

# JUTA'S TAX LAW REVIEW

July 2018

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

Welcome to the July edition of *Juta's Tax Law Review*. We thank you for your constructive suggestions and comments about this electronic review.

### **SOME POINTS ABOUT THE CASE NOTES:**

The case notes, classified by subject, are not intended as comprehensive summaries of the various judgments referred to. Rather, their focus is to identify those aspects most likely to be of interest to tax practitioners, and to provide a concise evaluative commentary.

Following each case note is a link to the full text of the judgment on Juta Law's website. The successive reviews and judgments are incorporated in your Juta's Tax Library, providing a comprehensive record of tax case law.

Please continue to send feedback to the publisher, Steve Allcock ([sallcock@juta.co.za](mailto:sallcock@juta.co.za))

Kind Regards

## **The Juta Law Marketing Team**

Download the Ms Word version of [Juta's Tax Law Review July 2018](#)

Download the PDF version of [Juta's Tax Law Review July 2018](#)

## LEGISLATION

4 June 2018 – The Division of Revenue Act 1 of 2018 has been published and takes effect on the date of publication in the *Gazette* (4 June 2018). The Division of Revenue Act 3 of 2017 has been repealed, except for ss 16 and 26 which will be repealed on 1 July 2018. The Division of Revenue Amendment Act 10 of 2017 has been repealed.

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

## BILLS

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

## COMMISSION OF INQUIRY

On 23 May 2018 the President of the Republic of South Africa appointed a Commission of Inquiry into tax administration and governance by the South African Revenue Service with a mandate to enquire into, make findings, report on, and make recommendations on taxation matters as well as certain practices in the tax system.

## **TAX ADMINISTRATION ACT AND RULES**

4 June 2018 – Publication of draft dispute resolution rules in terms of s 103 of the Tax Administration Act 28 of 2011.

11 May 2018 – A public notice in terms of s 210(2) lists incidences of non-compliance that are subject to a fixed amount penalty in accordance with ss 210(1) and 211 of the Tax Administration Act.

### **PUBLIC NOTICES**

2 March 2018 – Income Tax Notices 169 and 170 have been published in *Government Gazette* 41473 in terms of s 8(1) of the Income Tax Act relating to the daily amounts in respect of meals and incidental costs, and fixing of rates per kilometre for vehicles with effect from 1 March 2018.

16 March and 23 March 2018 – Publication by the Department of Trade and Industry of the decision to approve applications received in terms of s 12I(19)(d) of the Income Tax Act.

4 April 2018 – Publication by SARS of the rates at which interest-free or low interest loans are subject to income tax.

## **GUIDES AND DRAFT GUIDES**

8 March 2018 – Guide on the taxation of professional sports clubs and players.

16 March 2018 – Guide to the Urban Development Zone (UDZ) (issue 6).

23 March 2018 – Guide on the determination of medical tax credits (issue 9).

28 March 2018 – Draft Guide on the calculation of the tax payable on lump sum benefits (issue 3).

29 March 2018 – Short Guide to the Tax Administration Act.

29 March 2018 – Guide to understatement penalties.

18 April 2018 – Guide to understatement penalties (issue 2).

21 May 2018 – Draft Guide on MAPS (mutual agreement procedures).

4 June 2018 – Guide to the employment tax incentive (issue 2).

20 June 2018 – Guide on income tax and the individual (2017/8).

20 June 2018 – Draft guide on venture capital companies.

## BINDING RULINGS

### BINDING GENERAL RULINGS

#### **BINDING GENERAL RULING (EMPLOYMENT TAX INCENTIVE) BGR 47**

**Effective date:** 5 March 2018

**Affected legislation:** Employment Tax Incentive Act 26 of 2013; section 1(1) definition of 'monthly remuneration'.

**Subject:** The meaning of 'month' in the definition of 'monthly remuneration' in respect of employers remunerating employees on a weekly or fortnightly basis

**Executive Summary:** This ruling determines the meaning of 'month' in the definition of 'monthly remuneration' in s 1(1) for eligible employers that remunerate employees on a weekly or fortnightly basis.

