Synopsis

Tax today

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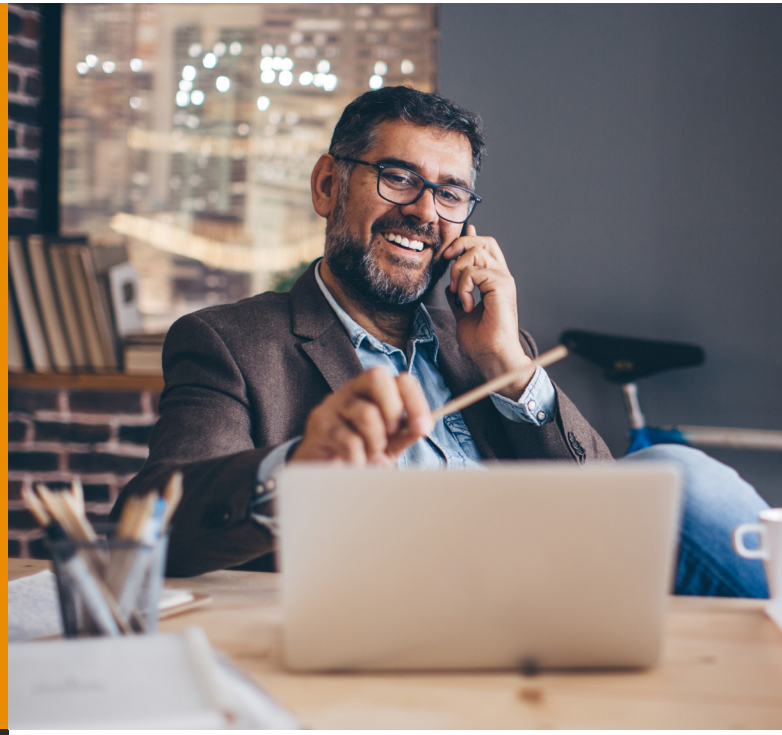

A monthly journal, published by PwC South Africa, that gives informed commentary on current developments in the tax arena, both locally and internationally.

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.

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Did the SCA get this right?

Section 23H of the Income Tax Act is a provision that is designed to spread prepayments made by taxpayers over the term of the contract, where the goods or services to be supplied or the benefits to be enjoyed under the contract will extend more than six months beyond the end of the year of assessment. The Supreme Court of Appeal was called upon to adjudicate whether commissions paid by a cellphone service provider constituted prepayments that were required to be so spread.

In the matter of *Telkom SA SOC Ltd v Commissioner for the South African Revenue Service* [2020] ZASCA 19 (25 March 2020), on which we have reported in relation to the foreign exchange dispute, a second dispute concerned the right of Telkom to deduct commissions paid to selling agents who signed up subscribers.

Telkom offered a special incentive bonus to agents for the introduction of new subscribers, which was paid on connection of the subscriber to Telkom's mobile network. It paid an incentive bonus of approximately R179m in the year of assessment in question, which it claimed as a deduction. SARS asserted that the subscribers had signed up for 24-month contracts and that the expenditure should be spread over the term of each contract. It disallowed approximately R137m, which would only be allowed as a deduction in subsequent years of assessment.

The decision of the Tax Court is summarised in paragraph [46] of the SCA judgment:

> 'The Tax Court, in upholding the appeal, made the following findings:
>
> a. The benefit that was attached to the expenditure was the conclusion of the contract with the customer in question.
>
> b. Velociti rendered all the services which it was obliged to do in terms of the incentive letters and for which the payment of R178 788 421 was made.
>
> c. As a result, there was no basis to add back and disallow R136 531 542 of the cash incentive bonus expenditure by the application of s 23H in the 2012 year of assessment.'

SARS had been dissatisfied with this decision and had noted an appeal to the SCA.

The judgment

In his judgment, Swain JA paraphrased section 23H(1) by referring only to the parts that he considered pertinent:

> 'Where any person has during any year of assessment actually incurred any expenditure (other than expenditure incurred in respect of the acquisition of any trading stock) –
>
> d. (a) which is allowable as a deduction in terms of the provisions of section 11 (a). . .; and
>
> e. (b) . . . in respect of –
>
> . . .
>
> (ii) any other benefit, the period to which the expenditure relates extends beyond such year of assessment, the amount of the expenditure which shall be allowable as a deduction in terms of such section in the said year and any subsequent year of assessment, shall be limited to, in the case of expenditure incurred in respect of –

. . .

(iii) any other benefit to which such expenditure relates, an amount which bears to the total amount of such expenditure the same ratio as the number of months in such year during which such person will enjoy such benefit bears to the total number of months during which such person will enjoy such benefit or where the period of such benefit is not determinable, such period over which the benefit is likely to be enjoyed:

Provided that the provisions of this section shall not apply –

(aa) Where all the goods or services are to be supplied or rendered within six months after the end of the year of assessment during which the expenditure was incurred, or such person will have the full enjoyment of such benefit in respect of which the expenditure was incurred within such period, unless the expenditure is allowable as a deduction in terms of section 11D (2); …'

Telkom argued that the agent had provided a customer, which Telkom had accepted and connected to its network, and that no further benefit was expected to accrue to Telkom from the agent, whose services had been fully rendered and paid for. Telkom was thereafter under an obligation to supply the services to the subscriber in terms of the subscription agreement, for which a fee was payable by the subscriber. The agent, in addition to the introductory commission, would be entitled to receive a commission monthly in respect of subscription revenues.

