JUTA'S TAX LAW REVIEW

November 2018

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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

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

BILLS AND DRAFT BILLS

17 July 2018 – Publication by National Treasury of the draft Taxation Laws Amendment Bill for public comment.

17 July 2018 – Publication by National Treasury of the draft Tax Administration Laws Amendment Bill 2018 for public comment.

25 October 2018 – Tax Administration Laws Amendment Bill [Bill 39—2018]
25 October 2018 – Taxation Laws Amendment Bill [Bill 38—2018]
25 October 2018 – Rates and Monetary Amounts and Amendment of Revenue Laws Bill [B37—2018]

EXPLANATORY MEMORANDA

19 October 2018 – Publication by SARS of an Explanatory Summary of the Tax Administration Laws Amendment Bill 2018

TAX ADMINISTRATION ACT AND RULES

17 October 2018 – Draft public notice relating to the incidences of non-compliance by a person in terms of s 210(2) that are subject to a fixed amount penalty in accordance with ss 210 and 211

QUALIFYING PHYSICAL IMPAIRMENT OR DISABILITY EXPENDITURE

4 October 2018 – SARS released a draft list of qualifying physical impairment or disability expenditure as envisaged in section 6B(1) of the Income Tax Act 58 of 1962.

PRACTICE NOTES AND ARCHIVED PRACTICE NOTES

4 July 2018 – Practice Note 4 of 1999 regarding the treatment of gains and losses on foreign exchange transactions has been archived.

INTERNATIONAL

4 July 2018 – Uruguay Convention on Mutual Administrative Assistance (CMAA) in force as from 1 September 2018

GUIDES AND DRAFT GUIDES

25 July 2018 – SARS VAT Quick Reference Guide for non-executive directors
6 October 2018 – SARS Guide on the calculation of the tax payable on lump sum benefits (issue 3)

9 October 2018 – SARS Comprehensive Guide to Capital Gains Tax (issue 7)

11 October 2018 – SARS Guide on Mutual Agreement Procedures (issue 2) and minimum information requirements for MAP requests

29 October 2018 – SARS ABC of Capital Gains Tax for Individuals (issue 10)

BINDING RULINGS

BINDING GENERAL RULINGS

BINDING GENERAL RULING (VAT) 48
Effective date: 25 July 2018
Affected legislation: Value-Added Tax Act 89 of 1991; s 18B
Subject: The temporary letting of dwellings by developers and the expiry of s 18B.

Executive summary: This is a Ruling on the VAT treatment of residential fixed properties consisting of dwellings, developed for the purpose of sale, that were subsequently temporarily let by the residential fixed property developers. The ruling also deals with the cessation of s 18B. The ruling applies to all dwellings let on a temporary basis by the developer for the first time during the period from 10 January 2012 to 31 December 2017.

BINDING GENERAL RULING (VAT) 39 (Issue 2)
Effective date: 26 July 2018
Affected legislation: Value-Added Tax Act 89 of 1991; s 8(28)
Subject: The VAT treatment of municipalities affected by changes to municipal boundaries.

Executive summary: This is a ruling on the VAT treatment of the transfer of assets, liabilities, rights and obligations pursuant to the merger, creation and disestablishment of municipalities as a result of any municipal boundary change, envisaged in terms of s 8(28). This ruling withdraws the first issue of the ruling dated 27 January 2017 with effect from 1 April 2018.

BINDING PRIVATE RULINGS

BINDING PRIVATE RULING BPR 307
Effective date: 4 July 2018
Affected legislation: Income Tax Act 58 of 1962; s 108 and para 4*(b)* of article 11 of 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 (the South Africa/Brazil Treaty).
Subject: Relief from the double taxation of interest as between South Africa and Brazil

Executive summary This is a ruling on whether South Africa or Brazil has taxing rights in respect of interest income derived from bonds issued by the government of Brazil and paid to a South African resident.

BINDING PRIVATE RULING BPR 308
Effective date: 8 August 2018
Affected legislation: Income Tax Act 58 of 1962; s 1(1) (definition of 'gross income'), s 37 and para 35 of the Eighth Schedule
Subject: The assumption of contingent liabilities and the cession of a right of recovery

Executive summary: This private ruling is binding as between SARS and the applicant and co-applicants only. It does not constitute a practice generally prevailing. This is a ruling on the tax consequences of the sale of a mine in exchange for the assumption of liabilities by the purchaser, and the tax implications of the cession of a right of recovery.

