

JUTA'S TAX LAW REVIEW

March 2018

Dear Subscriber to *Juta's Tax Law Review* publications

Welcome to the November 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

The following fiscal legislation has been enacted since the last issue of the *Juta Tax Law Review*:

- Taxation Laws Amendment Act 17 of 2017 (date of promulgation: 18 December 2017)
- Rates and Monetary Amounts and Amendment of Revenue Laws Act 14 of 2017 (date of promulgation: 14 December 2017)
- Tax Administration Laws Amendment Act 13 of 2017 (date of promulgation: 18 December 2017)

BILLS

No fiscal Bills have been tabled in the National Assembly since the last issue of the *Juta Tax Law Review*.

RESPONSE DOCUMENTS PUBLISHED BY NATIONAL TREASURY AND SARS

On 18 December 2017 National Treasury and SARS released Response Documents in respect of the following Bills:

- Tax Administration Laws Amendment Bill [Bill 28—2017]
- Taxation Laws Amendment Bill [Bill 27—2017]
- Rates and Monetary Amounts and Amendment of Revenue Laws Bill [B26—2017]

DRAFT PUBLIC NOTICES

DRAFT NOTICE

Date of issue: 31 January 2018

Due date for public comments: 14 February 2018

Executive summary: This draft notice is in regard to returns of information to be submitted by third parties in terms of s 26 of the Tax Administration Act, 2011 and is issued in terms of s 26 of the Tax Administration Act, 2011 which provides that the Commissioner may, by public notice, require a person who employs, pays amounts to, receives amounts on behalf of or otherwise transacts with another person, or has control over assets of another person, to submit returns as provided in the notice. The draft notice will, with effect from its date of publication, replace Notice 1 published in *Government Gazette* No 39575 dated 6 January 2016.

EXPLANATORY MEMORANDA AND DRAFT MEMORANDA

18 December 2017 – release by SARS of an *Explanatory Memorandum on the Taxation Laws Amendment Bill 2017*

DRAFT DOCUMENTS RELEASED FOR PUBLIC COMMENT

21 February 2018 – SARS and National Treasury released the following draft documents for public comment:

- 2018 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill
- Draft Amendments to Regulations prescribing electronic services
- Consolidated Regulations after Draft Amendments to Regulations prescribing electronic services
- Draft Explanatory Memorandum-Regulations prescribing electronic services

GUIDES AND DRAFT GUIDES

12 December 2017 – SARS *Transfer Duty Guide*

13 December 2017 – SARS *Comprehensive Guide to Capital Gains Tax (issue 6)*

22 January 2018 – SARS *Draft Guide to Understatement Penalties* (due date for public comments: 12 February 2018)

BINDING RULINGS

BINDING GENERAL RULINGS

BINDING GENERAL RULING: BGR (VAT) 45

Effective Date: 1 November 2017

Affected legislation: Value-Added Tax Act 89 of 1991; ss 11(1)(g) and 11(1)(j) and Part A and Part of Schedule 2

Subject: The supply of potatoes in the context of VAT

Executive Summary: This ruling records the factors that the Commissioner will consider in determining whether potatoes are being supplied as seed under Part A for use as agricultural, pastoral or other farming purposes, or as vegetables under Part B, in other words as the supply of foodstuff.

BINDING GENERAL RULING: BGR (VAT) 46

Effective date: 27 November 2017
Affected legislation: Value-Added Tax Act 89 of 1991
Provisions: Section 11(1)(j) and Part B of Schedule 2
Subject: The supply of brown bread

Executive Summary: This ruling concerns an arrangement in terms of s 72 relating to the VAT treatment of the supply of brown bread.

BINDING PRIVATE RULINGS

BINDING PRIVATE RULING: BPR 283

Effective Date: 1 November 2017
Affected legislation: Income Tax Act 58 of 1962; s 45(1)(a)
Subject: Intra-group disposals of a capital asset

Executive Summary: This ruling relates to the question whether the proposed disposal of an asset by a special purpose corporate vehicle to its holding company will constitute an intra-group transaction.

