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SARS Watch

# Synopsis

## Tax today

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A monthly journal, published by PwC South Africa, that gives informed commentary on current developments in the tax arena, both locally and internationally.

Through analysis of and comment on new laws and judicial decisions of interest, Synopsis helps executives to identify developments and trends in tax law and revenue practice that may affect their business.

**Editor:** Al-Marie Chaffey
Simangaliso Manyumwa

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# EU Carbon Border Adjustment Mechanism — what does this mean for my business?

## Executive summary

The European Union ("EU") Carbon Border Adjustment Mechanism ("CBAM") forms part of the EU's "*Fit for 55 package*". The Fit for 55 package is a series of proposals announced by the EU aimed to align current laws with the EU's 2030 and 2050 carbon neutral ambitions. The CBAM will broadly apply to price the carbon emissions embedded in certain goods which are imported into the EU, by charging the equivalent carbon price, as is charged under the EU emissions trading system ("EU ETS"). The objective of the EU ETS is to encourage industrial decarbonisation, however, due to the risk of carbon leakage, which is the risk of businesses relocating their emissions-intensive operations out of the EU due to a disparity in carbon pricing, the CBAM proposals were put forward. With publication of the Proposal for a regulation of the European Parliament and the Council establishing a carbon border adjustment mechanism ("the CBAM Regulation") on 16 May 2023, CBAM will come into effect from 1 October 2023. This entry into force will, however, be on a transitional basis between 1 October 2023 until the end of 2025. At this stage, it is important for South African and other global exporters into the EU to note that during the transitional period the CBAM only applies as a reporting obligation for the importer without an adjustment (a carbon price or tax) being due. On 17 August 2023 the European Commission adopted and published the Implementing Regulation for the CBAM which sets out the applicable rules for purposes of the transitional period.

## Background

The EU's primary domestic carbon regulatory framework is the EU ETS, which applies a market-based price to carbon emissions generated by certain industries within the EU. The current EU ETS contains free allowance allocations which are meant to safeguard competitiveness of the EU industry and to avoid carbon leakage. However, in order to achieve the EU's climate goals, the EU ETS free allowance allocations will decline over time, and eventually be phased out — which may dampen investment within greener production and impact EU competitiveness. Similarly, the expansion of the EU ETS framework, including the reduction in free allowance allocations, may increase the risk of carbon leakage. The CBAM is aimed at safeguarding competitiveness of EU industries and to address the risk of so-called 'carbon leakage'. The revised framework of the EU ETS may create a situation whereby industries may opt to move their production activities offshore to countries with less stringent environmental legislation to circumvent the increased costs of domestic production, this is known as 'carbon leakage'. To address the increasing risk of carbon leakage, the CBAM was introduced, which aims to ensure equivalent carbon pricing between imports and domestic EU products. Simultaneously, the CBAM encourages producers in third countries (non-EU member countries) to decarbonise their production processes and encourages third countries to adopt a carbon tax and/or cap-and-trade system.

## Scope and application of the CBAM

The CBAM Regulation (as published in the Official Journal of the EU on 16 May 2023) is directly applicable and binding on all EU member states as of the entry into force on 1 October 2023. Before full entry into force, a transitional period will apply during which the importer is required to report on the import of the goods which are in scope. The transitional period of the CBAM commences on 1 October 2023 and ends on 31 December 2025. On 17 August 2023, the European Commission adopted and published the Implementing Regulation for the transitional period of the CBAM. The final Implementing Regulation contains key clarifications and differences from the draft version that was published for comment on 13 June 2023.

The CBAM effectively addresses the risks associated with carbon leakage by requiring importers to acquire CBAM certificates and then surrender these CBAM certificates based on the embedded emissions (direct and indirect) of imported goods within the scope of the CBAM Regulation. The number of certificates to be surrendered depends on the amount of specific embedded emissions of the imported goods. In broad terms, the CBAM is a tax calculated by reference to

the greenhouse gas emissions embedded in iron and steel, cement, fertilisers, aluminium, electricity and hydrogen, some precursors and a limited number of downstream products (the exact goods currently in scope are listed in an Annex to the CBAM Regulation) as imported into the EU Customs Union. The products covered by the CBAM Regulation include raw materials, semi-finished products and a limited number of finished products. The European Commission has announced that the scope of CBAM will be gradually expanded to all sectors covered by the EU ETS by 2030. It will therefore become more important for importers to correctly determine the tariff classification of their goods imported in the EU. Furthermore, the origin of goods is also relevant for determining the applicability of the CBAM regulation, as importers will need to determine whether goods are subject to a domestic carbon tax or cap-and-trade system in the country of origin.

For South African exporters into the EU Customs Union, it is important to understand the tariff classification of the goods exported into the EU. South African exporters are encouraged to appropriately classify their goods in order to determine whether their goods are within scope for CBAM purposes. South African exporters are in a unique position given that a carbon tax is currently in force in South Africa — being one of less than 50 countries globally that have carbon pricing laws in force in some or other form. This means that some or other assessment of South African companies' emissions would have likely been carried out or considered previously, and any carbon taxes payable would reduce the CBAM charge once the transitional period ends (from 1 January 2026).

