Synopsis
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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.

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SARS fails in disallowing expenditure to fund an executive incentive scheme

Every trading organisation aspires to be profitable so that its employees and shareholders can benefit from its prosperity.

A key element of the profit-making strategy is to ensure the retention of selected executives who make the vital strategic decisions on which the organisation's prosperity depends, and who might otherwise be poached by competing concerns.

Immunising key executives from such temptation is not achieved simply by paying them generously, for this still leaves them free to resign and join forces with a competitor who offers them even more.

An incentive plan must thus provide an appropriate financial incentive for the executives to remain with the company for a substantial period of time and must also deprive them of that financial benefit if they leave the company prematurely.

Moreover, an incentive plan needs to be tax-effective for the company that seeks to retain its key executives – the cost to the company of funding the scheme must thus be tax-deductible.

The simultaneous achievement of these objectives is no easy matter.

The company could of course simply offer its shares to the key executives that it wishes to retain. But this would require those individuals to outlay their personal funds to acquire the shares, and they would run the risk of suffering a loss if the shares were to decline in value.

An executive incentive scheme comes under scrutiny in the Tax Court

The decision of the Cape Town Tax Court in *SG Taxpayer v Commissioner for the South African Revenue Service* [2018] ZATC 1 on 9 May 2018 may be of interest, as the court held that, based on the particular facts of the case, the expenditure incurred by the taxpayer company in funding the scheme was deductible.

It should be noted that SARS could lodge an appeal to the High Court and, if unsuccessful in that forum, to the Supreme Court of Appeal to challenge the findings of the Tax Court.

The structure of the executive incentive scheme

In this particular matter, the taxpayer company – a listed company that was the subsidiary and chief operating arm of a group holding company – set up an incentive scheme with the object of retaining some 26 members of its own key managerial staff.

To this end, the group holding company formed a discretionary trust in 2004 whose sole beneficiary was, initially, itself.

Its subsidiary, the taxpayer company, then remitted R48m to the trust by way of a *non-refundable contribution* and the trust then acquired a shelf company and applied all of those funds in subscribing for preference shares in that shelf company (redeemable after five years). The shelf company in turn used all those funds to purchase shares in the group holding company.

The taxpayer company's key selected employees were offered (and paid in cash for) ordinary shares in the shelf company at par value. Those employees were restrained from disposing of those shares for seven years; if they left the employ of the taxpayer company before the end of that period, they would forfeit their shares.

At the end of the envisaged five years, the value of the group holding company's shares had substantially appreciated in value – with a concomitant increase in the value of the shelf company, substantially exceeding the latter's preference share liability.

The directors of the shelf company resolved to redeem its preference shares for some R48m. The shelf company then disposed of its remaining shares in the group holding company for some R16m in December 2009 and paid a dividend of some R28m to the senior employees who had participated in the incentive scheme.

By virtue of the terms on which the scheme was structured, the taxpayer company's R48m initial contribution to the trust was not repaid to it by the trust.

The tax-deductibility of the R48m "contribution" by the taxpayer company to the trust

The tax-effectiveness of the scheme depended on the taxpayer company's entitlement to deduct, in terms of section 11(a) of the Income Tax Act, the R48m "non-refundable contribution" it had paid to the trust.

This deduction was initially allowed by SARS, but a subsequent additional assessment disallowed it on the grounds (as stated in SARS's rule 31 statement) that –

> "… the expenditure was not incurred in the production of [the taxpayer's] income in that there is no direct, causal link between the contribution and the production of income." [14]

The basis of SARS's contention in this regard was that the group holding company, not the taxpayer company, was the sole beneficiary of the trust and was the only party to directly benefit from the R48m contribution made by the taxpayer company to the trust. SARS argued that the participants in the incentive scheme were not beneficiaries of that contribution.

In effect, SARS argued that the R48m contribution to the trust by the taxpayer company was not incurred in the production of that company's income, as required by section 11(a) of the Income Tax Act, and that this expenditure consequently did not qualify as a deduction for the company.

Significantly, SARS chose not to argue that the R48m contribution fell foul of section 23(g) of the Income Tax Act, which disallows expenditure that is not laid out or expended "for the purposes of trade".