The argument of SARS was set out in paragraph [50] of the judgment:

> 'The Commissioner, however, submitted that the key question was when and how the benefit, in respect of which the expenditure was incurred, was enjoyed. This was because the pleaded dispute turned on, when and how Telkom enjoyed the benefit, received from the cash incentive bonus payment. The Commissioner pleaded that it was the subscription agreement with the client that was the source of the direct benefit to Telkom. The Commissioner also pleaded that the benefit to Telkom, flowed primarily and directly from the service contract, in terms of which the individual customer paid monthly subscription fees. The dealer was a mere facilitator, who brought about the source of the benefits, and the benefits ie the fees, were direct and central to Telkom's business. It was the agreement concluded between Telkom and the respective dealers which was the indirect source of the benefit.'

These arguments prevailed and the judgment concluded at paragraph [53]:

> 'The Commissioner therefore correctly submitted, that the period to which the expenditure "relates", must be the period during which the benefit is enjoyed. Telkom does not incur the incentive bonus expenditure solely to establish a new connection with a customer. The benefit lies in having a customer who pays subscription fees over the fixed term of the contract. Telkom does not enjoy any benefit immediately upon the conclusion of a new contract. It has nothing to show for it until such time as the connection turns into fee income. That is when Telkom begins to enjoy the true benefits of the cash incentive payments.'

Judgment was given in favour of SARS and it was held that the commissions could only be deducted evenly over the period of the contract.

Commentary

From the discussion in the judgment of the respective arguments, it appears that the arguments on both sides addressed only the 'benefit' derived from a contract of agency and that the Court concerned itself only with the benefit of the arrangement. That said, it is submitted that a thorough analysis of section 23H(1) should have been made. The second finding in the Tax Court (that the services in respect of which the commission was paid had been fully rendered by the agent in the year of assessment) was not addressed in the judgment. It is submitted that the finding that the services had been rendered by the agent in the year of assessment was the *ratio decidendi* of the Tax Court decision.

In paragraphs 8 to 21 of the judgment, Swain JA had gone to lengths to specify the approach to interpretation of words used in a statute and the importance of the correct application of context in so doing. He had also confirmed that the contra *fiscum* rule, which entails an interpretation more favourable to the taxpayer, should be applied in cases of irresoluble ambiguity.

Based on the discussion on interpretation in the judgment, it is pertinent to identify whether the principles were put into practice in interpreting section 23H(1)*(b)*.

Words used in a statute should be interpreted by considering '… the language used in the light of the ordinary rules of grammar and syntax …'

The judgment considered only a part of section 23H(1)*(b)* (which was referred to in the judgment as 'the relevant portions of section 23H(1)').

Section 23H(1)*(b)* applies to expenditure actually incurred by a taxpayer:

> '(b) in respect of—
>
> (i) goods or services, all of which will not be supplied or rendered to such person, during such year of assessment; or
>
> (ii) any other benefit, the period to which the expenditure relates extends beyond such year of assessment.' (Emphasis added)

It is submitted that, based on the ordinary rules of grammar and syntax, the relevant inquiry was to establish first whether the payment had been made for goods or for services or for another benefit and not whether the taxpayer enjoyed a commercial benefit flowing from a person other than the person to whom the expenditure was paid. This was the basis for the finding in the Tax Court, to which no reference is made in the judgment, other than to state the Tax Court's findings.

By simply assigning no relevance to paragraph *(b)*(i), Swain JA appeared to ignore a part of the subsection that was critical to the dispute.

Even in the modern age of purposive interpretation, consideration still needs to be given to the words used in the statutory provision, as suggested in *Rex v Standard Tea & Coffee Co. (Pty.) Ltd. and Another*, 1951(4) S.A. 412 (A.D.) at 416:

> 'It is a cardinal rule of interpretation of legislative enactments that they "should be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant".'

It is submitted that Swain JA failed to take account of the necessity to identify the cause for the payment, as opposed to the indirect outcome. It is submitted that the words used in section 23H(1), applying the ordinary rules of grammar and syntax indicate that the expenditure must have been incurred either for goods or for services or for some other benefit.

The determination appears to hinge on the interpretation of the words 'in respect of'. In this regard, Rumpff ACJ stated in *Buglers Post (Pty) Ltd v Secretary for Inland Revenue* 1974 (3) SA 28 (A) at 33:

> 'I have quoted the whole of this sub-paragraph because it illustrates the possibility of the words 'in respect of' having a narrow or a wide meaning depending on the context in which the words are used. See, for instance, *Sekretaris van Binnelandse Inkomste v Raubenheimer*, 1969 (4) SA 314 (AD), where, in considering the meaning of these words in relation to sec. 11 (1) of the then Act, this Court referred to the case *Commissioner for Inland Revenue v Crown Mines Ltd.*, 1923 AD 121, and more specifically to what SOLOMON, J.A., said at p. 128, namely:
>
> > "Now the words in respect of may be used in various senses, and in each case it is essential to examine the context in order to ascertain the sense in which it is used."'

Words used in a statute should be interpreted after considering '… 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.'