### BINDING PRIVATE RULINGS

**BINDING PRIVATE RULING: BPR 115** (SARS has drawn attention to the fact that policy guidance on the subject of this Ruling is now provided in Interpretation Note 76)

**Effective date:** 19 March 2012

**Affected legislation:** Income Tax Act 58 of 1962, Fourth Schedule, para 1, definition of 'remuneration', 'employer' and 'employee' read with para 2(1)(a) of the Fourth Schedule .

**Subject:** The tax treatment of tips and incentive rewards paid to independent sales persons.

**Executive summary:** This ruling deals with incentive cash rewards to be paid by a company to independent sales persons not in the employ of the company.

#### **BINDING PRIVATE RULING: BPR 294**

**Effective date:** 5 March 2018

**Affected legislation:** Income Tax Act 58 of 1962, s 44

**Subject:** An amalgamation transactions between non-resident companies

**Executive summary:** This ruling determines whether the proposed merger under foreign law constitutes an amalgamation transaction.

#### **BINDING PRIVATE RULING: BPR 295**

**Effective date:** 5 March 2018.

**Affected legislation:** Income Tax Act 58 of 1962, ss 64F(1)(b) and 64FA(1)(a) of the Act and para 75 of the Eighth Schedule.

**Subject:** The distribution in specie of a share to the government.

**Summary:** This ruling determines the dividends tax and capital gains tax consequences of a proposed in specie distribution of a share to the government.

#### **BINDING PRIVATE RULING: BPR 296**

**Effective date:** 8 March 2018

**Affected legislation:** Income Tax Act 58 of 1962, ss 1(1) – definition of 'company', 'foreign partnership' and 'person' and 24H and para 11(1) of The Eighth Schedule.

**Subject:** Disposal by a German limited partnership of its assets to its sole member.

**Executive summary:** This ruling determines whether the disposal by a German *Kommanditgesellschaft* limited partnership of its assets to its sole member and the immediate disposal of the assets by that member to another German *Kommanditgesellschaft* limited partnership of which that person is also a sole member results in a disposal for that member, a resident, for capital gains tax purposes.

#### **BINDING PRIVATE RULING: BPR 297**

**Effective date:** 8 March 2018

**Affected legislation:** Income Tax Act 58 of 1962, s 1(1) – definition of 'dividend' and 'REIT' and ss 25BB and 44 and para 11 of the Eighth Schedule.

**Subject:** Amalgamation transactions involving the conversion of share block companies to private companies.

**Executive summary:** This ruling determines the tax consequences of an amalgamation transaction involving the conversion of share block companies to private companies in a group of companies controlled by a REIT.

#### **BINDING PRIVATE RULING: BPR 298**

**Effective date:** 23 March 2018

**Affected legislation:** Income Tax Act 58 of 1962, ss 55 and 58

**Subject:** Waiver of a debt.

**Executive summary:** This ruling determines the donations tax consequences of the waiver of a debt.

#### **BINDING PRIVATE RULING: BPR 299**

**Effective date:** 23 March 2018

**Affected legislation:** Income Tax Act 58 of 1962, s 1(1) – definition of 'dividend'.

**Subject:** Dividend distributions.

**Executive summary:** This ruling determines the income tax consequences for a company that makes dividend distributions to its holding company.

#### **BINDING PRIVATE RULING: BPR 300**

**Effective date:** 23 March 2018

**Affected legislation:** Income Tax Act 58 of 1962, s 1(1) – definition of 'group of companies', 'foreign company', 'foreign dividend' and 'contributed tax capital', ss 10B(2)(a), 44(5), and 45 and paragraph 1 – definition of "base cost", 12A, 20(1)(a) and 75 of the Eighth Schedule.

**Subject:** Intra-group transactions and the conversion of debt to equity

**Executive summary:** This ruling determines the tax consequences of an "intra-group transaction" contemplated in paragraph (b) of the definition in s 45(1) and a conversion of debt to equity.

#### **BINDING PRIVATE RULING: BPR 301**

**Effective date:** 20 April 2018

**Affected legislation:** Income Tax Act 58 of 1962, ss 1(1) – definitions of 'gross income', 'income' and 'securities lending arrangement', 9(2)(a), para (ff) of the proviso to section 10(1)(k)(i), 11(a) read with s 23(g) and 64F.