The expert witness called by the taxpayer company testified that the purpose of the incentive scheme was to ensure that the taxpayer company's senior employees indirectly enjoyed the benefit of the growth in the value of the shares of the group holding company without bearing the attendant risk of a decline in their value. In the scheme before the court, the interposition of the shelf company insulated those employees from that risk.

Moreover (refer paras [25] – [26] of the judgment) testimony was given in the Tax Court that the taxpayer's purpose was to incentivise its key management personnel, described by one witness as the "engine room" of the company, by enabling them to participate indirectly in the growth of the group holding company's shares and giving them a financial incentive to remain with the company.

The judgment

In its rule 31 statement, SARS relied on the alleged absence of a "direct, causal link" between the R48m "contribution" paid by the taxpayer company to the trust and the production of income by that company.

This contention was the basis of SARS's argument that the R48m contribution did not qualify for deduction by the taxpayer company in terms of section 11(a).

In the course of the proceedings (refer to para [33]), SARS admitted that a *direct, causal link* is not in fact the legal criterion for deductibility, and that the law merely requires *a sufficiently close connection* between the expenditure in question and the production of the taxpayer's income.

The court said (at para [34]) that what needs to be considered in this regard is, firstly, *the purpose of the expenditure from the taxpayer's perspective* and, secondly, *what that income actually causes to happen or brings about*.

The court went on to quote from the decision in *CIR v Genn & Co (Pty) Ltd* 1955 (3) SA 293 AD at 299C, which held that it must be *proper, natural or reasonable* to regard the expenditure in question as part of the cost of performing the taxpayer's operations [36].

The purpose and effect of the scheme

In the critical passage in its judgment the Tax Court held at [46] that –

> "On the evidence, the dominant purpose in the establishment and implementation of the scheme was to *protect and enhance the business of the taxpayer and its* income, by motivating its key staff to be *efficient* and productive and *remain in the taxpayer's employ*. The fact that the incentive offered to, and in fact received by, the employees was the financial benefit that would flow from the success of the taxpayer's business and the growth in the value of the shares in HoldCo, cannot detract, in my view, from a finding that *the expenditure was incurred by the taxpayer for the purpose of earning income*."

If SARS takes the judgment on appeal, a crucial question will be whether the appeal court agrees with this passage in the Tax Court judgment.

The Tax Court held (at paras [48] and [50]) that the taxpayer company's R48m contribution to the trust did in fact achieve its purpose, inter alia in that of the 26 key staff of the taxpayer company who participated in the scheme, only three left the taxpayer's employ during the period of the scheme.

In the result, the court held that the taxpayer company had discharged the onus of proving the existence of a *sufficiently close link* between its expenditure of R48m by way of a contribution to the trust and the company's income-producing operations, and that this amount therefore qualified as a section 11(a) deduction.

The legal criteria for the deductibility of expenditure, as set out in section 11(a) and section 23(g) of the Income Tax Act, and interpreted in a series of judgments, are well-established and clear.

It is the application of those criteria to the facts of a case such as the present that is contentious.

In particular, cogent arguments can be presented both ways as to whether, in this particular matter, there was indeed the requisite *sufficiently close connection* between, on the one hand, the taxpayer company's non-refundable R48m contribution to the trust in question and, on the other hand, the production of income by the taxpayer in that its senior executives were retained and incentivised by the benefits they stood to derive from the scheme.

Where a taxpayer incurs expenditure to fund a scheme to incentivise its employees to remain in their employment and to work diligently, tax-deductibility turns on whether the expenditure satisfies the criteria laid down in section 11(a) of the Income Tax Act, namely, that it was non-capital expenditure incurred for the purpose of producing income. The courts have interpreted this as requiring a sufficiently close link, as regards both purpose and effect, between the expenditure on the one hand and the taxpayer's income on the other.

The outsourcing of primary production activities under the Diesel Refund Scheme

Introduction

The Diesel Refund Scheme is an incentive programme whereby qualifying diesel users in primary production industries can claim a refund of Road Accident Fund (RAF) and fuel excise levies paid when purchasing diesel. For diesel refund purposes, the relevant primary production industries include farming, mining, forestry, fisheries, rail transport and electricity producers, among others.