BINDING PRIVATE RULING: BPR 284

Effective Date: 10 November 2017
Affected legislation: Income Tax Act 58 of 1962; the definitions in ss 1(1) of 'gross income' and 'trading stock', 11(a) read with s 23(g) and 22(1)(a), s 24J, and the s 24JB(1) definition of 'covered person'.
Subject: Debentures that track the value of a reference asset.

Executive Summary: This ruling concerns the income tax consequences where a company issues debentures to investors where the value of such debentures tracks the price of specified quantities of a precious metal as reference assets.

BINDING PRIVATE RULING: BPR 285 (This note was replaced on 24 November 2017 when the reference to 'franchisor' in para 4 was changed to 'franchisee'.)

Effective date: 22 November 2017
Affected legislation: Income Tax Act 58 of 1962; s 11(f)
Subject: The initial fee paid to a franchisor

Executive Summary: This ruling concerns the deductibility under s 11(f) of an initial lump sum that is payable in terms of a franchise agreement by a franchisee to a franchisor on the commencement of the franchise.

BINDING PRIVATE RULING: BPR 286 (This ruling was replaced on 24 November 2017 to provide for textual changes in the summary.)

Effective date: 22 November 2017
Affected legislation: Income Tax Act 58 of 1962; s 1(1) the definition of 'income'; in s 10 (1)(nB); paragraphs 1 – the definition of 'remuneration' and para 2(1) of the Fourth Schedule to the Act.
Subject: Certain settling-in allowances

Executive Summary: This ruling determines the taxability of settling-in allowances where these are paid by an employer.

BINDING PRIVATE RULING: BPR 287

Effective date: 30 November 2017
Affected legislation: Income Tax Act 58 of 1962; s 42(1) – paragraph (a) of the definition of 'asset-for-share transaction'
Subject: The disposal of vacant land in exchange for shares

Executive summary: This is a ruling on the tax consequences of the disposal of vacant land in exchange for shares.

BINDING PRIVATE RULING: BPR 288

Effective date: 17 January 2018

Affected legislation: Income Tax Act 58 of 1963; s 1(1) – paragraph (a)(i) of the definition of 'trading stock', s 42(1) – paragraph (a) of the definition of 'asset-for-share transaction' and s 42(7)

Subject: Consecutive asset-for-share transactions within 18 months.

Executive summary: This ruling determines whether shares are acquired as capital assets or trading stock pursuant to a corporate reorganisation and whether consecutive asset transactions concluded within a period of eighteen months will render the anti-avoidance provision in s 42(7) applicable.

BINDING PRIVATE RULING: BPR 289

Effective date: 19 January 2018

Affected legislation: Income Tax Act 58 of 1962 (the Act); ss 10(1)(k), 24O, 45(4B), 64F(1)(a) and 64G(2)(b) and paragraphs 20(1)(a) and 35(3)(a) of the Eighth Schedule.

Subject: The base cost of a loan claim and the tax implications of the acquisition transaction

Executive Summary: This ruling determines the tax implications of a corporate restructuring involving, inter alia, the declaration of a dividend that is settled by the issue of debt and the implementation of a share acquisition transaction.

BINDING PRIVATE RULING: BPR 290

Effective date: 24 January 2018

Affected legislation: Income Tax Act 58 of 1962 (the Act); Paragraph 38 of the Eighth Schedule.

Subject: The distribution of shares to employee share scheme participants

Executive Summary: This ruling determines the tax consequences for the participants in an employee share scheme on the distribution to them of shares by a share scheme trust.

BINDING PRIVATE RULING: BPR 291

Effective date: 24 January 2018

Affected legislation: Income Tax Act 58 of 1962 (the Act); s 8(1)(a)(i)(bb) read with s 8(1)(c)

Subject: Deemed expenditure on meals and incidentals

Executive summary: This is ruling regarding the subsistence allowance paid by an employer in terms of its subsistence and travel policy.