**Subject:** The taxation of dividends received by a borrower under a securities lending arrangement.

**Executive summary:** This ruling determines whether a South African sourced dividend received by a borrower in terms of a securities lending arrangement must be included in the 'income' of the applicant and whether any related securities lending expenditure will be deductible.

#### **BINDING PRIVATE RULING: BPR 302**

**Effective Date:** 26 April 2018

**Affected legislation:** Income Tax Act 58 of 1962 ('the Act'); the Securities Transfer Tax Act 25 of 2007 (the 'STT Act'); sections 24BA, 40CA, 41(4), 42(1), 42(2)(b), 42(3A), 42(8A), 45(1), 45(2), 45(6), 46(1), 46(7), 47(1)(b), 47(2)(a)(i) of the Act and paras 12(2)(a), 12(2)(b) and 75(1)(a) of the Eighth Schedule to the Act; s 8(1)(a)(i), (iii) and (v) of the STT Act.

**Subject:** Corporate restructuring and unbundling of listed shares.

**Executive summary:** This ruling determines the tax consequences for the Applicant and the co-applicants of the proposed corporate restructuring and unbundling of listed shares to shareholders.

### **BINDING PRIVATE RULING: BPR 303**

**Effective date:** 11 June 2018

**Affected legislation:** Income Tax Act 58 of 1962 ('the Act'); Securities Transfer Act 25 of 2007 ('the STT Act') ss 19 and 24J(2) and paras 12A and 20(1) of the Eighth Schedule to the Act; ss 2 and 6 of the STT Act.

**Subject:** Tax implications of a group restructuring transaction

**Executive summary:** This ruling determines the tax consequences of a group restructuring transaction which included the discharge of debt by way of set-off, the disposal of shares in a subsidiary to unconnected persons, and the tax implications of a replacement loan.

### **BINDING PRIVATE RULING: BPR 304**

**Effective date:** 20 June 2018

**Affected legislation:** Income Tax Act 58 of 1962, ss 1(1) – definitions of 'contributed tax capital' and 'dividend', ss 8(4)(a), 19, 24J(4A), 36(11) – definition of 'expenditure' and paras 12A and 20(1)(a) of the Eighth Schedule to the Act.

**Subject:** Debt reduction and subsequent liquidation of the debtor

**Executive summary:** This ruling determines the income tax consequences of the settlement of a loan by way of set-off from the outstanding subscription price of a new issue of additional shares and the subsequent liquidation of the issuer

### **BINDING PRIVATE RULING: BPR 305**

**Effective date:** 20 June 2018

**Affected legislation:** Income Tax Act 58 of 1962, s 54 and para 2 of the Eighth Schedule.

**Subject:** Registration of units in the name of the beneficial owners.

**Executive summary:** This ruling determines the consequences of the transfer of units in an equity fund registered in the name of a nominee for the beneficial owner.

### **BINDING PRIVATE RULING: BPR 306**

**Effective date:** 28 June 2018

**Affected legislation:** Income Tax Act 58 of 1962, ss 54 and 55

**Subject:** Donations to a special trust

**Executive summary:** This ruling determines the donations tax consequence of a cash transfer made to a special trust.

## **BINDING CLASS RULINGS**

### **BINDING CLASS RULING: BCR 061**

**Effective date:** 16 March 2018

**Affected legislation:** Income Tax Act 58 of 1962, s 1(1) – definition of 'foreign return of capital'.

**Subject:** The foreign return of capital

**Executive summary:** This ruling determines the interpretation of the definition of the 'foreign return of capital' in s 1(1) in the context of a foreign unbundling of a part of the business of a dual-listed company to South African resident shareholders.

### **BINDING CLASS RULING: BCR 062**

**Effective date:** 22 March 2018

**Affected legislation:** Income Tax Act 58 of 1962, s 11D(2), (4) and (9)

**Subject:** Research and development conducted on behalf of a taxpayer

**Executive summary:** This ruling determines the deductibility under s 11D(4) read with s 11D(2) of levy payments made by members of an association which will in turn use the levy to fund research and development (R&D) activities approved by the Minister of Science and Technology in terms of s 11D(9).

