Synopsis

Tax today

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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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VAT CASE 1626 – Reimagining the supply of financial services[1]

Background

On 3 March 2020, the Tax Court handed down its judgment in the matter of *ABC (Pty) Ltd v CSARS (VAT 1626) [2020] SARSTC*. This case concerned an appeal against the VAT assessment raised by SARS against the Appellant, ABC (Pty) Ltd ('ABC'). The background facts are as follows:

ABC's business comprises the buying and selling of currency to inbound and outbound travellers. ABC structured its business into three divisions: head office, treasury and a branch network, with each division having a separate operational function. Treasury is responsible for setting exchange rates for the buying and selling of foreign currencies to customers – that is, it sets the rate of the currency and adds a margin thereon. This rate (inclusive of the margin) is displayed on the board in the branch for customers to buy and sell the currency. The branches are responsible for the sale and exchange of foreign currencies to customers and the head office had a supporting role. When a customer buys or sells the currency, the relevant branch processes the transaction and charges the customer a commission or fee for its services.

For many years ABC was of the view that it made both taxable and exempt supplies and therefore apportioned its input tax. ABC applied the standard turnover-based method of apportionment to determine the extent of input tax it was entitled to deduct for its business as a whole. However, ABC reviewed its business and determined that it could directly attribute the VAT incurred by it to the respective business units/activities. ABC adjusted its VAT returns to claim the portion of input tax which was previously not deducted in full by the branches on the basis that the branches made wholly taxable supplies. SARS disagreed with this approach and insisted that the VAT in question must be apportioned in accordance with the standard turnover-based method of apportionment. SARS accordingly issued an assessment. ABC appealed this assessment in the Tax Court.

The Tax Court upheld the appeal and confirmed that ABC should apply direct attribution to the expenses incurred by its branches that made wholly taxable supplies, as opposed to apportioning the VAT incurred.

Parties' arguments

ABC's arguments

ABC considered the interpretation of section 2(1)(a) and its proviso. ABC contended that the exchange of currency is a financial services activity; however, in terms of the proviso, this activity is no longer deemed to be financial services where or to the extent that the *consideration* payable is a fee or commission.

ABC was further of the view that the only consideration payable and/or received was the fee or commission for its services of exchanging currency. ABC based its view on the following aspects:

1. The terms of the contract entered into with a customer were to *exchange currency* at a *particular rate* for a *commission*;
2. The customer contract does not include any provision relating to the margin that may be built into the rate of exchange. Customers were therefore completely unaware of the margin;
3. The definition of consideration relates only to a supply of goods or services, and the exchange of currency is neither a supply of goods nor services. ABC argued that currency as envisaged in

1 All references to sections herein are to sections of the VAT Act No. 89 of 1991, unless otherwise stated.

section 2(1)(a) and money, as defined, are virtually the same; and

4. Furthermore, the margin and/or amounts exchanged did not constitute consideration. It was argued that the exchange of money for money is not consideration, as it merely replaces one currency with another of equal value.

It therefore follows that the activity of exchanging currency merely for a commission does not constitute a financial services activity but rather a normal enterprise activity as envisaged in paragraph (a) of the definition of 'enterprise'. As such, the commission received is therefore subject to VAT at the standard rate under section 7(1)(a).

In light of this, ABC was of the view that the VAT incurred by the branches was entirely for purposes of making taxable supplies and therefore qualified for a deduction of input tax in its totality.

SARS' arguments

SARS argued that although the business of ABC operated in separate divisions, it was one entity and that the activities of such divisions were so interwoven and interdependent that the split was in essence artificial.

As such, ABC's main business was the exchange of currency and that if the exchange of currency did not take place at the branch, it would not have been able to or entitled to earn a commission.

SARS held the view that the exchange of currency took place at the branch and that such exchange of currency constituted financial services as envisaged in section 12(a) read with section 2(1)(a).

SARS concluded that ABC made mixed supplies and could therefore only directly attribute to the extent that it was possible within the branches to *allocate* expenses to wholly taxable purposes.

The judgment

The Tax Court had to determine whether ABC was correct in its approach. In doing so, the Tax Court had to consider:

- whether the exchange of currency by the branches constituted a 'financial services' activity under section 2(1), which qualified in terms of section 12(a) to be exempt from VAT; and
- whether the payment of a commission/fee is 'consideration' as contemplated in the proviso to section 2(1).

In this judgment, the Tax Court focused on the definitions of 'input tax', 'taxable supply', 'output tax', 'goods' and 'services'. It also had to consider the application of sections 7(1), 2(1) and 12(a).