For South African carbon tax purposes, taxpayers determine their carbon tax liability based on the carbon dioxide equivalent values on a legal entity level, however, for CBAM purposes importers are expected to report on a product level (i.e. the embedded emissions within a product). A further consideration for South African exporters into the EU Customs Union is that the CBAM Regulation provides that the greenhouse gas emissions that are in scope include the direct and, in certain instances, indirect emission from the production process of goods of which the producer has direct control. In comparison, for South African carbon tax purposes, taxpayers are currently only taxed on their "direct" emissions. South African exporters into the EU Customs Union are thus strongly encouraged to consider the inter-relationship between the CBAM Regulation and the South African carbon tax landscape.

## Compliance requirements

As part of the declaration process, a report ought to be prepared by the EU importer, broadly containing the following (collectively referred to as the "CBAM Report"):

- the total quantity of each type of good imported into the EU Customs Union during the period in question;
- the total embedded emissions in the type of good (direct and indirect emissions); and
- the carbon price paid abroad to determine the total number of CBAM certificates, corresponding to the total embedded emission, that should be surrendered.

For purposes of the transitional period, importers will only have a reporting obligation, without any tax being due. For purposes of the transitional period, the importer is required to prepare and submit a quarterly CBAM Report.

The CBAM Regulation furthermore provides for penalties relating to non-compliance after the transitional period. In this regard, an importer who fails to surrender, by 31 May of each year, a number of CBAM certificates corresponding to the emissions embedded in goods imported during the previous year shall be liable to a penalty (which will be determined with reference to the penalty provisions contained in the EU ETS regulation) for each CBAM certificate that the importer should have surrendered.

## Next steps and takeaway

The CBAM Regulation will have a wide-sweeping impact on a broad range of businesses operating globally or with global customer-bases. Given that the transitional period commences on 1 October 2023 South African exporters into the EU should:

- determine whether their products fall within the scope and are reportable in terms of the CBAM Regulation;
- consider whether they are able to accurately and efficiently determine the 'embedded emissions' from the production or acquisition of such goods outside of the EU;
- ensure that processes and systems are in place to ensure that the required reporting can take place by the first deadline in early 2024; and
- ensure that mandatory reporting obligations are adhered to so as to ensure smooth importation of goods within the EU Customs Union and to avoid the imposition of potential penalties.

South African exporters of goods within scope of the CBAM (or expected to become in scope of the CBAM) into the EU should already start understanding the impact of the costs that CBAM will have on their supply chains and value chains come 1 January 2026. Further, as South African companies liable for carbon tax may claim a reduction in the number of CBAM certificates to be surrendered on its CBAM declaration for the carbon taxes paid, these companies should determine the country of origin of their goods exported to the EU and should examine the set-off provisions to avoid any resultant double taxation.

Given the novel nature of the CBAM Regulation and the fact that these are foreign laws impacting local businesses, South African exporters into the EU are strongly encouraged to consider the CBAM Regulations with a holistic lens to effectively plan for its introduction and to appropriately determine the CBAM's impact on their value chain.

**Asif Joosub**
*Partner*
+27 (0) 83 488 4546

**Jason Daniel**
*Manager*
+27 (0) 78 339 4775

**Adrianne Greaver**
*Senior Associate*
+27 (0) 83 799 3767

# The Commissioner's discretionary powers: Can the Commissioner refuse to grant the new section 24(2A) lay-by allowance?

## Introduction

This article will consider whether the newly introduced section 24(2A) allowance, which provides temporary relief to taxpayers involved in selling goods by way of lay-by arrangements contemplated in section 62 of the Consumer Protection Act, No. 68 of 2008 ('the Consumer Protection Act or CPA'), is at the discretion of the Commissioner for the South African Revenue Service ('the Commissioner' and 'SARS'). The key question is whether the phrase 'the Commissioner *may* make an allowance' should be interpreted as 'the Commissioner *must* make an allowance'.

In recent years there has been a move toward removing most of the Commissioner's discretionary powers (see for example the Explanatory Memorandum on the Taxation Laws Amendment Bill, 2015) to promote certainty and prevent the abuse of such powers.

Where a complete removal of the Commissioner's discretion was not deemed feasible and the Commissioner's discretionary powers were retained, the approach has been to make such sections subject to objection and appeal, either through section 3(4) of the Income Tax Act, No. 58 of 1962 ('the Income Tax Act') or in the particular section itself. However, there are still some instances in the Income Tax Act where the discretionary power of the Commissioner is not made subject to objection and appeal (see for example sections 37H(17)(b), 76(2)(c), 78(2) and 88H) and in this instance the taxpayer's only remedy would be the taxpayer's constitutional right to just administrative action and for the decision to be taken on review.

It is not always clear whether the Commissioner has a discretion in applying a particular section. Often the uncertainty stems from the language used in such sections (e.g. the 'Commissioner *may*' as opposed to the 'Commissioner *must*'). A recent addition to the Income Tax Act, where National Treasury makes use of the word 'may', is section 24(2A) which deals with so-called 'lay-bys' as contemplated in section 62 of the CPA.

## Lay-bys

In general terms, a lay-by allows a customer to purchase goods they cannot afford to pay for in cash, by allowing the customer to pay off the purchase price in installments while the seller keeps the goods on until full payment of the purchase price has been made. Given the economic climate, it is not surprising that lay-by agreements have become more prevalent in recent years.