## INTERPRETATION NOTES

### REPLACED INTERPRETATION NOTES

#### INTERPRETATION NOTE 3 (Issue 1)

**Effective date:** 4 February 2002

**Effective date of replacement:** 20 June 2018

**Affected legislation:** Income Tax Act 58 of 1962, s 1 definition of 'resident' in relation to a natural person.

**Subject:** The criteria for residence in terms of the Income Tax Act in regard to a natural person.

**Executive summary:** This interpretation note explains the concept of residence for purpose of the Income Tax Act in relation to a natural person.

#### ARCHIVED INTERPRETATION NOTES

#### INTERPRETATION NOTE 48 (Issue 2)

**Effective date:** 19 December 2014.

**Effective date of archiving:** 5 March 2018; see now issue 3 of this Note

**Affected legislation:** Income Tax Act 58 of 1962, s 24.

**Subject:** Instalment credit agreements and debtors' allowances.

**Executive summary:** This Note provides guidance on the application and determination of the debtors' allowance granted under s 24(2), as it applies to instalment credit agreements.

#### INTERPRETATION NOTE 17 (Issue 3)

**Effective date:** 31 March 2010

**Effective date of archiving:** 14 March 2018; see now issue 4 of this Note.

**Affected legislation:** Income Tax Act 58 of 1962, Fourth Schedule

**Subject:** Employees' tax and independent contractors

**Executive summary:** This Note explains the statutory tests and the common law tests to assist officials of the South African Revenue Service and employers to classify a worker efficiently and effectively. This Note has been updated to incorporate the latest amendments made under s 54(1)(e)(g) of the Taxation Laws Amendment Act 8 of 2007, effective from 1 March 2007 in respect of the exclusionary sub-para (ii) of the definition of the term 'remuneration' as defined in para 1 of the Fourth Schedule.

#### INTERPRETATION NOTE 35 (Issue 3)

**Effective date:** 31 March 2010

**Effective date of archiving:** 26 March 2018 (see now issue 4 of this Note).

**Affected legislation:** Income Tax Act 58 of 1962, paras 1, 2(1A) and 2(5) of the Fourth Schedule and s 23(k) of the Act.

**Subject:** Employees' tax: personal service providers and labour brokers

**Executive summary:** This Note incorporates the latest amendments made by s 66(1) of the Revenue Laws Amendment Act 60 of 2008 which introduces a definition of a 'personal service provider', and limits the definition of a 'labour broker' to natural persons.

#### INTERPRETATION NOTE 3 (Issue 2)

**Effective date:** 20 June 2018

**Affected legislation:** Income Tax Act 58 of 1962, s 1(1).

**Subject:** The residence of a natural person for purposes of the Act.

**Executive summary.** This Note explains the meaning of the term 'ordinarily resident' in relation to a natural person in the definition of 'resident' in s 1(1).

## **INTERPRETATION NOTE: 9 (Issue 6)**

**Effective date:** 26 July 2016

**Date of archiving:** 25 June 2018

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

**Subject:** Small business corporations

**Executive summary:** This Note provides guidance on the interpretation and application of s 12E which provides accelerated depreciation allowances for a taxpayer that qualifies as a small business corporation.

## **INTERPRETATION NOTE 51 (Issue 4)**

**Effective date:** 5 May 2017

**Date of archiving:** 27 June 2018

**Affected legislation:** Income Tax Act 58 of 1962, ss 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.

## **DRAFT INTERPRETATION NOTES**

### **DRAFT INTERPRETATION NOTE 93 (Issue 2)**

**Effective date:** not indicated

**Affected legislation:** Income Tax Act 58 of 1962, s 1(1) definition of 'foreign dividend'; sections 9(4)(a), 9D(9)(f), 10B, 22(3)(a)(iii), 23(f), 23(q) and s 25D and para 20(1)(h)(iii) of the Eighth Schedule.

**Subject:** The taxation of foreign dividends

**Executive summary:** This Note provides guidance on the interpretation and application of various provisions of the Act relating to foreign dividends. The Note does not deal with the income tax consequences of a dividend paid by a headquarter company, since this topic is addressed in Interpretation Note 87 entitled 'Headquarter Companies'. This Note reflects the income tax and tax administration legislation (as amended) at the time of publishing.

