

# ENSafrica tax in brief

Below, please find issue 61 of ENSafrica's tax in brief, a snapshot of the latest tax developments in South Africa.

## case law

- **The Supreme Court of Appeal ("SCA") | *Commissioner: SARS ("CSARS") v Levi Strauss SA (Pty) Ltd***
  - The Commissioner for the South African Revenue Service ("**SARS**") appealed the decision of the Gauteng Division of the High Court, disallowing its origin and transaction value determinations for Levi Strauss South Africa (Pty) Ltd ("**Levi SA**").
  - During the period from 2010 to 2014, Levi SA imported goods from members of the South African Development Community ("**SADC**"). The arrangements with the suppliers were made by Levi Strauss Asia Pacific Division Pte Ltd ("**Levi APD**"). The goods were purchased directly from the producers in the SADC, but from 2011 Levi SA purchased the goods from Levi Strauss Global Trading Company Limited ("**Levi GTC**"), a company incorporated in Hong Kong. In turn, Levi GTC would purchase the goods from the same contracted suppliers in SADC countries as before, and sell them to Levi SA at a mark-up.
  - The SCA considered, *inter alia*:
    - Annex I of the Protocol on Trade in the SADC Region;
    - section 67(1)(a)(i) of the Customs and Excise Act, 1964;
    - section 65(9) of the Customs and Excise Act, 1964; and
    - section 74A of the Customs and Excise Act, 1964.
  - The SCA:
    - upheld the High Court's determination that SARS' contention that certificates of origin presented by Levi SA in support of its entry of goods from SADC suppliers were invalid was incorrect. This was on the basis that the relevant requirement (ie, "consigned directly from a Member State to a consignee in another Member State") refers to the physical transport of the goods from one member state to another and not to the underlying commercial transactions giving rise to that;
    - overturned the High Court's findings to the contrary and held that Levi APD was not acting as a buying agent on behalf of Levi SA;
    - overturned the High Court's findings to the contrary and held that the export of goods to South Africa is directly linked with the payment of a royalty.
  - Find a copy of the judgment [here](#).

- **The High Court of South Africa (Gauteng Division, Pretoria) | *Samsung Electronics SA (Pty) Ltd v CSARS***
  - Samsung Electronics SA (Pty) Ltd (the “**Applicant**”) sought an order in terms of section 47(9)(e) of the Customs and Excise Act, 1964, setting aside the decision of SARS made on 11 April 2018 to withdraw a tariff determination under tariff heading 8517.12.10 and its replacement by tariff determination under tariff heading 8517.62.90.
  - On 3 July 2017, the Applicant applied for a tariff determination for its imported multi-functional devices, the Samsung Galaxy 7 (“**the product**”), under tariff heading 8517.62.90 or tariff heading 8517.69.
  - The Applicant’s attorneys having previously received a tariff determination under tariff heading 8517.62.90 for an Apple iPhone 6s on behalf of another client, submitted applications for refunds of the customs duty on previously imported goods. SARS rejected these refund applications.
  - On 27 September 2017, the Applicant received a tariff determination from SARS determining that the products were “...smart devices classifiable under tariff sub-heading 8517.62.90”.
  - On 14 April 2018, SARS withdrew the tariff determination made on 27 September 2017, with retrospective effect from 4 August 2017, and made a new determination in terms of which the product was classified under tariff heading 8517.12.10.
  - The court considered, *inter alia*:
    - whether the product should be classified under tariff heading 8517.62.90 as argued for by the Applicant, or tariff heading 8517.12.10 as argued for by SARS;
    - tariff heading 8517.62.90 (Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus: Other);
    - tariff heading 8517.12.10 (Telephones for cellular networks or for other wireless networks: Designed for use when carried in the hand or on the person); and
    - the principal function of the product.
  - The court held that it is not convinced that the product is a machine other than a smartphone and that the Applicant premised its proposition that the product is not a telephone for cellular networks on the post-usage of the device. The application was dismissed and SARS’ determination was upheld.
  - Find a copy of the judgment [here](#).
- **SCA | *Massmart Holdings Limited v CSARS***
  - Massmart Holdings Limited (“**Massmart**”) appealed the decision of the Tax Court to dismiss Massmart’s appeal against SARS’ decision to disallow Massmart’s claims for capital losses for the period 2007-2013.
  - In the year 2000, Massmart resolved to adopt and implement a share incentive scheme, which was to be conducted through the Massmart Holdings Limited Employee Share Trust (the “**Trust**”).