From an income tax perspective, section 24 deems the entire selling price of the lay-by to accrue to the taxpayer (i.e. supplier), even though ownership of the goods will only pass to the customer *if* and *when* the full payment of the selling price is made to the taxpayer. In other words, if it weren't for the deemed accrual in section 24(1), such amounts would not be included in gross income until the goods are delivered to the customer as it would not have been 'received by or accrued to' the taxpayer as required under the gross income definition. This is owing to the fact that section 62 of the Consumer Protection Act expressly provides that the amounts paid by a consumer remain the property of the consumer until the goods have been delivered. Until such time, the amounts are held by the taxpayer in a fiduciary capacity. The standard allowance in section 24(2) providing relief against the upfront income inclusion is not available to the taxpayer in these instances, given that lay-bys are generally less than 12 months in duration (normally, three to six months). To make matters worse, the taxpayer would also not get a deduction for the cost of the goods subject to the lay-by as they would continue to constitute trading stock until such time as the goods are paid for in full.

## Section 24(2A) allowance

With effect from 1 January 2023, following a submission made by PwC, section 24 has been amended by the insertion of a new sub-section (2A). In terms of this new provision, the taxpayer may claim an allowance of the full amount that is deemed to have accrued to the taxpayer under a lay-by arrangement in terms of s24(1) but which has not been received by the end of the taxpayer's year of assessment.

In this regard, section 24(2A) reads as follows:

> '(2A) In the case of a lay-by agreement as contemplated in section 62 of the Consumer Protection Act, 2008 (Act No. 68 of 2008), the Commissioner may make an allowance in respect of all amounts which are deemed to have accrued under such agreement but which have not been received by the end of the taxpayer's year of assessment.' (our underlining)

It should be noted that the allowance in section 24(2A) only provides temporary relief as the allowance has to be included in the income of that taxpayer in the immediately following year of assessment in terms of section 24(2B) (i.e effectively only treating the payments as taxable in the year the income was 'received" by the taxpayer).

### 'May' vs 'must'

The use of the word 'may' as opposed to 'must' in the context of section 24(2A) raises the question as to whether the legislature intended for the Commissioner to have a discretionary power in granting the section 24(2A) allowance. It is noted that section 24(2A) is not included in section 3(4) as one of the decisions of the Commissioner which are subject to objection and appeal in contrast to section 24(2), which is included.

The s24(2) debtors allowance afforded on credit agreements where at least 25% of the amount payable only becomes due and payable after the expiry of a period of not less than 12 months, is subject to the Commissioner deeming such an allowance as reasonable based on the special circumstance of the trade of the taxpayer. The newly introduced section 24(2A) is not made subject to such a stipulation. If the legislature intended for the Commissioner to also first consider the special circumstances of each taxpayer and determine its reasonableness, it would have been expected that the subsection explicitly made mention of this.

To determine how the word 'may' must be interpreted in the context of section 24(2A), the following remarks of Wallis JA in paragraph 18 of Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) is instructive:

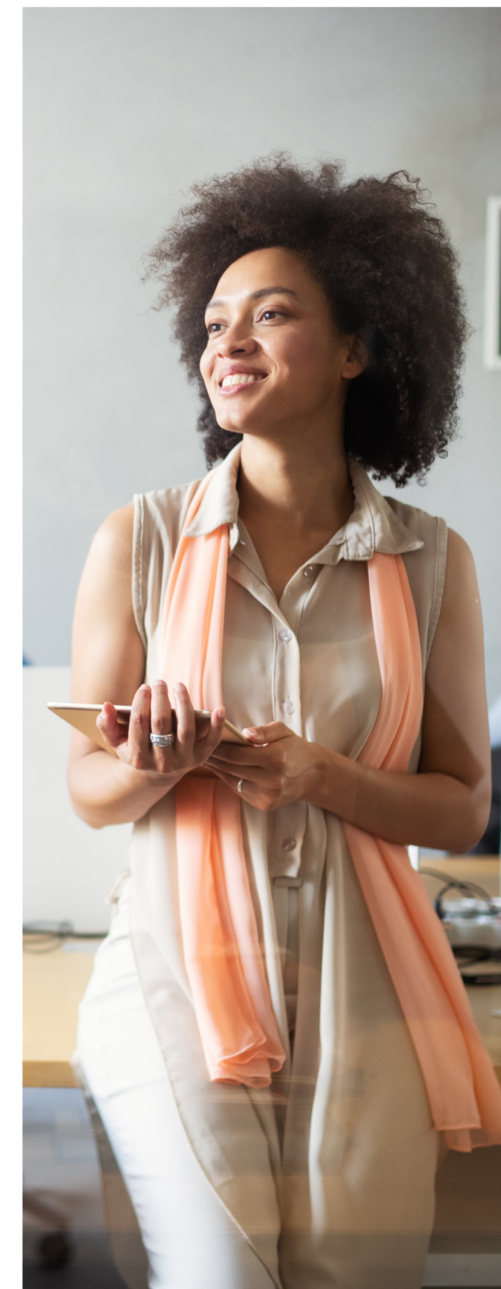
> 'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.'

