50 other jurisdictions under the Organisation for Economic Co-operation & Development (OECD) Common Reporting Standard (CRS). The number of committed jurisdictions is expected to grow to over 100 by September 2018.

This is an international initiative to assist revenue authorities around the world to ensure that everyone pays the right amount of tax on their income. The adoption of the CRS by South Africa obliges a number of Reporting Financial Institutions to report specific information to SARS by 31 May 2017 in respect of clients who are not tax-resident in South Africa.

The CRS sets out what financial account information should be reported to SARS, the types of accounts and taxpayers that are covered, as well as common due diligence procedures to be followed by financial institutions.

The required financial information includes interest, dividends, account balances, income from certain insurance products, sales proceeds from financial assets and other income generated from assets held in the account or from payments made in respect of account.

As the CRS provides for the reciprocal exchange of information, SARS will simultaneously receive financial information regarding South African tax-resident taxpayers from revenue authorities in other jurisdictions that have committed to the CRS.

26 April 2017 – In a media statement, the Davis Tax Committee invited submissions by 31 May 2017 on the desirability and feasibility of the following possible forms of wealth tax, namely: a wealth tax, a national tax on the value of property over and above municipal rates and an annual wealth tax.

15 May 2017 - SARS has introduced changes and improvements to its current dispute management process. These include:

- The introduction of an electronic request for reasons via eFiling for Personal Income Tax (PIT), Company Income Tax (CIT) and Value-Added Tax (VAT) and a request to allow late submission of a dispute for PIT, CIT and VAT. The new dispute management process introduces a separate condonation workflow whereby the taxpayer is now allowed to submit a Request for Reasons, Notice of Objection (NOO) or Notice of Appeal (NOA) after the periods prescribed by the Dispute Resolution Rules have elapsed.
- Taxpayers are now able to request the suspension of VAT payments pending the outcome of a dispute on VAT via eFiling or at a SARS branch. This is in line with the process for the suspension of payments implemented for PIT and CIT in 2015.
- To assist taxpayers in following the correct dispute sequence and to complete all the information required in respect of PIT, CIT and VAT, eFiling has been made an entirely guided process. This guided process will ensure that the dispute is submitted according to legislative requirements, thereby ensuring that invalid disputes are not submitted to SARS.

On 14 October 2016, SARS implemented an enhanced dispute management process for Value-Added Tax (VAT) on the electronic platform. The improved system will enable VAT vendors to lodge disputes via eFiling and electronically at any SARS branch, to better manage their tax profiles, and to have a consolidated view of all disputes lodged in respect of PIT, CIT and VAT.

1 June 2017 - A draft public notice has been issued by SARS in terms of s 25 of the Tax Administration Act of 2011 requiring the submission of country-by-country returns, master file, and local file returns.

GUIDES

10 March 2017 - SARS Tax Guide for Small Businesses 2015/16

30 March 2017 - SARS VAT 419 Guide for Municipalities

GOVERNMENT NOTICES

3 March 2017 - *Government Gazette* 40660: Income Tax notices 194 and 195 in terms of s 8(1) relating to the daily amounts in respect of meals and incidental costs, and the fixing of rates per kilometre for vehicles, effective from 1 March 2017

13 March 2017 - Department of Trade and Industry – Publication of the decision to approve applications received in terms of s 12I(19)(d) in the Tax Allowance Programme

31 March 2017 - *Government Gazette* 40757: notice 308 issued by the Minister of Finance stipulating the persons or entities that may administer financial instruments or policies as a tax-free investment for the purposes of s 12I of the Income Tax Act

TAX ADMINISTRATION ACT

Recovery of tax on behalf of foreign governments

13 March 2017 - Section 185 of the Tax Administration Act 2011 makes provision for the recovery of tax on behalf of foreign governments. The form of the certificate for such tax recovery has been released and is available on the SARS website.