BINDING PRIVATE RULING: BPR 292

Effective date: 24 January 2018

Affected legislation: Income Tax Act 58 of 1962 (the Act); ss 19, 42, and paragraphs 12A and 38 of the Eighth Schedule

Subject: Income tax consequences of debt restructuring.

Executive summary: This ruling determines the income tax consequences of a discharge of debt by way of set-off, the waiver of a right to the payment of a dividend, and the acquisition and immediate disposal of associate company shares.

BINDING PRIVATE RULING: BPR 293

Effective date: 1 February 2018

Affected legislation: Income Tax Act 58 of 1962 (the Act); Securities Transfer Tax Act 25 of 2007 (STT Act); s 9C paragraph 2(1)(b) read with para 2(2) of the Eighth Schedule to the Act; ss 2, 6 and 7 of the STT Act.

Subject: The disposal of shares by a non-resident individual

Executive summary: This ruling determines some of the tax consequences of the disposal of shares held by a non-resident individual.

BINDING CLASS RULINGS

BINDING CLASS RULING: BCR 060

Effective date: 19 January 2018

Affected legislation: Income Tax Act 58 of 1962; ss 1(1) – definitions of ‘connected person’ and ‘gross income’, and s 8C and paras 56 and 80 of the Eighth Schedule

Subject: Consequences where an employee share trust disposes of the underlying shares and distributes the net proceeds to the beneficiaries

Executive summary: This ruling determines the tax consequences for an employee share trust and its beneficiaries of a disposal by the employee share trust of the underlying shares and the resulting distribution of the net proceeds to the beneficiaries.

INTERPRETATION NOTES

REPLACED INTERPRETATION NOTES

INTERPRETATION NOTE 67 (Issue 2) (replaced on 8 December 2017 by issue 3)

Effective Date: 14 February 2014

Affected legislation: Income tax Act 58 of 1962; s 1(1); the definition of ‘connected person’

Subject: The meaning of ‘connected persons’ in s 1(1).

Executive Summary: This Note explains the definition of ‘connected person’ in s 1(1).

INTERPRETATION NOTE 73 (Issue 2) (replaced on 20 December 2017 by issue 3)

Effective Date: 14 December 2015

Affected legislation: Income Tax Act 58 of 1962; ss 11(a), 11(e), 20(1), 23A and 25D

Subject: Rental income in respect of tank containers

Executive Summary: This Note explains the income tax implications of the leasing of tank containers

ARCHIVED INTERPRETATION NOTES

INTERPRETATION NOTE 2 (Issue 3)

Effective date: 17 March 2009

Affected legislation: Income Tax Act 58 of 1962; s 11C

Subject: foreign dividends; the deductibility of interest

Executive summary: This Note provided guidance to portfolio investors, who are natural persons, on the application of those provisions of the Act that were relevant in determining taxable income derived from foreign dividends. The archiving of this note follows on the repeal of s 11C with effect from 1 April 2012.

INTERPRETATION NOTE: NO. 22 (Issue 3) (see now issue 4, below)

Effective date: 22 September 2015

Affected legislation: Transfer Duty Act 40 of 1949; ss 9(1)(c) and 9(1A)

Subject: Transfer duty exemption: public benefit organisations and statutory bodies

Executive summary: This Note provides guidance on the interpretation and application of the following sections of the Transfer Duty Act: s 9(1)(c), which exempts from the payment of transfer duty a public benefit organisation or any statutory body, which has as its sole or principal object the carrying on of any public benefit activity, provided the whole or substantially the whole of the property acquired is used for carrying on one or more public benefit activities; s 9(1A), which exempts from transfer duty the transfer of property by a public benefit organisation to any other entity controlled by that PBO. For purposes of this Note, the transactions do not constitute taxable supplies of fixed property under s 7(1)(a) of the Value-Added Tax Act No 89 of 1991.