The application of the rules of interpretation to words in a statute was further clarified in Telkom SA SOC Ltd v Commissioner for the South African Revenue Service [2020] ZASCA 19 (25 March 2020) and can be summarised as follows (see also our April 2022 Synopsis):

- Are the words in the statute, irrespective of the facts, ambiguous?
- If they are, the ambiguity should be resolved by reference to the law-making context. In this process an interpretation which is sensible and businesslike should be preferred to an interpretation which is insensible or unbusinesslike.
- If there remains an irresoluble conflict, resolution may be obtained by applying other common law aids to interpretation, such as the contra fiscum rule.

In the current instance it is clearly open to interpretation if the Commissioner has a discretion in granting the section 24(2A) allowance, i.e. the use of the word 'may' is potentially ambiguous.

However, if one considers the purpose of the amendments to section 24(2A) set out in the Explanatory Memorandum on the Taxation Laws Amendment Bill, 2022, it becomes apparent that it was not the intention of the Legislature to make the allowance subject to the Commissioner's discretion. In this regard the Explanatory Memorandum explains that section 24(2A) would make provision for a taxpayer to claim as an allowance against income, all amounts which are deemed to have accrued but which have not been received by that taxpayer. No mention is made of the allowance being subject to the



Commissioner exercising a discretion. In any event, it is not clear on what basis the Commissioner would allow the allowance for one taxpayer and refuse it for another, if the aim was clearly to provide relief, albeit temporary, to qualifying taxpayers from the tax burden resulting from section 24(1) in a situation where suppliers under a lay-by agreement would otherwise be subject to tax on amounts to which they have no legal claim.

Generally, the ordinary meaning of 'may' would be permissive as opposed to obligatory. However, there are a vast number of cases in South Africa where the word 'may' has been interpreted as permissive in certain instances and as 'must' in other instances. Ultimately, it appears that the only consensus reached in case law is that the interpretation of the word 'may' will depend on the context in which it is used (see *Gunn v Barclays Bank* 1962 3 SA 678 (A) 685).

It is worth noting that in Stroud Riley and Co Ltd v Secretary for Inland Revenue [1974] 4 All SA 416 (E) the court held that the word 'may' in section 102 of the Income Tax Act, must mean that there is a duty to refund where it has been proven that excess tax was paid. Cloete J stated the following:

> 'It seems to me that in dealing with a matter of this nature the respondent is required firstly to enquire into the facts. If after such enquiry he is satisfied that the amount paid is in excess of the amount properly chargeable under the Income Tax Act, he is bound, as a matter of duty, to authorise the refund to the taxpayer. This seems to be the clear effect of the decisions quoted above. In the latter respect he has no discretion in the matter in spite of the use of the word "may" in the section which authorises him to make a refund. The general principle applicable was laid down Macdougall v. Paterson, (1851) 11 C.B. 755 at p. 766, by JERVIS, C.J., as follows:
>
> 'The word "may" is merely used to confer the authority: and the authority must be exercised, if the circumstances are such as to call for its exercise.'
>
> In dealing with a similar provision in the Australian legislation, it was held in Finance Facilities (Pty.) Ltd. v. Federal Commissioner of Taxation, (1971) 2 A.T.R. 573 at p. 578:
>
> 'If the Commissioner, having considered the matter, is satisfied of facts out of which the power to allow the rebate arises, he cannot nevertheless refuse to allow it.'

Taking the above into account, one would think that SARS would be hard pressed to argue that the Commissioner has a discretionary power to grant the allowance in section 24(2A) once the objective requirements have been met.

That being said, consider the wording in the standard allowance in section 24(2):

> '(2) In the case of such an agreement, other than a lay-by agreement as contemplated in subsection (2A), in terms of which at least 25 per cent of the said amount payable only becomes due and payable on or after the expiry of a period of not less than 12 months after the date of the said agreement, the Commissioner, taking into consideration any allowance the Commissioner has made under section 11 (j), <u>may</u> make such further allowance as under the <u>special circumstances of the trade of the taxpayer seems to the Commissioner reasonable</u>, in respect of all amounts which are deemed to have accrued under such agreements but which have not been received at the close of the taxpayer's accounting period: Provided that any allowance so made shall be included as income in the taxpayer's returns for the following year of assessment and shall form part of that taxpayer's income.' (our underlining)

Compare this to the amendment to section 24(2) (effective date not yet determined — see the 2015 EM), where the word 'may' was replaced with 'shall' to 'remove reference to Commissioner's discretion':

> '(2) In the case of such an agreement in terms of which at least 25 per cent of the said amount payable only becomes due and payable on or after the expiry of a period of not less than 12 months after the date of the said agreement, taking into consideration any allowance made under section 11 (j), there <u>shall</u> be made such further allowance as under the special circumstances of the trade of the taxpayer, as set out in a public notice issued by the Commissioner, <u>is reasonable</u>, in respect of all amounts which are deemed to have accrued under such agreements but which have not been received at the close of the taxpayer's accounting period: Provided that any allowance so made shall be included as income in the taxpayer's returns for the following year of assessment and shall form part of the taxpayer's income.' (our underlining)

Notably, both the current and proposed wording of 24(2) are made subject to objection and appeal in terms of section 3(4).