BINDING PRIVATE RULING BPR 309
Effective date: 31 August 2018
Affected legislation: Income Tax Act 58 of 1962; s 1(1) definition of 'gross income', and para 63A of the Eighth Schedule.
Subject: The disposal of an asset by a public benefit organisation

Executive summary: This private ruling is binding as between SARS and the applicant and any co-applicant only. It does not constitute a practice generally prevailing. This is a ruling on the tax consequences of the disposal of an asset by a public benefit organisation.

BINDING PRIVATE RULING BPR 310
Effective date: 12 September 2018
Affected legislation: Income Tax Act 58 of 1962 (the Act); Value-Added Tax Act 89 of 1991 (VAT Act); s 11*(a)* read with s 23*(g)* of the Act; ss 1(1) – definition of 'consideration', 7(1)*(a)*, and 10(23) of the VAT Act
Subject: The tax aspects of customer loyalty programmes.

Executive summary: This private ruling is binding as between SARS and the applicant and any co-applicant only. It does not constitute a practice generally prevailing. This is a ruling on the income tax and VAT consequences of a customer loyalty programme.

BINDING PRIVATE RULING BPR 311
Effective date: 11 October 2018
Affected legislation: Income Tax Act 58 of 1962, s 12B
Subject: Photovoltaic solar energy plants

Executive Summary: This ruling determines the deductibility of expenditure to be incurred to install photovoltaic solar energy plants at sites owned and leased by the applicant.

BINDING CLASS RULINGS

BINDING CLASS RULING BCR 063
SARS has temporarily removed this ruling.
BINDING CLASS RULING BCR 064
Effective date: 6 July 2018
Affected legislation: Securities Transfer Tax Act 25 of 2007; s 1 definition of 'security' and ss 2(1)*(a)* and 8(1)*(f)*
Subject: The transfer of a security constituting a participatory interest in a collective investment scheme

Executive summary This is a ruling on the security transfer tax consequences of the transfer of a security constituting an interest in a collective investment scheme regulated by the Collective Investment Schemes Control Act 45 of 2002.

BINDING CLASS RULING BCR 065
Effective date: 14 August 2018.
Affected legislation: Income Tax Act 58 of 1962; definitions of "remuneration" and "employer" in the Fourth Schedule to the Act and paragraphs 1 (definition of "associated institution"), 2(l), 4 and 12D of the Seventh Schedule to the Act.
Subject: Post-retirement medical aid benefits.

Executive summary: This class ruling is binding as between SARS and the applicants and the class members only, and does not constitute a practice generally prevailing.
This is a ruling on the tax consequence of the intra-fund allocation of an amount from an employer surplus account to a member's fund credit.

INTERPRETATION NOTES

NEW AND RE-ISSUED INTERPRETATION NOTES

Interpretation Note 4 (Issue 5)
Effective date: 3 August 2018
Affected legislation: Income Tax Act 58 of 1962; s 1(1)
Subject: The definition of 'resident' in relation to a natural person, with specific reference to the physical presence test.

Executive summary: This is a note on the statutory physical presence test which is the criterion for determining whether a natural person, who was not at any time ordinarily resident in the Republic of South Africa during the relevant year of assessment, is a 'resident' as defined in s 1(1).

Interpretation Note 45 (Issue 3)
Effective date: 24 August 2018
Affected legislation: Income Tax Act 58 of 1962, ss 11*(a)* and *(e)*; ss 18A, 22(8), 23*(b)* and *(g)*, s 24D; paras 2*(a)*, *(b)*, *(e)*, *(f)* and *(h)* of the Seventh Schedule, paras 20 and 53 of the Eighth Schedule and Part II of the Ninth Schedule.
Subject: The deduction of expenditure in respect of security

Executive summary: This is a note on the deductibility for income tax purposes expenditure in respect of security incurred by a taxpayer and the fringe benefits tax implications for employees where their employers fund such expenditure.

