

ENSAfrica tax in brief

Below, please find issue 83 of ENSAfrica's tax in brief, a snapshot of the latest tax developments in South Africa.

case law

- **The High Court of South Africa, Gauteng, Pretoria | *Sasima Investment Holdings (Pty) Ltd v Commissioner, South African Revenue Service [2022] (59288/2021) (6 May 2022)***
 - On 16 September 2021 at Skilpadhek, on the border to Botswana, the respondent (Commissioner) detained a truck and trailer that the applicant uses to transport fuel to Botswana.
 - Pursuant to an export entry made on behalf of the applicant, the respondent issued a letter of demand demanding payment of duties on the fuel, on the basis that the fuel has been irregularly dealt with in terms of the Custom and Excise Act, 1964.
 - The applicant responded to the letter of demand by requesting the truck, trailer and fuel detained. In addition, the applicant requested suspension of payment pending the action of review proceedings.
 - The applicant issued a section 96 notice on 16 November 2021 and launched an urgent application a week later.
 - Issues
 - whether it is in the interest of justice that the period of one month in a section 96 notice ought to be reduced; and
 - whether the relief sought by the applicant in Part A is final or justified.
 - Held
 - The relief sought by the applicant is not interim in that once the vehicle is released, there is no guarantee the vehicle will return to South Africa with the fuel sale should Part B not proceed or succeed.
 - The application is dismissed with costs.
 - Find a copy of the judgment [here](#).
- **The Tax Court of South Africa, KwaZulu Natal Local Division, Durban | *Taxpayer Z v The Commissioner for the South African Revenue Service Case No. 35448***
 - This is a tax appeal concerning an additional income tax assessment issued by the South African Revenue Service (“SARS”) in respect of the 2014 tax period, in terms of which SARS disallowed expenses of the Taxpayer of some ZAR90-million. More representations were made and the disallowed expenses were reduced to ZAR30 677 104.74.
 - There are four aspects of the 2014 assessment that are in dispute:

- management fees claimed by Taxpayer Z in the sum of circa ZAR16-million. This is made up of management fees claimed to have been provided to Taxpayer Z by two associated entities, RR in the sum of circa ZAR12-million and II in the sum of circa ZAR4-million. Both these figures exclude Value Added Tax (“VAT”), and are expressed in the financial accounts of Taxpayer Z as “Management Fees”;
 - whether SARS was entitled to impose interest in terms of section 89quat of the Income Tax Act, 1962 (the “Act”), and whether SARS should have remitted that interest;
 - whether SARS was entitled to impose an understatement penalty of 125% under the Tax Administration Act, 2011 (the “TAA”); and
 - whether Taxpayer Z or SARS should pay the costs of the appeal.
 - In the initial tax return submitted by Taxpayer Z, the ZAR16-million had been claimed under the heading “Income Statement” under both “Admin., secretarial, rentals guarantee fees and other services – Non-connected”. On the next page, the same amount was claimed under the heading “Management fees – Non-connected”. SARS queried this and was told the amount was for “Other expenses” – SARS did not suggest that this was a double deduction. ZAR11.9-million was claimed for donations. Ms E, the only witness for Taxpayer Z and the person who managed and controlled Taxpayer Z, RR and II, contended that both of these expenses were part of Taxpayer Z’s operating expenses.
 - In the Tax Court’s view, Ms E was not a helpful witness with regard to establishing the true state of affairs at Taxpayer Z, and in explaining what was really done with all the money representing the items claimed as deductions.
 - With regard to the understatement penalty, the Tax Court found that Ms E could easily have been assessed as falling into the “Intentional tax evasion” category.
 - As far as the question of costs is concerned, the Tax Court was satisfied that it was unreasonable of Taxpayer Z to persist in the appeal, which, with regard to the first three of the four issues raised, had no prospects of success. There is an aspect, however, where SARS does not deserve to have its costs covered. This aspect relates to the unnecessarily prepared documentation for purposes of trial.
 - The Tax Court made the following orders:
 - the appeal is dismissed, and the 2014 assessment by SARS is confirmed;
 - the appellant is to pay the costs of the application, including the costs of senior counsel and two counsel, where employed;
 - the order for costs shall not include the costs of photocopying and preparing the 16 461 pages which were unnecessarily prepared. Neither party may be charged for those costs.
 - Find a copy of the judgment [here](#).
- **The Tax Court of South Africa, Gauteng Division, Johannesburg I *Taxpayer M v The Commissioner for the South African Revenue Service Case No. VAT 1826***
 - The applicant, Taxpayer M, applied for default judgment in terms of Tax Court rule 56(1), read with section 129(2)(b) of the TAA after the respondent, SARS, failed to deliver its statement of grounds of assessment and opposing

the appeal, in terms of Tax Court rule 31 (“**the rule 31 statement**”). The applicant wished for a final order, namely, that the respondent's understatement penalty assessments, totalling some ZAR175-million, be set aside.