The provisions of section 23H were enacted in 2000. The Explanatory Memorandum to the Taxation Laws Amendment Bill, 2000, stated that the provision is an anti-avoidance provision to address certain tax-avoidance schemes. It stated, at page 35:

> 'In this regard, a new section 23H is proposed, which provides that where any person has incurred any expenditure, which is or was allowable as a deduction in terms of the provisions of section 11*(a)*, *(b)*, *(c)* or *(d)* of the Income Tax Act 1962, the amount allowed to be deducted in any year of assessment shall be limited to the expenditure relating to goods supplied, services rendered or benefits the person will become entitled to during the relevant year of assessment.' (Emphasis added)

Subsection (b) read as follows when originally enacted:

> 'in respect of goods, services or any other benefit, all of which will not be supplied or rendered to such person, or the full benefit of which such person will not become entitled to during such year of assessment,'

In 2001, the wording of section 23H(1) *(b)* was amended and split into two paragraphs, as recorded earlier. Paragraph (i) dealt with goods or services that had not been fully supplied or rendered and subparagraph (ii) with other benefits yet to be fully 'enjoyed'.

At the same time, subparagraph (iii) to subsection 1 was amended as follows *(Note: bold text indicates deletions and underlined text indicates insertions)*:

> '(iii) any other benefit to which such **[person will become entitled]** expenditure relates, an amount which bears to the total amount of such expenditure the same ratio as the number of months in such year during which such person will **[be entitled to]** enjoy such benefit bears to the total number of months during which such person will **[be entitled to]** enjoy such benefit or where the period of such benefit is not determinable, such period over which the benefit is likely to be enjoyed:'

The Explanatory Memorandum to the Second Revenue Laws Amendment Bill, 2001, explained the amendment thus:

> 'Certain commentators have suggested that this provision is not effective in spreading the amount incurred in respect of a benefit over the period over which that benefit will be enjoyed. It is, therefore, proposed that this section be amended to make it clear that this is the intention.' (Emphasis added)

The purpose of the amendment was therefore to give effect to the spread of the expenditure and not to extend the original purpose that the taxpayer must be entitled to a benefit in respect of the payment.

The mischief at which the provision was directed was the deduction of prepayments for services yet to be rendered or prepayment of contractual consideration or statutory charges for benefits which would only commence or be finally received after the end of the year of assessment and claiming deduction of the expenditure as actually incurred. At the same time, recipients of the payments could potentially invoke section 24C and claim a deduction for expenditure yet to be incurred by them under the contracts. The purpose was to match the deduction of expenditure incurred with the goods or services or

benefits that were supplied or to be provided or to which the taxpayer might be entitled.

The reference to 'other benefits' was included to bring within the ambit of the provision expenditure such as:

- premiums for short-term policies of insurance paid annually in advance,
- statutory charges, which may be imposed or paid annually, such as municipal rates, vehicle licensing charges, television licences and business licences, and
- prepaid rental.

Payment of these amounts does not result in the supply of goods or services, but provides the security of insurance cover in respect of insurable risks, the ongoing enjoyment of maintained municipal or national infrastructure, such as roads, parks, public beaches, public television broadcasts, and the like, and undisturbed possession of leased premises. This is the context in which the term 'other benefit' was used. The payment resulted in entitlement and demanded no obligation of the taxpayer other than to make payment.

It was clear from the words 'goods or services … supplied or rendered' that the expenditure in question related to consumption. Similar principles apply to a benefit, which is enjoyed for the period referred to in the contract or statute giving rise to the payment. That is, the goods or services would be consumed or the entitlement to the benefit of insurance cover, enjoyment of public amenities or undisturbed possession of leased premises would be extended to the taxpayer in the future period. In all instances the payment must have secured a future entitlement.

In the circumstances, the context suggests that the words 'in respect of' should be interpreted narrowly. In this respect, the words should be interpreted in the manner suggested by Innes CJ in *Commissioner for Inland Revenue v Crown Mines Ltd.*, 1923 AD 121 at 125:

> 'A tax cannot be said to be imposed in respect of a particular subject matter unless it has a direct relationship to that matter.'

Telkom had urged a narrow interpretation that the commission was paid for the introduction of a qualifying subscriber and that the fees flowed from a separate agreement – the subscription agreement – between Telkom and the subscriber. The commission agent was not bound to perform any service other than to introduce a qualifying subscriber. This argument, which formed the cornerstone of the Tax Court's decision, was apparently rejected without further consideration.

Swain JA however seemingly applied a wide interpretation and accepted the view of the Commissioner, which was stated as follows at paragraph [50]:

> 'The dealer was a mere facilitator, who brought about the source of the benefits, and the benefits ie the fees, were direct and central to Telkom's business. It was the agreement concluded between Telkom and the respective dealers which was the indirect source of the benefit.' (Emphasis added)

From the aforegoing, it is submitted that there was at least an ambiguity in the interpretation of the words 'in respect of'.

The argument of Telkom, as accepted by the Tax Court, was that the direct cause of the commission payment should be decisive, whereas that of SARS was that the indirect result of the commission payment should be decisive. At the very least, had Swain JA applied his own counsel, these interpretations should have been identified as being equally plausible on the wording of section 23H when read in context. However, by ignoring that the Tax Court's decision was based on the words in section 23H(1)*(b)*(i) and (ii) and by selecting only the words in subparagraph (ii) as being relevant to the SCA decision, Swain JA did not raise this possibility.