INTERPRETATION NOTE: NO. 24 (Issue 3)

Effective date: 4 February 2014; replaced on 12 February 2018

Affected legislation: Income Tax Act 58 of 1962, s 10(1)(cN)

Subject: The provisions of the Income Tax Act regarding the trading rules in respect of public benefit activities.

Executive summary: This Note provides guidance on the interpretation and application of s 10(1)(cN), which provides for the exemption from income tax of the receipts and accruals of a public benefit organisation other than receipts and accruals derived from certain business undertakings or trading activities.

DRAFT INTERPRETATION NOTES

DRAFT INTERPRETATION NOTE

Due date for public comments: 30 April 2018

Affected legislation: Income Tax Act 58 of 1962; s 23I

Subject: Prohibition of deductions for certain intellectual property

Executive Summary: Section 23I prohibits a deduction of any expenditure incurred for the right or permission to use intellectual property and other expenditure which is directly or indirectly related to such expenditure. This Note provides guidance on the interpretation and application of s 23I, which relates to the prohibition of deductions for tainted intellectual property

DRAFT INTERPRETATION NOTE: 15 (Issue 5)

Due date for public comments: 31 March 2018

Affected legislation: Tax Administration Act 28 of 2011; ss 104 and 107

Subject: The exercise of discretion by SARS in the case of a late objection or appeal

Executive summary: This Note provides guidance on the factors that a senior SARS official will take into account when deciding whether to extend the period for lodging an objection under s 104(4) or an appeal under s 107(2). It also highlights that the period during which an objection or appeal may be lodged is limited.

DRAFT INTERPRETATION NOTE

Due date for public comments: 30 April 2018

Affected legislation: Income Tax Act 58 of 1962; s 13quin

Subject: Deduction in respect of commercial buildings

Executive summary: This Note provides guidance on the interpretation and application of s 13quin which provides for an allowance on any new and unused buildings or any new and unused improvements to any building, owned and wholly or mainly used by a taxpayer for purposes of producing income in the course of that taxpayer's trade.

DRAFT INTERPRETATION NOTE

Due date for public comments: 30 April 2018

Affected legislation: Income Tax Act 58 of 1962; s 13sex

Subject: The deduction in respect of certain residential units

Executive summary: This Note provides guidance on the interpretation and application of s 13sex which provides for an allowance on any new and unused residential unit or improvements to a residential unit used for the purpose of trade and an additional allowance on that residential unit if it qualifies as a low-cost residential unit.

DRAFT INTERPRETATION NOTE

Due date for public comments: 30 April 2018

Affected legislation: Income Tax Act 58 of 1962; s 18A(2B) and (2C)

Subject: Section 18A audit certificates

Executive summary: This Note provides guidance on the interpretation and application of s 18A(2B) and (2C) in relation to the audit certificate which must be obtained and retained in specified circumstances for s 18A receipts issued by an approved organisation or department.

DRAFT INTERPRETATION NOTE

Date: 5 February;

Due date for public comments: 11 May 2018

Affected legislation: Income Tax Act 58 of 1962; paragraph (g) of the definition of 'gross income' and s 11(f) and (h)

Subject: Lease premiums

Executive summary: This Note provides guidance on the application of para (g) and the related deductions under s 11(f) and (h) of the Income Tax Act.

DRAFT INTERPRETATION NOTE

Date for public comment: 11 May 2018

Affected legislation: Income Tax Act 58 of 1962; s 13bis

Subject: Deductions in respect of buildings used by hotelkeepers

Executive summary: This Note provides guidance on the interpretation and application of s 13bis, which deals with deductions in respect of buildings used in the trade of hotelkeeper.

