

ENSafrica tax in brief

Below, please find issue 75 of ENSafrica's tax in brief, a snapshot of the latest tax developments in South Africa.

case law

- **The Tax Court of South Africa, Cape Town | *Commissioner for the South African Revenue Service v FP (Pty) Ltd* | Case NOs. 25330, 25331 and 25256 (1 October 2021)**
 - The Commissioner for the South African Revenue Service (“SARS” or the “Applicant”) applied to the Tax Court in terms of rule 30 of the Uniform Rules of Court for an order setting aside, as an irregular step, a legality review brought by FP (Pty) Ltd (“Respondent” or the “Taxpayer”) in appeal proceedings already pending in the Tax Court.
 - The Applicant contended that the Taxpayer’s legality review was both procedurally defective and irregular, since it cannot be brought in terms of the Tax Administration Act, 28 of 2011 (“TAA”) and the rules promulgated thereunder.
 - The Respondent opposed the application on the grounds that: (1) the Applicant improperly relied on uniform rule 30, which is directed at procedural irregularities, and should instead have raised a point of law in terms of uniform rule 6(d)(iii); (2) the Tax Court is not precluded from entertaining a legality review by the TAA and its rules; and (3) there is nothing improper or irregular for a review to be launched on motion in an appeal pending before the Tax Court.
 - The Tax Court had to determine whether:
 - the Applicant correctly invoked uniform rule 30;
 - the Applicant had demonstrated prejudice; and
 - the Tax Court should exercise its discretion to set aside the irregular step.
 - The Tax Court considered, *inter alia*:
 - uniform rule 30;
 - rule 42 of the rules promulgated under section 103 of the TAA;
 - the interpretation and application of uniform rule 30 in SA *Metropolitan Lewensversekeringsmaatskappy Bpk v Louw* NO 1981 (4) SA 329 (O) at 333G-H;
 - section 117(1) of the TAA;
 - the interpretation of section 105 of the TAA in *Absa Bank Ltd and Another v CSARS*.
 - The Tax Court held that the Taxpayer’s review application to the Tax Court, when there was already an appeal pending before it, constituted an irregular step. In this regard, the Tax Court noted that even if one assumes that the

Taxpayer had no procedural control over the referral of the appeal to the Tax Court, it remained open to it (and still does) to approach the High Court for leave to institute a review application in that court, while simultaneously seeking a stay of the appeal proceedings pending the determination of the review.

- The Tax Court further held, although not set out in specific terms in the relevant papers, that the prejudice to the Applicant lies in the Taxpayer potentially being permitted by the Tax Court to run parallel litigation in the Tax Court where it is not legally entitled to do so. The prejudice was thus self-evident. The same considerations militate persuasively against allowing the irregular step to stand.
 - The Tax Court set aside the Respondent's review application.
 - Find a copy of the judgment [here](#).
- ***The High Court of South Africa, Pretoria I Arena Holdings(Pty) Ltd t/a Financial Mail and Others V CSARS and Others (88359/2019) [2021] ZAGPPHC (16 November 2021)***
 - The applicant, Financial Mail, sought access to the tax records of former President, Mr Zuma, on the basis that evidence in the public domain and not denied or controverted by the taxpayer in question indicated that he was not tax compliant during his presidency.
 - Taxpayer confidentiality is primarily provided for in section 35 of the Promotion of Access to Information Act 2 of 2000 ("PAIA") and section 69 of the TAA
 - The Financial Mail contended that their rights of access to information guaranteed in section 32 of the Constitution and in PAIA, as well as the obligation on the media to impart information which is in the public interest, as guaranteed in section 16 of the Constitution, should not be limited by the blanket ban on disclosure of taxpayer information, which in turn may be protected by a taxpayer's privacy rights in section 14 of the Constitution.
 - The court considered sections 25(2); 45 to 66; 69(1); 234(d); 200 to 205; and 227 to 231 of the TAA, as well as sections 11; 34(1); 35(1); 46; 74; 78(2)(a) of PAIA, and sections 14; 16(1); 32 and 36 of the Constitution.
 - It was held that the blanket prohibitions against disclosure of a taxpayer's information in section 35 of PAIA and section 69 of the TAA limit the rights access to information provided for in section 32 of the Constitution and that such limitation is not justifiable in terms of section 36 of the Constitution, and moreover that a "reading-in" of the "public interest override" provisions otherwise contained in section 46 of PAIA is both justifiable and competent.
 - The court declared sections 36 and 45 of PAIA, and sections 67 and 69 of the TAA to be unconstitutional and invalid to the extent that they preclude access to tax records by a person other than the taxpayer. The order was consequently referred to the Constitutional Court to be confirmed.
 - The following interim orders were granted regarding the "reading-in" and disclosure of records:
 - Section 46 of PAIA shall be read as if the phrase "35(1)" appeared immediately after the phrase "section 34(1)" contained therein.