BINDING RULINGS

BINDING GENERAL RULINGS

DRAFT BINDING GENERAL RULINGS

DRAFT BINDING GENERAL RULING (VAT)

Date: Undated

Affected legislation: Value-Added Tax Act 89 of 1991

Provisions: Section 11(1)(g) and 11(1)(j) read with Parts A and B of Schedule 2

Subject: The supply of potatoes

Executive summary: This ruling sets out the factors that will be considered by the Commissioner in determining whether potatoes are being supplied as seed under Part A, to be used or consumed for agricultural, pastoral or other farming purposes; or as vegetables under Part B, that is, the supply of foodstuffs; and the general VAT treatment of the supply of potatoes under Part A and Part B.

DRAFT BINDING GENERAL RULING (VAT)

Date: Undated

Affected legislation: Value-Added Tax Act 89 of 1991

Provisions: Section 1(1) definitions of 'input tax' and 'second-hand goods'

Subject: The deduction of input tax in respect of second-hand gold

Executive summary: This ruling sets out the instances in which the supply of gold is regarded as a supply of 'second-hand goods' as defined in s 1(1) and when notional input tax may be deducted.

DRAFT BINDING GENERAL RULING (EMPLOYMENT TAX INCENTIVE)

Date: Undated

Affected legislation: Employment Tax Incentive Act 26 of 2013

Provisions: Section 4(1)(b)

Subject: The reference to 160 hours in s 4(1)(b)

Executive summary: This ruling determines the meaning of the 160 hours stipulated in s 4(1)(b).

BINDING GENERAL RULINGS

BINDING GENERAL RULING (VAT) 41 (ISSUE 2)

Date: 4 May 2017

Affected legislation: Value-Added Tax Act 89 of 1991

Provisions: Proviso (iii) to the definition of 'enterprise' in s 1(1) and s 23(4)(b)

Subject: The VAT treatment of non-executive directors

Executive summary: This ruling deals with the VAT treatment of the activities conducted by non-executive directors and clarifies whether those activities fall within the ambit of proviso (iii)(aa) or proviso (iii)(bb) to the definition of 'enterprise' in s 1(1). This ruling must be read in conjunction with Binding General Ruling 40 which provides clarity on whether fees for services rendered by non-executive directors fall within the definition of 'remuneration' in the Fourth Schedule to the Income Tax Act.

BINDING GENERAL RULING (INCOME TAX) 42

Date: 22 March 2017

Affected legislation: Income Tax Act 58 of 1962

Provisions: Paragraph 10(2)(b) of the Seventh Schedule

Subject: The no-value provision in respect of transport services

Executive summary: This ruling provides clarity on the no-value provision in respect of transport services rendered by an employer to employees in general for transport services provided from their homes to their place of employment and vice versa.

BINDING GENERAL RULING (INCOME TAX) 31 (Issue 2)

Date: 23 May 2017

Affected legislation: Income Tax Act 58 of 1962

Provisions: The Second Schedule to the Act

Subject: Interest on the late payment of benefits

Executive summary: This ruling provides clarity on when an amount constitutes interest, as opposed to forming part of the lump sum benefit, for purposes of the Second Schedule to the Act.

BINDING PRIVATE RULINGS

BINDING PRIVATE RULING: BPR 019

Date: 14 July 2008. (*SARS has appended a note to this Ruling, drawing attention to the fact that that the guidance provided in this Ruling has been affected by subsequent legislative amendments; in this regard, see the Comprehensive Guide to Capital Gains Tax (issue 5).*)

Affected legislation: Income Tax Act 58 of 1962

Provisions: Paragraph 11 of the Eighth Schedule to the Act

Subject: The receipt of a cash payment from a trust; the disposal of vested rights by the beneficiary for capital gains tax purposes.

Executive summary: The main issue considered in this Ruling is whether a beneficiary who has a vested right to the capital in relation to the trust property and who enters into an agreement in terms of which a cash payment is received from the trustees of the said trust, will have made a disposal of his or her interest in the trust property for CGT purposes. An attendant issue dealt with in the Ruling relates to the payment of the cash amount by the trustees to the beneficiary and determines that such payment is governed by the provisions of para 11(2)(e) of the Eighth Schedule to the Act.