Section 2(1) of the VAT Act states:

For the purposes of this Act, the following activities shall be ***deemed to be financial services****:*

a. the ***exchange of currency*** *(whether effected by the exchange of bank notes or coin, by crediting or debiting accounts, or otherwise) …*

Provided that the activities *contemplated* ***in paragraphs (a)****, (b), (c), (d), (f) and (o)* ***shall not be deemed to be financial services to the extent that the consideration payable in respect thereof is any fee, commission****, merchant's discount or similar charge, excluding any discount cost. (own emphasis added)*

Section 7(1)(a) of the VAT Act states:

Subject to the exemptions, exceptions, deductions and adjustments provided for in this Act, there shall be levied and paid for the benefit of the National Revenue Fund a tax, to be known as the value-added tax—

a. on ***the supply by any vendor of goods or services supplied by him*** *on or after the commencement date in the course or furtherance of any enterprise carried on by him…*

calculated at the rate of 15 per cent *on the value of the supply concerned or the importation, as the case may be. (own emphasis added)*

Section 12(a) of the VAT Act states:

The supply of any of the following goods or services ***shall be exempt*** *from the tax imposed under section 7 (1) (a):*

The supply of any financial services*, but excluding the supply of financial services which, but for this paragraph, would be charged with tax at the rate of zero per cent under section 11 … (own emphasis added)*

The main question to answer was if the exchange of currency in the circumstances constituted 'financial services', which were exempt from VAT in terms of section 12(a). The Tax Court held that the essence of the case revolved around the correct interpretation of the proviso to section 2(1).

In determining the nature of the supplies made by ABC, the Tax Court accepted and applied the principle that the VAT consequences of a transaction must be determined by having regard to the contractual arrangements under which the supply is made. In this instance, the contract evidenced transactions with the following features:

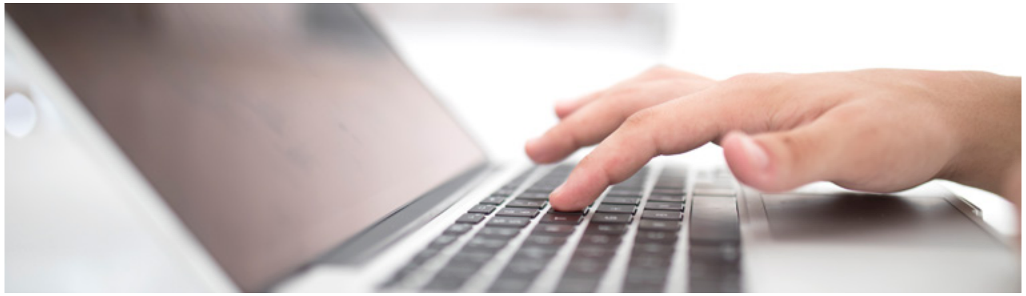
- the agreement to exchange specified currencies,
- at a particular rate of exchange determined by ABC; and
- the payment by the customers of a commission.

The Tax Court stated that the margin (whether notional or not) does not form part of the agreement between the parties and that it was unknown to ABC (i.e. the treasury and branch network) and the customer at the time of the transaction.

The court furthermore held that it would be absurd to determine the VAT consequences based on the margin/profit made instead of the true rights and obligations arising from a contract in deciding whether a supply is taxable or exempt.

The court held that the only payment the customer makes to ABC for the exchange of currency is the commission/fee paid by the customer and the margin earned on the currency does not detract from this. The commission/fee charged by ABC is 'consideration' as envisaged in the proviso to section 2(1). Following this, the Tax Court found that the consideration, in this case, being the payment of a commission/ fee, removed the activity of the 'exchange of currency' from being deemed financial services and ABC was therefore required to charge output tax and deduct any input tax on expenses incurred for the exchange and sale of foreign currencies to customers by its branches.

The result is that the branches were deemed to only make taxable supplies and as such, ABC was correct to apply direct attribution as opposed to apportioning the VAT incurred by its branches. The costs in the matter were awarded to ABC.



The takeaway

Judgment was given in favour of ABC. This judgment provides guidance on the principle of direct attribution and the interpretation of financial services. We caution however that this is a Tax Court judgment and that SARS has applied for leave to appeal the judgment.

Commentary

The importance of this case

This judgment highlights the interpretation and application of the VAT Act to the supply of financial services and provides guidance on direct attribution.

Having regard to the wording of section 2(1), we are of the view that section 2 does no more than deem certain activities to be financial services. The proviso to section 2(1), however, deems certain listed activities not to be financial services to the extent that the consideration payable in respect of such services is in the form of any fee, commission, merchant's discount or similar charge.

Section 2 does not, nor is it intended to, deem these financial services activities to be a non-enterprise activity for VAT purposes. It is the taxable nature of the supplies of goods or services in the course or furtherance of these financial services activities which will determine whether the financial services activity is an non-enterprise activity; that is, if the supply of goods or services qualifies to be exempt under section 12(a), then this financial services activity will be deemed to be a non-enterprise activity by virtue of proviso (v) to the definition of enterprise.

At first glance, we are in agreement that the exchange of currency is in accordance with section 2(1)(a) deemed to be a financial services activity. To determine whether this activity is a non-enterprise activity, we need to consider whether there is a supply of goods or services which qualifies to be exempt under section 12(a). In this regard, we consider the definition of 'goods' and 'services' and note that these definitions specifically exclude money. Therefore, the exchange of currency constitutes neither a supply of goods nor services, and cannot therefore be exempt under section 12(a).

Furthermore, the exchange of one currency for another cannot be 'consideration' as defined, as it is not payment made or to be made in relation to the supply of goods or services. In addition, the margin included in the rate also cannot be 'consideration', as this profit element is unknown to the customer and does not form part of the contract and/or payment made by the customer.

