

# ENSafrica tax in brief

Below, please find issue 89 of ENSafrica's tax in brief, a snapshot of the latest tax developments in South Africa.

## case law

- **The High Court of South Africa, Western Cape Division | *The Commissioner for the South African Revenue Services v Esibonga Investment (Pty) Ltd and Others***
  - On return date of the rule nisi, the 11th and 12th respondents opposed the confirmation of a provisional preservation order in terms of section 163 of the Tax Administration Act, 2011 (“TAA”).
  - The provisional preservation order was granted, *inter alia*, against the Respondents over an immovable property which fell within the estate of the Respondents. The provisional preservation order authorised the Registrar of Deeds to register a caveat notice on the property to ensure that the property was not transferred without notice to the South African Revenue Service (“SARS”).
  - In addition, a curator bonis was appointed and given the authority to take control of the estate.
  - The Respondents opposed the confirmation of the provisional preservation order on the following basis:
    - there was no evidence that their assets were reliable assets in terms of section 163;
    - the preservation order was unnecessary; and
    - the relief obtained exceeded the bounds of section 163.
  - SARS, in its reply, contended in *limine* that:
    - the Respondents erred in opposing the confirmation and that their relief lay instead in section 163(9) of the TAA; and
    - their failure to adequately explain the connection of Esibonga Investment (Pty) Ltd necessitated the curatorship.
  - The court considered, *inter alia*:
    - Whether the rule *nisi* stood to be discharged in respect of the Respondents;
    - Section 163 of the TAA; and
    - Section 1(c) of the Constitution of the Republic of South Africa, 1996.
  - The court held:
    - A rule *nisi* was granted calling for the respondents to show cause why the preservation order should not be made final.

- The respondents answered the call, which the court made at the instance of SARS. They are properly before the court. SARS cannot now seek to refer them to section 163(9).
  - SARS has a provisional order in its favour. It does not have a final preservation order. SARS argument that the proper procedure was for the applicant to seek relief as envisaged in section 163(9), and not as per an order granted in its favour is untenable.
  - SARS should be allowed to investigate in furtherance of the collection of outstanding taxes. The respondents' assets were under the circumstances, susceptible to a provisional order against them. The suggestion that there was no case made out that any of their assets should be preserved to satisfy Esibonga's debt stands to be rejected.
  - It was necessary to place the respondents' property beyond their control and into the hands of the curator pending the outcome of the application for the order.
  - The purpose of that preservation order was to secure the collection of tax. The purpose of the curator was to investigate the whereabouts of Esibonga's assets and the assets of the respondents, amongst others, and to take control thereof in order to secure the collection of tax.
  - The respondents elected not to set out any facts that could stand as a valid answer to the money laundering allegations, or at least provide a satisfactory explanation for Esibonga to pay for its transactions and the source for the money it intended to use as security.
- Thus, the provisional preservation order against the respondents was confirmed.
- Find a copy of the judgment [here](#).
- **The High Court of South Africa, Gauteng Local Division, Johannesburg I Premier Plastics (Pty) Ltd v CSARS (9726/2021)**
  - This was an appeal by Premier Plastics Pty Ltd (the "**Applicant**") in terms of section 47(9) of the Customs and Excise Act, 1964.
  - In 2019, SARS conducted an environmental levy audit of the Applicant for the period June 2017 to May 2018. The audit found that the Applicant manufactured plastic products falling under
  - Schedule 1, Part 3A to the Customs and Excise Act (wall thickness of 24 microns or more) and on its accounting records, marked the goods for export. It was, however, established that the plastic
  - bags were not exported by the Applicant directly, but sold to three of the Applicant's local customers. No environmental levies were paid to SARS in respect of the plastic bags.
  - SARS held the Applicant liable for environmental levies, penalties and interest in respect of the plastic bags on the basis that they were disposed of in a manner inconsistent with, and in contravention of section 20(4), read with rule 54F.12 of the Customs and Excise Act.
  - The Applicant contends that it is not liable for the environmental levies on two bases:
    - firstly, the plastic bags were not environmental levy goods; and