## **NEW INTERPRETATION NOTES**

### **INTERPRETATION NOTE 48 (Issue 3)**

**Effective date:** 5 March 2018

**Affected legislation:** Income Tax Act 58 of 1962, s 24.

**Subject:** Instalment credit agreements and debtors' allowances.

**Executive summary:** This Note provides guidance on the application and determination of the debtors' allowance granted under s 24(2), as it applies to instalment credit agreements.

### **INTERPRETATION NOTE 17 (Issue 4)**

**Effective date:** 14 March 2018

**Affected legislation:** Income Tax Act 58 of 1962, Fourth Schedule.

**Subject:** Employees' tax and independent contractors.

**Executive summary:** This Note explains the statutory tests and the common law tests to assist SARS officials and employers to classify a worker efficiently and effectively. This Note has been updated to incorporate the latest amendments made under s 5(1)(d) of the Tax Administration Laws Amendment Act 16 of 2016, effective from 1 March 2017, in respect of the exclusionary sub-para (ii) of the definition of 'remuneration' as defined in para 1.

#### **INTERPRETATION NOTE 35 (Issue 4)**

**Effective date:** 26 March 2018

**Affected legislation:** Income Tax Act 58 of 1962, paras 1, 2(1A) and 2(5) of the Fourth Schedule and s 23(k).

**Subject:** Employees' tax: personal service providers and labour brokers.

**Executive summary:** This Note discusses the employees' tax implications as well as the deductions that may be claimed by a personal service provider or a labour broker.

#### **INTERPRETATION NOTE 100**

**Effective date:** 5 June 2018.

**Affected legislation:** Mineral and Petroleum Resources Royalty Act 28 of 2008, ss 1 and 6A(1)(b).

**Subject:** The meaning of 'extracted' in the context of this Act.

**Executive summary:** This Note provides clarity on the interpretation of the word 'extracted' in s 6A(1)(b) of the Act.

#### **INTERPRETATION NOTE 9 (Issue 7)**

**Effective date:** 25 June 2018

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

**Subject:** Small business corporations

**Executive summary:** This Note provides guidance on the interpretation and application of s 12E, which provides accelerated depreciation allowances for a taxpayer qualifying as an SBC.

#### **Interpretation Note 51 (Issue 5)**

**Effective date:** 27 June 2018

**Affected legislation:** Income Tax Act 58 of 1962, ss 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.

### **CASE LAW**

#### **SUPREME COURT OF APPEAL**

#### **Lion Match Company (Pty) Ltd v CSARS [2018] ZASCA 36**

**Facts:**

During 2008 the taxpayer company had disposed of its entire shareholding in the Kimberly Clark Group using the market value of the shares as at 1 October 2001 as the base cost for capital gains tax purposes. SARS issued an additional assessment that adjusted the base cost, resulting in an increase in the taxpayer's capital gain. In the Tax Court the taxpayer sought an order setting aside SARS's Rule 31 statement. The Tax Court dismissed the application and the taxpayer appealed against the dismissal to the Supreme Court of Appeal

**Issue:**

The appealability of the order made by the Tax Court.

**Decision:**

The Supreme Court of Appeal held that the Tax Court's decision was not appealable in terms of s 104(2) of the Tax Administration Act 28 of 2011; that jurisdictional challenges must be raised either by exception or special plea, and that the Tax Court had not been called on to pronounce on the issue of jurisdiction.



## **CSARS v The Executors of Estate Late Sidney Ellerine [2018] ZASCA 39**

### **Facts:**

The issued preference shares of the company in question had been held by the late Sidney Ellerine and formed part of the share capital of Sidney Ellerine Trust (Pty) Ltd which, in total, consisted of 600 ordinary shares of R1 each and 112 000 seven per cent redeemable non-cumulative preference shares of R1 each.

### **Issue:**

The issue before the court was the valuation of the preference shares for the purposes of determining the capital gain, and in particular, whether the rights that attached to the preference shares and entitled the holder to convert them should be taken into account in the determination of the market value.

### **Decision:**

The deceased had been entitled, on the date of his death, to convert the preference shares to ordinary shares and the preference shares must consequently be valued on this basis for the purposes of para 40 read with para 31(3) of the Eighth Schedule to the Income Tax Act.

## **SARS v Daikin Air Conditioning [2018] ZASCA 66**

### **Facts:**

The respondent, Daikin Air Conditioning South Africa (Pty) Limited, imported and distributed air conditioning machines and parts of such machines.