In light of the above, we therefore agree with the *court a quo* that the only consideration received by ABC is the commission that it contractually charges to the customer for its services of exchanging currency. This commission falls within the proviso to section 2(1), and, as a result, this activity comprising the exchange of currency is deemed not to be a financial services activity. It therefore follows that this activity comprises a normal enterprise activity as envisaged in paragraph (a) of the definition of 'enterprise' and the commission is therefore subject to VAT at the rate of 15% levied under section 7(1)(a).

Having regard to the above, we consider the key dispute in this case being whether ABC was entitled to directly attribute the VAT incurred in its branches wholly for purposes of making taxable supplies and therefore entitled to deduct the VAT in full. In this regard, we consider the definition of 'input tax', which requires that expenses incurred by a vendor must firstly be directly attributed to:

- the making of taxable supplies, in which case the VAT incurred thereon can be deducted in full; or
- the making of exempt supplies or another non-taxable purpose, in which case no VAT can be deducted.

The VAT incurred on expenses acquired partly for taxable and partly for another purpose may be deducted as input tax to the extent that it is used, consumed or supplied in the course of making taxable supplies. Section 17(1) generally determines that where goods or services are acquired partly for taxable and partly for another intended purpose (that is, for making exempt or non-taxable supplies), only a portion of the VAT determined in accordance with an approved apportionment formula may be deducted as input tax, i.e. only the portion that relates to the making of taxable supplies.

Based on the above, as ABC makes only taxable supplies, any VAT incurred by ABC is wholly attributed to the making of such taxable supplies, in which case ABC can deduct the VAT incurred in full as input tax and is not required to apportion the VAT incurred.

The disappointments of this case

SARS imposed interest in terms of the assessment raised for the period from making the refund to ABC. ABC requested the Tax Court to consider the aforementioned imposition should it disagree with ABC's arguments based on the fact that SARS verified the return before processing the refund to ABC and took two years to finalise its audit.

Unfortunately, as the judgment is in favour of ABC, the Tax Court did not deal with ABC's arguments relating to the interest imposed. If the case is overturned on appeal to the High Court or Supreme Court of Appeal, it would be useful to address the arguments regarding the remission of interest to provide guidance to vendors in future cases.

Conclusion

This case provides some guidance with regard to the principle of direct attribution, which is to be welcomed considering that this is generally a concept which SARS avoids providing guidance on. Further to this, it confirms that the exchange of currency constitutes neither a supply of goods nor services for VAT purposes.

We agree with the outcome reached in the judgment of the Tax Court, but caution, however, that this case is being appealed and that the principles should be applied with care.

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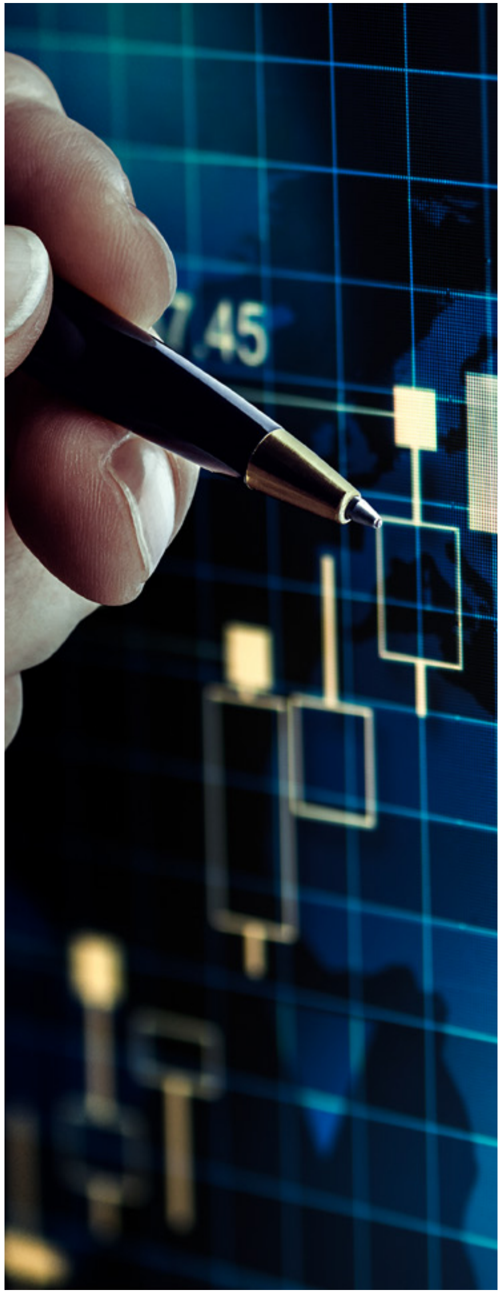

The ups and downs of taxing deep-sea divers

A dispute has progressed over a number of years through the courts of the United Kingdom in which the matter at issue has been the proper application of the double taxation agreement between the UK and South Africa ('the DTA'). In a topsy-turvy passage through the courts, the original finding by the First-tier Tax Tribunal in favour of the taxpayer was overturned on appeal in the UK Upper Tribunal. Thereafter, following an appeal to the Court of Appeal, the matter was again decided in favour of the taxpayer. The Commissioners for Her Majesty's Revenue and Customs then filed an appeal with the Supreme Court against the decision of the Court of Appeal. The Supreme Court delivered its judgment on 20 May 2020.