BINDING PRIVATE RULING: BPR 007

Date: 6 March 2008. (*SARS has appended a note to this Ruling, drawing attention to the fact that that the guidance provided in this Ruling has been affected by subsequent legislative amendments; in this regard, see Interpretation Note 35 (issue 3) – Employees' tax: Personal service providers and labour brokers.*)

Affected legislation: Income Tax Act 58 of 1962

Provisions: The definition of 'gross income' in s 1; paragraph 2 of Fourth Schedule to the Act and articles 5 and 7 of the Convention between the Government of the Republic of South Africa and the Government of the United Kingdom of Great Britain and Northern Ireland for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital gains.

Subject: Service fees received by a non-resident labour broker.

Executive summary: The issues considered in this ruling are whether service fees received in respect of the supply of consultants who have to perform specific services (inside and outside South Africa) to a South African resident are from a South African source and whether the Applicant for this Ruling had created a permanent establishment in South Africa.

BINDING PRIVATE RULING: BPR 267

Date: 1 March 2017

Affected legislation: Income Tax Act 58 of 1962

Provisions: Sections 64G(3) and 108 of the Act; article 10 of the Convention between the Republic of South Africa and the Kingdom of Sweden for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income; the Protocol amending this Treaty; article 10 of para 1 of the agreement between the Republic of South Africa and the Government of the State of Kuwait for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income.

Subject: Dividends tax and the most favour nation clause in a tax treaty.

Executive summary: This ruling determines whether dividends tax must be withheld where a dividend is paid to the beneficial owner resident in the Kingdom of Sweden. In this regard, Sweden and South Africa have concluded a tax treaty which, when read with the Protocol, includes a 'most favoured nation' clause.

BINDING PRIVATE RULING: BPR 268

Date: 3 April 2017

Affected legislation: Income Tax Act 58 of 1962

Provisions: Sections 8(4)(a) and 11(a) read with s 23(g)

Subject: Corrective payments.

Executive summary: This ruling determines whether payments to be made to correct amounts erroneously invoiced in previous years of assessment will be deductible and whether receipts of those amounts must be recouped.

BINDING PRIVATE RULING: BPR 269

Date: 3 April 2017

Affected legislation: Income Tax Act 58 of 1962

Provisions: Section 1(1) – definition of 'foreign dividend' and 'foreign return of capital'; section 10B and para 64B of the Eighth Schedule to the Act

Subject: The income tax consequences of a share buy-back between two controlled foreign companies.

Executive summary: This ruling determines the income tax consequences of a share buy-back between two controlled foreign companies of a resident company.

BINDING PRIVATE RULING: BPR 270

Date: 11 April 2017

Affected legislation: Income Tax Act 58 of 1962; Transfer Duty Act 40 of 1949

Provisions: Sections 25BB(4), 29A, 40CA and 42 and para 20(1)(a) of the Eighth Schedule to the Income Tax Act; section 9(1)(i) of the Transfer Duty Act

Subject: The restructuring of a property portfolio under the corporate rules.

Executive summary: This ruling determines tax consequences resulting from the restructuring of the unlisted property portfolio of a long-term insurer by making use of the corporate rules.

BINDING PRIVATE RULING: BPR 271

Date: 11 April 2017

Affected legislation: Income Tax Act 58 of 1962

Provisions: Sections 8(5) and 47

Subject: The acquisition of leased property by the lessee pursuant to a liquidation distribution.

Executive summary: This ruling determines the tax consequences of the transfer of immovable property as a liquidation distribution under section 47 to the company renting the property.