- The respondent opposed the application for default judgment and brought a counter-application for condonation for the failure to file the rule 31 statement timeously. The applicant, in turn, opposed the respondent's application for condonation.
- The main issues for determination were:
 - whether the respondent has shown good cause for its default to timeously file the statement and whether the court should condone the late filing of the rule 31 statement and direct that the appeal (against the imposition of understatement penalties) proceeds on the merits; and
 - if the failure is not condoned, whether default judgment in terms of rule 56(1)(a), read with section 129 of the TAA should be granted in favour of the applicant.
- Ancillary to the main issue, the Tax Court was also requested to consider whether the applicant's two applications to strike out in terms of Tax Court Rule 42 read with rules 6(15) and 23(2) of the Uniform Rules of Court should succeed.
- The applicant contended that the respondent failed to deliver the rule 31 statement for a period of almost two years and that it has failed to give a full account of the reasons for the default. The respondent disputed that it has been in default for two years and contended that there was an agreement between the parties to suspend litigation, which only lapsed in April 2021. The Tax Court found that the objective facts clearly demonstrated that the respondent was not, as alleged by the applicant, in default in filing the rule 31 statement at the time the agreement to pend litigation was reached, and most definitely not for a period of almost two years.
- On 15 April 2021, the applicant sent a notice of default, purportedly in terms of Tax Court Rule 56(1), to the incorrect attorney, and in terms of this notice, the respondent was given 45 days to file its rule 31 statement. That meant that the respondent had to file its statement on or before 21 June 2021. As a result of the notice of default being sent to the incorrect attorney, the respondent only became aware that the agreement to pend litigation was terminated by the applicant on 22 April 2021.
- The Tax Court held that there was therefore no default on the part of the respondent prior to 21 June 2021 as there was an agreement in place that all litigation was pended, including the exchange of pleadings. This agreement was only terminated, at best for the applicant, on 15 April 2021, when the notice was served on the incorrect attorney.
- The Tax Court found that the respondent was not in default of delivery of its rule 31 statement before 15 April 2021 (ie, the date upon which the agreement to suspend litigation, on the applicant's version, was terminated) and that there must be a default prior to the delivery of a rule 56 notice.
- The Tax Court held that the applicant's application for default judgment was premature and fatally defective. Another reason why the notice was not valid was that the default relied on by the applicant in the notice was the failure to

- advise whether alternative dispute resolution proceedings would be appropriate and not the respondent's failure to file the rule 31 statement.
- The respondent had to file the rule 31 statement on 21 June 2021 but only filed the statement on 21 July 2021. The delay was not a result of any non-compliance on the part of the respondent, but as a result of the conduct of the respondent's attorney and counsel (the respondent's attorney had contracted COVID-19 at the beginning of June 2021 and, on 28 June 2021, the respondent's junior counsel, who had been briefed to draft the rule 31 statement, tested positive for COVID-19).
 - The Tax Court held that the opposition to the condonation application was unreasonable. The period for which condonation was sought was slight and the default was explained satisfactorily. There would furthermore be no significant prejudice to the applicant. The application for condonation was therefore granted with costs.
 - The Tax Court considered, *inter alia*:
 - Tax Court Rule 31(1)(d);
 - Tax Court Rule 52(6);
 - Tax Court Rule 56(1) read with section 129(2) of the TAA;
 - Rule 6(15) of the Uniform Rules of Court
 - *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* 2010 (2) SA 181 (CC); and
 - *Bernert v Absa Bank Ltd* 2011 (3) SA 92 (CC).
 - The Tax Court made the following orders:
 - the application for default judgment is dismissed with costs, including the costs of two counsel.
 - the application for condonation is granted with costs, including the costs of two counsel.
 - the application to strike out is dismissed. No order as to costs.
 - Find a copy of the judgment [here](#).
- **The Tax Court of South Africa, Gauteng Division, Johannesburg I *MB v Commissioner for the South African Revenue Service In Re MB v Commissioner for the South African Revenue Service and The Commissioner for the South African Revenue Service v MB and The Commissioner for the South African Revenue Service v MB Case No. 24578***
 - The three applications before the Tax Court all derive from an appeal brought by MB against additional assessments initiated by the Commissioner in relation to the 2013 to 2015 tax years. The Commissioner launched two applications: one for better discovery brought in terms of Rule 35(7) of the Uniform Rules of Court and one for further and better particulars brought in terms of Rule 21 of the Uniform Rules of Court. While these applications were in motion MB elected to bring an application to have the additional assessments set aside brought in terms of Tax Court Rule 56.
 - MB owns and operates three mines: AA, BB and CC. Two of the main issues in the appeal are:
 - whether certain expenses incurred by MB (particularly expenses incurred at the AA mine) in the 2013 to 2015 tax years constitute expenditure incurred in the production of taxable income or capital expenditure; and

