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ENSafrica tax in brief

Below, please find issue 50 of ENSafrica's tax in brief, a snapshot of the latest tax developments in South Africa.

case law

- **High Court of South Africa (Gauteng Division, Pretoria) | *Absa Bank Limited and Another v CSARS* (21825/19)**
  - SARS officials issued a section 80J of the Income Tax Act, 1962 ("**ITA**") notice to each of the applicants.
  - Each of the applicants addressed a request to the Commissioner in terms of section 9 of the Tax Administration Act, 2011 (the "**TAA**"), requesting that the relevant 80J Notice be withdrawn on various grounds, which section 9 requests were refused by SARS.
  - The applicants launched the main application seeking to review and set aside this decision.
  - However, after the replying affidavits had been filed and while the main application was still pending, SARS delivered letters and notices of assessment to the applicants.
  - The applicants delivered a further supplementary affidavit dealing with the letters and notices of assessment. In the further supplementary affidavit, the applicants contended that the decision by SARS to issue the letters and notices of assessment fall to be reviewed and set aside in terms of the Promotion of Administrative Justice Act, 2000 ("**PAJA**"), alternatively the principle of legality.
  - Together with the further supplementary affidavit, the applicants delivered a Rule 28 Notice.
  - SARS objected to the Rule 28 Notice which necessitated the present application for leave to be amended.
  - The court considered:
    - whether it was appropriate to grant leave to the applicant to amend its notice of motion.
    - rule 28 of the Uniform Rules of Court, considered.
    - section 80J of the ITA, considered.
    - section 9 of the TAA, considered.
    - section 105 of the TAA, considered.
  - Find a copy of this judgment here.
- **High Court of South Africa (Gauteng Division, Pretoria) | *BP Southern Africa (Pty) Ltd v CSARS* (22772/2020)**
  - In Part A, the applicant sought interim relief in the form of an interdict, in essence prohibiting the respondent on executing on a debt management

certified statement obtained in terms of section 114(1)(*a*)(ii) of the Customs and Excise Act, 1964 ("**Customs Act**").
    - In Part B, the applicant sought to have the decision of the Commissioner to file the debt management certified statement to be reviewed and set aside in terms of PAJA.
    - The nub of the dispute between the applicant and the respondent in relation to the civil judgment was a consequential failure by the applicant to produce valid acquittals relating to some of the consignments stated in the letters of demand and the subject of the civil judgment.
    - The respondent demanded payment or returns of the amounts credited to the applicant which were not supported by proof that the export of fuel in fact occurred.
    - The applicant wanted to keep the amount of the export refund it received by credit, pending either the completion of its internal investigation to uncover the documents or mounting a court challenge to the letters of demand and the civil judgment.
    - The court considered, *inter alia*:
        - the requirements of an interim interdict.
        - whether the applicant will suffer any prejudice should the urgent application not be granted.
        - directives applicable to the court of urgent applications in the Gauteng Division, Pretoria.
        - rule 6(12) of the Uniform Rules of Court.
    - find a copy of this judgment here.
- **High Court of South Africa (Gauteng Division, Pretoria) | *Purveyors South Africa Mine Services (Pty) Ltd v CSARS* (61689/2019)**
    - Relief was sought by the applicant in the High Court, that the respondent's decision in terms of which it held that the applicant's voluntary disclosure application submitted in terms of the provisions of Part B to Chapter 16 of the TAA be reviewed and set aside.
    - The applicant imported an aircraft into South Africa in 2015 which it then used to transport goods and personnel to other countries in Africa. The applicant failed to pay import value-added tax ("**VAT**") to SARS in respect of the importation of the aircraft.
    - During the latter part of 2016, the applicant manifested reservations about its failure to have paid the import VAT and accordingly engaged with SARS to obtain a view on its liability for such tax. Following the engagements, the applicant was informally advised (ie, no notice of audit or criminal investigation) that the applicant was liable for the import VAT and more importantly, that penalties were applicable as a result of the failure to have paid the import VAT.
    - The applicant subsequently applied to SARS for voluntary disclosure relief in terms of section 226 of the TAA. SARS declined to grant relief on the basis that the applicant had not met the requirements of section 227 of the TAA.
    - The court considered, *inter alia*:
        - the requirements of section 226 of the TAA.
        - the requirements of section 227 of the TAA.
        - the meaning of the word "voluntary".

