

# ENS tax in brief

Below, please find issue 114 of ENS' tax in brief, a snapshot of the latest tax developments in South Africa.

## case law

- *Ken CC v CSARS VAT2218 (VAT) [2023] ZATC CPT*
  - This case concerns the taxpayer's appeal to the Tax Court against additional VAT assessments raised by the Commissioner for the South African Revenue Services ("**SARS**") concerning the supply of services to foreign tour operators ("**FTOs**") incorporated outside of South Africa.
  - The taxpayer, being a registered VAT vendor, argued that it provides a single supply of tourism package assembly services to its FTO customers outside South Africa and accordingly the services were zero-rated under section 11(2)(l) of the Value Added Tax Act, 1991 ("**VAT Act**"). In regard to the local services (such as accommodation, guides, greeting services) contracted for by the taxpayer on behalf of its FTO customers as part of its package assembly function, the taxpayer contended it acted as agent on behalf of the FTOs and did not itself supply the services (which would be subject to the standard rate) to the FTO as principal.
- The appeal was upheld, and the additional VAT assessments set aside.
- Find a copy of the judgment [here](#).
- *JA Walter v CSARS (A2023-008433)*
  - This matter concerns an appeal against a judgment by the Tax Court. The main issue was whether a payment of R60 million received by the taxpayer as consideration for, and pursuant to, a restraint of trade ("**RoT**") agreement should be classified as income or capital received.
  - Both the court a quo and appellate court held that the payment under the RoT fell within the definition of "gross income" under section 1(cB)(ii) of the Income Tax Act, 1962 ("**ITA**"), as a sufficient causal link existed between the RoT payment and the taxpayer's past employment, thus classifying the payment as income, not capital.
  - The appellate court however remitted the understatement penalty imposed by the court a quo, finding that the taxpayer placed reliance on a document from SARS which purported to be a tax directive classifying the amount as a capital gain, and was acting bona fide in declaring the amount on the basis of the directive.
- The court also addressed procedural matters, reinstating the appeal, altering the assessments to exclude the penalty, and ordering each party to bear its own costs.

- Find a copy of the judgment [here](#).
- *Enviroserv Waste Management (Pty) Ltd v CSARS (154/2022) [2023] ZASCA 180*
  - This appeal to the Supreme Court of Appeal (“SCA”) concerned:
    - the interpretation of section 12C(1)(a) of the ITA and whether cells constructed by the appellant on its landfill sites constitute a plant used directly in a process of manufacture or a process similar to manufacture;
    - whether the appellant was entitled to claim a depreciation allowance from SARS in respect of the cells; and
    - whether the understatement penalty levied by SARS from the appellant’s failure to disclose interest due to it from its Ugandan subsidiary was properly imposed.
- The appeal was upheld on all three points above.
- Find a copy of the judgment [here](#).
- *Assmang Proprietary Limited v CSARS and Others (91960/2015) [2023] ZAGPPHC 2036*
  - This is an application for judicial appeal concerning a review against the decision taken by SARS to refuse a rebate on the basis that fuel consumed by the applicant’s contractors had not been used in terms of item 670.04 as required in section 75(1A) of the Customs and Excise Act, 1964 (“Customs and Excise Act”).
  - The issue for decision was whether the mining operations in relation to which the diesel refunds were claimed by the applicant had been carried out in accordance with item 670.04 in Part 3 of Schedule 6 to the Customs and Excise Act where the diesel was purchased and used in accordance with Note 6.
  - The High Court held that the purchases of diesel on which the refunds were claimed were not "eligible purchases" for the purposes of Note 6 as the diesel was used in mining activities carried on by the applicant on a wet basis and the applicant failed to keep proper records with substantial and sufficient particularity in terms of Note 6 (q). Consequently, the purchases of diesel did not qualify for refund under the provisions of section 75(1A) and Schedule 6 of Part 3 as claimed by the applicant and the determination by SARS to disallow the refunds was upheld.
- Find a copy of the judgment [here](#).
- *Karino Homeland Distribution (Pty) Ltd v CSARS (21279/2023) [2023] ZAWCHC 329*
  - The applicant sought a partial upliftment of a lien imposed over its goods by SARS in terms of section 114 of the Customs and Excise Act as security for an admitted debt.
  - The applicant contended that the value of the goods attached in terms of the statutory lien far exceeded the debt it owed SARS in that the lien cannot operate concerning subsequent debts that may have been incurred in favour of SARS. The applicant contended that SARS had abused the provisions of section 114 of the Customs and Excise Act.
  - Subject to the determination of a number of points in limine, the High Court held that there is no requirement for a lien to be exercised over only so much