Interpretation Note 101
Effective date: 4 July 2018
Affected legislation: Income Tax Act 58 of 1962; s 24I; s 1(1) – definition of 'trading stock', ss 3(4)*(b)*, 6quat(4), 8(4)*(a)*, 9(2)*(l)*, 9(4)*(e)*, para *(c)*(ii) and (iii) of the proviso to section 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, paras 12A, 35(3)*(a)* and 43 of the Eighth Schedule and para 4(1) of the Tenth Schedule.
Subject: Gains or losses arising from foreign exchange transactions.

Executive summary: This is a note on the interpretation and application of s 24I which governs the income tax treatment of foreign exchange gains and losses on exchange items and premiums or like consideration received or paid in respect of FCOCs (foreign currency option contracts) entered into and any consideration paid in respect of an FCOC acquired by certain persons.

Interpretation Note 102
Effective date: 17 July 2018
Affected legislation: Income Tax Act 58 of 1962; s 29A
Subject: The classification of risk policies and the once-off election that is available to transfer certain policies or classes of policies issued before 2016 to the risk policy fund.

Executive summary: This is a note on the interpretation and application of the definition of 'risk policy' in s 29A(1) and the once-off election available to an insurer to transfer certain policies or classes of policies issued before 1 January 2016 to the risk policy fund under s 29A(13B).

Interpretation Note 103
Effective date: 14 September 2018
Affected legislation: Value-Added Tax Act 89 of 1991; s 11(2)*(a)*, *(b)*, *(c)*, *(d)* and *(e)*
Subject: The value-added tax treatment in respect of supplies of international and ancillary transport services

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

INTERPRETATION NOTE 104
Effective date: 4 October 2018
Affected legislation: Income Tax Act 58 of 1962; s 10(1)(gC)(ii)
Subject: The exemption in respect of foreign pensions and transfers.

Executive summary: This is a Note on the interpretation and application of section 10(1)(gC)(ii) to a lump sum, pension or annuity received by or accrued to a resident from a source outside the Republic.

CASE LAW

SUPREME COURT OF APPEAL

CSARS v Respublica (Pty) Ltd [2018] ZASCA 109

Issue:
In this case, the issue was whether the supply of a building, coupled with the supply of related goods and services, to the Tshwane University of Technology, an educational institution. to be used by its students in terms of a written agreement, constituted the supply of 'commercial accommodation', as defined in the Value-Added Tax Act 89 of 1991.

Ruling:
It was held that this supply did not satisfy the first requirement of the statutory definition of 'commercial accommodation' and that this alone sufficed to determine the appeal against the respondent, rendering it unnecessary to consider whether the other statutory requirements had been met.

CSARS v Amawele Joint Venture CC [2018] ZASCA 115

Facts:
The respondent had been under contract to the KwaZulu-Natal Provincial Department of Human Settlements to effect the 'revitalisation and rectification' of housing projects that had been undertaken between 1994 and 2002 in respect of which the workmanship had been inadequate and the houses defective, necessitating extensive remedial work, including in some instances demolition and reconstruction.

Issue:
The issue before the court was whether the respondent was required to charge, collect and pay value-added tax to the South African Revenue Services at the then standard rate of 14 per cent on the amounts that it had been paid for this work, or whether these services were zero-rated in terms of the provisions of s 11(2)(s), read with s 8(23) of the Value-Added Tax Act 89 of 1991.

Ruling:
It was held that such services were not zero-rated for VAT purposes, and that VAT at the standard rate was consequently chargeable.

CSARS v Volkswagen SA (Pty) Ltd [2018] ZASCA 116

Issue:
The issue in this case was whether, in terms of the Income Tax Act 58 of 1962, the respondent's closing stock could properly be valued in accordance with international accounting standards, namely, IAS 2 or AC 108, at its net realisable value.

Ruling:
It was held that closing stock could not be so valued, and that it had to be valued in accordance with s 22(1)*(a)* of the Income Tax Act.

TAX COURT

ITC 1905 (2018) 80 SATC 223

Facts:
This case involved a claim, in terms of s 24C of the Income Tax Act 58 of 1962, for an allowance in respect of certain future expenditure. The Commissioner for the South African Revenue Service had disallowed the claim on the grounds that there had been two separate contracts, the first a sale to customers (in terms of which income was derived) and the second a franchise agreement (in terms of which expenditure was incurred).

Issue:
SARS argued these two contracts were legally independent and separate.