The Diesel Refund Scheme was introduced for mainly two reasons:

- To improve the competitiveness of the local primary production sector; and
- To provide relief of road-related taxes to persons who are not road users.

The competitiveness is achieved by reducing the costs of primary production and more specifically the cost of fuel. The targeted sectors are often heavy users of diesel and any reduction in this expense contributes to the sector's overall competitiveness. Countries like New Zealand, Australia and the UK have introduced similar schemes for the same reasons.

In addition to other taxes, diesel purchased in South Africa includes a Road Accident Fund (RAF) levy. This levy is a compulsory social insurance that covers road users in the event of motor vehicle accidents. While this insurance is for the benefit of South African road users, it does not benefit diesel users that do not use public roads. In the interest of fairness primary producers (non-road users) should not carry the burden of the RAF levy, as they do not benefit from it.

Legal regime

Diesel refunds are regulated by Section 75 of the Customs and Excise Act 91 of 1964 ("the Act"). While the Act itself provides for the refund of certain fuel levies, the administration of the scheme is regulated by Part 3 of Schedule 6 to the Act ("Schedule 6").

Item 670.04 of Part 3 of Schedule 6 provides for a number of eligibility requirements for qualification and implementation of the Diesel Refund Scheme. These requirements include both substantive as well as documentary requirements.

There are a number of substantive requirements that must be met before a person qualifies for refunds in terms of the scheme. The first qualifying requirement is that the person intending to benefit from the Diesel Refund Scheme must be a user as defined in Schedule 6. This requires that such a person be registered as a VAT vendor in terms of the Value-Added Tax Act and for Diesel Refund purposes as contemplated in section 75(1A) AND (4A) of the Act.

The second criterion is that the diesel claimed must form part of an eligible purchase. An eligible purchase is one that complies with three (defined) requirements:

- Purchase of diesel by a user;
- Diesel must then be used in own primary production; and
- Where the primary production activities are performed by a contractor, the contract must be on a 'dry' basis.

Purchased by user

The Schedule defines eligible purchases as fuel purchased by the user and used in accordance with the requirements below.

Own primary production by the user

Schedule 6 lists activities that are considered as primary production activities for each of the sectors that are covered by the scheme. There are distinct lists for mining, farming and forestry, for instance. The primary production activities listed for mining, for example, include activities like the prospecting for minerals, the removal of overburden, the recovery of minerals and the transportation of minerals.

In addition to the requirement that primary production activities must be performed, Schedule 6 requires that the activities are performed by the user for its own primary production. Own primary production requires that the user has some form of ownership over the goods produced. This prerequisite therefore entails that the user perform the listed primary production activities itself. A user may therefore not claim the refund where it produces products on behalf of another person.

There is however an exception to this rule in that a contractor may be used to perform the activities under limited circumstances.

Contract on a dry basis

Primary production activities must, under normal circumstances, be carried out by the user itself. Schedule 6 does however provide that in the case of mining, forestry and fisheries, a contractor may be employed to perform the listed primary production activities.

While the use of a contractor is specifically provided for it is required that the contract be concluded on a 'dry' basis. The term 'contracted on a dry basis' is defined in the Schedule as follows:

"'dry' or 'contracted or hired on a dry basis' means that any vehicle, vessel, machine or any other equipment whatsoever using distillate fuel is hired or a person using such vehicle, vessel, machine or other equipment is contracted by a user for the purpose of performing any qualifying activity and the user supplies the distillate fuel from eligible purchases;"

The above definition requires that a user hiring equipment or a contractor to conduct activities must supply the fuel consumed by such equipment or contractor. Should the contractor supply the diesel used in the activities, the contract will be defined as a 'wet' contract. In such cases the user will not be able to claim the levies on the diesel purchased and used by the contractor. The contractor will also not be able to benefit from the refunds under the scheme.

It is clear that there is a substantial focus on the user as defined by Schedule 6. This focus has resulted in some anomalies and practical issues in the administration/implementation of the Diesel Refund Scheme and, arguably, has had unfair consequences for those who were meant to benefit.