of the value of the property as is equal to the indebtedness. Furthermore, nowhere does section 114 of the Customs and Excise Act provide an amount concerning the lien. Importantly, it is goods that are subject to a lien and not the value of the goods.

- The application was dismissed.
- Find a copy of the judgment [here](#).
  
- *FITA and Others v CSARS and Another* (115176-2023) and *Bozza and Others v CSARS and Others* (115375-2023) [2023] ZAGPPHC
  - Two urgent applications were consolidated for hearing, launched by several tobacco product manufacturers.
  - In both applications, the applicants sought urgent relief against SARS preventing it from implementing Rule 19.09 promulgated under the Customs and Excise Act, while they challenge the legality thereof.
  - Rule 19.09 is published under section 19, 60 and 120 of the Customs and Excise Act and requires registered licensees who manufacture or store tobacco products, such as the applicants, to allow SARS to install CCTV monitoring equipment at licensed customs and excise warehouses operated by tobacco product manufacturers.
  - The High Court held that given the substantial delay in launching both the applications and the absence of an adequate explanation, the applicants had failed to meet the peremptory requirements necessary for the grant of urgent relief.
- Find a copy of the judgment [here](#).
  
- *Unitrans Holdings v CSARS* (A3094/2022) [2023] ZAGPJHC
  - The High Court had to determine the correctness of the partial disallowance by SARS of an amount claimed by the taxpayer as deductible interest expenditure.
  - The High Court held that it cannot be said that the interest expenditure was incurred by the taxpayer in the production of income whilst the taxpayer was conducting its trade as an investment holding company. On this basis, it was held that the taxpayer did not meet the requirements of section 24J(2) of the ITA and was not entitled to the interest deduction claimed.
- The appeal was dismissed.
- Find a copy of the judgment [here](#).
  
- *BP Southern Africa (Pty) Ltd v CSARS* (2021/49805) [2024] ZAGPPHC 1
  - This was an appeal against a determination by SARS that the applicant was not entitled to a rebate of duty payable on diesel that the applicant stated it exported from South Africa to Zimbabwe between June and September 2019.
  - The High Court found that *inter alia*:
    - the applicant's statutory appeal under section 47(9)(e) of the Customs and Excise Act must fail on the basis that the applicant did not make a positive factual case that the diesel was in fact exported; and

- the applicant's application should be referred for the hearing of oral evidence to the extent that there is a genuine dispute of fact about where the applicant's conduct was fraudulent.
- The appeal was dismissed.
- Find a copy of the judgment [here](#).
- *BP Southern Africa (Pty) Ltd v CSARS* (Case no 801/2022) [2024] ZASCA 2
- This was an application for special leave to appeal where the SCA had to determine whether:
  - the High Court correctly refused the application in terms of section 96 of the Customs and Excise Act;
  - the applicant made out a proper case for an interim interdict; and
  - the refusal to admit the supplementary affidavit is appealable and, if it is, whether the refusal to admit it was proper.
- The application for special leave to appeal was dismissed.
- Find a copy of the judgment [here](#).
- *International Version Trading and Projects (Pty) Ltd v CSARS* (6012/21) [2024] ZAGPPHC
  - This application was an appeal against the tariff determination made by SARS that the applicant entered goods under rebate item 311.12/60.01.01.04/49 in terms of Schedule 3, Part 1 of the Customs and Excise Act, which goods do not qualify for the rebate.
  - The applicant also applied for condonation of the lateness of its application.
  - The condonation was not granted on the basis that the cause of the delay was unsatisfactory and the prospects of success were unconvincing.
- The application was dismissed.
- Find a copy of the judgment [here](#).
- *Petroleum Oil and Gas Corporation of South Africa (SOC) Ltd v CSARS and Another* (8808/2020) [2024] ZAWCHC 3
  - The High Court in this matter had to determine on appeal whether:
    - SARS' findings were contrary to a practice generally prevailing during the audit period, as contemplated in section 44(11A) of the Customs and Excise Act; and
    - SARS' determinations were based on a sound interpretation of the Customs and Excise Act or whether the applicant's business model was approved by SARS in a determination.
- The appeal was upheld.
- Find a copy of the judgment [here](#).