- During the period 2007-2013, Massmart claimed capital losses amounting to ZAR954-million. SARS disallowed these claims, and Massmart appealed this decision to the Tax Court.
- Massmart initially claimed the amounts as a capital loss on the basis that it was a vested beneficiary of the Trust. Massmart then amended its argument to say that Massmart instructed the Trust to grant call options to employees, and Massmart acquired a right against the Trust to require the Trust to grant the options to the offerees, and that the loss was suffered in respect of its right against the Trust.
- The Tax Court had to consider whether during the 2007-2013 years of assessment, Massmart suffered capital losses for capital gains tax (“CGT”) purposes, by virtue of its dealings with and in relation to the Trust. The Tax Court dismissed Massmart’s appeal and confirmed SARS’ assessments.
- In the SCA, Massmart argued that when it issued instructions to the Trust to offer specific share options to specific employees at specified prices (the strike prices), the appellant acquired a jus in personam ad faciendum, ie, a right to claim performance, against the trustees, requiring them to offer the share options as aforesaid. The right was an “asset” for CGT purposes.
- The court considered, *inter alia*:
  - paragraph 4 of Eighth Schedule to the Income Tax Act, 1962 (“ITA”); and
  - the definition of an “asset” under paragraph 1 of the Eighth Schedule to the ITA;
- The court held that Massmart purported to account for the Trust’s losses in its books, despite the fact that at the outset they had received legal advice noting that they could not, by arrangement between them and the Trust, change the incidence of capital gains or losses. The court, therefore, dismissed Massmart’s appeal.
- Find a copy of the judgment [here](#).

## advance tax rulings

- **Binding general ruling (VAT) 56 | Application for a decision under section 72**
  - This ruling prescribes the requirements and conditions relating to an application for a decision under section 72 of the Value-Added Tax Act ,1991, pursuant to section 72(2), read with section 90 of the Tax Administration Act, 2011 (“TAA”).
  - Find a copy of this ruling [here](#).

## SARS publications

- **SARS published the VAT Section 72 Decisions Process Reference Guide**
  - The guide provides information and guidelines on VAT decisions under section 72 of the VAT Act, read with Chapter 7 of the TAA, including guidance

---

on the application process and SARS' view on the interpretation of certain requirements.

- Find a copy of the guide [here](#).
- **SARS has released a further media statement calling on employers to comply with their legal obligations by submitting accurate information during the annual filing season for employers from 1 April to 31 May 2021**
  - Employers are required to submit their Employer Reconciliation Declaration (EMP501) to SARS by 31 May, as well as outstanding monthly declarations (EMP201) and annual reconciliations (EMP501).
  - A copy of the media statement can be found [here](#).
- **SARS published the Transfer Duty Guide (Issue 5)**
  - The guide can be found [here](#).
- **SARS published Interpretation Note 14 (Issue 5) | Allowances, advances and reimbursements**
  - The Interpretation Note 14 (Issue 5) can be found [here](#).
- **SARS published the trade statistics for February 2021**
  - The trade statistics can be found [here](#).
- **TAA | Notice 299 published in *Government Gazette* No.44383 of 1 April 2021**
  - The notice relates to application and cost recovery fees for binding private rulings and binding class rulings under section 81 of the TAA and section 72 of the VAT Act.
  - The notice can be found [here](#).
- **VAT Act | Notice 300 published in *Government Gazette* No.44383 of 1 April 2021**
  - The notice relates to prescribing a list of transactions or matters in respect of which the Commissioner may decline to make a decision in terms of section 72 of the VAT Act.
  - The notice can be found [here](#).

---

## customs and excise

- **Customs and Excise Act, 1964 | tariff amendment notice R.329 published in *Government Gazette* No.44428 of 9 April 2021**
    - Amendments to Part 1 of Schedule No. 1, by the amendment of various tariff subheadings under Chapter 49 as well as the insertion of Additional Note 6, in order to create separate 8-digit tariff subheadings for banknotes, postage stamps and revenue stamps.
    - The notice can be found [here](#).
  - **Customs and Excise Act, 1964 | notice R.304 published in *Government Gazette* No.44384 of 1 April 2021**
    - The notice relates to the imposition of a provisional payment in relation to anti-dumping duty in response to alleged dumping of pasta originating in or imported from Egypt, Latvia, Lithuania and Turkey classifiable in tariff heading 1901.11 and 1901.12 – ITAC Report No. 655.
    - The notice can be found [here](#).
-