Issues with current outsourcing requirements

As mentioned above, the purpose of the Diesel Refund Scheme is twofold. Firstly it is intended to improve the competitiveness of primary production and secondly it relieves the road-related tax burden for non-road users. The current requirements limit the effectiveness of the scheme with regard to both objectives.

With regard to increasing competitiveness, the current scheme does not achieve the full potential effect. The mining, forestry and farming sectors often make use of contractors to conduct some if not all of the required production activities. The exclusion of contractors from the scheme has the effect that their fuel costs will not be reduced and as a result they will receive no competitive benefit. While it is true that the contractor is not the end producer of the primary product, higher costs will inevitably be passed on to such producer.

The current system also does not properly compensate all non-road users for road-related levies. This once again is due to the fact that contractors are excluded from the refund scheme. These contractors are liable to pay the RAF levy while not receiving any benefit from it.

This clearly illustrates that the Diesel Refund Scheme is currently not applied in the most effective form to achieve its stated goals. In order to fully realise its goals some changes to the outsourcing requirements are needed.

Thuthugani Contractors v The Commissioner of the South African Revenue Service

In order to practically illustrate the difficulties associated with the current system it is helpful to consider court cases dealing with the subject. In recent years only one case dealing with diesel refunds and specifically the eligibility of contractors has been reported. The case in question is that of Thuthugani Contractors v The Commissioner of the South African Revenue Service ([2016] ZAKZPHC 33).

This case centers on the requirements relating to contractors as described above. In this matter, Thuthugani ("the Applicant") was contracted by Mondi Limited, a company engaged in the forestry industry. Thuthugani provided silviculture services to Mondi, which included land preparation as well as the planting and maintenance of trees. These services were provided by the Applicant in forests owned by Mondi.

Thuthugani was registered with the South African Revenue Service (SARS) as a user in terms of the Diesel Refund Scheme. It was also common cause that Thuthugani was engaged in 'primary production activities' as defined in the relevant part of Schedule 6.

Thuthugani submitted a refund claim in terms of the Diesel Refund Scheme to SARS. These refunds were disallowed on the basis that the Applicant did not comply with the requirements as laid out in Schedule 6. As a result of the decision to disallow the claim Thuthugani instituted an application against SARS in the Pietermaritzburg High Court.

It was contended by Thutugani that it was registered as a user of the scheme and had been engaged in own primary production activities as required by Schedule 6. While SARS agreed that Thuthugani was registered as a user and that it indeed conducted qualifying activities it did not conduct these activities for its own primary production.

The court in this matter found that the registration as a user in terms of Schedule 6 does not automatically render fuel purchased eligible. It further found that while the appellant did conduct primary production activities these activities were not for own primary production. In this case a lot of focus was placed on the meaning of the word "own". The court found that there must be some form of ownership of the product in order to comply with the own primary production requirement. Thutugani's appeal was resultantly dismissed with costs.

The outcome can perhaps be considered as unfair towards the Applicant. This is due to the fact that Thuthugani was not refunded for the RAF levy. This application of the law arguably defeats the intended purpose of the diesel refund in the first place, as it does not improve the competitiveness of local primary production.

This case serves to illustrate the current state of affairs and the potential issues that arise as a result of the scheme's requirements.

Diesel refunds discussion paper

During February 2017 National Treasury and SARS released a document entitled Discussion Paper for Public Comment: Review of the Diesel Fuel Tax System. This document is intended to serve as the basis for a number of changes to the Diesel Refund Scheme.

The document identified a number of issues relating to the scheme, including the lack of an independent administration system, the lack of compliance with the documentary requirements and the problem relating to outsourcing. It is clear from the document that SARS and National Treasury are aware of the difficulties relating to contracting and diesel refunds. Specific reference is made to the fact that the current system fails to fully promote the competitiveness of local primary producers.

A number of recommendations are proposed to solve the problems experienced with the scheme. With regard to the outsourcing of work, it has been proposed that the focus should shift away from the term user and rather focus on the activities performed.

Under this proposal persons conducting primary production activities will be eligible for the refund (assuming that they comply with all other requirements). This system would allow "producers, operators, contractors and joint ventures" that conduct primary production activities to qualify for the scheme.