In Fowler v HMRC [2020] UKSC 22, the matter for decision was whether the income derived by Mr Fowler ('MF'), a deep-sea diver who performed services related to exploration on the continental shelf in UK waters, was income from employment or income from a trade or business. MF was at all relevant times a resident of South Africa.

The significance of the nature of the income derived arises from the manner in which the DTA allocates taxing rights between the source country and the country of residence. In terms of the DTA, income from employment is required to be taxed where it is earned, whereas income from trade will be taxable only if it is attributable to a permanent establishment of a resident of one state that is situated in the other state.

At first blush, the solution appears to be simple. MF was engaged under a contract of service, for which he was remunerated. However, as is apparent from the contradictory decisions in the lower courts, the matter was more complex than first appears. This complexity was identified by Lord Briggs (who delivered the unanimous judgment of the Court) in paragraph 3 of the judgment:

> 'But the matter is complicated by two factors. The first is that employed divers doing the particular kind of diving work in UK waters which Mr Fowler did are, under UK tax law, to be treated as if they were self-employed for income tax purposes. The second is that terms used in the Treaty, if not defined in the Treaty itself, are to be given the meaning which they have in the tax law, or the general law, of the state seeking to recover tax, here the UK. Thus, if the effect of the UK tax law's requirement to treat Mr Fowler as if he was self-employed is to govern the meaning of relevant terms in the Treaty, the outcome might be that he was to be treated as self-employed under the Treaty, and therefore taxable, if at all, in South Africa.'

Lord Briggs confirmed that the DTA has force of law in the UK. The Supreme Court had to decide how terms used in the DTA should be interpreted in the UK. He commenced by identifying critical terms that required interpretation – 'employment', 'business' and 'enterprise'. At paragraph 8, Lord Briggs quoted Article 3.(2) of the DTA:

> 'As regards the application of the provisions of this Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which this Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.'

The judgment then continued, at paragraph 9:

> 'Looking at article 3 as a whole, the following points may be noted. First, paragraph (2) provides an "always speaking" means of ascertaining

> the meaning of terms in the Treaty which are undefined therein. It is always speaking because it requires meaning to be ascertained by reference to the national law of a Contracting State "at that time", that is at the time when the Treaty falls to be applied. Secondly, the "terms" of the Treaty which fall to be given meaning for the purposes of this appeal are "employment", "business" and "enterprise". "Employment" is not a defined term, so that article 3(2) applies to it with full force. But "enterprise" is defined, and "business" has a partial definition, in both cases in article 3(1).'

The judgment continued with an examination of how treaties are to be interpreted, in the course of which Lord Briggs referred to the guidance found in the OECD Commentary on the Model Tax Convention ('MTC'), at paragraph 17:

> Articles 7 and 14 of the Treaty have their origin in similar but differently numbered provisions in the MTC. The predecessors of articles 7 and 14 are articles 7 and 15 of the MTC. The OECD Commentary on article 15 notes, at para 8.1, that:
>
> > 'It may be difficult, in certain cases, to determine whether the services rendered in a State by an individual resident of another State, and provided to an enterprise of the first State (or that has a permanent establishment in that State), constitute employment services, to which article 15 applies, or services rendered by a separate enterprise, to which article 7 applies or, more generally, whether the exception applies.'
>
> The Commentary recognises that in different states, the national law may focus on either the form or on the substance of the relationship (paras 8.2 - 8.7). At para 8.7 it is acknowledged that the domestic law of the state applying the MTC is likely to prevail, but subject to two qualifications. The first is that the context may require otherwise (see again para 8.7). This qualification is of course expressly made in article 3(2) of the Treaty. The second qualification (expressed in para 8.11) is that:
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> > 'The conclusion that, under domestic law, a formal contractual relationship should be disregarded must, however, be arrived at on the basis of objective criteria. For instance, a State could not argue that services are deemed, under its domestic law, to constitute employment services where, under the relevant facts and circumstances, it clearly appears that these services are rendered under a contract for the provision of services concluded between two separate enterprises. ... Conversely, where services rendered by an individual may properly be regarded by a State as rendered in an employment relationship rather than as under a contract for services concluded between two enterprises, that State should logically also consider that the individual is not carrying on the business of the enterprise that constitutes that individual's formal employer …'

In paragraph 18, Lord Briggs makes the telling point that while the OECD commentaries may post-date a particular DTA *'they are to be given such persuasive force as aids to interpretation as the cogency of their reasoning deserves.'* The clear message is that interpretation of language used in a DTA is a dynamic process and that the interpretation is not limited to the guidance that was published in the OECD Commentary on the MTC at the time that the DTA was concluded.

Lord Briggs then examined the relevant UK law. The term 'employment' is a defined term in section 14 of the Income Tax (Earnings and Pensions) Act, 2003 ('ITEPA'). Under sections 6 and 7 of ITEPA, a tax is imposed on 'general earnings' and 'specific employment income'. Section 6(5) provides that income shall not be taxed under ITEPA if it is chargeable to tax under the provisions of Part 2 of the Income Tax (Trading and Other Income) Act, 2005 ('ITTOIA') by virtue of section 15 of that Act, which applies to divers and diving supervisors.