Decision:
The Tax Court held that the two contracts were inextricably linked and were not legally independent or separate. The appeal was accordingly allowed, and the court set aside the additional assessments raised by SARS.

XYZ CC v CSARS (Case No: 14055, Tax Court, Kwazulu-Natal Local Division, Durban, 20 November 2017) (ITC 1906 (2018) 80 SATC 256)

Facts:
The taxpayer, a supplier of agricultural products, claimed an income tax deduction for expenditure on so-called 'social development' that it claimed to have incurred via an arrangement with a customer who had approached the taxpayer to solicit a donation to a community upliftment initiative. The taxpayer had then passed a credit note against its invoices to the customer and had receipted an amount equal to the sum of the invoices raised, less the agreed credit note. For income tax purposes, the taxpayer disclosed the amount of the credit note as 'corporate social expenditure' on the basis that its customer was to pay the community an amount on its behalf in exchange for which the amount was to be credited to the customer's account with the taxpayer. The taxpayer, in its tax return and in its financial statements, included the amount in its gross income and then claimed it as deductible expenditure

Issue:
The issue before the court was whether the expense was a deductible amount in terms of s 11*(a)* of the Income Tax Act 58 of 1962. It was held that this expenditure was not deductible in terms of the Act, nor could it be set off against accrued income.

Decision:
The court held, further, that there had not been gross negligence on the part of the taxpayer and that the understatement penalty should therefore be reduced to 50% on the basis that there had been no more than an absence of reasonable grounds for the tax position taken by the taxpayer.

ABC Trading (Pty) Ltd v CSARS (Case No: 13686, Tax Court, Johannesburg, 30 March 2017) (ITC 1907 (2018) 80 SATC 271)

Facts:

The taxpayer, who carried on business as a 'contract miner', claimed a deduction in respect of capital expenditure in terms of s 15(a) read with s 36 of the Income Tax Act 58 of 1962, on the basis that its income was 'derived from mining operations'.

Decisions:

It was held that, in the context of processes that constituted 'mining operations', the activity of extraction was necessary but not of itself sufficient for the taxpayer to be categorised as involved in 'mining operations'. It was accordingly held that mere extraction did not suffice to render a contractor who earns a fee for such extraction as being in the class of persons who are engaged in 'mining operations', as statutorily defined, and that the taxpayer was merely carrying on the trade of servicing a miner's requirements by the extraction of material. It was accordingly held that the taxpayer was not engaged in 'mining operations' and was thus not entitled to the deduction in terms of s 15 read with s 36 of the Act.

ABC (Pty) Ltd v CSARS (Case No: IT 14247, Tax Court, Megawatt Park, Gauteng, 18 August 2017) (ITC 1908 (2018) 80 SATC 299)

Issue:

The issue in this case was whether the Commissioner for the South African Revenue Service was entitled to levy understatement penalties against the taxpayer in respect of both income tax and value-added tax, as provided in ss 129(3), 221 and 222(1) and (2) of the Tax Administration Act 28 of 2011. The taxpayer made the concession, in relation to income tax, that its returns had contained an omission or incorrect statement, but denied that SARS and the fiscus had suffered any prejudice as a result, as required in the statutory definition of 'understatement' in s 221.

Decision:

The court held that SARS had suffered prejudice by way of the opportunity cost occasioned by the delayed recovery of income tax and VAT, and that SARS had thus discharged the onus of proving an 'understatement' by the taxpayer. It was further held that, in view of the taxpayer's grossly negligent understatement, the highest applicable understatement penalty, namely 100% should be imposed.

X Group (Pty) Ltd v CSARS (Case No: 13671, Tax Court, Western Cape Division, Cape Town, 20 April 2017) ITC 1909 (2018) 80 SATC 342

Issue:

The issue in this case was whether the expenditure incurred by the taxpayer in paying an amount of compensation provided for in a settlement agreement was deductible in terms of the Income Tax Act 58 of 1962, as having been incurred in the production of income and for the purpose of trade as required by s 11*(a)* and s 23*(g)* of the Act.

Decision:

It was held that the onus was on the taxpayer to prove that these requirements were met. The court held that the taxpayer had failed to discharge the onus, in that on the evidence the taxpayer had not been legally obliged to pay the compensation in question, that the taxpayer had not been trading in coal, nor had it been necessary for the taxpayer to enter into the settlement agreement to enable it to produce income. The taxpayer was ordered to pay costs on the grounds that it had no reasonable grounds for persisting in its contention that the expenditure was deductible in terms of s 11*(a)* of the Act.