The proposed amendments would relieve the current difficulties faced by users and contractors engaged in primary production activities. These recommended changes have not yet been effected and at this stage the timeline is uncertain.

The takeaway

While it is true that a primary producer may employ a contractor on a 'dry' basis and claim the refund, such an arrangement may not be practical in all cases. The requirements in this regard place unnecessary administrative and cash flow burdens on the primary producer and create difficulties in the contracting process. The current system further hampers the use of contractors in the primary production sector.

The solution proposed in the abovementioned discussion paper should solve the difficulties experienced in this regard. It is therefore imperative that the proposed amendments be effected as soon as possible to ensure that the Diesel Refund Scheme delivers equitably on its stated objectives.

SCA overturns dividend cession decision

In the May edition of Synopsis we commented on a decision in the Tax Court of the Western Cape, which had found that a cession of right to dividend did not result in the accrual of an "amount". This decision appears to have had a brief history, as it is in conflict with a judgment handed down in the Supreme Court of Appeal ("SCA") on 31 May 2018.

On closer inspection, it transpires that the Tax Court judgment had been taken on appeal by SARS and that the SCA judgment was the outcome of that appeal. Approximately 15 months elapsed between the first decision and the delivery of the SCA judgment, but SARS posted the Tax Court judgment on its website only in May 2018.

It is not necessary to repeat the facts in detail, but, in essence, the taxpayer, in consideration for the funds that it placed on deposit with Investec, received a cession of the rights to dividends declared by listed companies prior to the last date for registration. SARS had originally treated the receipt as dividends subject to the dividend exemption applicable in respect of dividends from a resident company. Subsequently, SARS had changed its view and issued additional assessments in which it treated the right to the dividends as an accrual of gross income akin to interest on the funds placed with Investec and not as a dividend.

In the Tax Court, it was held that the right was a contingent right and that the entitlement to dividends was dependent on the taxpayer being the "shareholder" (as contemplated in the Income Tax Act) at the last date for registration. Until that time, there was no right to the dividend, and therefore nothing had accrued to the taxpayer.

SARS took the decision on appeal, and judgment in the matter of *Commissioner for the South African Revenue Service v KWJ Investment Services (Pty) Ltd* [2018] ZASCA 81 was delivered by Davis AJA on 31 May 2018.

The SCA decision

In the judgment, Davis AJA identified two principal issues of critical relevance.

Classification of the dividend right

At paragraph [23] Davis AJA stated:

> The first question which has to be answered in the affirmative in this case in order for the appeal to succeed, is whether the dividend right constituted 'an amount' that accrued to respondent; that is, an independent amount from the dividend ultimately received by respondent.

After summarising the opposing arguments, Davis AJA continued at paragraph [37]:

> The dispute reduces to the following: did the antecedent cession of dividend rights constitute a form of property that had a monetary value attached thereto at the time respondent became entitled to these dividend rights? The starting point for any analysis is that the right to the dividends to be declared in the future which were ceded by Investec to respondent cannot be classified as dividends. The dividend definition as set out in s 1 of the Act expressly refers to 'the amount transferred or applied by a company for the benefit of any shareholder in relation to that company'. That transfer was from the company paying the dividend to the respondent. It took place subsequent to the cession of rights by Investec and hence constituted a separate amount that fell to be taxed in terms of the definition of gross income and which was then exempt from tax in terms of s 10 (1) *(k)*(i) of the Act.

This statement effectively dealt a death blow to the Tax Court's finding that the dividend right was not in existence at the date of cession and therefore no "amount" accrued as a result of the cession.

Further, the Court noted that the issuing bank issued notice to the taxpayer setting forth the various dividends to which the taxpayer would acquire a right on the last date for registration and the amount thereof. Thus, Davis AJA stated at paragraph [38]:

> Acceptance of that notice and the resulting cession clearly carried a value with it. Had respondent sought to sell it on the open market it would clearly have carried a monetary value …

On this basis, Davis AJA concluded at paragraph [39]:

> The cession of these dividend rights constituted an unconditional right described by Hefer JA in *Peoples Stores* at 365 A-C as follows: "any right (of a noncapital nature) acquired by a taxpayer during the year of assessment and to which a money value can be attached, forms part of the 'gross income' irrespective of whether it is immediately enforceable or not, but that its value is affected if it is not immediately enforceable".[1]

It was evident that the rights were the consideration for the loan of money and therefore were of a non-

1 The case referred to as "Peoples Stores" is reported as Peoples Stores (Walvis Bay) (Pty) Ltd v CIR 1990 (2) SA 353 (A)

capital nature, and the Court found that the amounts were gross income and taxable.