- **Customs and Excise Act, 1964 | rule amendment notice R.305 published in *Government Gazette No.44384 of 1 April 2021***
  - SARS published a promulgation of rules to section 58A of the Customs and Excise Act, 1964.
  - The notice relates to the implementation anti-forestalling measures in respect of anticipated increases in excise duties – DAR208.
  - The rules can be found [here](#).
- **Customs and Excise Act, 1964 | tariff amendment notice R. 308 published in *Government Gazette No.44410 of 1 April 2021***
  - The notice relates to the amendment to Part 3F of Schedule No. 1, by an increase of 5.2 percent in the rate of environmental levy on carbon dioxide equivalent from ZAR127 to ZAR134 per tonne, to give effect to the Budget proposals announced by the Minister of Finance on 24 February 2021.
  - The notice can be found [here](#).
- **Customs and Excise Act, 1964 | tariff amendment notice R.310 published in *Government Gazette No.44410 of 1 April 2021***
  - The notice relates to the amendment to Part 5B of Schedule No. 1, by an increase of 11c/li in the RAF levy from 207c/li to 218c/li on both petrol and diesel, to give effect to the budget proposals announced by the Minister of Finance on 24 February 2021.
  - The notice can be found [here](#).
- **Customs and Excise Act, 1964 | tariff amendment notice R.311 published in *Government Gazette No.44410 of 1 April 2021***
  - The notice relates to the amendment to Part 5A of Schedule No. 1, by an increase of 15c/li in the rate of the general fuel levy from 370c/li to 385c/li and 355c/li to 370c/li on petrol and diesel respectively, the substitution to Note 8 as well the increase of 1c in the carbon fuel levy from 7c/li to 8c/li for petrol and from 8c/li to 9c/li for diesel, respectively, to give effect to the budget proposals announced by the Minister of Finance on 24 February 2021.
  - The notice can be found [here](#).
- **Customs and Excise Act, 1964 | tariff amendment notice R.312 published in *Government Gazette No.44410 of 1 April 2021***
  - The notice relates to the amendment to Part 3 of Schedule No. 6, as a consequence of the increase in the fuel and RAF levy as announced by the Minister of Finance in his budget speech of 24 February 2021; the diesel refund provisions are adjusted accordingly.
  - The notice can be found [here](#).

## International

- **The Organisation for Economic Co-Operation and Development (“OECD”) has published an updated database on country tax measures in response to COVID-19**
  - Find a copy [here](#).
- **The OECD released a notice on data from Effective Carbon Rates for 2021**

- Carbon pricing effectively encourages the shift of production and consumption choices towards low and zero carbon options that is required to limit climate change.
- The Effective Carbon Tax Rates can be found [here](#).
- **The OECD released a notice on Greece and Hungary depositing their instrument of ratification for the Multilateral Base Erosion and Profit Shifting Convention (“MLI”)**
  - With 95 jurisdictions currently covered by the MLI, the ratifications by Greece and Hungary bring the number of jurisdictions that have ratified, accepted or approved the MLI to 65.
  - The notice can be found [here](#).
- **The OECD released a statement noting that twelve no or only nominal tax jurisdictions began their first tax information exchanges on 31 March 2021 under the Forum on Harmful Tax Practice’s (FHTP) global standard on substantial activities**
  - The standard ensures that mobile business income can no longer be parked in a low tax jurisdiction without the core business functions being carried out from that jurisdiction and that the countries where the parent entities and beneficial owners are tax resident get access through regular exchanges of information.
  - More information can be found [here](#).
- **The OECD released new peer review results on the prevention of tax treaty shopping under the BEPS Action 6 minimum standard**
  - The third peer review report on the implementation of the Action 6 minimum standard on treaty shopping reveals that a large majority of members of the OECD/G20 Inclusive Framework on BEPS (Inclusive Framework) are translating their commitment on treaty shopping into actions and are modifying their treaty network.
  - As one of the four minimum standards, BEPS Action 6 identified treaty abuse, and in particular treaty shopping, as one of the principal sources of BEPS concerns.
  - More information can be found [here](#).
  - The policy brief discusses how the COVID-19 crisis is accelerating an expansion of e-commerce towards new firms, customers and types of products, likely involving a long-term shift of e-commerce transactions from luxury goods and services to everyday necessities. It also highlights how policymakers can leverage the potential of digital transformation in retail and related areas to support business adaptation and to enhance social distancing while ensuring that no one is left behind.
  - Find a copy of the policy brief [here](#).

This email contains confidential information. It may also be legally privileged. Interception of this email is prohibited. The information contained in this email is only for the use of the intended recipient. If you are not the intended recipient, any disclosure, copying and/or

distribution of the content of this email, or the taking of any action in reliance thereon, or pursuant thereto, is strictly prohibited. Should you have received this email in error, please notify us immediately by return email. ENSafrica (ENS and its affiliates) shall not be liable if any variation is effected to any document or correspondence emailed unless that variation has been approved in writing by the attorney dealing with the matter.

**ENS africa | Africa's largest law firm**

[info@ENSafrica.com](mailto:info@ENSafrica.com) | [ENSafrica.com](http://ENSafrica.com)

[privacy statement](#) | [unsubscribe](#)

