

ENS tax in brief

Below, please find issue 132 of ENS' Tax in brief, a snapshot of the latest tax developments in South Africa.

case law

- **Constitutional Court | *Thistle Trust v Commissioner for the South Africa Revenue Service* (CCT 337/22) [2024] ZACC 19 (2 October 2024)**
 - On appeal and cross-appeal from the Supreme Court of Appeal (“SCA”) respectively, the Constitutional Court (“CC”) had to consider, *inter alia*:
 - the applicability of the “conduit principle” to capital gains when distributed by multiple trusts in the same tax year in terms of the common law, section 25B and paragraph 80 of the Eighth Schedule of the Act; and
 - whether the circumstances giving rise to the tax treatment by Thistle Trust warranted the imposition of an understatement penalty.
 - The taxpayer, Thistle Trust, an inter vivos discretionary trust, was a beneficiary of ten vesting trusts. During the relevant tax years, the vesting trusts realised capital gains after disposing of capital assets and distributed the proceeds to the Thistle Trust, which then, in turn, distributed these proceeds to its beneficiaries within the same tax years. It did not declare the capital gains in its income tax returns. Instead, its beneficiaries (taxed at a lower effective rate) declared the capital gains and paid capital gains tax on these gains.
 - SARS raised an assessment against the Thistle Trust for the relevant tax years for capital gains that SARS contended had accrued to the Thistle Trust. SARS also imposed a 50% understatement penalty and required the Thistle Trust to pay interest on the outstanding tax liability. Thistle Trust, in turn, objected to SARS’ assessments on the basis that it was merely a conduit for the movement of gains to its beneficiaries

which, in terms of the common law and the ITA at the time, were taxable in the hands of only the beneficiaries.

- The majority for the CC held, inter alia, as follows in respect of the main application:
 - The wording of paragraph 80(2) indicates that the conduit principle applied only to the first beneficiary trust in a multi-tiered trust structure. Paragraph 80(2) cannot be reasonably interpreted to allow the conduit principle to run through a multi-tiered trust structure to attribute liability for capital gains tax in respect of the disposal of an asset to a beneficiary beyond the first beneficiary of the trust that realised the capital gain by disposing of that asset.
 - SARS had no sustainable case for penalties.
- A dissenting minority judgment held it was possible for paragraph 80(2) and the conduit principle to apply such that capital gains are taxed in the hands of the ultimate beneficiaries in a multi-tier trust structure.
- Find a copy of the judgment [here](#).
- **Tax Court | IT 45791; VAT 22288**
 - The taxpayer applied for default judgment against the South African Revenue Service (“SARS”) under Tax Court rule 56(1)(b) read with rule 56(2)(a) (as promulgated under section 103 of the Tax Administration Act, No. 28 of 2011 (“TAA”)) on the basis that SARS was late in filing its rule 31 statements (grounds of assessment and opposing appeal). SARS also failed to apply for condonation for the late filing. SARS, in turn, brought an application in terms of Uniform rule 30 setting aside the rule 56(2)(a) notices on the basis that they were delivered prematurely.
 - The taxpayer contended that until SARS filed an application for condonation for the late filing of the rule 31 statements, no valid rule 31 statements are before court and that, therefore, the period within which the taxpayer is to file its rule 32 statements (grounds of appeal) has not commenced. It was argued on behalf of the taxpayer that the mere filing of the rule 31 statements does not automatically cure SARS’ default.
 - The Tax Court confirmed that SARS’ rule 31 statements were delivered out of time, however, on the basis that the rule 31 statements were invalid but condonable, the court held that the rule 31 statements can only be set aside if condonation is not granted.

- On this basis, the taxpayer's applications to set aside the rule 31 statements was postponed sine die to be heard simultaneously with SARS' application for condonation for the late filing of the rule 31 statements.
- The court made a cost order in favour of the taxpayer and against SARS, including for wasted costs occasioned by SARS' postponement of the hearing of the taxpayer's application for default judgement.
- Find a copy of the judgment [here](#).

- **Tax Court | IT 45781**

- The taxpayer appealed SARS' additional assessments in terms of which advance payments or part-payments in respect of the purchase price of unrefined metals/materials was disallowed as deductible in terms of section 11(a) of the Income Tax Act, No. 58 of 1962 ("ITA").
- SARS argued that the advance payments were capital loans and not expenditure as contemplated in section 11(a) of the ITA.
- The court considered the contractual background to the payments (a series of metal purchase agreements and subsequent special agreements concluded between the taxpayer and its foreign supplier from 2008 to 2012) which governed the supply of the materials.
- The court concluded that a loan obligation was created and that the advance payments were, therefore, not deductible expenditure for income tax purposes. The taxpayer's appeal was accordingly dismissed, and SARS' additional assessments confirmed.
- Find a copy of the judgment [here](#).

tax rulings

- **Binding Private Ruling 411 | Tax consequences of a deemed input tax deduction under the VAT Act**
 - This binding private ruling ("BPR") determines the tax consequences of a deemed input tax deduction when a motor vehicle financed under an Instalment Credit Agreement

(ICA), as defined in section 1 of the VAT Act, No. 89 of 1991 (“VAT Act”) is repossessed by the creditor.

- The BPR is a ruling on the interpretation and application of the definition of “gross income” in section 1(1) of the Act and the definition of “asset” in paragraph 1 of the Eighth Schedule to the Act, as well as the definition of “input tax” in section 1, paragraph (c) and sections 8(1) and 16 of the VAT Act.
- Find a copy of the BPR [here](#).
- **Binding General Ruling 27 (issue 2) | Application of sections 20(7) and 21(5)**
 - This ruling sets out the circumstances and conditions under which a vendor need not issue a tax invoice, credit- or debit note, or the particulars required on a tax invoice may be furnished in another manner.
 - Find the ruling [here](#).
- **Binding General Ruling 74 | Supplies of goods or services made by municipalities to national or provincial government**
 - This ruling sets out sets out the VAT treatment of supplies of goods or services that are made by municipalities to national or provincial government under each method of contracting.
 - Find the ruling [here](#).