Section 15 of ITTOIA applies where a person performs services as a diver or diving supervisor in the UK, the duties are performed wholly or mainly on the seabed and the income from the employment would otherwise be taxable under ITEPA. Section 15(2) then provides:

> 'The performance of the duties of employment is instead treated for income tax purposes as the carrying on of a trade in the United Kingdom.'

The origin of the tax treatment of deep-sea divers is not clear. Regardless of the lack of clarity, Lord Briggs noted at paragraph 25:

> 'It is clear that it was not a purpose of the deeming provision in section 15(2) to resolve some legal or factual uncertainty about whether such divers were genuinely employed or self-employed. On the contrary, section 15 applies only to employed divers.'

Lord Briggs then considered the interpretation of deeming provisions. He found that precedent was inconsistent. However, he noted at paragraph 27 that certain points had remained consistent over many years:

> (1) The extent of the fiction created by a deeming provision is primarily a matter of construction of the statute in which it appears.
>
> (2) For that purpose the court should ascertain, if it can, the purposes for which and the persons between whom the statutory fiction is to be resorted to, and then apply the deeming provision that far, but not where it would produce effects clearly outside those purposes.
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> (3) But those purposes may be difficult to ascertain, and Parliament may not find it easy to prescribe with precision the intended limits of the artificial assumption which the deeming provision requires to be made.
>
> (4) A deeming provision should not be applied so far as to produce unjust, absurd or anomalous results, unless the court is compelled to do so by clear language.
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> (5) But the court should not shrink from applying the fiction created by the deeming provision to the consequences which would inevitably flow from the fiction being real.

Having laid out the relevant law and principles, Lord Briggs then analysed the application of the law to the facts. He noted that the Court of Appeal had determined that, since section 15 of ITTOIA regarded the activities as being the conduct of a trade, the income derived by MF should be treated as business profits under Article 7 of the DTA and not as employment income under Article 14. His view was contrary to that finding. His reasoning is encapsulated in paragraph 30:

> 'Nothing in the Treaty requires articles 7 and 14 to be applied to the fictional, deemed world which may be created by UK income tax legislation. Rather they are to be applied to the real world, unless the effect of article 3(2) is that a deeming provision alters the meaning which relevant terms of the Treaty would otherwise have. This much is confirmed by paragraph 8(11) of the OECD Commentary quoted above, and it would be contrary to the requirement to treat the Treaty as a bilateral international agreement to do otherwise ... Were it not for section 15 of ITTOIA, there would be no doubt that article 14, not article 7, would apply to Mr Fowler's diving activities, at least on the necessary but as yet untested assumption that he really was an employee. The meaning of 'employment' is laid down in section 4 of ITEPA, and his remuneration plainly constitutes employment income within sections 6 and 7. UK tax law would not regard him as making profits from a trade, or his business as being that of an establishment.'

The bone of contention was the deeming provision in section 15 of ITTOIA and the extent to which the fiction created should extend. Lord Briggs explained the interpretation to be applied at paragraphs 31 to 33:

> 31. So the question is whether section 15 gives a different meaning to the relevant terms. That is not how a deeming provision works generally, nor does section 15(2) in particular. Section 15(1) uses 'employment' and 'employment income' in exactly the same way as is prescribed by sections 4, 6 and 7 of ITEPA, and the phrase 'performance of the duties of employment' in section 15(2) again uses 'employment' in the same way. Section 15 is about the taxation of income arising from the performance of those duties of employment but, introduced by the word 'instead', provides that the income is to be taxed as if, contrary to the fact, it was profits of a trade.
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> 32. Section 15 also uses 'trade' in its conventional sense and does not therefore alter the meaning of 'enterprise' in article 7, it being common ground that enterprise is descriptive of a business, and that business includes trade. In short, nothing in section 15 purports to alter the settled meaning of the relevant terms of the Treaty, viewed from the perspective of UK tax law. Rather it takes the usual meaning of those terms as its starting point, and erects a fiction which, applying those terms in their usual meaning, leads to a different way of recovering income tax from qualifying divers.
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> 33. Furthermore section 15 creates this fiction not for the purpose of deciding whether qualifying employed divers are to be taxed in the UK upon their employment income, but for the purpose of adjusting how that income is to be taxed, specifically by allowing a more generous regime for the deduction of expenses... If one asks, as is required, for what purposes and between whom is the fiction created, it is plainly not for the purpose of rendering a qualifying diver immune from tax in the UK, nor adjudicating between the UK and South Africa as the potential recipient of tax. It is for the purpose of adjusting the basis of a continuing UK income tax liability which arises from the receipt of employment income. Therefore, to apply the deeming provision in section 15(2) so as to alter the meaning of terms in the Treaty with the result of rendering a qualifying diver immune from UK taxation would be contrary to its purpose. It would also produce an anomalous result.

Judgment was therefore given in favour of HMRC, and MF was held liable to tax in the UK because his earnings were income from employment.

The takeaway

Notwithstanding that this was a judgment of the UK courts, it makes important points that would be equally applicable in South Africa to interpretation of the words used in double tax agreements.