Practice generally prevailing

Fortunately, the finding on the character of the accrual proved not to be a knockout blow.

The taxpayer had a secondary defence, which had been well set out in the Tax Court statement of fact, but on which the Tax Court had found it did not have to adjudicate.

It contended that, even if SARS was correct in its argument that the dividend rights were gross income, it was nevertheless precluded from raising an additional assessment based upon an exclusion in proviso (iii) to section 79(1) of the Income Tax Act (which applied at the time of the additional assessment).

Proviso (iii) precluded SARS from raising an additional assessment if the failure to tax the amount in question in the original assessment was in accordance with the practice generally prevailing at the date of assessment.

Reliance on practice generally prevailing carries two important elements. The first is that the taxpayer must prove the existence of the practice and the second is that it must be demonstrated that the practice is generally prevalent within SARS and is not isolated to a few incidences. These are aptly summarised in paragraph [47] of the judgment:

> It was common cause between the parties that respondent bore the onus to show, on a preponderance of probability, that the original assessments were in accordance with a practice generally prevailing at the time of the assessment. See SA Mutual Unit Trust Management Co Ltd at 538-539 where what is required of a taxpayer seeking to rely on a practice generally prevailing was set out thus:
>
> > "The existence of such a practice could be established by showing that the Commissioner, or someone in the Department with the necessary authority, had issued a departmental directive to that effect and that this directive was being followed generally in the assessment of taxpayers; or by showing that in the general process of assessment dividend stripping losses were consistently allowed in a sufficient number of cases to lead to the inference that such a practice was authorized and generally prevailed."

The taxpayer had produced evidence of a number of dividend income funds that had been assessed on the basis that the receipts or accruals of dividend rights were treated on assessment as exempt dividends. In addition, it had provided evidence of rulings issued on behalf of SARS that stated that the dividend rights acquired by cession would not be treated as interest but as dividends.

The taxpayer had sought an indication from SARS whether it had adopted a different stance to its rulings in assessing the cession of dividend rights in respect of any other taxpayer at any time prior to the issue of the original assessments that had been issued to the taxpayer in this case. The judgment records that SARS had responded "*that it was unable to identify any taxpayers so assessed …*"

SARS had introduced evidence from one of its investigative audit specialists, and, in cross-examination, the expert conceded that SARS was, from the year 2000, aware of the existence of dividend income funds similar to the taxpayer's. Further, he stated that he was unaware of any adverse ruling or taxation of a dividend income fund that was different from that of the original assessment of the taxpayer.

SARS had also attempted to argue that there had been non-disclosure of material fact that would have precluded it from identifying the fact that the income was from dividend cessions. However, a second official noted that the returns of income reflected significant amounts of dividend income, which would have resulted in a compulsory examination of the financial statements in terms of SARS standing practice. These statements did not disclose dividend income, but reflected the amounts as interest. Therefore it was reasonable to conclude that SARS was aware that the dividends accrued as a result of a dividend cession.

Thus, Davis AJA was able to conclude at paragraph [57]:

> In the circumstances, [the taxpayer] placed sufficient evidence before the court to require [SARS] to provide evidence to contradict the clear inference that otherwise must be drawn from the evidence presented by respondent. That it failed to do and for this reason, the additional assessments must be set aside on the basis of proviso (iii) to s 79(1) of the Act.

The appeal by SARS was therefore dismissed, because the taxpayer had satisfied the Court that the assessment had been made in accordance with practice generally prevailing.

The takeaway

This was a fortunate escape from what would have been a significant assessment to tax. In principle the amounts in question should have been assessed to tax. However, the adoption by SARS of what was found to be an erroneous practice prevented SARS from succeeding.

The provisions of section 79(1) of the Income Tax Act no longer apply.