### **Issue:**

The proper classification for customs duty purposes of certain air conditioning machines, namely, 'window or wall types, self-contained or split-system air conditioning machines' and parts of such machines in terms of s 47(9)(e) of the Customs and Excise Act 91 of 1964.

### **Decision:**

The interpretation, in the context of the relevant tariff heading, of the words 'window or wall types, self-contained or split-system', as advanced by the Commissioner, was the preferred interpretation, and SARS's appeal against the decision of the High Court was upheld.

## **SARS v Encarnacao NO [2018] ZASCA 71; (2017) 79 SATC 247**

### **Facts:**

Two consignments of cigarettes that had been imported into South Africa from Zimbabwe were stolen on 15 August 2009 by armed robbers from a customs and excise warehouse as described in s 19(2) of the Customs and Excises Act 91 of 1964. SARS notified the respondents, the trustees of the DA Encarnacao Trust, that they were accordingly liable for outstanding customs duties and VAT in the amount of R910 171.42 in respect of these consignments of imported cigarettes. The Trust disputed liability on the grounds that it qualified for a full rebate of the duty together with VAT in terms of Rebate item 412.09 in Part 1 of Schedule 4 to the Act.

### **Issue:**

The issues before the court were: the requirements for entitlement to a rebate of customs duty in terms of Rebate item 412.09 in Part 1 of Schedule 4 to the Customs and Excise Act; what occurrences fall within the scope of *vis major* in this context; and the meaning of the expression 'such goods did not enter into consumption'.

### **Decision:**

An interpretation that accepts that an armed robbery can fall within the scope of *vis major* and that goods that are lost as a result of an armed robbery fall within the scope of the rebate item in issue does not subvert any of the relevant provisions of the Act and the Schedule. In addition, it allows for a situation whereby a rebate can be claimed where goods are lost to both appellant and respondent as a result of an armed robbery. The taxpayer's appeal against the contrary decision of the High Court was upheld.

## **SARS v KWJ Investments Service (Pty) Ltd [2018] ZASCA 81**

### **Facts:**

The taxpayer conducted a business in redeemable preference shares. Investors who sought a return in the form of dividends subscribed for and were issued preference shares by the taxpayer and the latter then invested the funds so raised and made a profit on the difference between the dividends it received and the dividends it was obliged to pay the holders of its preference shares.

### **Issues:**

The two issues to be determined in this matter were, firstly, whether the cession of a right to a dividend that had been declared but had not yet accrued constitutes a 'receipt or accrual' for the purposes of the Income Tax Act either in terms of s 24J(3) or in terms of the definition of 'gross income' in s 1; secondly, whether the original assessment in this matter had been issued in accordance with 'a practice generally prevailing', with the result that SARS was precluded from issuing an additional assessment.

### **Decision:**

The rights to dividends in this matter had a defined monetary value that fell within the scope of 'gross income', as defined, and the cession of those rights gave rise to an unconditional right. However, the taxpayer had discharged the onus of showing that the original assessments had been issued in accordance with a practice generally prevailing and the Commissioner was therefore precluded from raising an additional assessment.

## **CSARS v Char-Trade [2018] ZASCA 89**

### **Facts:**

The taxpayer had provided interest-free loans and loans to related close corporations and companies with the result that SARS issued the taxpayer with assessments to secondary tax on companies on the basis that the loans in question constituted deemed dividends because interest that was less than the official rate of interest had been charged. SARS also levied in interest in terms of s 64B(9) of the Income Tax Act on the capital amounts that were owed.

### **Issue:**

Whether SARS's right to issue an assessment for secondary tax on companies in respect of the dividend cycle ending in February 2007 in terms of ss 64B and 64C of the Income Tax Act 58 of 1962 had become prescribed in terms of s 99 of the Tax Administration Act 28 of 2011.

### **Decision:**

The taxpayer had failed to file the relevant obligatory return for secondary tax on companies with the result that, in terms of the applicable legislative provisions, prescription had never commenced running against SARS in respect of its right to issue an assessment. The assessments were therefore confirmed.