BINDING PRIVATE RULING: BPR 272**Date:** 11 April 2017**Affected legislation:** Income Tax Act 58 of 1962**Provisions:** Section 1(1) – definition of 'trading stock'; s 8(4)(a), s 11(a), s 22, s 23(g), s 23H and s 24J**Subject:** The deduction of expenditure incurred to acquire land development rights.**Executive summary:** This ruling determines the income tax consequences arising out of expenditure incurred to acquire rights to develop land on another person's property at the taxpayer's own risk and to exploit it for its own account.**BINDING PRIVATE RULING: BPR 273****Date:** 2 May 2017**Affected legislation:** Income Tax Act 58 of 1962; the Value-Added Tax Act 89 of 1991**Provisions:** Sections 19, 55, 56(1)(n) and (r) and paras 12A and 38 of the Eighth Schedule to the Income Tax Act and s 10(4) of the VAT Act**Subject:** The waiver of a contractual right.**Executive summary:** This ruling determines the income tax, donations tax, capital gains tax and value added tax consequences of the proposed waiver of a right to receive an annual quantity of produce in terms of a joint venture agreement.**BINDING PRIVATE RULING: BPR 274****Date:** 6 June 2017**Affected legislation:** Income Tax Act 58 of 1962**Provisions:** Section 1(1) – definitions of 'controlled group company' and 'equity share', s 12B, s 12D and s 12J.**Subject:** A venture capital company investing in a company providing and expanding plants for the generation of solar electricity.**Executive summary:** This ruling determines the meaning of 'controlled group company' and 'equity share' for purposes of the definitions of 'qualifying company' and 'qualifying share' respectively in s 12J(1) with reference to an operating company that proposes to issue different classes of ordinary shares; whether an operating company will be regarded as carrying on an 'impermissible trade' in immovable property as contemplated in para (a) of the definition of that term in s 12J(1); whether rental income derived by the operating company will be 'investment income' as defined in s 12E(4)(c) and contemplated in para (f) of the definition of 'qualifying company' in s 12J(1); and whether the operating company will be entitled to claim allowances under s 12B(1)(h)(ii)(bb) read with ss 12B(2)(b) and 12D(2).**INTERPRETATION NOTES****DRAFT INTERPRETATION NOTES****DRAFT INTERPRETATION NOTE****Date:** Undated**Affected legislation:** Income Tax Act 58 of 1962**Provisions:** Section 24I and ss 1(1) – definition of 'trading stock', 3(4)(b), 6quat(4), 8(4)(a), 9(2)(l), 9(4)(e), para (c)(ii) AND (iii) of the proviso to s 9D(2A), 9D(6), 9D(9)(fA)(ii) and (iii), 9D(9A)(a)(iii), 11(a), 11(i), 11(j), 19, 20(2), 22(3)(a)(i), 24J(2), (3) and (5A) and 25D; paragraphs 12A and 43 of the Eighth Schedule and para 4(1) of the Tenth Schedule**Subject:** Gains or losses on foreign exchange transactions.

Executive summary: This Note provides guidance on the interpretation and application of s 24I which deals with the income tax treatment of foreign exchange gains and losses on exchange items as well as premiums or like consideration received or paid in respect of a foreign currency option contract (FCOC) entered into and any consideration paid in respect of an FCOC acquired by certain persons. This Note will withdraw and replace Practice Note 4 dated 8 March 1999 – 'Income Tax: The Treatment of Gains and Losses on Foreign Exchange Transactions in terms of Section 24I of the Income Tax Act, 1962'.

DRAFT INTERPRETATION NOTE

Date: Undated

Affected legislation: Income Tax Act 58 of 1962

Provisions: Sections 49A to 49H

Subject: The withholding tax on royalties.

Executive Summary: This Note provides guidance on the interpretation and application of ss 49A to 49H which relate to the withholding tax on royalties and sets out: the VAT implications regarding the supply of an enterprise disposed of as a going concern; the requirements for zero-rating the supply of an enterprise disposed of as a going concern; and the VAT treatment of the supply of goods or services used partly for carrying on the enterprise disposed of as a going concern and partly for other purposes.

DRAFT INTERPRETATION NOTE

Date: Undated

Affected legislation: Value-Added Tax Act 89 of 1991

Provisions: Section 11(2)(a), (b), (c), (d) and (e)

Subject: The value-added tax treatment of supplies of international and ancillary transport services.

Executive summary: This note sets out the VAT treatment of the international transportation of passengers or goods; the VAT treatment of ancillary transport services; and the rate of tax applicable to each of the aforementioned transportation services. This Note does not deal with the VAT treatment of exempt passenger transport as envisaged in s 12(g).