SARS publications

- **Media Release | More than 1 million taxpayers withdraw from their savings pot**
 - SARS announced that to date it has received 1,213,646 applications for tax directives for withdrawals from the Savings Withdrawal Benefit of the two-pot system. Of the total number of applications 1,148,729 tax directives were approved for funds to be released. The remainder were declined for a variety of reasons, including incorrect Identity Numbers, incorrect tax numbers, amongst others.
 - A total gross lumpsum of R21.4 billion has been paid out to date.

- Find the full media release [here](#).
- **Clarification on the criteria for the recognition of Controlling Bodies and the registration of tax practitioners**
 - The TAA stipulates that an individual must register with both a Recognised Controlling Body ("RCB") and SARS as a Tax Practitioner if they wish to provide tax related services to taxpayers. An RCB is responsible for overseeing the registration and admission of Tax Practitioners. RCBs are also required to manage their tax practitioner members' compliance to the registration requirements. To support RCBs and tax practitioners in fulfilling these responsibilities, SARS has reworked the 'Criteria for the registration of Tax Practitioners and the recognition of controlling bodies' as previously published and agreed to.
 - Find a copy of the guide How RCBs can manage tax practitioner members on *eFiling* [here](#).
 - Find a copy of Criteria for the Recognition of Controlling Bodies [here](#).
 - Find a copy of Criteria for the Registration of Tax-Practitioners [here](#).
- **Media Release | SARS warns about crypto asset compliance**
 - SARS has noted the phenomenal growth of the use of various digital currencies by many South Africans. Prominent amongst these is the prevalence of crypto assets.
 - SARS is concerned that these crypto assets and trades are not being declared on the tax returns of taxpayers and, in addressing crypto compliance, SARS is increasing capability in its audit teams to support enforcement initiatives. SARS has also resorted to greater use of artificial intelligence, machine learning and algorithms to process related work.
 - SARS has also recently issued query letters to taxpayers with crypto assets. These letters aim to gain an insight into taxpayers' investment in crypto assets and the trades undertaken to enable SARS to assess taxpayers' compliance in this regard.
 - Find the full media release [here](#).
- **Interpretation Note 83 (issue 3) | Application of sections 20(7) and 21(5) of the VAT Act**
 - This note sets out the requirements that must be met for SARS to apply the provisions of sections 20(7) and 21(5) of the VAT Act.
 - Find the interpretation note [here](#).

- **Draft Interpretation Note | Meaning of “similar finance charges”**
 - The draft interpretation note considers the meaning of “similar finance charges” and whether various finance charges payable under a financial arrangement fall within the ambit of “similar finance charges”.
 - Due date for comment is 8 November 2024
 - Find the draft note [here](#).
- **Draft Interpretation Note | Public benefit organisations: Non-professional sport and recreation**
 - The draft interpretation note provides guidance on the interpretation and application of the public benefit activity that provides for the administration, development, co-ordination or promotion of sport or recreation in which the participants take part on a non-professional basis as a pastime.
 - Due date for comment is 15 November 2024
 - Find the draft note [here](#).
- **Draft Interpretation Note | Diminution in the value of closing stock**
 - The draft interpretation note provides guidance on the determination of the diminution in the value of closing stock, which is deducted from the cost of that closing stock for purposes of determining the value of closing stock that must be included in gross income under section 22(1)(a) of the ITA.
 - Due date for comment is 22 November 2024
 - Find the draft note [here](#).

exchange control

- **Exchange Control Circular No. 11/2024 | Amendment of name**
- The name of Tookiyo Trading (Pty) Limited, a Category three Authorised Dealer in foreign exchange with limited authority (ADLA), has been changed to Tayo Pay (Pty) Limited with immediate effect. Consequential amendments will be effected.

- Find the circular [here](#).

customs and excise

- **International Treaties and Agreements | Nigeria | Mutual Administrative Assistance agreement**
 - The agreement regarding Mutual Administrative Assistance (“MAA”) between their customs administrations was entered into between South Africa and Nigeria.
 - The date of entry into force is 1 May 2024.
 - Find a copy of the MAA [here](#).

International

- **The Organisation for Economic Co-Operation and Development (“OECD”) | Taxation Working Papers | Tax arbitrage through closely held businesses**
 - The OECD published a taxation working paper that explores tax arbitrage incentives and behaviours in OECD countries, and their implications for tax systems more broadly. It focuses on how OECD tax systems might encourage business owners, in particular owners of unincorporated businesses and owner-managers of closely held incorporated businesses, to minimise their tax burdens through tax arbitrage.
 - The paper finds that tax incentives to incorporate and earn capital income through corporations have increased in the last two decades. It shows that there has been an increase in incorporated businesses in many OECD countries, which has been partly driven by tax factors. The paper also finds that, in many countries, a combination of tax system features – related to corporate, dividend, capital gains, gift and inheritance taxation – provide particularly strong incentives to retain earnings inside corporations.
 - Find a copy of the paper [here](#).
- **OECD | Tax policy evolving from crisis management towards long-term fiscal priorities**
 - The OECD published a media release which provides that a trend of decreased taxes on businesses and individuals during the pandemic and the subsequent inflationary

period is now showing signs of deceleration and reversal, according to a new OECD report.

- Find more information [here](#).

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