- Section 69(2) of the TAA shall be read as if it contained an additional sub-section (bA) after existing sub-section (b), which provides:
- “(bA) *where access has been granted for the disclosure of the information in terms of the Promotion of Access to Information Act*”.
- Section 67(4) of the TAA shall be read as if the phrase “*unless the information has been received in terms of the Promotion of Access to Information Act*” appeared immediately before the full stop.
- Find a copy of the judgment [here](#).

legislation and draft legislation

- TAA | Notice 1488 published in Government Gazette. 45437 of 8 November 2021
 - The notice relates to the intention of the Minister of Finance to introduce the Tax Administration Laws Amendment Bill, 2021.
 - Find a copy [here](#).

advance tax rulings

- Binding Private Ruling (“BPR”) 370 | Registration of shares in the name of beneficial holder
 - This ruling determines the donations tax, securities transfer tax and transfer duty consequences in respect to a proposed transaction involving the registration of shares in the name of the resident applicant who is and always was the beneficial owner and holder of the shares in question.
 - Find the ruling [here](#).
- BPR 369 | Deductibility of interest incurred pursuant to liquidation of company
 - This ruling determines that interest that arose, out of the investment proceeds of assets sold in the course of a liquidation and is paid to trade creditors in terms of sections 95 and 103 of the Insolvency Act 24 of 1936, is not deductible in the determination of taxable income
 - Find the ruling [here](#).
- BPR 368 | Payments made pursuant to an agreement relating to a permission to occupy
 - This ruling determines the income tax and donations tax consequences resulting from payments to be made pursuant to an agreement relating to a ‘permission to occupy’.
 - Find the ruling [here](#).
- Binding General Ruling (“BGR”) 58 | Purchase of different types of annuities at retirement
 - This purpose of this BGR is to confirm that, for income tax purposes, any annuity purchased or provided by any retirement fund must be compulsory, non-commutable, payable for and based on the lifetime of the retiring member or the value of the member’s retirement interest, if applicable. It is further to confirm that the annuity may not be transferred, assigned, reduced, hypothecated or attached by creditors as contemplated by the provisions of sections 37A and 37B of the Pension Funds Act, 24 of 1956.

- Find the ruling [here](#).

SARS publications

- SARS has published an update to its letter regarding the enhancements to the Tax Directive process in respect to the recently introduced legislation which makes provision for SARS to determine the effective rate of tax in respect of the combined employment and/or pension sources of income of a taxpayer.
 - Find the letter [here](#).
- SARS has published a media release welcoming the commitment made by the Minister of Finance, to fiscal sustainability, enabling long-term growth by narrowing the budget deficit and stabilising debt, when he presented the Medium Term Budget Policy Statement (MTBPS) in Parliament on 11 November 2021.
 - Find the media release [here](#).
- SARS has published Interpretation Note 70 (Issue 2) on supplies made for no consideration on 10 November 2021.
 - Find the interpretation note [here](#).
- SARS has published a Tax Guide for Small Businesses on 10 November 2021.
 - Find a copy of the guide [here](#).
- SARS has published a letter to stakeholders regarding the New Penalty Rule and Auto-Assessment process which will be in effect from 1 December 2021.
 - Find a copy of the letter [here](#).
- SARS has released an upgraded e@syFile™ Employer version 7.2.0. The change is an adjustment to the EMP501 pre-population process to allow special characters, including the single apostrophe (') in the employer name field.
 - Find a copy of the full release notes [here](#).
- SARS has published Interpretation Note 118 (Issue 2) on VAT Consequences of Points-Based Loyalty Programmes on 04 November 2021
 - Find the interpretation note [here](#).
- SARS has published the VAT Rulings Process Reference Guide (Issue 3)
 - Find the guide [here](#).
- SARS has published a Draft Interpretation Note which provides guidance on the interpretation and application of section 22B and paragraph 43A relating to the income tax treatment of extraordinary dividends on certain disposals and deemed disposals of shares by a company to prevent so-called “dividend stripping”.
 - The due date for public comment is 14 January 2022.
 - Find the draft interpretation note [here](#).
- SARS has published a Draft Interpretation Note which provides guidance on the meaning of “employee” for purposes of the Employment Tax Incentive Act.
 - The due date for public comment is 3 December 2021.
 - Find the draft interpretation note [here](#).
- SARS has published the updated Guide on the Determination of Medical Tax Credits (Issue 13) to incorporate the Amended List of Qualifying Physical Impairment or Disability Expenditure – Effective from 1 March 2020.
 - Find a copy of the guide [here](#).
- SARS has published the External Guide: How to submit a dispute via eFiling.