## legislation and draft legislation

- Taxation Laws Amendment Act, 2023
  - The Taxation Laws Amendment Act, 2023 was published on 22 December 2023.
  - Find a copy [here](#).

- Tax Administration Laws Amendment Act, 2023
  - The Tax Administration Laws Amendment Act, 2023 was published on 22 December 2023.
  - Find a copy [here](#).
- Rates and Monetary Amounts and Amendment of Revenue Laws Act, 2023
  - The Rates and Monetary Amounts and Amendment of Revenue Laws Act, 2023 was published on 22 December 2023.
  - Find a copy [here](#).

## SARS publications

- Draft documents for public comment
  - SARS has published draft rule amendments for public comment with the view to facilitate transfer pricing adjustments.
  - The draft amendments relate to rules under sections 40(3), 41(4) and 120 of the Customs and Excise Act.
  - The due date for comment is 9 February 2024.
  - Find a copy of the draft amendments [here](#).
- Draft Guide to Solar Energy Tax Credit Provided under section 6C of the ITA
  - The draft guide has been published for public comment.
  - The due date for public comment is 9 February 2024.
  - Find a copy [here](#).
- Amendments to the criteria for registration of Tax Practitioners and the recognition of Controlling Bodies
  - To fully implement chapter 18 of the Tax Administration Act and ensure the professionalism of the tax advisory industry, the criteria for the recognition of controlling bodies and the registration of tax practitioners has been updated.
  - The amended criteria pertain to the following:
    - Requirements of individuals when registering as a Tax Practitioner.
    - Requirements of Tax Practitioner Membership relating to their RCBs.
    - Requirements of Controlling Bodies to be approved as RCBs.
  - Find more information [here](#).
- SARS Publication | Synthesised Texts to the Multilateral Instrument (“MLI”).
  - Find more information [here](#).
- SARS Publication | African Continental Free Trade Area (“AfCFTA”) Agreement
  - The Minister of Trade, Industry and Competition launched the implementation of the start of preferential trade by South Africa.
  - Find a copy of the letter to trade [here](#).

## exchange control

- Exchange Control Circular No. 1/2024
  - Find Exchange Control Circular 1 of 2014 regarding the appointment of Tookiyo Trading (Pty) Ltd as Authorised Dealer [here](#).