INTERPRETATION NOTES

INTERPRETATION NOTE 39 (Issue 3)

Date: 29 March 2017

Affected legislation: Value-Added Tax Act 89 of 1991

Provisions: Sections 1(1), 8, 11, 16, 18 and 23

Subject: The VAT treatment of public authorities and grants.

Executive summary: This Note deals with the VAT treatment of public authorities and grants. In particular, it explains the policy framework within which the law operates and the impact of the amendments in this regard which came into effect on 1 April 2005.

INTERPRETATION NOTE 51 (Issue 4)

Date: 5 May 2017

Affected legislation: Income Tax Act 58 of 1962

Provisions: Sections 11, 11A and 23

Subject: Pre-trade expenditure and losses.

Executive summary: This Note provides guidance on the deduction of pre-trade expenses (sometimes also called start-up costs) under s 11A.

ARCHIVED INTERPRETATION NOTES

INTERPRETATION NOTE NO 5 (Issue 2)

Date: 23 January 2006

Affected legislation: Income Tax Act 58 of 1962

Provisions: Paragraphs 1, 9(5) and 11C of the Fourth Schedule

Subject: Employees' tax in respect of directors of private companies (including persons in close corporations who perform functions similar to those of directors of companies).

Executive summary: This Note incorporates the relief measure (namely, the insertion of subpara (6) into para 11C of the Fourth Schedule to the Act by s 85(1)(d) of the Revenue Laws Amendment Act 45 of 2003), which was introduced with effect from 1 March 2004 to exclude the formula-based approach in respect of directors of private companies earning more than 75% of remuneration in the form of fixed monthly payments. This amendment was necessary due to the complex method of determining the employees' tax imposed on directors who receive remuneration on the same basis as ordinary employees. This Note also incorporates other amendments effected by s 85(1).

INTERPRETATION NOTE NO 39 (Issue 2)

Date: 8 February 2013; replaced on 29 March 2017; see now issue 3 of this Note

Affected legislation: Value-Added Tax Act 89 of 1991

Provisions: Sections 1(1), 8, 11, 16, 18, 23 and 40A

Subject: The VAT treatment of public authorities, grants and transfer payments.

Executive summary: This Note sets out the VAT treatment of public authorities, grants and transfer payments and deals with the impact of the amendments in this regard which came into effect on 1 April 2005 and withdrew the first issue of Interpretation Note 39 dated 4 December 2007, as from 8 February 2013.

INTERPRETATION NOTE: NO 51 (Issue 3)

Date: 22 July 2014; replaced 5 May 2017

Affected legislation: Income Tax Act 58 of 1962

Provisions: Sections 11, 11A and 23

Subject: Pre-trade expenditure and losses

Executive Summary: This Note provides guidance on the deduction of pre-trade expenses (sometimes also called start-up costs) under s 11A.

INTERPRETATION NOTE: NO 33 (Issue 4)

Date: 22 July 2014; replaced 5 May 2017

Affected legislation: Income Tax Act 58 of 1962

Provisions: Section 20(1)(a)

Subject: Assessed losses: companies: the 'trade' and 'income from trade' requirements.

Executive summary: This Note clarifies when a company may forfeit its right to carry forward its assessed loss from the preceding year of assessment as a result of its not carrying on a trade during the current year of assessment, or having carried on a trade during the current year of assessment, but not deriving any income from trade during that year of assessment.

INTERNATIONAL

13 April 2017 - Conclusion of an agreement between the government of the Republic of South Africa and the government of Grenada for the exchange of information relating to tax matters; the date of entry into force is 10 March 2017.

15 May 2017 - Conclusion of an agreement between the Republic of South Africa and the Republic of Singapore on the exchange of financial information to improve international tax compliance.

5 June 2017 - Conclusion of an arrangement between the respective competent authorities of the United States of America and the Republic of South Africa on the exchange of country-by-country reports.

CASE LAW

SUPREME COURT OF APPEAL

XO Africa Safaris CC v Commissioner for South African Revenue Service [2016] ZASCA 160; (2017) 79 SATC 1 (SCA)

Facts

The appellant, a registered VAT vendor in terms of the Value-Added Tax Act 89 of 1991, had supplied services to foreign tour operators by assembling tour packages which included arranging group and individual tours to South Africa. The packaged tours included accommodation, travel, restaurant bookings, and recreational activities.