- whether the taxable income in MB's tax returns for each of these years was understated and whether an understatement penalty ("UP") should be imposed on MB. To decide these issues, the court will, amongst others, engage in the question of whether the AA mine is contiguous to the BB and CC mines.
- **The Tax Court Rule 56 application**
 - One of MB's grievances lies in the decision of the Commissioner to impose a UP. MB essentially sought the record of the deliberations of the Commissioner's staff who decided that a UP should be imposed for each of the tax years in question. The Commissioner refused to provide said documents on the ground that they are privileged and constitute confidential information. MB contends that the refusal of the Commissioner is unlawful, and accordingly it is entitled to an order in terms of Tax Court Rule 56.
 - The Tax Court dismissed the Tax Court Rule 56 application on the basis that the Commissioner was correct to invoke the protection afforded by confidentiality of his internal operations as envisaged in section 68(1)(e) of the TAA. The kind of communications that the Commissioner's employees engaged in when considering whether each of the relevant MB's tax returns was blemished with an understatement, and whether in terms of section 222 of the TAA they were obliged to impose a UP, is precisely the one that is protected from disclosure by legislative fiat.
- **The better discovery application**
 - The Commissioner called for better discovery. In the present case, the Commissioner intends to use the documents at the hearing. He says that they allow him to test the veracity of some of the claims made by MB. By not availing them, MB denies him this opportunity. They are the source documents which made it possible for MB to generate spreadsheets. The spreadsheets provide greater detail of what is in BMM, which is a document – also generated by MB – that is fundamental to the case. The Tax Court found that the documents are self-evidently relevant and that MB should avail the documents requested by the Commissioner, as listed in Annexure A to the judgment.
- **The application for further particulars**
 - The Commissioner asks this court to order MB to provide the answers to certain questions as well as furnish copies of documents he seeks. The Tax Court found it to be inappropriate to call for documents in an application for further particulars and held that the Commissioner cannot in such application be granted the order for documents to be furnished and he should have sought the documents in the application for further and better discovery. The Tax Court held that MB should provide the answers to the questions raised in the Commissioner's request for further particulars as listed in Annexure B to the judgment. The questions focus on alleged inconsistencies or contradictions in the case presented by MB and create uncertainty as to what MB's case at trial will be. The Tax Court held that the answers to the questions would be strictly necessary for the preparation of

the trial hearing and that even if there is no inconsistency or contradiction in the case of MB, MB by providing the answers will be doing no more than clarifying what its case is.

- The Tax Court considered, *inter alia*:
 - Tax Court Rule 36(6);
 - Tax Court Rule 36(7);
 - Tax Court Rule 56;
 - Tax Court Rule 42;
 - Section 68(1)(e) of the TAA;
 - Section 129(2) of the TAA;
 - Section 129(3) of the TAA;
 - Section 222 of the TAA;
 - Rule 21 of the Uniform Rules of Court; and
 - Rule 35(7) of the Uniform Rules of Court.
- The Tax Court made the following orders:
 - **Tax Court Rule 56 application:** The appellant's (MB's) rule 56 application is dismissed;
 - **The discovery application:** The appellant (MB) is to furnish the documents listed in Annexure A to this judgment to the respondent within five court days of this order;
 - **The application for further and better particulars:** The appellant (MB) is to deliver (file and serve) detailed answers to questions listed in Annexure B to this judgment within five court days of this order.
 - **Costs of all three applications:** The appellant (MB) is to pay the costs of the respondent which costs are to include those occasioned by the employment of two counsel
- Find a copy of the judgment [here](#).