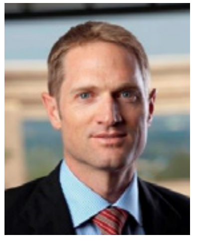
The first of these is that the purpose of provisions in a double tax agreement is different from the purpose of domestic taxation provisions. This requires that, in applying the provisions of the DTA, regard should be had to the fact that the purpose of the DTA is to allocate the rights to tax income.

The second is that defined terms in a DTA should be interpreted as they are defined, whereas terms that are not defined must be interpreted by applying the law of the territory that is required to establish its rights to impose taxes on a resident of another territory under the DTA.

Thirdly, the guide to interpretation provided by the OECD Commentary on the MTC should not be limited by reference to the guidance that existed at the time the DTA was concluded. There has been a school of thought that suggests that the interpretation should be guided by the guidance that was available at the time the DTA was concluded. Lord Briggs considered that guidance that post-dated the conclusion of the DTA does have persuasive force.

Finally, the provisions of domestic legislation should not influence how words in a DTA should be interpreted. The interpretation should be based on objective facts.

This judgment is a useful addition to the body of law on the interpretation and application of international treaties.



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Desperate times call for desperate (Tax Debt Relief) measures

The South African Revenue Service ('**SARS**'), by law, is tasked with assessing and collecting taxes. However, in these trying economic times, it is likely that many taxpayers may find themselves in a situation where they are unable to pay their outstanding tax debts to SARS (even with the current draft tax relief measures which have now been introduced in Parliament), as they may be burdened by decreased revenue/sales and continuous and mounting day-to-day operating expenses to ensure the survival of their businesses.

Apart from the tax relief measures contained in the Draft Disaster Management Tax Relief Bills (deemed to come into operation from 1 April 2020), the Tax Administration Act, No. 28 of 2011 ('**TAA**') contains additional tax relief measures that may assist financially distressed taxpayers to manage the payment of their tax debts to SARS. One such relief measure is a request for a compromise of debt (or compromise agreement).

A request for a compromise agreement is appropriate where the taxpayer has a tax debt due to SARS (for example R100 000) and the taxpayer is able to pay only an amount of tax which is less than the full amount of the tax debt due (for example R50 000). In this regard, SARS will undertake to permanently write off the remaining portion of the tax debt (being R50 000) on the condition that the taxpayer complies with the said criteria (as listed below) and thereafter the terms and conditions of the said agreement. A key point to take note of is that the compromise of a tax debt is applicable only if the tax debt in question is not disputed under Chapter 9 of the TAA.

Section 200 of the TAA provides that a senior SARS official may authorise the compromise of a portion of a tax debt upon receiving a request from the taxpayer if the purpose of the compromise is to secure the highest net return from the recovery of the tax debt and the compromise is consistent with considerations of good management of the tax system and administrative efficiency. The request for compromise comprises a detailed application to SARS, along with all the relevant information to support the compromise request.

In terms of section 201(1) of the TAA, the request by a taxpayer for the compromise of a tax debt must be signed by the taxpayer and must be supported by:

- the fair market value of the taxpayer's assets and liabilities,
- the amounts received by or accrued to, and expenditure incurred by, the taxpayer during the 12 months immediately preceding the request;
- the assets which have been disposed of in the preceding three years, or such longer period as a senior SARS official deems appropriate, as well as their value, the consideration received or accrued, the identity of the person who acquired the assets and the relationship between the taxpayer and the person who acquired the assets, if any;
- the taxpayer's future interests in any assets, whether certain or contingent or subject to the exercise of a discretionary power by another person;
- the assets the taxpayer, either alone or with other persons, has a direct or indirect power of appointment or disposal over, whether as trustee or otherwise;
- details of any connected person in relation to that taxpayer;
- the taxpayer's present sources and level of income and the anticipated sources and level of income for the next three years, with an outline of the taxpayer's financial plans for the future and
- the reasons the taxpayer is requesting a compromise.

The request for a compromise must also be accompanied by evidence that supports the taxpayer's claims that they are unable to pay the full tax debt and the taxpayer must ensure that the information provided in their request is accurate and complete. If necessary, a senior SARS official may request that the taxpayer's application be supplemented by further information.

In order for the tax debt to be compromised, a senior SARS official and the taxpayer must sign an agreement that sets out the amount payable by the taxpayer (R50 000 in our example) in full satisfaction of the debt, the undertaking by SARS not to pursue recovery of the balance of the tax debt (R100 000 in our example) and the conditions subject to which the tax debt is compromised by SARS.

Of importance is that a compromise agreement may not be concluded if:

- the taxpayer has entered into a compromise in the three years preceding the request for compromise;
- the taxpayer's other tax affairs are not up to date;
- other creditors have expressed their intention or have initiated liquidation or sequestration proceedings against the debtor;
- other creditors will be advantaged or disadvantaged by the compromise, unless a creditor consents to being disadvantaged;
- the compromise will adversely affect broader taxpayer compliance; and
- the taxpayer is a person other than a natural person and SARS has not explored recovery of the tax debt from the personal assets of the persons who may be liable for the debt.