Issue

Whether the supplies made by the appellant were zero-rated in terms of s 11(2)(l) of the Value-Added Tax Act or were subject to the standard 14% rate of VAT.

Decision

The supply of the services in question attracted VAT at the standard rate.

HIGH COURT

Dale v Aeronastic Properties Ltd (Case no 9297/2016, Western Cape Division, Cape Town, 25 October 2016); (2017) 79 SATC 12 (Western Cape High Court)

Facts

The applicant sought an order placing the first respondent, a company that had been wound up, under supervision, thus commencing business rescue. The company in question was insolvent with a significant assessed tax debt owing to SARS which had taken judgment in the magistrates' court in terms of s 40(2)(a) of the Value-Added Tax Act. Thereafter, SARS had applied for the first respondent to be liquidated on the grounds that it was commercially insolvent by reason of the tax debt owing to SARS. The taxpayer's appeal against the assessment had been dismissed by the Tax Court on the basis of an agreement between the first respondent and SARS.

Issue

The only issue before the court was the application for the first respondent to be placed in business rescue in terms of the Companies Act 71 of 2008.

Decision

The decision in *CSARS v Beginsel NO 75 SATC 87* did not support the proposition that SARS's claim for unpaid tax in this matter should not be taken into account in determining whether the company was financially distressed. However, SARS was not, by virtue of its preferent status in terms of s 99 of the Insolvency Act 24 of 1936, a preferent creditor for the purposes of the business rescue proceedings. The fact that SARS's claim was on the same footing as the other claims against the company was not of itself sufficient to show that the alternative purpose of business rescue could be achieved, namely an improved return for shareholders and creditors.

ABC (PTY) LTD v CSARS (Case no 13164, Western Cape Division, Cape Town, 7 September 2016); (2017) 79 SATC 24

Facts

A company, JK (Pty) Ltd, had purchased all the shares in the appellant company ('the first sale of shares'). Thereafter JK (Pty) Ltd had sold those shares to H ('the second sale of shares'). In issuing an assessment, SARS invoked s 103(2) to disallow the setting-off of the balance of the assessed loss of the appellant company against its income on the grounds that the first sale of shares infringed s 103(2). At the time, the Commissioner was not aware of the second sale of shares and did not rely on it in invoking his powers under s 103(2). Thereafter, SARS sought to rely on the second sale of shares to invoke s 103(2).

Issue

Whether SARS could amend the assessment to rely on s 103(2) in relation to the second sale of shares.

Decision

SARS could not amend the assessment to rely on the second sale of shares which was not known to the Commissioner at the time the assessment was issued. On the evidence, the first sale of shares did not contravene s 103(2). The assessment in this regard was set aside and referred back to SARS for reassessment on the basis that the set-off of the balance of the assessed loss could not be disallowed.

XYZ COMPANY (PTY) LTD v CSARS (Case no VAT 1247, Western Cape Division, Cape Town, 5 September 2016); (2017) 79 SATC 39

Facts

The appellant, a wholly-owned subsidiary, made land owned by it available to its holding company which then undertook the development of property in Cape Town. By agreement, the holding company had funded the appellant's cash-flow requirements via inter-company shareholder loans. On 2 April 2009, the holding company issued a tax invoice to the appellant in respect of a taxable supply of R82 095 000, inclusive of VAT at 14%, in respect of the residential component of the development. The appellant claimed an input tax deduction in respect of the VAT in an amount of R10 081 842.10 and received payment of this amount from SARS.

Issue

Whether, given the provisions of s 22(3) of the Value-Added Tax Act, 89 of 1991, the crediting of a loan account constituted 'payment' given the funding arrangement between the two companies.

Decision

The crediting of the holding company's loan account by the appellant in the context of the funding arrangement between the two companies, amounted to 'consideration' in relation to the supply of goods and services and s 22(3) was therefore not applicable.