The above 'muddies the waters' as to the interpretation of the word 'may' in the context of section 24(2A). One has to ask why the legislature would have used the word 'may' in section 24(2A) when it intends to remove the word 'may' from section 24(2), as well as why the legislature would make section 24(2) (current and proposed) subject to objection and appeal but not section 24(2A)? This may be explained by the fact that in section 24(2) the Commissioner is enjoined to apply his mind as to what is reasonable under both versions of the section, something which he does not do with regard to section 24(2A).

The phrase 'the Commissioner may' is not always consistently used throughout the Income Tax Act. In some instances, like the current case in section 24(2A), the Act simply refers to 'the Commissioner may' whereas in other instances, for example section 11(j), 'the Commissioner may, on application by a taxpayer' issue a directive that the doubtful debt allowance may be increased to 85% in certain cases. In this regard, the Act specifically sets out the criteria that the Commissioner must take into account after an application has been received by the Commissioner. In the absence of any criteria or stipulations, the taxpayer is left to speculate on what basis the section 24(2A) allowance may or may not be granted if the allowance is in fact subject to the Commissioner's discretion.

SARS may have to consider updating its Interpretation Note 48 dealing with credit agreements and the section 24(2) debtors allowance (issue 3 last updated 5 March 2018) to shed some light on the introduction of section 24(2A), specifically whether the allowance is at the discretion of the Commissioner and, if so, what facts and circumstances the Commissioner will take into account in arriving at such a decision.

## The takeaway

The use of the phrase 'the Commissioner *may*' remains open to interpretation. Taking the apparent purpose of the section 24(2A) allowance into account, it remains difficult to envisage an interpretation where the Commissioner has a discretion to either allow or disallow the section 24(2A) allowance.

The apparent purpose of section 24(2A) is to provide welcome tax relief, albeit temporary, to taxpayers selling goods in terms of lay-by agreements that were previously precluded from claiming the relief in section 24(2). However, the wording used in section 24(2A) has caused some confusion, specifically when compared to the reading of the immediately preceding section 24(2). SARS has not issued any guidance on the matter to date and taxpayers are left to speculate on what basis the allowance may be granted.

**Christine Fourie**
*Senior Manager*
+27 (0) 79 268 5811

**Gizelle Ridgway**
*Senior Associate 2*
+27 (0) 84 534 0545

# No escape hatch: business rescue pre and post commencement debts

The High Court case of *Henque 3935 CC trading as PQ Clothing Outlet (in Business Rescue) ("Henque") v the Commissioner of the South African Revenue Service ("SARS") (2020/35790) [2023] ZAGPJHC 186 (7 March 2023)*, dealt with, *inter alia*, tax debts 'pre' and 'post' commencement of business rescue proceedings.

Before delving into the details of the Henque case, it is important to understand what is meant by the terms "tax debt" and "business rescue".

In terms of section 1 of the Tax Administration Act, No. 28 of 2011 ("TAA"), read with section 169(1) of the TAA, a tax debt is an amount of tax "due and payable" in terms of a tax Act. This definition becomes significant further below, for purposes of this article.

In terms of section 128(1)(b) of the Companies Act, No. 71 of 2008 ("Companies Act"), business rescue is defined, most relevantly, as proceedings to facilitate:

- the rehabilitation of a company that is financially distressed by providing for the temporary supervision of the business by a Business Rescue Practitioner,
- the temporary suspension of creditors' claims, and
- the development of a business rescue plan.

By placing a temporary moratorium on the rights of claimants, the Companies Act ring-fences the debts of the entity that have accrued prior to the commencement of business rescue. It is these debts that the business rescue plan focuses on for purposes of rehabilitating the entity.

Other pertinent terms that are often used in the business rescue process include pre-commencement debts/finance (meaning debts incurred prior to instituting business rescue proceedings) and post-commencement debts/finance (meaning debts incurred after instituting business rescue proceedings).

## Background to the matter and issue in dispute

On 29 November 2017, Henque submitted its 2017 income tax return, wherein it declared a loss of R46,000. SARS accordingly issued an original assessment for the 2017 tax period, indicating an assessed loss of R46,000 due to Henque, as per the return. On the same day, SARS issued a notification of audit to Henque for the 2017 year of assessment.

Pursuantly, Henque commenced business rescue proceedings on 31 January 2018.

In the interim, Henque also had a cumulative Value-Added Tax ("VAT") refund of R1,018,820.80 due to it in respect of the 02/2018 VAT period.

On 4 April 2018, the audit for the 2017 year of assessment was finalised by SARS. Subsequently, on 1 May 2018, SARS issued an additional assessment, in terms of which the taxable income of Henque was increased by R16,793,724 indicating a tax liability of R5,620,571.03. The notice of additional assessment indicated that the final date for payment of the additional liability was 31 May 2018. On the same day (1 May 2018) SARS notified the Business Rescue Practitioner of the additional tax liability when a SARS official contacted the Business Rescue Practitioner directly.

The business rescue plan was prepared and published on 31 May 2018. The matter of contention was whether the 2017 income tax liability reflected on the additional assessment constituted a 'pre' or 'post' business rescue debt. The classification of which would consequently have a bearing on whether the VAT refund (post-business rescue) could be offset against the 2017 tax liability of approximately R5.6 million.