## customs and excise

- Customs and Excise Act | Amendment Notice R.4264
  - Amendment of Appendix II to Annex 1 of the SADC Protocol on Trade, where it appears in Part B to the General Notes in Schedule No. 1, is being amended to substitute the 12-block SADC Certificate of Origin template with the 13-block SADC Certificate of Origin template as agreed on the 28th meeting of the SADC CMT
  - Find a copy of the notice [here](#).
- Customs and Excise Act | Amendment Notice R.4263
  - Amendment to Part 2 of Schedule No. 4, by the creation of a temporary rebate provision for the importation of optic fibre cables and electrical apparatus, classifiable under tariff subheading 8544.70, used in the international submarine optical fibre cable infrastructure, as well as the creation for a temporary rebate provision for electrical apparatus for making connections to or in electrical circuit, for a voltage not exceeding 1000 volts, other, classifiable under tariff subheading 8536.90.90, for use in international submarine optical fibre cable infrastructure – ITAC Report 614
  - Find a copy of the notice [here](#).
- Customs and Excise Act | Amendment Notice R.4260
  - Amendment to Part 1 of Schedule No. 1, by the insertion tariff subheading 2009.89.55 and 2009.90.15 to provide for nut juices in subheading 2009.89 and mixtures of nut juices in subheading 2009.90
  - Find a copy [here](#).
- Customs and Excise Act | Amendment Notice R.4261
  - Amendment to Part 1F of Schedule No. 6, by the substitution of Note 1 to remove the reference to rebate item 623.01, as it no longer exists
  - Find a copy [here](#).
- Customs and Excise Act | Amendment Notice R.4262
  - Amendment to Part 1 of Schedule No. 1, to provide for technical amendments, by the insertion of new 8-digit tariff subheadings under Chapters 5, 12, 20, 30, 41 and 72
  - Find a copy [here](#).
- Customs and Excise Act | Amendment Notice R.4265
  - Amendment to Part 1 of Schedule No. 2, by the imposition of definitive anti-dumping duties on windscreens for vehicles, classifiable in tariff subheading 7007.21.20, originating in or imported from China – ITAC Report 722
  - Find a copy [here](#).
- Customs and Excise Act | Correction Notice R.4267
  - by the deletion of tariff subheadings 7225.92.20, 7225.92.30, 7225.92.40 and 7225.92.50 where it appears under insertions in Notice No. R. 4262 of Government Gazette No. 50012 on 19 January 2024, with retrospective effect from 1 January 2024; and
  - by the substitution of the wording “of” with “or” in the article description of tariff subheading 3002.41.63 where it appears under insertions in Notice No. R. 4262 of Government Gazette No. 50012 on 19 January 2024, with retrospective effect from 1 January 2024.
  - Find a copy [here](#).

- Customs and Excise Act | Amendment Notice
  - Amendment to Part 2 of Schedule No. 4, by the creation of a temporary rebate provision for the importation of certain cold-rolled steel and painted steel classifiable under tariff subheadings 7211.29 and 7212.40 – ITAC Report No. 612
  - Find a copy [here](#).
- Customs and Excise Act | Amendment Notice
  - Amendment to Part 2 of Schedule No. 4, by the creation of temporary rebate provisions for the importation of certain flat-rolled products of iron or non-alloy steel, of a width of 600 mm or more, hot-rolled, not clad, plated or coated, classifiable under tariff subheadings 7208.26 and 7208.27 – ITAC Report No. 662
  - Find a copy [here](#).
- Customs and Excise Act | Amendment Notice
  - Amendment to Part 2 of Schedule No. 4, by the insertion of rebate item 460.15./7301.10/01.06 in order to provide for the creation of a temporary rebate of the customs duty for the importation of sheet piling of iron or steel, whether or not drilled, punched or made from assembled elements excluding those that are cold-rolled (cold-reduced) classifiable under tariff subheading 7301.10 – ITAC Report No. 690
  - Find a copy [here](#).
- Customs and Excise Act | Amendment Notice
  - Amendment to Part 2 of Schedule No. 4, by the creation of temporary rebate provisions under item 460.03 for the importation of meat and edible offal of the species Gallus Domesticus classifiable under tariff subheading 0207.1– ITAC Report No. 726
  - Find a copy [here](#).
- Customs and Excise Act | Amendment Notice
  - Amendment to Part 1 of Schedule No. 3, review of rebate item 311.18/63.09/01.04 applicable to “wiping rags” – ITAC Report No. 694
  - Find a copy [here](#).
- Customs and Excise Act | Amendment Notice
  - Amendment to Part 1 of Schedule No. 3, by the creation of a full-duty rebate facility on titanium dioxide classifiable under tariff subheading 3206.11, for use in the manufacture of white masterbatch, classifiable in tariff heading 3206.19.90 – ITAC Report No. 670
  - Find a copy [here](#).
- Customs and Excise Act | Amendment Notice
  - Amendment to Part 2A of Schedule No. 1, by the substitution of tariff items 104.37.19 and 104.37.21 in order to increase the rates of excise duty for heated tobacco products, to give effect to the Budget proposals announced by the Minister of Finance on 22 February 2023
  - Find a copy [here](#).
- Customs and Excise Act | Amendment Notice
  - Amendment to Schedule No. 1, by the substitution of General Note O, to implement the AfCFTA Agreement
  - Find a copy [here](#).
- Customs and Excise Act | Amendment Notice