        - whether a disclosure is made voluntary if SARS already has knowledge thereof.
    - find a copy of this judgment here.
- **High Court of South Africa (Gauteng Division, Pretoria) | *Pearlstock (Pty) Ltd v CSARS* (83481/2018)**
    - The applicant sought to appeal, in terms of section 49(9)(*e*) of the Customs Act, a tariff determination/classification of certain PVC panels that it imported.
    - The respondent classified the panels as other plastics of PVC under tariff subheading 3916.20.90 attracting customs duty at a rate of 18%.
    - The applicant contended that the panels should be classified under tariff subheading 3921.12 of Part 1 of Schedule No.1 to the Customs Act (which covers plastics of cellular PVC), attracting customs duty at a rate of 10%.
    - The question for the court to determine was whether the PVC goods constitute cellular PVC products as contended by the applicant.
    - The court considered, *inter alia*:
        - sections 47(1) and 47(8)(*a*) of the Customs Act.
        - the definition of plastics in Chapter 39, Chapter Notes 1 of the Schedule.
        - the definition of "cellular plastics" in Chapter 39 of the Schedule.
        - the ordinary meaning of the word cellular within the context of Chapter headings 39.16 and 39.21 of the Schedule.
        - the explanatory note to tariff heading 39.20 and 39.21 of the Schedule.
        - the use of expert opinion in making the correct tariff determination in terms of the Customs Act.
    - Find a copy of this judgment here.
- **High Court of South Africa (Gauteng Division, Pretoria) | *Cart Blanche Marketing CC and Others v CSARS* (26244/2015)**
    - The reason for the dispute is the applicants' refusal to provide the Commissioner with any documentation to prove their compliance, after being notified by the respondent that they had been selected for an audit in terms of section 40 of the TAA.
    - The applicants brought an application for the court to review and set aside the decision of the respondent to select the applicants for an audit to allegedly verify their compliance with the ITA and the Value Added Tax Act, 1991 (the "**VAT Act**"), on the basis that it was unlawful.
    - The respondent contended that a decision to audit the applicant, in terms of section 40 of the TAA, does not constitute reviewable administrative action but even if a selection in terms of section 40 is reviewable, the decision in issue was lawful and should not be set aside.
    - The court considered, *inter alia*:
        - section 40 of the TAA.
        - whether the decision to select taxpayers for audits, in the context of the facts of this case, should be reviewed on the basis of the principle of legality.
    - Find a copy of this judgment here.

- **High Court of South Africa (Gauteng Division, Pretoria) | *WPD Fleetmas CC v CSARS and Another* (31339/20)**
    - Application in the Urgent Court for an order declaring that the first respondent's notice to appoint a third party in terms of the provisions of section 179 of the TAA be declared null and void as the applicant contended that only after the third party notice was issued, the first respondent issued and addressed a "final letter of demand" to the applicant and therefore failed to comply with section 179(5) of the TAA.
    - The applicant applied for an order that the first respondent must repay the amount that was paid over by the second respondent as a third party to the first respondent.
    - Furthermore, the applicant applied for an interim interdict, pending the applicant's launching of a review application against the first respondent, interdicting and restraining the first respondent from "initiating and/or continuing recovery proceedings" against the applicant. In this regard, the applicant had been engaging the first respondent with an offer in terms of section 200 of the TAA for a compromise. Notwithstanding an attempt to reach a compromise, the first respondent ultimately decided not to approve the application. It is for this reason, so it appears, that the applicant sought an interim interdict pending the applicant's launch of a review application against the first respondent.
    - The first respondent raised three points *in limine*:
        - the application is not urgent;
        - the application is premature as the internal processes of the first respondent have not been exhausted; and
        - that no written notice of at least one week of the applicant's intention to institute legal proceedings, was given to the first respondent.
    - According to the deponent on behalf of the first respondent, there was proper compliance with the provisions of section 179 of the TAA, as a "final demand dated 20 May 2020" was sent to the applicant by the first respondent on even date.
    - The court considered, *inter alia*:
        - section 11(4) of the TAA.
        - section 179 of the TAA.
        - section 200 of the TAA.
        - whether the applicant failed to comply with section 11(4) of the TAA.
        - whether the first respondent failed to comply with section 179(5) of the TAA, thus rendering the notice to appoint a third party in terms of the provisions of section 179 of the TAA unlawful, and therefore also null and void.
        - the appropriateness of granting an interim interdict.
    - Find a copy of this judgment here.
- **High Court of South Africa (Gauteng Division, Pretoria) | *Peresoft Software and Support (Pty) Ltd v Minister of Science and Innovation (NO) and Another* (11372/19)**
    - The applicant, a well-known and internationally recognised developer of specialised software relating to accounting and financial management

programmes, brought a review application in terms of which it sought to set aside the refusal by the Minister of Science and Innovation (the "**first respondent**") to approve a tax incentive for a research and development ("**R&D**") project of the applicant in terms of section 11D of the ITA.