DRAFT INTERPRETATION NOTE

Due date for public comments: 18 May 2018

Affected legislation: Mineral and Petroleum Resources Royalty Act 28 of 2008; Schedule 2

Subject: The meaning of 'bulk' in Schedule 2

Executive summary: This Note provides clarity on the interpretation and application of the word 'bulk' as contained in Schedule 2.

NEW INTERPRETATION NOTES**INTERPRETATION NOTE 67 (issue 3)**

Effective Date: 8 December 2017

Affected legislation: Income Tax Act 58 of 1962; s 1(1); the definition of 'connected person'

Subject: The definition of 'connected persons' in the Act

Executive Summary: This Note explains the definition of 'connected persons' in s 1(1).

INTERPRETATION NOTE 97

Effective Date: 8 December 2017

Affected legislation: Income Tax Act 58 of 1962; s 1(1) – definition of 'REIT', 8F(2) and (3)(d), ss 8FA(2) and (3)(d), 9C(2) and (5), para (aa) of the proviso to s 10(1)(k)(i), 11(a), 11(x), 23N(5), 24J(2), s 25BB, ss 41 to 47, 64E(1), 64F(1)(a)(i)(2), 64FA(1)(a); paragraph 20(3)(a) of the Eighth Schedule; s 2(1) s 8(1)(t) of the Securities Transfer Tax Act; sections 1(1) – definition of 'residential property company', s 2(1) and s 9(1)(l) of the Transfer Duty Act and ss 7(1)(a), 12(a) and 17(1) of the Value-Added Tax Act.

Subject: The taxation of REITs and controlled companies

Executive Summary: This Note explains the interpretation and application of section 25BB, which deals with the taxation of REITs and controlled companies; takes account of other provisions of the Act that are relevant to REITs, controlled companies and the holders of shares or linked units in these companies; the Note does not discuss all the statutory provisions that apply to REITs and controlled companies and which, while not specifically referring to REITs and controlled companies, are nonetheless applicable to REITs and controlled companies; the Note takes account of the amendments introduced by the Taxation Laws Amendment Act 15 of 2016.

INTERPRETATION NOTE 98

Date: 7 February 2018

Act: Income Tax Act 58 of 1962; ss 30(1), (3)(f) and public benefit activities in terms of Part 1 of the Ninth Schedule.

Subject: Public benefit organisations: the provision of funds, assets or other resources to any association of persons

Executive summary: This Note provides guidance on a conduit public benefit organisation carrying on a 'public benefit activity' number 10 listed in Part I of the Ninth Schedule; the requirement imposed under s 30(3)(f) on a conduit public benefit organisation providing funds to an association of persons contemplated in public benefit activity 10(iii) in Part I of the Ninth Schedule; and the meaning of 'association of persons' contemplated in PBA 10(iii) in Part I.

INTERPRETATION NOTE: 22 (issue 4)

Effective date: 30 January 2018

Affected legislation: Transfer Duty Act 40 of 1949; ss 9(1)(c) and 9(1A)

Subject: The transfer duty exemption in respect of public benefit organisations and institutions, boards or bodies

Executive summary: This Note provides guidance on the interpretation and application of the following sections of the Transfer Duty Act: s 9(1)(c), which exempts from the payment of transfer duty a public benefit organisation or any institution, board or body, provided the whole or substantially the whole of the property acquired is used for carrying on one or more public benefit activities; and s 9(1A), which exempts from transfer duty the transfer of property by a PBO to any other entity controlled by that PBO. For purposes of this Note, the transactions do not constitute taxable supplies of fixed property under s 7(1)(a) of the Value-Added Tax Act 89 of 1991.

INTERPRETATION NOTE 73 (Issue 3)

Effective date: 20 December 2017

Affected legislation: Income Tax Act 58 of 1962; ss 11(a), 11(e), 20(1), 23A and 25D

Subject: The income tax implications of rental income from tank containers

Executive summary: This Note provides guidance on the income tax implications of the letting of tank containers.