advance tax rulings

- **Legal Counsel Advisory | Binding Private Ruling 371, published on 9 May 2022 ("BPR 371").**
 - Public benefit activities carried on for the benefit of the general public.
 - This ruling determines whether activities carried on by a public benefit organisation will comply with the requirements of the definition of a "public benefit organisation".
 - Find a copy of the ruling [here](#).
- **Legal Counsel Advisory | Binding Private Ruling 372, published on 10 May 2022 ("BPR 372").**
 - Withholding tax on foreign royalties.
 - This ruling considers whether lease payments for the use of equipment will constitute royalties in terms of a tax treaty between South Africa and another country, and whether the withholding taxes to be levied will meet the requirements of section 6quat(1A).
 - Find a copy of the ruling [here](#).
- **Legal Counsel Advisory | Binding General Ruling 30 (issue 2) published on 12 May 2022 ("BGR 30").**

- Allocation of direct and indirect expenses within and between an insurer's funds.
- This ruling determines the allocation of direct and indirect operating expenses within and between the funds that are required to be established by insurers under section 29A and the subsequent deductibility of such operating expenses and the deductibility of expenses against transfers under section 29A(7).
- Find a copy of the ruling [here](#).
- **Legal Counsel Advisory | Binding General Ruling 8 (issue 3) published on 12 May 2022 ("BGR 8").**
 - Application of the principles enunciated by the *Brummeria* case.
 - BGR 8 prescribes in which year of assessment the right to use an interest-free loan should be included in the taxpayer's gross income as well as the method to calculate the value of such right.
 - Find a copy of the ruling [here](#).

SARS publications

- **Tender**
 - RFP50/2021: Provision of Fleet Management Services for a Period of Five (5) Years.
 - Find the questions and answers (part one) [here](#).
 - Appointment of panel of service providers for debt collection and related services.
 - Find more information [here](#).
- **SMME Connect newsletter**
 - May edition of the *SMME Connect* publication detailing employment-related tax obligations, key changes in the 2022 budget speech and key obligations of newly registered companies (including turnover tax).
 - Find more information [here](#).
- **New SARS Service Charter**
 - With effect from 1 April 2022 SARS has a new service charter. The Service Charter as a tool of commitment, should help SARS on clarity and certainty in making it easy to connect all SARS employees and operations in the value chain to deliver outcomes in line with Service Obsession.
 - Find a copy of the Service Charter [here](#).
- **Tax Practitioner newsletter**
 - May 2022 version of the Tax Practitioner Connect newsletter.
 - Find more information [here](#).
- **Status overview of all double tax agreements and protocols - Multilateral Convention to Implement Tax Treaty Related Measures to Prevent base erosion and profit shifting ("MLI") Synthesised Texts**
 - Cameroon and Thailand have been added to the list of treaty partners that ratified the MLI.
 - Find a copy of the updated status overview [here](#).
- **Tax workshops**
 - SARS published the updated tax workshops schedule
 - Find the updated schedules [here](#).