- During 2016, the applicant began R&D work on a new software programme which was intended to be a completely new programme as it would allow users to operate the programme without necessarily using the Windows operating system. In this regard, the R&D conducted by the applicant involved the creation of a new programme which, when completed, would constitute a programme as contemplated in section 11D of the ITA and section 1 of the Copyright Act,1978 ("**Copyright Act**").
- During 2017 the applicant applied for the relevant tax incentive which application was declined by the first respondent. In its refusal of the application, the first respondent contended that the applicant failed to show that it was involved in the R&D of a computer programme that was geared to resolve technological uncertainty as contemplated in section 11D of the ITA.
- The applicant contended that the refusal of its application amounted to a reviewable administrative action under the PAJA on the grounds of procedural unfairness.
- The court considered, *inter alia*:
  - section 11D of the ITA.
  - section 6 of PAJA.
  - section 1 of the Copyright Act.
  - whether the first respondent incorrectly interpreted sections 11D(1) and 11D(1)(*b*)(iii) of the ITA in the reasons given for the refusal of the applicant's application in the various correspondence with the applicant.
  - whether the first respondent was permitted, as part of the review proceedings, to furnish new reasons for the refusal of the applicant's application not previously communicated to the applicant.
- Find a copy of this judgment here.

legislation and draft legislation

- The National Assembly passed the following bills, as amended by the Standing Committee on Finance, on 25 August 2020:
  - Disaster Management Tax Relief Bill [B11B—2020]; and
  - Disaster Management Tax Relief Administration Bill [B12B—2020].
- Find a copy of the Disaster Management Tax Relief Bill [B11B—2020] here and a copy of the Disaster Management Tax Relief Administration Bill [B12B—2020] here.
- Income Tax Act, 1962 | Updated Tables A and B of the Average Exchange Rates.
  - find a copy of the updated tables here.

advance tax rulings

- **Binding private ruling 351 | waiver of an intra group loan to, and subsequent liquidation distribution by a subsidiary**
    - Sections 10(1)(*k*), 47 and 64FA(1)(*b*) of the ITA.
    - Paragraphs 12A and 43A of the Eighth Schedule to the ITA.
    - Sections 1 and 8(1)(*a*)(v) of the Securities Transfer Tax Act, 2007.
    - This ruling determines the income tax, dividends tax and securities transfer tax consequences of the waiver of an intra group loan by a holding company to its subsidiary followed by the distribution *in specie* of the subsidiary's only asset to its holding company.
    - Find a copy of this ruling here.
- **Binding private ruling 352 | taxation of employees participating in an option programme**
    - Definition of "gross income" in terms of section 1(1) of the ITA.
    - Section 8C of the ITA.
    - Paragraph 58 of the Eighth Schedule to the ITA.
    - This ruling determines the tax consequences relating to the exercise of share options acquired by an employee under an incentive scheme.
    - Find a copy of this ruling here.
- **Binding private ruling 353 | linear adjustment of gross sales of unrefined mineral resources**
    - Section 6(2) of the Mineral and Petroleum Resources Royalty Act, 2008 ("**MPRRA**").
    - Section 6A of the MPRRA.
    - Schedule 2 to the MPRRA.
    - This ruling determines that a linear adjustment may be made to adjust gross sales of an unrefined mineral resource in the event that the mineral is supplied in a condition higher than the maximum condition specified in Schedule 2 to the MPRRA, read with section 6(2) of the MPRRA.
    - Find a copy of this ruling here.
- **Binding general ruling 55 | sale of dwellings by fixed property developers following a change in use section 18(1) or 18B(1) of the VAT Act.**
    - Section 18(1) of the VAT Act
    - Section 18B(1) of the VAT Act.
    - This ruling clarifies the VAT consequences of the sale of fixed property consisting of dwellings, by a developer, pursuant to such dwellings being deemed to have been supplied by the developer.
    - Find a copy of this ruling here.