- Amendment to Part 1 of Schedule No. 1, by the substitution of various tariff subheadings to implement changes to the rates of customs duties in terms of the AfCFTA Agreement
  - Find a copy [here](#).
- Customs and Excise Act | Customs RLA update
  - The facility codes used in Box 30 on the Customs Clearance Declaration (CCD) have been updated to include the details of the new approved container depot – Grindrod Logistics (Pty) Ltd. in Port Elizabeth. This enables Customs to transmit electronic messages to these facilities communicating the status of the consignment. If the applicable facility codes listed in SC-CF-19-A02 are not inserted in Box 30 on the CCD, the CCD will be rejected by Customs.
  - The external annexure can be accessed [here](#).
- Customs and Excise Act | Prohibited and Restricted Imports and Exports list
  - Exportation of goods classified under tariff heading 0804.40.10 now require a Phytosanitary export certificate.
  - Find the updated list [here](#).
- Customs and Excise Act, 1964 | Tariff Amendments
  - The notice sets out Schedule No. 2 amendments which include the addition of Cooper (Kunshan) Tire Co. Ltd. for 14.56% anti-dumping duty, correcting the name of Double Coin Group (Jiang Su) Tyre Co., Ltd and Qingdao Fullrun Tyre Tech Corp., Ltd and excluding certain companies from the weighted average anti-dumping duty.
  - Find the notice [here](#).
- Customs and Excise Act, 1964 | Rule Amendments
  - Find more information regarding sections 49 and 120 (trade agreements) rules amendment [here](#).
  - Find more information on the substitution of the DA 177 (Environmental Levy Account for Carbon Dioxide Emission Levy) [here](#).
- Customs and Excise Act, 1964 | Tarriff Amendments
  - Find notice R4280 regarding amendment to Schedule No. 4 introducing temporary rebates for specific flat-rolled iron or non-alloy steel products [here](#).
  - Find notice R4281 regarding the amendment to part 1 of Schedule No. 1 involving the substitution of various tariff subheadings to enact alterations to the customs duty rates [here](#).
  - Find notice R4282 regarding the amendment to Schedule No. 4 which introduces temporary rebate provisions for importing meat and edible offal [here](#).
  - Find notice R4286 regarding amendment to Schedule No. 1 which inserts notes in part F in the General Notes section [here](#).
  - Find notice R4288 regarding amendment to part 1 of Schedule No. 3 creating a full-duty rebate facility on titanium dioxide [here](#).
  - Find notice R4290 regarding amendment to part 2 of Schedule No. 4 creating a temporary rebate provision for importation of certain cold-rolled steel and painted steel [here](#).
- Customs and Excise Act, 1964 | Correction Notices
  - Find more information on correction notices related to part 1 of Schedule No. 1 and part 1 of Schedule No. 3 [here](#).



- OECD | International tax reform: OECD/G20 Inclusive Framework releases new information on key aspects of the Two-Pillar Solution
  - The OECD/G20 Inclusive Framework on BEPS (Inclusive Framework) released further technical guidance to assist governments with implementation of the global minimum tax under Pillar Two and a statement on the timeline of the Multilateral Convention (MLC) under Pillar One.
  - Find more information [here](#).
- OECD | Public comments received on proposed changes to the Commentary on Article 5 of the OECD Model Tax Convention and its application to extractible natural resources
  - On 16 November 2023, the OECD invited public comments on the proposed changes to the Commentary on Article 5 of the OECD Model Tax Convention and its application to extractible natural resources.
  - Find more information [here](#).

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