- The guide has been updated with the extension of Covid-19 PAYE and ETI information.
 - Find a copy [here](#).
- SARS has released trade statistics for September 2021:
 - recording a preliminary trade balance surplus of R22.24 billion attributable to exports of R157.02 billion and imports of R134.78 billion;
 - exports decreased by R1.57 billion (1.0%) between August and September 2021; and
 - imports increased by R18.47 billion (15.9%) over the same period.
 - A copy of the full media release can be found [here](#).
 - Or visit the Trade Statistics webpage [here](#).
- SARS has upgraded e@syFile Employer version 7.1.9. The following changes have been implemented:
 - warnings when duplicate certificate numbers are used for different employees;
 - updated EMP501 form to include and display the reason provided for over or understatement; and
 - adjustment to calculations on the EMP501 declaration page to include cents in amount fields.
 - Find a copy of the full Release Notes [here](#).
- SARS published its annual report for 2020 – 2021
 - Find a copy of the Report [here](#).
- SARS published a warning to taxpayers in respect of a new phishing scam involving possible refunds
 - The link to the scam warning can be found [here](#).
- SARS published an update regarding the enhancements to the Tax Directive process, including an updated interface specification version (6.203).
 - Find a copy of the latest interface specification version [here](#).

exchange control

- no new exchange control news noted.

customs and excise

- SARS has published a Customs and Excise guide entitled “*Goods for Display or Use at Exhibitions, Fairs, Meetings or Similar Events*”.
 - Find a copy of the guide [here](#).
- Customs and Excise Act, 91 of 1964 (“**Customs Act, 1964**”) | Draft Amendment to Part 1 of Schedule No. 1 regarding super fine maize meal
 - The due date for public comment is 8 December 2021.
 - Comment to be recorded in the Customs and Excise Comment Sheet [here](#).
 - Find a copy of the draft amendment [here](#).
- Customs and Excise Act, 91 | Notice R1481 published in Government Gazette No.45427 of 5 November 2021
 - Amendment to Part 1 of Schedule No. 1, by the insertion and substitution of various tariff subheadings under tariff heading 73.04, in order to increase the

rate of customs duty on certain tube, pipes and hollow profiles from free to 15% and 10% to 15%, respectively – ITAC Report 643

- Find a copy of the Notice [here](#).
- Customs weekly list of unentered goods
 - Find a copy of the list [here](#).
- The SARS-Customs, external policy document ([Registration Licensing and Designation](#)), has been updated.
 - Find a copy of the list [here](#).
- SARS has published an update on the African Continental Free Trade (“AfCFTA”)
- Preferential trade under the AfCFTA is not yet possible as the tariff schedules required are still being negotiated.
- Once an agreement is reached on the tariff schedules, they will be appended to Annexure 1 to the AfCFTA for adoption by the AU Submit.
- Find the letter setting out the update and state of play of the AfCFTA SARS published an updated Message Implementation Guideline, CUSDEC – Customs Declaration (Version 29 variant 3)
- Find a copy of the guide [here](#).
- Find more information on Electronic Data Interchange [here](#).

international

- On 04 November 2021, the Organisation for Economic Co-Operation and Development (“OECD”) announced that Mauritania joins the Inclusive Framework on BEPS and participates in the agreement to address the tax challenges arising from the digitalisation of the economy.
 - Find a link to the OECD media release [here](#).
- On 12 November 2021, published Revenue Statistics in Africa: Key findings for South Africa
 - The revenue statistics shows the tax-to-GDP ratio, the structure of tax revenues and non- tax revenues.
 - Find a link to the OECD publication [here](#).

other

- National Treasury invites taxpayers, tax practitioners and members of the public to submit technical tax proposals to be considered for possible inclusion in Annexure C of the 2022 Budget Review by Friday, 3 December 2021.
- More substantive tax policy proposals and rate changes are contained in Chapter 4 of the Budget Review, while the more technical tax proposals are generally contained in Annexure C of the Budget Review.
- Find a link to the publication [here](#).

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