INTERPRETATION NOTE 86 (Issue 2)

Date: 2 February 2018

Affected legislation: Income Tax Act 58 of 1962, s 12I

Subject: Additional investment and training allowances for industrial policy projects

Executive summary: Section 12I provides for the deduction of additional investment and training allowances from the income of a company carrying on an 'industrial project' which qualifies as an 'industrial policy project'. This Note provides guidance on the interpretation and application of s 12I and takes into account amendments effected by the Taxation Laws Amendment Act 15 of 2016.

INTERPRETATION NOTE 99

Effective date: 21 February 2018

Affected legislation: Income Tax Act 58 of 1962; para 4(1) of the Second Schedule

Subject: Unclaimed benefits

Executive summary: This Note explains the treatment of lump sum benefits classified as unclaimed benefits that accrued to members (both before and from 1 March 2009) for income tax purposes.

INTERNATIONAL

7 February 2018 - Agreement between the government of the Republic of South Africa and the government of the Republic of Zambia regarding mutual assistance between their customs administrations. Date of entry into force - 27 December 2017

9 February 2018 – Protocol amending the convention between the government of the Republic of South Africa and the government of the Federative Republic of Brazil for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, signed at Pretoria on 8 November 2003

CASE LAW

SUPREME COURT OF APPEAL

New Adventure Shelf 122 (Pty) Ltd v CSARS [2017] ZASCA 29, [2017] 2 All SA 784 (SCA), 79 SATC 233

Facts

The taxpayer in this case had, for the year of assessment in issue, taken into account for purposes of capital gains tax in terms of the Eighth Schedule to the Income Tax Act, the proceeds of the sale of an asset, and was duly assessed. Thereafter, in a subsequent year of assessment, the purchaser failed to pay the major part of the price. The taxpayer responded by cancelling the sale and objected to the original assessment in an attempt to have it revised in the light of the cancellation.

Decision

It was held that, since the statutory three-year period for objecting had elapsed, the assessment in issue had become final and, consequently, that the taxpayer was not entitled to have the tax liability in terms of that assessment redetermined in the light of the subsequent cancellation of the sale. From this it followed that the loss could be brought into account only in the year of assessment in which the proceeds of the disposal became irrecoverable.

CSARS v Van der Merwe NO and Others 2017 (3) SA 34 (SCA), [2017] 2 All SA (SCA), (2017) 79 SATC 283

Facts

In this case, a company was in the process of being wound up as insolvent. Prior to the winding up, the company had purchased certain equipment, had appointed a clearing agent for the importation of that equipment and the equipment had entered the agent's warehouse.

Issue

In these proceedings, the liquidators sought an order that the equipment be released to them without the prior payment of customs duty and value-added tax, and averred that they were obliged in terms of the Companies Act 61 of 1973 and the Insolvency Act 24 of 1936 to assume possession of the equipment.

Decision

The court held that in the present context the ranking of claims in terms of the Insolvency Act did not entail a creditor's being accorded a preference of the kind contended for by the Commissioner and that the common law requires that, on insolvency, a trustee is obliged to realise all the assets of the insolvent, including those that are subject to a lien, and that the trustee in this case was thus entitled to require delivery of such assets. It was further held that the Customs and Excise Act and the Value-Added Tax Act did not bar the Commissioner in a case such as this from releasing the equipment to the liquidators prior to the payment of customs duty and value-added tax.

TAX COURT

ITC 1898 (2017) 79 SATC 266 (Case 13935)

Facts

The appellant, a family trust, had sold certain shares on the open market for a consideration expressed in Australian dollars. The proceeds of the sale were paid in full by the purchaser into a bank account in the Netherlands and were received by the appellant's stockbrokers on its behalf. Against the appellant's wishes, the funds so held were then transferred to an entity located in the United Arab Emirates in what amounted to a misappropriation of the funds.