The statute must apply to all subjects equally, regardless of the facts.

At paragraph [15] of the judgment, Swain JA had stated:

> 'As correctly submitted by counsel for the Commissioner, it is axiomatic that a statute must apply to all subjects equally and that its interpretation cannot vary from one factual matrix to the next. It is impermissible to apply a particular meaning to legislation, depending upon the factual situation, in which it is sought to be applied.'

This invites a hypothetical comparison:

- In scenario one, a taxpayer's business is letting of office properties in buildings that it owns. It employs full-time staff whose sole function is to negotiate and conclude rental agreements with lessees. The majority of the contracts concluded by the employees are for terms of three years or more. The staff receive monthly salaries and performance bonuses. At the end of the year of assessment there are a number of long-term contracts which will continue to run in subsequent years of assessment.

  Based on the decision in the SCA, deduction of the remuneration paid to the employees should be deferred based on the benefit derived from the sales that were concluded by the taxpayer. It is trite that remuneration is a payment for services, and that the services of the employees have been fully rendered in the year of assessment. The expenditure would not be deferred because the payment is in respect of services rendered and not in respect of the outcome of the services.

- In scenario two, a taxpayer conducting the same business determines that it is less costly to use third-party agents than to employ personnel to perform its sales function in house. It appoints agents whose sole mandate is to negotiate and conclude rental agreements. The majority of the agreements concluded by the agents are for terms of three years or more. The agents are paid a commission in respect of contracts concluded in the year of assessment. At the end of the year of assessment there are a number of long-term contracts which will continue to run in subsequent years of assessment.

  There is no justification in finding that the agents' activities are not services whereas the employees' activities are. To do so would be to apply the provisions of section 23H(1) differently based on the factual situation – which is 'impermissible'.

The clear indication is that a wide interpretation would not apply equally in all circumstances and that the words 'in respect of' should have been interpreted narrowly.

In cases of competing equally plausible interpretations, the interpretation favourable to the taxpayer must apply

Faced with competing arguments, in which one party contended that the words 'in respect of' should have a narrow interpretation and one that suggested they should be widely interpreted to incorporate indirect benefits, both of which were arguably equally plausible interpretations in the circumstances, it is submitted that Swain JA should have considered the application of the contra fiscum rule.

Paragraph [19] of the judgment states:

> 'C I Miller The Application of a New Approach to Interpreting Fiscal Statutes in South Africa (2016) para 6.4, in a limited-scope dissertation submitted in January 2016 as part fulfilment of the requirements for the degree of Master of Commerce, at the University of Johannesburg, states the following, with which I agree:
>
> "It is submitted that the contra fiscum rule still applies in South African law and that it would be incorrect to conclude that the contra fiscum rule has no application in the context of an interpretation of a fiscal provision, anti-avoidance or otherwise. The rule is clearly consistent with the values underlying the Constitution. It is conceded that in the modern era of a purposive approach to interpretation, this rule may have a reduced application when compared to the previous era which favoured a strict literal approach to interpretation which more easily appeared to lead to ambiguity. However, to the extent that following analysis, a purposive approach ultimately yields two constructions which are both equally plausible, it is submitted that the contra fiscum rule should apply and the court should ultimately conclude in favour of the taxpayer."' (Emphasis added)

Again, if Swain JA had pursued the approach to interpretation suggested earlier in the judgment and concluded that both interpretations of 'in respect of' were equally plausible, the one favourable to Telkom should have prevailed.

Conclusion

The cumulative effect is that the principles of interpretation espoused in the judgment were not applied to this issue. The broad interpretation of the words 'in respect of' was based on an edited version of section 23H(1)(b). The editing excluded consideration of the direct causal connection suggested by the omitted word 'or' ('goods or services … or other benefit') and reflected a distorted view of the words used in that section.

The takeaway

The decision is arguably contrary to the purpose of the section and has the result that the recipient is fully taxed in the year of assessment, with no deduction of future expenditure (there being none to incur), whereas the taxpayer that incurred the expenditure is required to defer the deduction.

The judgment on this issue is binding on all courts. It opens the path for SARS to investigate and defer the deduction of expenditure incurred by business operations which pay commissions to agents for the introduction of customers. If this should occur, it is to be expected that the issue may well come before the SCA again.