In the judgment Davis AJA has given the impression that reliance on practice generally prevailing is no longer a sound defence, where he stated at paragraph [45]:

> … [A]ppellant was precluded from contending that, if there was a practice generally prevailing at the time that it issued the original assessments in respect of respondent, it operated under an incorrect interpretation or application of applicable provisions of the Act. *Section 92 of the Tax Administration Act which repealed s 79(1) makes this clear in the way it has sought to abolish the principle of practice generally prevailing …* (Emphasis added)

With respect, this statement was misplaced and incorrect.

The Tax Administration Act, No. 28 of 2011, provides in section 99(1)(*d*) that SARS may not issue an additional assessment:

> in the case of—
>
> (i) an additional assessment if the—
>
> (*aa*) amount which should have been assessed to tax under the preceding assessment was, in accordance with the practice generally prevailing at the date of the preceding assessment, not assessed to tax; or
>
> (*bb*) full amount of tax which should have been assessed under the preceding assessment was, in accordance with the practice, not assessed;
>
> (ii) a reduced assessment, if the preceding assessment was made in accordance with the practice generally prevailing at the date of that assessment; or
>
> (iii) a tax for which no return is required, if the payment was made in accordance with the practice generally prevailing at the date of that payment

Far from being unavailable, the practice generally prevailing "escape hatch" is available to the taxpayer as a defence against the issue of an additional assessment and to SARS as a ground from refusing to issue a reduced assessment.

However, persons relying on practice generally prevailing should be aware that there are limitations on the time period within which an objection may be submitted, in that section 104(5)(*c*) of the Tax Administration Act provides that this period may not be extended beyond the 30 days prescribed if the grounds for the objection are based wholly or mainly on a change in practice generally prevailing.

SARS Watch:

Legislation		
15 Jun	Notice in terms of section 25 of the Tax Administration Act for submission of 2018 income tax returns	Notice No. 600 published in Government Gazette No. 41704 with an implementation date of 15 June 2018.
15 Jun	Amendment to Part 2 of Schedule No. 4, by the insertion of rebate items 460.15/7312.10/01.06 and 460.15/7312.90/01.06 in order to provide for a rebate facility on stranded wire, ropes and cables – ITAC Report 571 as amended by minute M02/2018	Notice R.605 published in Government Gazette No. 41705 with an implementation date of 15 June 2018.
15 Jun	Amendment to Part 1 of Schedule No. 2, by the deletion of item 206.04/3207.40/01.06 and substitution of item 206/04/3207.40/02.06 to give effect to the sunset review of the anti-dumping duties on glass frit originating in or imported from Brazil – ITAC Report no. 579	Notice R.604 published in Government Gazette No. 41705 with an implementation date of 15 June 2018.
15 Jun	Amendment to Part 1 of Schedule No. 1, by the insertion and substitution of various items under heading 73.12 in order to review the rates of customs duty on stranded wire, ropes and cables – ITAC Report No. 571 as amended by minute M02/2018	Notice R.603 published in Government Gazette No. 41705 with an implementation date of 15 June 2018.
8 Jun	Amendment to Schedule 1 (No. 1/1/41690) – Sugar	Notice R.581 published in Government Gazette No. 41690 with an implementation date of 8 June 2018.
4 June 18	Draft Dispute resolution rules	Comments were due to SARS on Tuesday, 26 June 2018.
Rulings		
20 Jun	BPR 305 – Registration of units in the name of beneficial owners	This ruling determines the consequences of the transfer of units in an equity fund registered in the name of a nominee for the beneficial owner.
20 Jun	BPR 304 – Debt reduction and subsequent liquidation of debtor	This ruling determines the income tax consequences of the settlement of a loan by way of set-off from the outstanding subscription price of a new issue of additional shares and the subsequent liquidation of the issuer.
11 Jun	BPR 303 – Tax implications of a group restructuring transaction	This ruling determines the tax consequences of a group restructuring transaction, which includes the discharge of debt by way of set-off, the disposal of shares in a subsidiary to unconnected persons and the tax implications of a replacement loan.
Case law published		
Date of delivery:		
31 May	CSARS v Encarnacao	This appeal was initially concerned with the meaning and scope of Rebate item 412.09 within the context of a consignment of imported cigarettes being stolen as a result of an armed robbery. The dispute was narrowed down to one central question: what was meant by “such goods did not enter into consumption”?
31 May	Commissioner for the South African Revenue Service v KWJ Investments Service (Pty) Ltd (466/2017) [2018] ZASCA 81	The central issue on appeal concerned whether when the respondent obtained rights to dividends declared but not yet accrued by way of cession, this constitutes a receipt or accrual for the purposes of gross income, and, if so, does section 79 (1) of the Income Tax Act 58 of 1962 apply?
31 May	Commissioner for the South African Revenue Service v Char-Trade 117 CC t/a Ace Parking (776/2017) [2018] ZASCA 89	This appeal concerns the question whether an assessment issued for secondary tax on companies (STC) in respect of the dividend cycle ending in February 2007, which was levied in terms of sections 64B and 64C of the Income Tax Act 58 of 1962, had become prescribed in terms of section 99 of the Tax Administration Act 28 of 2011.