The Business Rescue Practitioner excluded the tax liability as reflected on the additional assessment from the business

rescue plan. Henque relied on section 5(1)(d) of the Income Tax Act, No. 58 of 1962 ("ITA"), and asserted that the 2017 income tax liability was a pre-commencement debt. This was on the premise that the tax became due on 28 February 2017, being the last day of the year of assessment, therefore, prior to Henque entering into business rescue on 31 January 2018. Resultantly, Henque argued, the VAT refund (which arose post-business rescue) could not be offset against the 2017 income tax debt (pre-commencement debt).

Conversely, SARS contended that the 2017 income tax liability was a post-commencement debt on the basis that the tax debt became "due and payable" on 31 May 2018 as per the additional assessment. The VAT refund could, according to SARS, therefore, be offset against the 2017 income tax liability by virtue of both the VAT refund and 2017 income tax liability being post-commencement amounts.

## The decision of the High Court

In ascertaining whether the 2017 income tax liability constituted a 'pre' or 'post' commencement debt, the High Court dissected the legislative purpose of section 5(1) of the ITA.

Section 5(1)(d) of the ITA reads as follows, '*Subject to the provisions of the Fourth Schedule there shall be paid annually for the benefit of the National Revenue Fund, an income tax (in this Act referred to as the normal tax) in respect of the taxable income received by or accrued to or in favour of — any company during every financial year of such company.*'

It was noted by the Court that the purpose of section 5(1) of the ITA is to quantify the liability, and not to make the tax payable before it has been assessed. Only when read in conjunction with the legislative provisions governing the issuance of assessments to which the tax relates, can the date that the tax is due and payable be deduced.

The High Court thus considered sections 92 and 96 of the TAA which set out the rubric for the issuance of assessments, and at paragraphs 16 and 18 in conclusion pronounced that the 2017 income tax liability constituted a post-business rescue debt -

> "Reading s 5(1)(d) of the Income Tax Act in the context of ss 1, 92 and 96 of the TAA it is unquestionably clear that the income tax only becomes due and payable when the assessment or additional assessment is made and issued to the taxpayer….Section 96(1 )(f) of the TAA, provides that SARS must issue a notice of assessment which is to include 'the date for paying the amount assessed'. In this case the additional assessment was made on 4 April 2018 and issued to Henque on 1 May 2018. The notice of the additional assessment identified the 'due date' to be 1 May 2018 and the 'second date' to be 31 May 2018. The second date is the date by when it is to be paid. The amount assessed, thus, only became due and payable on 31 May 2018. Until then it was not a 'debt'. Thus it constitutes a post-commencement debt or finance (in the parlance of the Companies Act)."

Consequently, in light of the facts placed before it, the High Court found that the VAT refund could indeed be offset against the 2017 income tax liability as both amounts constituted post-business rescue amounts.

## Key takeaways

Business rescue proceedings establish a moratorium of the body of creditors to allow a company to rehabilitate its debts, with the aim of becoming profitable in the future. However, in the case of tax debts, nuances (such as pending audits and verifications) could result in the assessed tax for a period prior to the commencement of the business rescue proceedings, constituting post-business rescue debts. In such a case, the company and other creditors could be faced with an unplanned debt to be catered for in the business rescue plan.

Since the circumstances of all cases differ, it is imperative to obtain professional advice when taking measures to enter into business rescue, in order to understand the key legislative implications.

**Elle-Sarah Rossato**
*Partner*
+27 (0) 82 771 7417

**Jadyne Devnarain**
*Associate Director*
+27 (0) 82 382 5217

*We would like to thank Ashley Mhona for her contribution to this article.*

# SARS Watch

## SARS Watch 1 August 2023 – 31 August 2023

| | | |
|---|---|---|
| **Legislation** | | |
| *11 Aug 2023* | Notice R.3780 – Amendment to paragraph 8 of Schedule 1 to the Value-Added Tax Act, to regulate the exemption of value-added tax on the importation of certain arms, ammunition, parts and accessories thereof imported for testing and experimenting | Published in Government Gazette No. 49104 with implementation date of 11 August 2023. |
| **Interpretation** | | |
| *24 Aug 2023* | Draft Interpretation Note – Determining the calorific value of coal for purposes of the royalty | Comments are due to SARS by Friday, 22 September 2023. |
| *16 Aug 2023* | Interpretation Note 110 (Issue 2) – Leasehold improvements | This Note provides guidance on the application of paragraph (h) and the related deductions under section 11(g) and (h) of the Income Tax Act 58 of 1962 (the ITA). |
| *16 Aug 2023* | Interpretation Note 109 (Issue 2) – Lease premiums | This Note provides guidance on the application of paragraph (g) and the related deductions under section 11(f) and (h) of the ITA. |
| *16 Aug 2023* | Interpretation Note 107 (Issue 2) – Deduction in respect of commercial buildings | This Note provides guidance on the interpretation and application of section 13*quin* of the ITA. |
| **Binding rulings** | | |
| *28 Aug 2023* | Binding General Ruling 65 – Value-added tax treatment of rounding difference in cash transactions | This BGR sets out the circumstances and conditions under which a supplier need not issue a credit note and the input tax consequences for the recipient vendor when a rounding difference occurs as a result of a cash transaction. |
| **Customs and excise** | | |
| *30 Aug 2023* | Updated: Prohibited and Restricted Imports and Exports list | Tariff heading 0507.10 needs a TOPS and CITES permit from DFFE – Environment for Import & Export. |
| *30 Aug 2023* | Updated: Customs Clearance Declaration | The declaration processing system (DPS) has been enhanced to include:<br>• The dual inspection process for bonded movement goods; and<br>• The electronic exchange of declaration information with other government agencies (OGAs) after obtaining prior consent from the registered SARS client.<br>The external policy and annexures have been published accordingly. |
| *28 Aug 2023* | Draft amendments to rules under sections 59A, 60, 64F, 75, 101A and 120 – Electronic submission of applications for refunds and drawback | Comments are due to SARS by Wednesday, 6 September 2023. |
| *28 Aug 2023* | Substitution of forms<br>• DA 63 – Application for refund – Export for trade purposes of imported duty paid goods (Refund item 522.03)<br>• DA 64 – Application for drawback/refund<br>• DA 66 – General Application for drawback/refund | Comments are due to SARS by Wednesday, 6 September 2023. |