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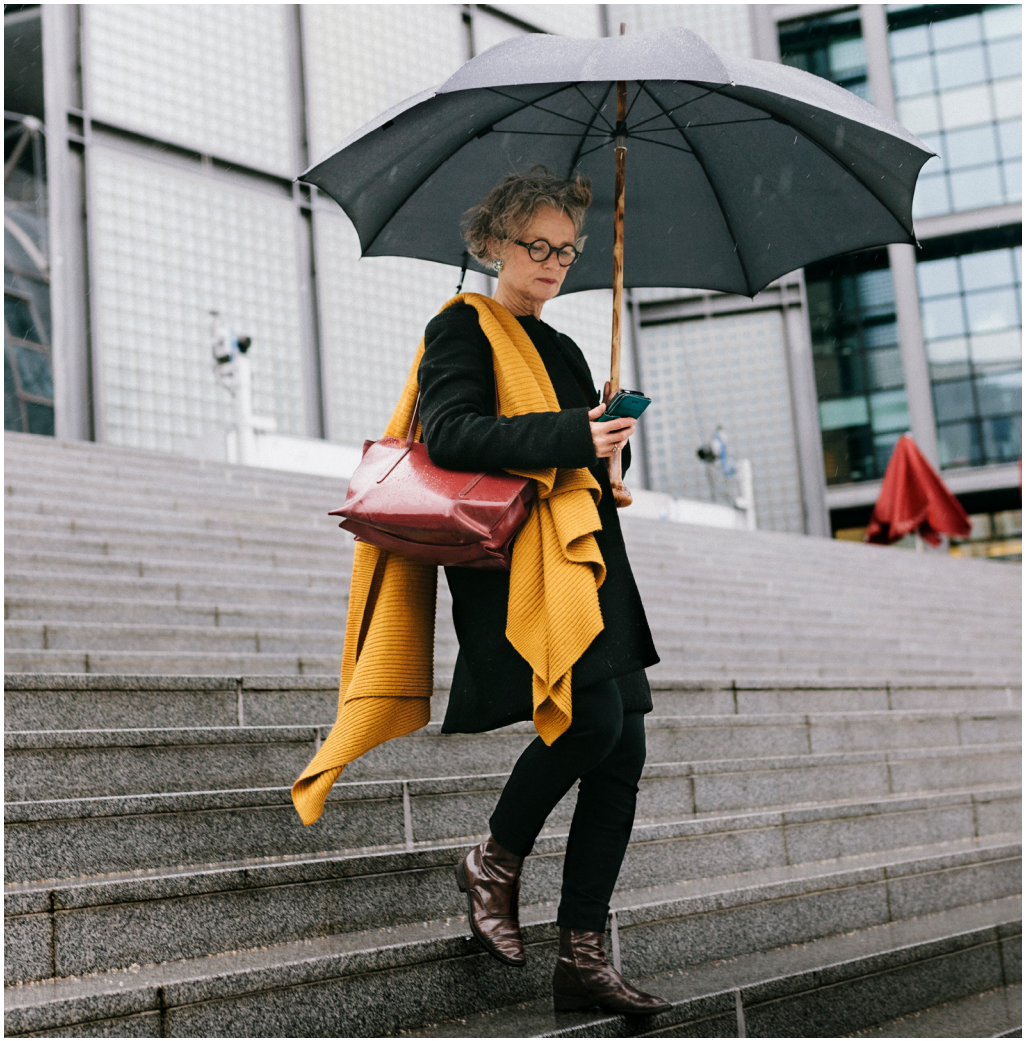
A victory for taxpayers in respect of third-party appointments by the SARS to satisfy tax debts



Section 179 of the Tax Administration Act, No. 28 of 2011 ('TAA') deals with the liability of a third party appointed to satisfy tax debts. The section states (most relevantly) that:

> *'(1) A senior SARS official may authorise the issue of a notice to a person who holds or owes or will hold or owe any money…for or to a taxpayer, requiring the person to pay the money to SARS in satisfaction of the taxpayer's outstanding tax debt.*
>
> *(2) …*
>
> *(3) A person receiving the notice must pay the money in accordance with the notice and, if the person parts with the money contrary to the notice, the person is personally liable for the money.*
>
> *(4) …*
>
> *(5) SARS may only issue the notice referred to in subsection (1) after delivery to the tax debtor of a final demand for payment which must be delivered at the latest 10 business days before the issue of the notice, which demand must set out the recovery steps that SARS may take if the tax debt is not paid and the available debt relief mechanisms under this Act, including, in respect of recovery steps that may be taken under this section—*
>
> *(a) …*
>
> *(b) if the tax debtor is not a natural person, that the tax debtor may within five business days of receiving the demand apply to SARS for a reduction of the amount to be paid to SARS under subsection (1), based on serious financial hardship …'*

Briefly, from the section set out above, it is observed that the TAA gives the South African Revenue Service ('SARS') the power to issue a notice to a third party i.e. a bank that holds money on behalf of a taxpayer. This third-party notice will require the bank to pay over to SARS such money in satisfaction of a taxpayer's tax debt. Where the bank can comply with the requirements of the third-party notice, the bank must pay such money to SARS in accordance with the third-party notice.

If the bank parts with the money contrary to the third-party notice, then the bank will be held personally liable for the taxpayer's tax debt. However, before SARS can issue this notice, there is a provision in section 179 which limits SARS's collection powers and safeguards taxpayers' rights i.e. the third-party notice may only be issued by SARS, after it delivers a letter of demand to the taxpayer. This letter of demand must be delivered at least 10 business days before the issue of the third-party notice by SARS.

The letter of demand provides the taxpayer with an opportunity to make arrangements with SARS to pay the outstanding tax debt or a portion thereof, before SARS can rely on the appointment of a third party to make payment of the taxpayer's tax debt.

The recent case of *SIP Project Managers (Pty) Ltd v The Commissioner for the*

South African Revenue Service (11521/2020) [2020] ZAGPPHC highlighted the importance of due process being followed by SARS, when issuing a third-party notice contemplated in section 179 of the TAA above.