SARS publications

- **SARS released the trade statistics for July 2020.**
    - find a copy of the SARS media release here.
- **SARS released an updated guide on booking an appointment at a SARS branch.**

    - Find a copy of the guide here.
- **Q&As for employers on COVID-19 tax relief have been updated to include the extension of the COVID-19 Tax Relief for PAYE. Updated items No: 1, 5, 10 and 11.**
    - Find a copy of the Q&As here.
- **SARS released an updated guide on managing VAT on imported services.**
    - Find a copy of the guide here.
- **SARS released a media release on its victory against non-compliance: *Cart Blanche* matter (see link to case above).**
    - The media release states that SARS warmly welcomes the court's decision of 31 August 2020, which ruled in its favour in the matter involving Cart Blanche.
    - The media release states that the important principle of the case was whether a decision to audit was an administrative action.
    - Find a copy of the media release here.
- **SARS released a media release on the importation of a second-hand vehicle.**
    - The media release states that SARS noted the judgment handed down by the Full Court of the High Court Division Free State, Bloemfontein, which dismissed SARS' appeal on 27 July 2020. This appeal was against the judgment and orders of the Bloemfontein High Court.
    - The media release states that SARS has opted to approach the Supreme Court of Appeal to note the leave to appeal this judgement.
    - The media release states that SARS wishes to remedy any misconception of the legal requirements when a second hand vehicle is imported into South Africa.
    - Find a copy of the media release here.
- **SARS released a letter to traders.**
    - The letter covers the escalation procedures for customs matters.
    - Find a copy of the letter here.
- **SARS released the *Guide to the Taxation of Special Trusts* (issue 3)**
    - Find a copy of the guide here.

customs and excise

- **Customs and Excise Act, 1964 | draft schedule amendment**
    - Part 1 of Schedule No. 1 to implement the 2021 Economic Partnership Agreement (EPA) phase-downs with effect from 1 January 2021.
    - Due date for public comment: 1 October 2020.
    - Find a copy of the notice here.
    - Find a copy of the explanatory memorandum here.
- **Customs weekly list of unentered goods**
    - Find a copy of the list here.
- **Customs and Excise Act, 1964 | draft rule amendments**
    - Draft rules amendments under sections 59A, 60 and 120 – Rules 59A.01A and 60.10(1) – calendar day grace period and implementation date.
    - The draft amendment to rules 59A and 60:

        - clarifies the grace period allowed for compliance with new registration or licensing requirements when updating information, and substitutes the period of "60 days" with "60 calendar days"; and
        - corrects references in the rules to "20 April 2020" to correspond with the implementation date of 24 April 2020, as indicated in Notice R.473 of *Government Gazette* 43245.
    - Find a copy of the draft notice here.
    - Due date for public comment: 9 September 2020. Please note: Public comment is only invited in respect of the proposed amendment relating to the correction of references in the rules to “20 April 2020" to correspond with the implementation date of 24 April 2020.
- **Customs and Excise Act, 1964 | tariff amendment notice R955 in *Government Gazette* 43683**
    - Amendment to Part 1 of Schedule No. 1, by the substitution of tariff subheadings 1001.91 and 1001.99 as well as 1101.00.10, 1101.00.20, 1101.00.30 and 1101.00.90, to increase the rate of customs duty on wheat and wheaten flour from 51.66c/kg and 77.49c/kg to 83,21c/kg and 124,81c/kg respectively, in terms of the existing variable tariff formula – Minute 16/2019.
    - Implementation date: 4 September 2020.
    - Find a copy of the notice here.
- **Updated Customs branch contact details**
    - Find a link to the updated branch list here.
- **Customs weekly list of unentered goods**
    - Find a copy of the list here.
- **Customs and Excise Act, 1964 | draft rule amendment under section 120**
    - The draft amendments extend the current hours of attendance and hours of business at Kopfontein, Oshoek and Lebombo commercial ports to 24 hours daily.
    - Find a copy of the draft ruling here.
- **Customs and Excise Act, 1964 | draft tariffs amendments to Part 1 of Schedule No. 1**
    - Draft tariff amendments to Part 1 of Schedule No. 1 are technical in nature and will not have an impact on the duty structure.
    - Due for public comment by **8 October 2020**.
    - Find a copy of the draft tariff amendment here.
    - Find a copy of the explanatory memorandum here.

international

- **OECD | Tax Policy Reforms 2020: OECD and Selected Partner Economies**

- The report describes the latest tax reforms across OECD countries, as well as in Argentina, China, Indonesia and South Africa. The report identifies major tax policy trends adopted before the COVID-19 crisis and takes stock of the tax and broader fiscal measures introduced by countries in response to the pandemic, from its outbreak to June 2020.
- Find a copy of the report here.

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