X (Pty) Ltd v CSARS (Case No: 13065/13, Tax Court, Johannesburg, 30 June 2017) (ITC 1910 (2018) 80 SATC 353)

Facts:
The taxpayer in this case had been assessed to tax on the basis that it had interposed a certain party in the supply chain involved in the importation and refinement of crude oil for the purpose of diverting the ownership of such oil and thereby diverting income that would otherwise have been taxable in South Africa, to the benefit of the taxpayer's group of companies.

Issue:
The Commissioner's argument in this regard was based on the distinction between substance and form, and the issue before the court was whether the profits of the controlled foreign company in question could, on this basis, be imputed to the taxpayer.

Decision:
It was held that the transaction in question did not have any real commercial justification, that the interposition of the entity had been artificial, that the contracts in question were disguised, and that the purpose of the supply agreement was the avoidance of tax. It was therefore held that the trading profits derived by the entity concerned were imputable to the taxpayer.

ACB Company (Pty) Ltd and DEF (Pty) Ltd v CSARS (Case Nos: 0032/2016 & 0033/2016, Tax Court, Johannesburg, 30 June 2017) (ITC 1911 (2018) 80 SATC 407)

Issue:
This case concerned a taxpayer's application to the Tax Court in terms of Rule 52(1)(a) for an order directing the Commissioner to provide the reasons requested by the taxpayer to enable the latter to formulate an objection to the additional assessments in issue. The taxpayer further averred that the request for reasons constituted "administrative action" as envisaged in s 33 of the Constitution.

Decision:
It was held that the reasons provided by the Commissioner in the present matter complied with the principles laid down in *Minister of Environmental Affairs and Tourism v Phambili Fisheries* 2003 (6) SA 407 (SCA), namely, that the decision-maker is required to set out his understanding of the relevant law, the findings of fact on which his conclusions are based and the reasoning process which led to his conclusions, that the reasons must be properly informative and must explain why the decision was taken. It was held that the reasons supplied by the Commissioner in the present matter satisfied these requirements.

ITC 1912 (2018) 80 SATC 417

Issue:
This case involved an interlocutory application in the Tax Court by the Commissioner for the South African Revenue Service to strike out a portion of the taxpayer's statement of grounds of appeal, filed in terms of Rule 32, on the grounds that the statement infringed the rule that an appellant is precluded from including in a statement of grounds of appeal a ground for the assessment that had not been objected to under rule 7.

Decision:
It was held that a taxpayer is entitled to raise a new ground in a Rule 32 statement, provided that it relates to an amount (or part thereof) in the assessment, that had been placed in dispute by the objection filed in terms of Rule 7. It was held that, in the present case, the new grounds included in the Rule 32 statement were permissible because the commonalities between the original and the new grounds outweighed the changes, and that to strike out the new grounds of appeal would be to elevate form over substance.

HIGH COURT

United Manganese of Kalahari (Pty) Ltd v CSARS 2018 (2) SA 275 (GP) (80 SATC 193)

Issue:
At issue in this case was an application for a declaratory order as to the proper method for calculating a particular royalty in terms of the Mineral and Petroleum Resources Royalty Act 28 of 2008, and whether the applicant was entitled to deduct from its gross sales the transport, insurance and handling costs incurred when transporting materials to customers.

Decision:
It was held that such expenditure was deductible, irrespective of whether such expenditure had been specifically considered in determining gross sales, and regardless of whether such costs were of a capital nature.

A Way to Explore v CSARS [2017] ZAGPPHC 541 ((2018) 80 SATC 211)

Issue:
This case involved an application for an order in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000 for the setting aside of certain value-added tax assessments raised by the Commissioner for the South African Revenue Service and for an order that the Commissioner pay a refund to the applicant.

Decision:
It was held that administrative action was not open to review in terms of the Act unless all internal remedies had been exhausted. It was held that, in this case, the applicant's objection to the assessments in issue was still pending and therefore could not be set aside on review at this juncture. However, it was held that it had been iniquitous for the Commissioner to have effected a set-off in the circumstances of this case, and such set-off would therefore be suspended pending the outcome of the objection.

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