25 May	CSARS v Daikin Air Conditioning	On the classification of articles for customs duty – correct tariff to be applied in respect of "window or wall types, self-contained or 'split-system'" air conditioning machines and parts thereof.
17 May	TCIT 13626	Whether there was a diminution in value of the Appellant's trading stock for the relevant years of assessment.
Interpretation Notes		
25 Jun	IN9 (Issue 7) – Small Business Corporations	This Note provides guidance on the interpretation and application of section 12E of the Income Tax Act 58 of 1962, which provides accelerated depreciation allowances for a taxpayer qualifying as an SBC.
20 Jun	IN 3 (Issue 2) – Resident definition in relation to a natural person – ordinarily resident	This Note explains the meaning of the term "ordinarily resident" as referred to in relation to a natural person in the definition of "resident" in section 1(1) of the Income Tax Act 58 of 1962.
5 Jun	IN 100 – Meaning of 'extracted'	This Note provides clarity on the interpretation of the word "extracted" used in section 6A(1)(b) of the Mineral and Petroleum Resources Royalty Act 28 of 2008.
Guides and forms		
22 Jun	Completion of DA66 application	This manual describes the completion of the DA 66 in order to apply for a refund.
20 Jun	Guide on income tax and the individual (2017/18)	The purpose of this guide is to inform individuals who are South African residents of their income tax commitments under the Income Tax Act 58 of 1962.
20 Jun	Draft guide on venture capital companies	Comments must be submitted to SARS by Friday, 31 August 2018.
30 May	Frequently asked questions: Increase in the VAT rate (Issue 5)	The FAQs are drafted purely to assist vendors and the public at large to obtain clarity and to ensure consistency on certain practical and technical aspects of implementing the change to the VAT rate.
Organisation for Economic Cooperation and Development (OECD)		
21 June	Guidance for Tax Administrations on the Application of the Approach to Hard-to-Value Intangibles, under BEPS Action 8	The new guidance for tax administration on the application of the approach to hard-to-value intangibles (HTVIs) is aimed at reaching a common understanding and practice among tax administrations on how to apply adjustments resulting from the application of this approach.
21 June	Revised Guidance on the Application of the Transactional Profit Split Method, under BEPS Action 10	This report contains revised guidance on the profit split method, developed as part of Action 10 of the BEPS Action Plan. This guidance has been formally incorporated into the Transfer Pricing Guidelines, replacing the previous text on the transactional profit split method.
18 Jun	OECD and IGF invite comments on a draft toolkit that will help developing countries to identify and cost potential behavioural responses by mining investors to tax incentives	Comments must be submitted to the OECD by Friday, 6 July 2018.
Other Publications		
6 Jun	Tax Alert – Filing season 2018	SARS published a draft annual public notice requiring taxpayers to furnish income tax returns for the 2018 year of assessment. The period for non-provisional taxpayers to furnish returns has been shortened.
29 May	Independent Panel of Experts to review the current list of zero-rated items	The Panel has been allowed more flexibility to make proposals that may alter the fiscal framework for the 2019/20 financial year and beyond, as they can be taken into account in the 2019 February Budget.