- **SARS annual performance plan**
 - SARS published its annual performance place for 2022 – 2023.
 - Find more information [here](#).
- **Comprehensive guide to dividends tax**
 - SARS published the Comprehensive Guide to Dividends Tax (Issue 5) on 12 May 2022.
 - Find a copy of the guide [here](#).
- **Archived | Interpretation Note (“IN”)**
 - SARS archived the following INs:
 - IN 102 - *Classification of Risk Policy and the Once-off Election to Transfer Certain Policies or Classes of Policies Issued Before 2016 to the Risk Policy Fund*;
 - IN 59 - *Tax Implications of the Receipt or Accrual of Government Grants and Government Scrapping Payments*;
 - IN 58 (issue 2) - *The Brummeria Case and the Right to Use Loan Capital Interest Free*
- **SARS IN**
 - SARS published IN 58 (issue 3) entitled “*The Brummeria case and the right to use loan capital interest free*”
 - Find a copy of the IN [here](#).
 - SARS published IN 59 (issue 2) entitled “*Tax treatment of the receipt or accrual of government grants*”
 - Find a copy of the IN [here](#).
 - SARS published IN 102 (issue 2) entitled “*Classification of risk policy*”
 - Find a copy of the IN [here](#).
 - SARS published IN 102 (issue 2) entitled “*Deductions in respect of improvements to land or buildings not owned by a taxpayer*”
 - Find a copy of the IN [here](#).
 - SARS published IN 120 entitled “*Prohibition of deductions in respect of certain intellectual property*”
 - Find a copy of the IN [here](#).
- **Alert | update on disputes issue on eFiling**
 - As previously indicated, SARS is aware of issues with submitting disputes on eFiling which has resulted in some disputes being rejected.
 - A fix was implemented on 13 May 2022 to address this matter.
 - The team is working on resolving any remaining issues.
 - Where a taxpayer or practitioner had submitted a dispute between 22 April 2022 and 14 May 2022, please check your dispute history on eFiling to verify if your dispute is reflecting as received or rejected. If the dispute is rejected, may you kindly submit this dispute to SARS as soon as possible. SARS apologises for the inconvenience.
- **Updates to table of interest rates**
 - Table 1: Interest rates on outstanding taxes and interest rates payable on certain refunds of tax.
 - Find a copy of the updated table [here](#).
 - Table 2: Interest rates payable on credit amounts.
 - Find a copy of the updated table [here](#).
- **Updated e@syFile version**
 - An updated version of e@syFile was released.

- The changes include adjustment to EMP501 submission files to align validation for Tax Directive numbers with the SARS PAYE BRS and adjustment to the PDF rendering to allow Operating System (OS) default application.
- For the latest version 7.2.6 (including 7.2.5), see the e@syFile webpage [here](#).

customs and excise

- **Customs and Excise Act | Draft amendment to SAD 500 – Customs declaration form**
 - The deadline for public comment is 27 May 2022.
 - Find a copy of the customs declaration form [here](#).
- **Customs and Excise Act | Draft Amendment to Rule under sections 59A and 120**
 - Draft amendment to rule 59A.01A – Submission of applications for registration and updating of registration details.
 - The deadline for public comment is 27 May 2022.
 - Find the proposed amendments [here](#).
- **Customs and Excise Act | Unentered Goods**
 - SARS published the customs weekly list of unentered goods.
 - Find a copy [here](#).
- **Customs and Excise Act | tariff amendment notice**
 - Amendment to Part 2 of Schedule No. 5, by the insertion of refund item 522.02/22.00/01.04 and Note 7, to provide for a refund item for certain alcoholic beverages that have undergone post-manufacturing deterioration (Expired Stock) (with retrospective effect from 15 March 2019).
 - Publication details will be made available later.
 - Find a copy of the notice [here](#).
- **Customs and Excise Act | tariff amendment notice R. 2081 in *Government Gazette* 46358**
 - Impositioning of provisional payment in relation to anti-dumping duties against the alleged dumping of spades and shovels of a maximum blade width of more than 150mm but not exceeding 200mm originating in or imported from the People’s Republic of China and the alleged dumping of spades and shovels of a maximum blade width of more than 200mm but not exceeding 320mm, picks, other rates (excluding those with not more than 8 prongs) and other forks, with a prong length exceeding 150mm originating in or imported from the Republic of India – ITAC Report 691.
 - Find a copy of the notice [here](#).
- **Customs and Excise Act, 1964 | Draft documents for public comment**
 - The draft amendment to the rules under section 120 of the Customs and Excise Act have been published for public comment.
 - The deadline for public comment was 25 May 2022.
 - Find the proposed amendments [here](#).
- **Customs and Excise Act | Draft documents for public comment**
 - Draft amendment to Part 1 of Schedule No. 1
 - The deadline for public comment is 12 June 2022.
 - Find the proposed amendments [here](#).

international

- **OECD | Tax challenges of digitalisation**
 - The OECD is seeking public comments on the Regulated Financial Services Exclusion under Amount A of Pillar One.
 - Find more information [here](#).
- **OECD | MLI instrument of ratification**
 - Senegal has deposited its instrument of ratification for the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.
 - Find more information [here](#).
- **OECD | Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standard**
 - The OECD is seeking public input on the Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standard. This public consultation meeting will focus on the key questions identified in the consultation document and issues raised in the written submissions received as part of the consultation process.
 - Find more information [here](#).

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