Issue

The issue before the court was whether the alleged fraud and embezzlement fell within the scope of the words 'any other event' in para 35(3)(c) of the Eighth Schedule to the Income Tax Act 58 of 1962; if so, the result would be that the proceeds derived from the sale would be reduced by the amount of the alleged embezzlement for the purposes of the Eighth Schedule.

Decision

It was held that para 35(3)(c) did not cover the fraud and embezzlement that had occurred in this case which involved a subsequent, unrelated event caused by a person who had no obligation to pay for the asset disposed of and who had acted outside of the agreement to dispose of the asset. It was accordingly held that the appellant was not entitled to claim a deduction, in terms of para 35(3)(c) in respect of the alleged embezzlement. It was further held that the set-off or deduction that is envisaged in that sub-paragraph, is one that is a consequence of the extinguishment of the taxpayer's right to receive payment and the other party's obligation to pay. As to costs, it was held that it could not be said that the appellant had no reasonable grounds to object to the assessment.

ITC 1899 (Case No IT 14027; 7 December 2017; (2017) 79 SATC 315)

Facts

In its return of provisional tax the appellant company had underestimated its taxable income for the year of assessment. The Commissioner consequently imposed an underestimation penalty in terms of para 20 of the Fourth Schedule to the Income Tax Act 58 of 1962. The taxpayer's objection to the penalty was rejected by SARS, but the Tax Board upheld the appellant's appeal on the basis of a point raised *mero motu* by the chairperson of the Board.

Issue

In its grounds of appeal to the Tax Court, the appellant abandoned all the grounds raised in its original objection and notice of appeal and sought to rely only on the procedural ground raised *mero motu* by the chairperson of the Tax Board on the basis of which the Tax Board had found in its favour. The Commissioner filed a notice of exception to the taxpayer's amendment of its grounds of objection, averring that the appellant could not, at a hearing *de novo*, rely on a new ground of objection. In response, the appellant applied for the amendment of the grounds of objection.

Decision

It was held that the Tax Court rules did not provide for the amendment of grounds of objection at the appeal stage in order to raise an entirely new ground of appeal, and that the Commissioner's exception to the appellant's application for amendment must thus be upheld. The penalty was confirmed.

ITC 1900 (Case No IT 14005; 30 May 2017; (2017) 79 SATC 341)

Facts

In the course of its trade, the appellant company had sold stands of immovable property in terms of agreements entered into during the 2013 tax year and received payment against transfer of the properties to the purchasers in the 2014 tax year.

Issue

The issues before the court were, firstly, whether the purchase price of the properties had accrued to the appellant in the 2013 or the 2014 tax year and, secondly, whether the proceeds were deemed to have accrued in the 2013 tax year in terms of s 24(1) of the Income Tax Act 58 of 1962.

Decision

It was held that, in terms of the principles laid down in *Lategan v CIR* 2 SATC 16 and *CIR v People's Stores Walvis Bay (Pty) Ltd* 52 SATC 9, the appellant's entitlement to payment vested at the date of the fulfilment of any suspensive conditions, in other words, as soon as the contract became enforceable at the instance of either party. It was accordingly held that the amounts had accrued when the contracts became enforceable during the 2013 tax year. It was further held that, in terms of s 24(1) as it was interpreted in *SIR v Silverglen Investments (Pty) Ltd* 30 SATC 199, the income in respect of all of the sales was deemed to have accrued to the appellant on the dates on which the agreements of sale were signed.

FOREIGN COURTS

Commissioner for Her Majesty's Revenue and Customs v M Fowler [2017] UKUT 0219 (TCC), (2017) 79 SATC 355

Issue

In this decision of the Upper Tribunal of the Tax and Chancery Chamber in the United Kingdom, the issue for determination was whether the income of the respondent (a resident of South Africa who was working in the United Kingdom) from his diving activities carried out on the UK continental shelf was taxable in the United Kingdom.