In addition, taxpayers must treat a request for a compromise as well as the resultant agreement with SARS seriously, as section 205 of the TAA provides for circumstances in which SARS will not be bound by the compromise agreement. These circumstances include:

- the taxpayer's failure to disclose a material fact to which the compromise relates;
- the supply of materially incorrect information to which the compromise relates;
- the failure to comply with a provision or condition contained in the compromise agreement that was signed by the taxpayer and a senior SARS official; or
- the taxpayer being liquidated, or the taxpayer's estate being sequestrated before the taxpayer has fully complied with the conditions contained in the compromise agreement signed by the taxpayer and a senior SARS official.

Key takeaways:

- Where taxpayers are unable to meet their tax debts, they must be proactive, and we suggest that they approach their tax advisers to assess the most practical way forward.
- It is possible for a taxpayer to request the compromise of a portion of a tax debt due to SARS; however, the application is a detailed one, which must be carefully set out. In addition, all the key documents to support the taxpayer's request must be gathered and submitted to SARS.
- All information submitted to SARS must be accurate and complete, failing which, SARS could decline a request or revoke an agreement for a compromise.

*We would like to acknowledge the contribution made by Lihle Qasha to this article.

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PwC Tax Controversy & Dispute Resolution Survey 2020

If you're a corporate taxpayer, we'd value your views about your experiences with SARS in relation to tax disputes and dispute resolution.

Click here to take the survey or paste the link into your browser: https://pwc.qualtrics.com/jfe/form/SV_b96bondgZ0qujzL

SARS Watch

SARS Watch 1 June 2020 – 30 June 2020

Legislation		
29 June 2020	Bond – External Policy	New sub-paragraphs (b) and (c) have been inserted under paragraph 2.1 of the excise policy guide to make it clear that bonds are not required for Carbon Tax purposes and tobacco leaf dealers.
24 June 2020	Memorandum of Objects of the Disaster Management Tax Relief Administration Bill, 2020	This document explains the proposals contained in the Disaster Management Tax Relief Administration Bill.
24 June 2020	Disaster Management Tax Relief Bill (Bill 11 No. of 2020)	The Bill was introduced into Parliament on Wednesday, 24 June 2020 during the Finance Minister's Supplementary Budget speech.
24 June 2020	Disaster Management Tax Relief Administration Bill (Bill No. 12 of 2020)	The Bill was introduced into Parliament on Wednesday, 24 June 2020 during the Finance Minister's Supplementary Budget speech.
23 June 2020	Rules under section 59A of the Customs and Excise Act, 1964, inserting a reference to the registration of tobacco leaf dealers contemplated in rule 107A.01; and rules under section 107A of the Act inserting a reference to rule 59A.01A – DAR198	Notice R699 published in Government Gazette No. 43466 with an implementation date of 23 June 2020.
22 June 2020	Tobacco – External Policy	This excise policy document on tobacco products comes into effect on 22 June 2020.
20 June 2020	Regulations on the greenhouse gas emissions intensity benchmark prescribed for the purpose of section 11 of Carbon Tax Act, 2019	Notice 691 published in Government Gazette No. 43452 with an implementation date of 1 June 2019.
17 June 2020	Publication of explanatory summary of the Disaster Management Tax Relief Administration Bill, 2020	Notice 674 published in Government Gazette no. 43443 with an implementation date of 17 June 2020.
12 June 2020	Relief measures under the Customs and Excise Act, 1964 to assist in alleviating the negative effects of the COVID-19 pandemic in the Customs and Excise sphere – DAR197	Notice R670 published in Government Gazette No. 43435 with a date of implementation of 12 June 2020, except for rule 19A.11, which commences retrospectively on 1 May 2020.
5 June 2020	Sections 19A, 32, 36 and 120 Testing of alcohol strength of spirits	Notice R638 published in Government Gazette No. 43399 with an implementation date of 5 June 2020.
4 June 2020	Notice of expiration of vat certificate issued in terms of schedule 1(8) of the Value Added Tax Act, 89 of 1991, item 412.11/00.00/01.00	GN 305 published in Government Gazette No. 43384 notifying the expiration of Item No. 412.11/00.00/01.00 on 5 June 2020.
2 June 2020	Notice in respect of amount of value of assets that may be paid in lumpsum for purposes of paragraph (c) of definition of living annuity	Government Notice No. 619, Government Gazette No. 43380 with an implementation date of 1 June 2020.
2 June 2020	Notice in respect of formula for purposes of determination of amount for purposes of paragraph (b) of the definition of living annuity	Notice 618, as published in Government Gazette 43379 with an implementation date of 1 June 2020.
Case law		
In accordance to date of judgment		
15 May 2020	Barnard Labuschagne Inc v SARS and Another (23141-2017) [2020] ZAWCHC	On 15 December 2017, SARS filed a certified statement ('certified statements') in terms of section 172 of the TAA setting out the amount of tax due and payable by the applicant for an outstanding liquid debt in respect of VAT, PAYE, UIF and SOL due and payable to SARS.
6 May 2020	Joseph Nyalunga v CSARS (90307/2018) [2020] ZAGPPHC	The judgment concerns the reviewing and setting aside of assessments in terms of sections 95(1), 100(1), 104(5) and 105 of the Tax Administration Act.
3 March 2020	SARSTC VAT 1626 (VAT) [2020] (Johannesburg)	The Tax Court upheld an appeal by a vendor to apply direct attribution (as opposed to apportioning the VAT incurred by one of its divisions that made wholly taxable supplies).