## **CSARS v Reunert Ltd [2017] ZASCA 153, (2018) 80 SATC 113 (SCA)**

### **Facts:**

The taxpayer had concluded an agreement in terms of which it was appointed as a sales promoter and would earn commission. The commission clause in the agreement was 'subject to' another clause which stated that the actual commission would be reduced by the grossed-up value of any dividend the taxpayer received from the other contracting party.

### **Issue:**

Whether, in terms of the agreement, the taxpayer had acquired an unconditional right to the gross commission.

### **Decision:**

The taxpayer was entitled to commission only if the grossed-up value of the dividends it received fell short of the gross commission calculated in terms of the relevant clause. The clause was aimed at a legitimate commercial purpose and an interpretation that sensibly advanced that purpose should be adopted. The interpretation put forward by the taxpayer yielded a sensible commercial result, whereas the Commissioner's interpretation did not. It was held that the taxpayer had discharged the onus of proving that the Commissioner's decision to disallow its objection to the assessments was wrong, and that the taxpayer had never become entitled to, nor received, any gross commission and that the only commission to which the taxpayer was entitled and which it received was the amount determined after the deduction of dividends.

## TAX COURT

**XYZ (Pty) Ltd v CSARS** (Case No 13539/13673, Tax Court, Port Elizabeth, 6 July 2017); (2018) 80 SATC 59

**Facts:**

The taxpayer was a manufacturer, importer and distributor of new and used motor vehicles. At the end of the years of assessment in dispute, the taxpayer had on hand various vehicles that constituted trading stock 'held and not disposed of' as envisaged in s 22(1) of the Income Tax Act. The taxpayer fixed their value on a vehicle-by-vehicle basis. The taxpayer determined the cost price in accordance with international accounting standards and then deducted from the estimated selling price the estimated costs of completion necessary for saleability as envisaged in international accounting standards and, where the net realisable value was less than cost price, the taxpayer adopted the net realisable value for purposes of s 22(1) of the Act.

**Issue:**

The correct method, in terms of the Income Tax Act, for determining the value of the taxpayer's trading stock on hand at the end of the year of assessment.

**Decision:**

The NRV (net realisable value) as set out in IAS2 (international accounting standard number two) is an appropriate method for determining the actual value of trading stock in the hands of the taxpayer at the end of the year of assessment and the NRV must then be compared to the cost price, determined in accordance with s 22(3) of the Income Tax Act in order to determine whether a diminution in value has in fact occurred as envisaged in s 22(1)(a).

**ITC 1902** (2018) 80 SATC 77 (Fiscal Appeal Court, Zimbabwe – Case No 17HH-213)

**Facts:**

The taxpayer, a value-added tax vendor operating a fast foods business, had failed to remit VAT to the Zimbabwe Revenue Authority and disputed the Authority's estimates of output tax payable for the relevant tax years, as well as the penalty imposed by the Authority.

**Issue:**

Whether the estimates by the Authority in respect of VAT and penalties should be upheld, and whether the Authority had arbitrarily increased output tax by using estimated sales that were not derived from factual records and information and without showing how the figure had been computed.

**Decision:**

The onus of proof in relation to the issues raised in the taxpayer's objection was on the taxpayer. The Authority had based the estimated assessments on the information derived from incomplete sales documents and inaccurate financial disclosures by the taxpayer. The Authority had raised estimated assessments because the taxpayer had failed to supply the requested information or to co-operate in the investigation. It was held that the court was unable to make a finding on the actual amount of output VAT due from the taxpayer, but that the Authority had been entitled to make an estimate of the VAT due by the taxpayer, and that the taxpayer had failed to show on a balance of probabilities that the estimated figures were wrong. The taxpayer's appeal was dismissed.

**ABC CC v CSARS** (Case No IT14036, Tax Court, Cape Town, 14 August 2017); (2018) 80 SATC 149

**Facts:**

On the basis of a 'deemed dividend' SARS had raised an assessment to secondary tax on companies dated 11 March 2015 in respect of a 'dividend declared date' of 28 February 2011 and a dividend cycle from 1 March 1997 to 28 February 2011, the last-mentioned date being the last day of the taxpayer's income tax year of assessment that ended on 28 February 2011.

**Issue:**

Whether SARS was precluded from issuing the disputed assessment as a result of the prescription of the time period laid down in the Tax Administration Act 28 of 2011 and the Income Tax Act 58 of 1962 for the issuing of the assessment.