Decision

It was held that this turned on whether such income was to be categorised under Article 7 of the Treaty as business profits or under Article 14 as income from employment. It was held that the applicable Double Tax Treaty fell to be interpreted in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969 and that, on the assumption that the respondent was employed and not self-employed, his diving engagements in the UK Continental Shelf waters fell within Article 14 of the Treaty.

HIGH COURT

Encarnacao NO and Another v Commissioner for South African Revenue Service [2017] ZAGPPHC 23, [2017] 2 All SA 153 (GP), 79 SATC 247

Facts

The appellant carried on business as an importer of cigarettes and was the licensee of a customs bonded warehouse. In an armed robbery, a consignment of cigarettes was stolen from the registered warehouse of the appellant's clearing agent. The payment of customs duty and value-added tax on the cigarettes in question had been deferred until they were removed from the warehouse for home consumption.

Decision

It was held that the Commissioner's decision that, in such circumstances involving vis major, with no element of negligence, the appellant was not entitled to a full rebate of excise duty on the stolen cigarettes must be set aside and substituted by an order that the appellant was entitled to a full rebate of customs duty in terms of the Customs and Excise Act 91 of 1964.

Masanago v Road Accident Fund 2016 (6) SA 508 (GJ), 79 SATC 295

Decision

It was held that an attorney who lawfully charges a client a contingency fee in terms of the Contingency Fees Act 66 of 1997, is liable for value-added tax on the fee but is not entitled to levy or recover from the client such value-added tax over and above the maximum permissible contingency fee.

Ntsanwisi v Khoza and Others (2017) 79 SATC 325

Facts

The applicant and his wife had divorced. In addition to the decree of divorce it had been ordered that the joint estate be divided and that the wife was entitled to a 50% of the husband's pension interest in the Government Employees Pension Fund to be paid out to her in terms of s 7(7) of the Divorce Act. The fund duly paid out the relevant amount to the wife, less tax as calculated by SARS. However, unbeknown to the Fund, the parties had entered into a later settlement agreement, at variance with the order, in terms of which the wife would be entitled to less than 50% of the husband's pension fund interest.

Issue

The husband applied to the High Court for an order compelling the wife to repay the amount overpaid to her and an order compelling the pension fund to apply for a new tax directive from SARS for a recalculation of the relevant tax, consequent upon the that variation agreement.

Decision

The court held that, until such time as the Fund had requested a new tax directive from SARS, it was premature to conclude that the wife had been enriched at the expense of the husband and that there was no legal basis on which SARS should be ordered to repay any amount of tax, and that the application against SARS accordingly fell to be dismissed.

Nondabula v Commissioner for South African Revenue Service and Another (Case No 4062/2016; Eastern Cape Local Division; 27 June 2017; (2017) 79 SATC 333)

Facts

The appellant, a businessman had received an income tax assessment for some R1.4 million, and this was followed by an additional assessment. The appellant objected to the additional assessment. The Commissioner averred that the objection was not in compliance with the Rules and demanded payment. The taxpayer's attempts to communicate further with the Commissioner elicited no response. SARS did not attempt to justify or provide a breakdown of the amount claimed in the additional assessment. Thereafter, the Commissioner issued a notice in terms of s 179 of the Tax Administration Act 28 of 2011 which required the appellant's bankers to freeze his account and remit the assessed amount of tax to SARS.

Issue

The appellant applied to the High Court for an interdict that would bar SARS from invoking s 179 pending the final determination of the objection to the additional assessment.

Decision

The court held that SARS had failed to disclose the legal basis for the additional assessment, and that SARS had not given a statement of the grounds of assessment as required by s 96(2)(a). It was accordingly held that the Commissioner had failed to comply with the peremptory provisions of s 96, and that the issuing of a s 179 notice was consequently unlawful and that the Commissioner's conduct had been unconstitutional. The court confirmed the rule nisi in respect of the granting of the interdict.