Interpretation note		
23 June 2020	Interpretation Note 18 (Issue 3) – Rebates and deduction for foreign taxes on income	This Note explains the scope, interpretation and application of section 6quat which provides for a rebate or deduction for foreign taxes on income.
22 June 2020	Draft Interpretation Note – Vesting of income in a resident beneficiary by a non-resident trust: Interaction between section 25B(1) and section 7(8)	Comments are due to SARS by Monday, 20 July 2020.
Rulings		
30 June 2020	BCR 070 – Recipients of shares in an 'unbundled' company	This ruling determines tax consequences for the recipients of listed shares in a company, following an unbundling transaction of that company's shares by its listed holding company.
30 June 2020	BPR 345 – Asset-for-share transactions followed by an unbundling transaction and a sale of shares to a third party	This ruling determines the tax relief for the parties involved in an internal restructuring involving corporate rules (section 42) followed by an unbundling (section 46) and a sale of shares to a third party.
22 June 2020	BGR 54 – Unbundling of unlisted company: Impact of non-qualifying shareholders	This BGR provides clarity on what constitutes an unbundling transaction when an unbundling company having non-qualifying shareholders unbundles shares in an unlisted unbundled company.
22 June 2020	BGR 53 – Rules for the taxation of interest payable by SARS under section 7E	This BGR sets out the rules to avoid double taxation when a deemed accrual of interest occurs under section 7E on or after 1 March 2018 and before that date either the whole or a part of that interest was included in the taxpayer's gross income on the accrual basis.
4 June 2020	BPR 344 – Transfer of listed financial instruments to collective investment schemes in exchange for participatory interests	This ruling determines tax consequences of a transfer of listed financial instruments to collective investment schemes in exchange for participatory interests in those schemes.
Guides		
25 June 2020	Guide for Employers iro Employees Tax for 2021	This guide was updated to include the deduction of donations to the Solidarity Fund by employees during the COVID-19 pandemic.
25 June 2020	Guide for Employers in respect of Skills Development Levy	This guide explains the legislative requirements applicable to employers for the registration and payment of Skills Development Levy ('SDL') and has been updated to include the proposed four months' payment holiday (non-payment) for SDL contributions by employers.
12 June 2020	Guide to the Tax Compliance Status functionality on eFiling	This guide is designed to assist taxpayers on how to utilise the tax compliance status functionality on eFiling to obtain a security PIN. In addition, the guide explains the functionality available to the third party to verify the tax compliance status of a taxpayer from whom it received the PIN.
1 June 2020	Manage Declaration for Non-Registered VAT Vendors – External Guide	The purpose of this document is to guide a person, who is not a registered VAT vendor, on the documentation and payment of VAT on imported services and where the person is the seller of goods that is sold in satisfaction of envisaged debt.
Other publications		
29 June 2020	OECD: The Platform for Collaboration on Tax invites public comments on the draft Toolkit on Tax Treaty Negotiations	Comments must be submitted to taxcollaborationplatform@worldbank.org by Thursday, 10 September 2020.
26 June 2020	Tax Alert: COVID-19 and the 2020 Supplementary Budget: Introduction of Bills containing tax measures to deal with the pandemic	The purpose of this Alert is to provide a brief overview of the final tax measures as contained in the Bills as introduced on Wednesday, 24 June 2020.
24 June 2020	Media Statement: Gazetting of Trade Exposure and Greenhouse Gas Benchmark Regulations and Renewable Energy Premium Notice in terms of the Carbon Tax Act	The Minister of Finance published on Friday, 19 June 2020 in Gazette Nos 43451, 43452 and 43453 the following regulations for the trade exposure and greenhouse gas (GHG) emission intensity benchmark performance allowance, and the notice for the renewable energy premium, in terms of the Carbon Tax Act (Act No. 15 of 2019).
23 June 2020	Tax Alert – VAT: Apportionment & Direct Attribution	This alert discusses the judgement in ABC (Pty) Ltd v CSARS (VAT 1626) [2020] SARSTC.
23 June 2020	OECD: Tax Database – Key rate indicators	This document presents comparative information on a range of statutory tax rates and tax rate indicators in OECD countries, encompassing personal income tax rates and social security contributions, corporate income tax rates and value-added taxes.
22 June 2020	Tax Alert: COVID-19: Disaster Management Tax Relief Administration Bill: Introduction in Parliament	The purpose of this Alert is to give notification that Disaster Management Tax Relief Administration Bill, 2020, will be introduced in Parliament on Wednesday, 24 June 2020.
10 June 2020	Tax Alert: 2020 Filing Season	Although the 2020 tax filing season dates are yet to be formally gazetted, the South African Revenue Service ('SARS') has informally published these dates on its website. This Tax Alert provides a few pointers regarding the upcoming filing season.
1 June 2020	OECD: In Tax, Gender Blind is not Gender Neutral: why tax policy responses to COVID-19 must consider women	This document discusses how tax policy measures play a crucial role in supporting individuals and businesses and how the gender impact of taxation is often overlooked.