- secondly, the disputed plastic bags were exported to Lesotho and Swaziland (now Eswatini), and thus not subject to environmental levies.
- The court had to determine whether the plastic bags were environmental levy goods, as defined.
- The compulsory specification for plastic carrier bags and flat bags is 24 microns. Plastic bags less than 24 microns may therefore be manufactured in South Africa for use outside the country.
- The court held:
  - The records documented that none of the carrier bags produced by the applicant and sold to the three entities had a wall thickness in excess of 24 microns. Independent testing further revealed that the plastic bags had a film thickness of less than 24 microns. As a result, the plastic bags are not environmental levy goods subject to environmental levies.
  - It is further clear from the evidence that the plastic bags were manufactured with the sole purpose of being exported to Lesotho and Eswatini. Although the applicant did not directly export the
    - plastic bags to these two countries, it is undisputed that the plastic bags were in fact exported to Eswatini and Lesotho.
- Thus, the court upheld the Applicant's appeal and set aside SARS' decision that the Applicant was liable to pay the environmental levies, together with the penalties and interest.
- Find a copy of the judgment [here](#)

## legislation and draft legislation

- **Income Tax Act, 1962 | Draft interpretation note**
  - SARS published a Draft Interpretation Note relating to the exemption for international aid received or accrued under an official development assistance agreement
  - This Interpretation Note provides guidance on the application of section 10(1)(yA) and the requirements that have to be met before an exemption can apply on amounts received by or accrued to a person in consequence of an Official Development Assistance agreement.
  - The due date for public comments is 16 September 2022.
  - Find a copy of the Draft Interpretation Note [here](#).

## advance tax

- **Legal Counsel Advisory | Binding Private Ruling 375, published on 5 August 2022 (“BPR 375”)**
  - Unbundling of shares in a controlled foreign company.
  - The ruling determines the tax consequences of an unbundling transaction of the shares in a controlled foreign company.
  - The ruling involves the interpretation and application of:
    - section 46(1) – paragraph (b) of the definition of “unbundling transaction”;
    - section 46(2); and
    - section 46(5).
  - Find a copy of the ruling [here](#)
- **Legal Counsel Advisory | Binding Class Ruling 80, published on 12 August 2022 (“BCR 80”).**
  - Tax implications for resident beneficiaries of a foreign pension trust.
  - The ruling determines the income tax, capital gains tax and estate duty implications for resident beneficiaries of a foreign pension trust.
  - Find a copy of the ruling [here](#)

## SARS publications

- **Tender**
  - Appointment of a VAT Refund Administrator.
  - Find more information [here](#).
- **Tender**
  - Appointment of a VAT Refund Administrator | Questions and answers Part 2 – Answer for question No.18.
  - Find more information [here](#).
- **Tender**
  - Appointment of a service provider(s) for the provision of onsite document storage reduction services for Cape Town and Johannesburg processing centres for the period of 24 months.
  - Find more information [here](#).
- **Media release | Agencies pledge to strengthen collaboration ahead of critical FATF review**
  - SARS Commissioner Edward Kieswetter, National Director of Public Prosecutions Shamila Batohi and National Head of the DPCI Godfrey Lebeya, were among the heads at the opening of a three-day workshop on inter-agency collaboration held in Pretoria.
- **Media release | Suspension of industrial action at SARS**
  - SARS welcomes the suspension of the industrial action by two recognised labour unions, PSA and NEHAWU. The PSA was the first officially to suspend the industrial action from 20 July 2022, followed by NEHAWU on 08 August 2022.
  - In light of this announcement by the two unions, striking employees are back at work and SARS operations, including trade facilitation at our borders, are continuing as usual.
- **Updated Mobile Tax Unit schedule for Gauteng**