**Decision:**

The STC assessment in issue had not been validly issued by SARS because the period within which the assessment could validly be issued had prescribed on 19 December 2014.

**S Company v CSARS** (Case No IT 0122/2017, Tax Court, Cape Town, 17 October 2017); (2018) 80 SATC 1904

**Facts:**

SARS had issued assessments in respect of the taxpayer, and the latter had requested reasons for the assessments. SARS supplied reasons. The taxpayer then brought an application in terms of Rule 6(1) to compel SARS to provide "adequate reasons" as well as reasons for its withdrawal of an earlier decision that impacted on the assessments; that application had been dismissed in an earlier judgment of the Tax Court. The taxpayer then filed its notice of appeal in terms of s 107(1) of the Tax Administration Act. SARS failed to deliver its Rule 31 statement within the prescribed 45 days thereafter; there was no agreement for an extension of time in this regard, nor had SARS requested an extension in terms of Rule 4(2). The taxpayer formally advised SARS that it would apply to the Tax Court for a final order in terms of s 129(2) of the Tax Administration Act if SARS failed to remedy its non-compliance within fifteen days. SARS failed to comply with that ultimatum and the taxpayer applied for default judgment. A month after the delivery of that application, SARS delivered its Rule 31 statement.

**Issue:**

Whether, in all the circumstances, the taxpayer was entitled to a final order in terms of Rule 129(2).

**Decision:**

SARS's conduct fell into the category of "inexcusable" as it had paid little if any regard to the proper administration of justice and the effect of its delay on the taxpayer and the fiscus. The approach by SARS had not enabled the court to determine that it enjoyed a good prospect of success and SARS had failed to show good cause for condonation of its default. The taxpayer was thus entitled to a final order in terms of s 129(2)(b) of the Tax Administration Act to alter the assessment in the matter contemplated in its notice of appeal, and the court duly granted an order in those terms.

## HIGH COURT

**Pienaar Brothers (Pty) Ltd v CSARS** [2017] ZAGPPHC 231; 2017 (6) SA 435 (GP)

**Facts:**

A distribution by the taxpayer company constituted a 'dividend' in terms of a retrospective amendment to the Income Tax Act 58 of 1962, although it was not a dividend, as defined, at the time of the distribution. Consequently, in terms of the amended legislation, an amount of STC (the now-repealed secondary tax on companies) had become payable, even though it was not payable as the law stood at the time of the distribution.

**Issue:**

Does the enactment of retrospective legislation, including fiscal legislation, which deems the law, as at a particular time in the past, to have been what it was not, infringe the constitutional principle of legality and the rule of law?

**Decision:**

The Constitution does not prohibit retrospective legislation in respect of civil law, as distinct from criminal law. Legislation cannot be impugned as unconstitutional on the grounds that it is 'unfair'; as a general rule, all that is required for legislation to pass constitutional muster is that it be rational. However, legislation that limits a constitutionally protected right must satisfy the criterion of being 'reasonable and justifiable in an open and democratic society' as envisaged in s 36(1) of the Constitution.

**CSARS v Digicall Solutions (Pty) Ltd** (2018) 80 SATC 125

**Facts:**

The taxpayer had an assessed loss of about R86 million by the end of its 2003 year of assessment. During 2003, shares in the taxpayer had been sold twice. An earlier Tax Court judgment in this matter had rejected SARS application to amend its grounds of assessment to rely on the second change in shareholding, as well as the first. SARS was consequently limited to relying on the first change in shareholding

**Issue:**

Whether the taxpayer had discharged the onus of proving that, in the circumstances of this case, the requirements of s 103(2) were not satisfied.

**Decision:**

In relying on s 103(2), SARS was limited to the first change in shareholding that formed the basis of the Commissioner's satisfaction of the three elements of s 103(2). This change in shareholding may have been the *sine qua non* of the receipt or accrual to the taxpayer of the income in question but it was not the *causa causans*, that is to say, it was not the effective cause; the second change in shareholding had been the effective cause. The 'trafficker' had not acquired the shares for the sole or main purpose of utilising the assessed loss in issue. Consequently, neither the second nor the third requirements of s 103(2) were satisfied, and the taxpayer had discharged the onus of proof.

oo0oo