The taxpayer's case was as follows:

- In October 2019, SARS issued an additional assessment to the taxpayer, via the SARS e-filing system.
- According to the additional assessment, the taxpayer was assessed to owe SARS an amount of approximately R1,2m and the date for the payment of this amount, was 30 November 2019.
- The additional assessment did not come to the attention of the taxpayer. According to the taxpayer's accountant, he was alerted to the additional assessment for the first time on 6 February 2020, when the taxpayer informed him that Standard Bank South Africa ('SBSA') had received a notification to pay an amount of approximately R1,2m to SARS, from the taxpayer's bank account.
- Upon scrutinising the taxpayer's e-filing profile, the taxpayer's accountant located the additional assessment; however, there was no letter of demand, as contemplated in section 179(5) of the TAA, to be found on the e-filing profile of the taxpayer, pursuant to the non-payment of the assessed amount.
- The taxpayer's accountant contacted the SARS official whose name was reflected on the third-party appointment notice issued to SBSA on 7 February 2020, who informed him that three letters of demand had been sent to the taxpayer before the third-party appointment notice was issued to SBSA, namely on 7 November 2019, on 11 November 2019 and on 22 January 2020.
- The SARS official forwarded copies of these three letters to the taxpayer's accountant. The taxpayer's accountant maintained that none of these letters were sent to him or the taxpayer, nor had they been uploaded on the taxpayer's e-filing profile.
- Upon contacting the SARS call centre to ascertain where he could locate the letters of demand on the taxpayer's e-filing profile, the taxpayer's accountant was informed that there were no letters of demand uploaded on the taxpayer's e-filing profile.
- The taxpayer then approached its legal advisers and a letter of demand for repayment of the amount paid over by SBSA in terms of the third-party notice, was sent to SARS on 10 February 2020.
- SARS did not respond to this letter of demand, which led to the application for declaratory relief being brought in the Pretoria High Court by the taxpayer against SARS. The taxpayer contended that no letter of demand was delivered prior to the issue of the third-party notice as required by section 179 of the TAA. Further, in the event that the court found that such a letter or letters were delivered, the taxpayer contended that the letters were either premature, as the tax debt was not yet payable at the time, or the 10-business day period prior to the issue of the third party-notice had not yet expired by the time that the notice was in fact delivered.

SARS's case was as follows:

- SARS abandoned relying on the letters dated 11 November 2019 and 22 January 2020 and relied only on the letter dated 7 November 2019, as being the demand letter referred to in section 179(5). The letter of 11 November 2019 was merely a reminder and did not comply with the requirements as set out in section 179(5).
- Further, the letter of 22 January 2020 was not issued at least 10 business days before the notice to SBSA was issued on 3 February 2020 and therefore did not meet the requirements for a letter of demand as required by section 179(5) of the TAA.
- SARS's explanation of the issue of the letter of demand dated 7 November 2019 was contradictory in respect of who actually sent the letters.
- SARS did not put forth adequate proof that the letter of demand was uploaded on the SARS e-filing system.
- In addition, SARS did not address the telephonic conversation held between the taxpayer's accountant and the SARS call centre personnel, wherein it was confirmed that the letters of demand were not uploaded on the taxpayer's e-filing profile.

In respect of whether a letter of demand was in fact delivered to the taxpayer, the judge referred to the case of *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* 2008 (3) 371 (SCA), which states that:

> *'When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but instead of doing so: rests his case on a bare or ambiguous denial, the court will generally have difficulty in finding that the test is satisfied.'*

In this regard, the judge found that no letter of demand was delivered to the taxpayer by SARS.

In respect of whether the letter of demand dated 7 November 2019 was premature, the court reasoned that it was clear that section 179 deals with a scenario where there is an outstanding tax debt due by the taxpayer. In this instance, this was not the position as at 7 November 2019, as the taxpayer would have an outstanding debt only after the due date for payment, namely 30 November 2019. SARS conceded that on this date there was not yet an outstanding tax debt owed by the taxpayer. The letter of demand dated 7 November 2019 was accordingly premature and therefore not lawful.

In respect of the third-party notice, the court stated that:

> *'[22] Subsection (5) to section 179 was introduced by an amendment to the Act in 2015. Prior to this amendment, there was no obligation on SARS to deliver a demand for an outstanding debt before issuing a third-party notice. The context of this amendment is that SARS may only use the method in sec 179 to obtain payment through a third party if it complies with the provisions of the requirements of the section. The wording of section 179(5) is unambiguous and clear – the notice to a third party "may only be issued after delivery of a final demand for payment which must be delivered at least 10 business days before the issue of the notice....". This is a peremptory requirement before the step can be taken to issue a third-party notice for recovery of an outstanding tax debt.*

[23] The notice issued to the third party in terms of section 179(1) does not comply with the peremptory qualification as set out in subsection 5, in that the notice was issued in the absence of a letter of demand delivered to the applicant is required. The notice issued is therefore unlawful and declared null and void.

[24] A finding that a legislative provision is peremptory is not the end of the matter. The Court must further enquire whether it was fatal that it had not been complied with. The Appellate Division as it then was laid down the test as "In deciding whether there has been compliance with the object sought to be achieved by the injunction and the question of whether this object has been achieved, are of importance".[1]

[25] Once it is established that a legislative provision is peremptory and the question arises whether exact compliance therewith is required, the answer is sought in the purpose of the statutory requirement which is to be found ascertained from its language read in the context of the status as a whole'.[2] *(Our emphasis)*

The court ultimately ordered that the third-party notice issued to SBSA be declared null and void.