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| *4 Aug 2023* | Notice R3744 – Amendment to Part 1 of Schedule No. 1, by the substitution of tariff subheadings 1701.12, 1701.13, 1701.14, 1701.91, and 1701.99, to reduce the rate of customs duty on sugar from 195,28c/kg to free of duty in terms of the existing variable tariff formula – ITAC Minute 03/2023 | Published in Government Gazette No. 49068 with implementation date of 4 August 2023. |
| *3 Aug 2023* | Notice R.3747 – Amendment to Part 1 of Schedule No. 2, by the insertion of anti-dumping items under 201.02, in order to impose anti-dumping duties against the alleged dumping of frozen bone-in portions of fowls of the species Gallus Domesticus classifiable in tariff subheading 0207.14.9, originating in or imported from Brazil, Denmark, Ireland, Poland and Spain – ITAC Report 695 | Published in Government Gazette No. 49072 with implementation date of 3 August 2023. |
| *3 Aug 2023* | Gradual implementation of the 13 blocks SADC Certificate of Origin (SCO) and transitional arrangements for the smooth phasing-out of the 12 blocks SCO. | Alignment of SCO with the format prescribed in the Consolidated SADC Protocol on Trade. |
| *2 Aug 2023* | Uganda CMAA Agreement | Date of entry into force is 1 September 2023. |
| *1 Aug 2023* | Updated: Prohibited and Restricted Imports and Exports list. | Tariff heading 3825.10 requires an Import permit from ITAC. |
| **Case law** | | |
| *In accordance with the date of judgment* | | |
| *18 Aug 2023* | Erasmus v Commissioner for the South African Revenue Service (9706/21) [2023] ZAWCHC 215 | This is an application seeking an order to review and set aside a decision by SARS that the taxpayer was party to an alleged impermissible tax avoidance arrangement, in terms of s80A (read with ss 80B and 80L) of the ITA, and an assessment that he was consequently liable for dividends tax, an understatement penalty and interest. |
| *17 Aug 2023* | Commissioner for the South African Revenue Services v Virgin Mobile South Africa (Pty) Ltd (A82/22 ; IT25117) [2023] ZAGPPHC 685 | Appeal against dismissal of application in terms of Rule 30 of the Uniform Rules of Court wherein SARS applied for the setting aside of the default judgement application made by the taxpayer in terms of Rule 56(1) of the Tax Rules on the grounds that the default judgement application amounted to an irregular procedure. The crux of the issue relates to interpretation of the word "default" in Rule 56(1). |
| *1 Aug 2023* | Kusasa Refining (Proprietary) Limited v Commissioner for the South African Revenue Services (56820 2021) [2023] ZAGPPHC 640 | The Applicant seeks to review and set aside the decision of the Respondent for its failure to take a decision to finalise the value added tax ("VAT") audit of the Applicant's 01/2019 to 02/2021 VAT Periods. |
| *1 Aug 2023* | Nu Africa Duty Free Shops (Pty) Ltd v Commissioner for the South African Revenue Services (62436 21) [2023] ZAGPPHC 624 | This is an application for an order to review and set aside SARS's detention and seizure notices, the Custom and Excise National Appeals Committee's decision confirming the seizure and remitting the matter back to SARS for reconsideration in terms of section 8(1)(c)(i) of the Promotion of Administrative Justice Act 3 of 2000. |
| *26 Jul 2023* | Siyandisa Trading (Pty) Ltd v Commissioner for the South African Revenue Services (A201 2021) [2023] ZAGPPHC 126 | Application for leave to appeal the judgement and order handed down by the High Court on 17 February 2023. |
| *24 Jul 2023* | Commissioner for the South African Revenue Services v Agrizzi and Another (45008 2021) [2023] ZAGPPHC 604 | Application in terms of section 186(2) of the Tax Administration Act ('TAA') for the compulsory repatriation of the respondent's foreign assets in Italy and counterapplication by the respondent to review SARS's decision to refuse the respondent's application for suspension of payment of tax assessed / outstanding tax liability in terms of section 164 of the TAA. |
| *21 Jul 2023* | PFC Properties (Pty) Ltd v CSARS and Others (543/21) and Brita De Robillard NO and Another v PFC Properties (Pty) Ltd and Others (409/22) [2023] ZASCA 111 | First issue is an appeal against a winding-up order granted against PFC in favour of SARS. Second is the appeal against the dismissal of the business rescue application launched by the trustees of the sole shareholder of PFC after the winding-up application. |
| *19 Jul 2023* | A Taxpayer v Commissioner for the South African Revenue Service (IT 45638) [2023] ZATC 13 | Whether the taxpayer's expenditure on the grant to Newco is properly characterised as being revenue or capital in nature. |
| **Guides and forms** | | |
| *31 Aug 2023* | Managed Shared Access Through eFiling – External Guide | Updated to include the new link to the definitions, acronyms and abbreviations and the disclaimer paragraph. |
| *24 Aug 2023* | Guide to the Voluntary Disclosure Programme | This guide provides general guidance on the voluntary disclosure programme under Chapter 16 of the TAA. |
| *24 Aug 2023* | Guide for Tax Rates / Duties / Levies (Issue 16) | This guide provides a current and historical view of the rates of various taxes, duties and levies collected by SARS. |