- Gauteng has published updated Mobile Tax Unit schedules.
- Find a copy of the schedules [here](#).
- **SARS Pretoria North Branch office**
  - The SARS Pretoria North Branch closed permanently in July 2022.
  - Tax practitioners are advised to book appointments via the usual channels if they need assistance from SARS.
- **SARS Pavilion Branch Office**
  - The SARS Pavilion branch in Pretoria has been permanently closed, but staff continue to service clients.
  - Tax practitioners are advised to book appointments via the usual channels if they need assistance from SARS.
- **Media Release | Clearing agent in court for defrauding SARS and importers**
  - Jayson Perumal (43) of Dynamic Freight and Reshlan Pillay (38) were charged with fraud and various contraventions of the Customs and Excise Act, 1964. Both accused are out on bail. The matter has been postponed to 20 October 2022.
  - It is alleged that Reshlan Pillay, director of Potenza Capital, and a clearing agent, processed customs entries whilst working with Jayson Perumal of Dynamic Freight, who was acting on behalf of various importers. Potenza Capital is alleged to have submitted false documents to SARS, where the values of the goods, the goods themselves and the importers details were falsified, resulting in minimal duties and VAT paid over to SARS.
  - The full media release can be found [here](#).
- **VAT Connect Issue 14 (August 2022)**
  - The latest VAT newsletter is available and can be accessed [here](#).
- **Value-Added Tax Act, 1991 | FAQs**
  - SARS has published the 2nd issue of SARS' responses to the frequently asked questions relating to the Domestic Reverse Charge Regulations.
  - This issue can be found [here](#).

## customs and excise

- **Customs and Excise Act, 1964 | Tariff amendment notices (Government Gazette 47199, 5 August 2022)**
  - Notice R.2357
    - Amendment to Part 1A of Schedule No. 6, as a consequence to the amendment in Part 1 of Schedule No. 1
    - Find the proposed amendments [here](#).
- **Notice R.2356**
  - Amendment to Part 7A of Schedule No. 1, as a consequence to the insertion of the new tariff subheading in Chapter 19 in Part of Schedule No. 1.
  - Find the proposed amendments [here](#).
- **Notice R.2355**
  - Amendment to Part 2A of Schedule No. 1, as a consequence to the amendment in Part 1 of Schedule No. 1.
  - Find the proposed amendments [here](#).
- **Notice R.2354**

- Amendment to Part 1 of Schedule No. 1, by the insertion of Additional Notes in Chapters 19 and 21 as well as new subheadings to provide for preparations for making alcoholic beverages.
- 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 | Refunds and Drawbacks**
  - SARS published the automation FAQs.
  - Find a copy [here](#).
- **Customs – Valuation of Imports**
  - The Valuation of Imports Policy has been revised to give effect to additional benefits for accredited clients.
  - Applications for value determinations submitted by accredited clients will be expedited provided that the accreditation letter is attached to the application.
  - The Valuation of Imports documents have also been reorganised for a more logical process and to show integration with the declaration process.
  - The Method 1 Valuation of Imports policy has also been updated to include verification of international freight paid to the carrier or shipping line in terms of Commentary 21.1 read with Article 8.3 and Article 17 of the WTO Valuation Agreement.
  - The Method 1 Valuation of Imports policy has also been updated to include verification of international freight paid to the carrier or shipping line in terms of Commentary 21.1 read with Article 8.3 and Article 17 of the WTO Valuation Agreement.
  - The revised Valuation of Imports Policy can be found [here](#).
  - The updated Method 1 Valuation of Imports policy can be found [here](#).

## international

- **OECD | Tax challenges of digitalisation: Public consultation meeting on Amount A of Pillar One**
  - As part of the ongoing work to implement the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, the OECD is seeking public comments on the draft model rules to implement a new taxing right that will allow market jurisdictions to tax profits from some of the largest multinational enterprises ("Amount A of Pillar One"). 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.
  - The meeting will be held on 12 September 2022.
  - Please find more information [here](#).

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