In addition, not only was SARS ordered to repay the amount of approximately R1,2m to SBSA (together with interest), SARS was also ordered to pay the Taxpayer's costs of the application.

The takeaway

- SARS has the power to issue a notice to a third party in satisfaction of a taxpayer's tax debt. However, SARS must ensure that it exercises its powers in accordance with the law.
  - As a starting point, the taxpayer's tax debt must be outstanding.
  - Thereafter, SARS is permitted to deliver a letter of demand to the taxpayer in accordance with the relevant rules for electronic communication.
  - Finally, SARS may issue a third-party notice, at least ten business days after the letter of demand was issued to the taxpayer.
  - Until then, SARS may not commence with mechanisms for the recovery of the taxpayer's tax debts from a third party.
- Taxpayers must closely monitor their e-filing profiles and check whether assessments, notices and letters have been issued by SARS. This is important, as not only does it dictate what action is required on the part of taxpayers, but it also impacts on the lawfulness of SARS's subsequent actions.

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

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1 Maharaj and others v Rampersad 1964 (4) SA 638 (a) at 646C.
2 Ex parte Mothulhoe 1996 (4) SA 1131 (T) at 1137H – 11378F.

SARS Watch

SARS Watch 1 May 2020 – 31 May 2020

Legislation		
28 May 2020	Correction Notice R606 published in Government Gazette No. 43359 to correct Notice R583 Government Gazette No. 43343 of 22 May 2020	Notice R606 published in Government Gazette No. 43359 with an implementation date of 30 days after publication of initial Notice in the Government Gazette.
28 May 2020	Rule amendment notice R607 under sections 38 and 120, providing for the deletion in rule 38.14A(a) of Botswana and the insertion of Lesotho as a country participating in the South African Customs Union (SACU) Unique Consignment Reference Number (UCR) implementation – DAR195	Notice R607 published in Government Gazette No. 43359 with an implementation date of 29 May 2020.
27 May 2020	Table 3 – Rates at which interest-free or low-interest loans are subject to income tax	The South African Reserve Bank changed the repo rate to 4.75% as of 1 June 2020.
25 May 2020	Draft rule amendment under sections 39 and 120 – Rule 39.01 – telephonic clearing instructions	Comments must be submitted to SARS by Monday, 15 June 2020.
22 May 2020	*Rule amendments in terms of the Customs and Excise Act, 1964, providing for the insertion of rules relating to requirements in respect of tobacco leaf dealers and growers, as well as the installation of product counters on cigarette production lines in customs and excise manufacturing warehouses – DAR194*	Notice R583 published in Government Notice No. 43343 the implementation date is 30 days after publication in the Government Gazette.
22 May 2020	Determining of date on which section 20(1) of Tax Administration Laws Amendment Act, 2016 (Act No. 16 of 2016) amending section 76C of the Customs and Excise Act, 1964 relating to set-off of refunds against amounts owing, comes into operation	Proclamation No. 20 published in Government Gazette No. 43341 with a commencement date of 22 May 2020.
20 May 2020	Proposal to introduce export taxes on scrap metal	Comments must be submitted to SARS and National Treasury by Friday, 29 May 2020.
19 May 2020	Notice – Expanding access to living annuities	The Notice on Expanding Access to Living Annuity Funds will be published in the Government Gazette.
19 May 2020	Draft Disaster Management Tax Relief Bill	The Bill was published to provide early feedback on issues raised through public comment on the revised COVID-19 Draft Tax Bills published on 1 May 2020 that are time critical for payroll and other aspects to be implemented in May 2020.
19 May 2020	Draft EM on the Revised Draft Disaster Management Tax Relief Bill	The Explanatory Memorandum was published to provide early feedback on issues raised through public comment on the revised COVID-19 Draft Tax Bills published on 1 May 2020 that are time critical for payroll and other aspects to be implemented in May 2020.
19 May 2020	Amendment to Part 1 of Schedule No. 2, by the insertion of items 207.01/3907.6/01.05; 207.01/3907.6/02.05 and 207.01/3907.6/03.05 in order to implement anti-dumping duties on poly(ethylene terephthalate) (PET) originating in or imported from The People's Republic of China – ITAC Report 621	Notice R534 published in Government Gazette No. 43336 with an implementation date of 19 May 2020.
15 May 2020	Amendment to the General Notes of Schedule No. 1, by the insertion of Note O in order, to give effect to the name change of Swaziland to Eswatini	Notice R532 published in Government Gazette No .43317 with retrospective effect date from 19 April 2018.
15 May 2020	Amendment of Schedule No. 10, by the insertion of Note 1, to give effect to the name change of Swaziland to Eswatini	Notice R531 published in Government Gazette No. 43317 with retrospective effect date from 19 April 2018.
15 May 2020	Amendment of Schedule No. 6, by the insertion of Note 3, to give effect to the name change of Swaziland to Eswatini	Notice R530 published in Government Gazette No. 43317 with retrospective effect date from 19 April 2018.
15 May 2020	Amendment of Schedule No. 4, by the insertion of Note 6, to give effect to the name change of Swaziland to Eswatini	Notice R529 published in Government Gazette No. 43317 with retrospective effect date from 19 April 2018.
15 May 2020	Amendment Schedule No. 2, by the insertion of Note 1, to give effect to the name change of Swaziland to Eswatini	Notice R528 published in Government Gazette No. 43317 with retrospective effect date from 19 April 2018.