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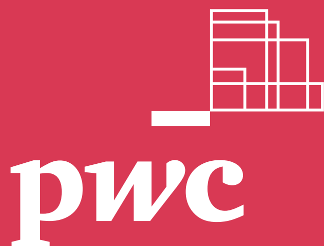
| *16 Aug 2023* | VAT Rulings Process Reference Guide (Issue 4) | This guide provides information and guidelines on the VAT rulings process. It sets out the steps to be followed when applying for a VAT class ruling or a VAT ruling and explains certain terms. |
| *16 Aug 2023* | VAT Section 72 Decisions Process Reference Guide (Issue 2) | This guide provides information and guidelines on VAT decisions under section 72 of the Value-Added Tax Act 89 of 1991, read with Chapter 7 of the Tax Administration 28 of 2011 (section 72 decision). It sets out the steps to be followed when applying for a section 72 decision and explains certain terms. |
| *4 Aug 2023* | Customs Trader Portal (CTP) for Registration and Licensing of Customs Clients – External Guide | Guidance on the registration and licensing of customs clients. |
| **Other Publications** | | |
| *28 Aug 2023* | OECD: The taxation of labour vs. capital income: A focus on high earners | This working paper presents novel analysis comparing the tax treatment of labour and capital income across OECD countries through stylised effective tax rates. |
| *23 Aug 2023* | OECD: Tunisia deposits its instrument for the ratification of the Multilateral BEPS Convention | Tunisia deposited its instrument of ratification for the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS Convention). The BEPS Convention will enter into force on 1 November 2023 for Tunisia. |
| *11 Aug 2023* | Tax Alert: 2023 Draft Tax Bills and Regulations: Environmental-tax-related proposals. | This Alert provides more details on the proposed amendments in respect of the Carbon Tax Act and related Regulations thereto published in the 2023 draft tax legislation. |
| *9 Aug 2023* | Tax Policy Alert: The UN Secretary-General releases early Report on promotion of inclusive and effective international tax cooperation | On 8 August 2023, the UN Secretary-General published an advance unedited version of a report analysing options / next steps around UN international tax cooperation. The Report follows the approval and adoption of the draft resolution from certain African countries in late 2022. This Alert provides more details. |
| *8 Aug 2023* | OECD: Policy Guidance on Mitigating the Risks of Illicit Financial Flows (IFFs) in Oil Commodity Trading | This Guidance proposes a set of relevant, feasible actions for providers of official development assistance (ODA) to respond to IFFs in oil commodity trading. |
| *8 Aug 23* | Tax Alert: 2023 Draft tax legislation – Reviewing the Practice Note 31 principles | The proposal is to withdraw Practice Note 31 of 1994 (PN31) and to insert a new section in the income tax legislation to allow a deduction for expenditure incurred by a company in the production of interest income accruing from another group company (as defined) provided certain requirements are met. The proposed amendments will come into effect on 1 January 2024 and apply in respect of years of assessment commencing on or after that date. This Alert provides more details. |
| *8 Aug 2023* | Tax Alert: 2023 Draft tax legislation – Foreign Business Establishment amendment | The draft 2023 Taxation Laws Amendment Bill (published for comment on 31 July) proposes potentially far-reaching amendments to the Foreign Business Establishment (FBE) exemption for Controlled Foreign Companies (CFCs) of South African residents. This Alert provides more details. |
| *1 Aug 2023* | Tax Alert: 2023 Draft tax legislation. | On 31 July 2023, National Treasury (NT) and the South African Revenue Service (SARS) published the 2023 Draft Tax Bills and Draft Regulations for comment (due by 31 August 2023). This Alert provides a summary of the draft amendments and legislative process. |
| *1 Aug 2023* | SARS: Update on the distribution of funds to non-resident Trusts by resident Trusts | It has been the practice of SARS not to approve the release of funds when resident trusts make distributions to non-resident trusts. Following queries in this regard, SARS confirmed that it will consider approval for the release of funds / amounts distributed to non-resident trusts. Must apply for a manual letter of compliance to obtain the necessary approval. |



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