6 May 2020	*Updated SARS VAT 412.11 Mapping of ESSENTIAL GOODS*	The list of essential goods was updated 6 May 2020 to include plastic face shields.
4 May 2020	Direction by the Minister of Finance in terms of the regulations (R.480) issued by the Minister of Cooperative Governance and Traditional Affairs in terms of section 27(2) of the Disaster Management Act, 2002 (Act No. 57 of 2002) – Essential financial services	Notice 487 published in Government Gazette No. 43266 with an implementation date of 4 May 2020.
4 May 2020	VAT Rebate Item 412.11 – List of essential goods (critical supplies) (version 2 – 4 May 2020)	The date of implementation for the Regulation is 4 May 2020.
1 May 2020	Draft Rule amendments under the Customs and Excise Act 1964 - COVID 19 Relief Measures	Comments must be submitted to SARS and National Treasury by Friday, 15 May 2020.
1 May 2020	Revised Draft Disaster Management Tax Relief Bill	Comments must be submitted to SARS and National Treasury by Friday, 15 May 2020.
1 May 2020	Draft Explanatory Memorandum on the Revised Draft Disaster Management Tax Relief Bill	Comments are due to SARS and National Treasury by Friday, 15 May 2020.
1 May 2020	Revised Draft Disaster Management Tax Relief Administration Bill	Comments are due to SARS and National Treasury by Friday, 15 May 2020.
Case law		
In accordance to date of judgment		
20 May 2020	Fowler v Commissioners for Her Majesty's Revenue and Customs [2020] UKSC 22 (20 May 2020)	Mr Fowler argued that, since he is treated as self-employed for income tax purposes, he must be treated as self-employed under the Treaty and is therefore only taxable in South Africa. HMRC, on the other hand, says ITTOIA does not affect whether someone is an employee, but only regulates the manner in which an employee is taxed.
30 Apr 2020	Toneleria Nacional RSA (Pty) Ltd v Commissioner, South African Revenue Service	Appeal against the classification for customs duty purposes by SARS of certain wooden products imported by the applicant. The appeal is brought in terms of s 47(9)(e) of the Customs and Excise Act 91 of 1964.
29 Apr 2020	SIP Project Managers (Pty) Ltd v CSARS (11521/2020) [2020] ZAGPPHC (29 April 2020)	Tax administration; section 179; Rule 3(2)(b)(ii) of the Rules for Electronic Communications; SARS withdrawing funds from applicant's bank account after appointing bank as agent in order to settle tax debt.
14 Apr 2020	HMT Projects (Pty) Ltd v Commissioner South African Revenue Service (7215/2018) [2020] ZAGPPHC 143 (14 April 2020)	The classification of articles under tariff headings for customs duty.
24 Feb 2020	ABC (Pty) Ltd v CSARS (TAdm 13950) 2020 ZATC 1 (24 February 2020)	Whether the Appellant's application for a postponement should be entertained.
28 Aug 2018	Langholm Farms (Pty) Ltd v CSARS (1657/2017) [2018] ZAECGTHC (28 August 2018)	Whether carting of empty crates from exporter to applicant qualifies as a primary production activity.
Interpretation Note		
29 May 2020	IN 87 (Issue 3) – Headquarter companies	This Note provides guidance and clarity on the interpretation and application of section 9I which deals with headquarter companies.
Rulings		
14 May 2020	BPR 343: Donations tax implications of subscribing for shares at a discount	This ruling determines that there are no donations tax implications resulting from a broad-based black economic empowerment trust subscribing for shares at a discount.
Other Publications		
26 May 2020	OECD: Early restoration planning by tax administrations key to support individual and business taxpayers towards economic recovery from COVID-19 pandemic	The report outlines how tax administrations can prepare for the potentially prolonged, uncertain and complex recovery period from the COVID-19 crisis.
18 May 2020	Legal Alert: COVID-19 – Impossibility of performance, force majeure and section 129(7) notices	This Alert explores certain legal aspects of force majeure and section 129(7) of the Companies Act in the context of the global COVID-19 pandemic.
7 May 2020	Tax alert – COVID-19: Further tax measures to deal with the pandemic – revised draft legislation	On 23 April, National Treasury issued a Media Statement that provides further detail regarding the relevant tax measures, and two revised draft Bills, which give effect to these measures, were published on 1 May. The purpose of this Alert is to provide a brief overview of these tax measures.
7 May 2020	Tax Alert: VAT and loyalty programmes: Draft Interpretation Note	This alert discusses the Draft Interpretation Note issued by SARS dealing with the value-added tax ('VAT') consequences of points-based loyalty programmes. The IN is intended to clarify the VAT implications resulting from participation in loyalty programmes for all parties involved.
6 May 2020	Tax Alert: New registration, licensing and accreditation system	Prior to 20 April 2020, registrations with SARS in terms of the Customs and Excise Act, 1964 (Act No. 91 of 1964), required that all applications be submitted to SARS and be manually supported by hard copies of relevant supporting documents.

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