Return of CTC – caveat investor!

Curiosity saves the cat: I-CAT International Consulting (Pty) Ltd ("I-CAT") vs CSARS

SARS Watch

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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Return of CTC – caveat investor!

The economic rationale for an investor to whom capital is returned by a company is to treat the return of capital as a reduction in the cost of investment. Where the investor is the original sole shareholder in the company, the return of all the capital should ultimately result in a zero-sum outcome, because the shareholder recovers the amount that was originally invested. While this may be regarded as a logical and sensible conclusion, the Income Tax Act contains provisions that may lead to surprising and unwelcome outcomes.

It is useful to provide an illustrative example to highlight the risk issue.

Investor A wished to acquire a business in 2010. He formed a company with an initial share capital of 100 ordinary shares which were issued for a subscription of R1,00 each (Tranche 1). The company then negotiated to purchase the business for a consideration of R5,000,000. To finance the acquisition, Investor A injected the additional amount into the company as share capital and the company issued a further 100 shares in consideration for an aggregate subscription price of R4,999,900 (Tranche 2). Investor A then held 200 shares with an aggregate cost of R5,000,000. The company operated successfully and in April 2022 resolved to return R2,000,000 of the capital contribution to Investor A. The company elected in writing that the cash distribution was a distribution of contributed tax capital ("CTC"). Investor A credited the amount of R2,000,000 that he received against the cost of investment, which was reduced to R3,000,000.

Investor A must now account for the transaction in his return of income for the year of assessment ended on 28 February 2023. Investor A determines that he will elect the specific identification method of valuation of the shares and reduces the cost of the pool of shares proportionally.

Return of capital accruing prior to 1 January 2023

The tax treatment of a return of capital is found in paragraph 76B(2) of the Eighth Schedule to the Income Tax Act ("par 76(B)"). Par 76B(2) provides as follows:

> "Where—
>
> a. a return of capital … in respect of a share … is received by or accrues to a holder of a share in respect of that share; and
>
> b. that return of capital … is received by or accrues to the holder of that share on or after 1 April 2012 and prior to the disposal of that share,
>
> the holder of that share must reduce the expenditure in respect of the share by the amount of that cash or the market value of that asset on the date that the asset or that cash is received by or accrues to the holder of that share."

If the amount returned exceeds the base cost of the share, then a capital gain will arise equal to the amount of the excess (Par 76B(3)).

The reaction to the illustrative scenario at first sight is that the tax treatment should follow the accounting treatment and no tax liability should arise. It appears that SARS has other ideas.

SARS suggests that the return of capital of R2,000,000 must be treated as a return of R10,000 in respect of each share held.

Therefore, for each of the 100 shares acquired in the first tranche, there will be a capital gain of R9,999 per share (an aggregate gain of R999,900) while the base cost of each second tranche share will be reduced by R10,000 to R39,999 per share. This results in a tax bill of almost R216,000, on a transaction from which no profit was earned.

SARS' rationale

The argument advanced by SARS is that shares of a particular class all have the same participation rights in terms of section 37(1) of the Companies Act. Therefore, it is suggested, any distribution to shareholders must, in terms of the Companies Act, be treated as being proportionally allocated to each share held by that shareholder. The argument then continues that the proviso to the definition of contributed tax capital in section 1 of the Act supports SARS' interpretation:

> "Provided that the amount transferred by a company as contemplated in paragraph (*a*) or (*b*) for the benefit of a person holding shares of any class of shares of that company must not exceed an amount that bears to the total of the amount of contributed tax capital attributable to that class of shares immediately before the transfer the same ratio as the number of shares of that class held by that person bears to the total number of shares of that class…"

Following from this, SARS argues that the amount distributed as a return of capital in respect of each share must be compared with the expenditure actually incurred in acquiring that share. If the amount returned in respect of that share exceeds the expenditure actually incurred, a capital gain must be recognised. If the expenditure actually incurred in acquiring that share exceeds the amount returned, the expenditure actually incurred in respect of the share must be reduced by the amount returned.

SARS argues that the provisions relating to the treatment of identical assets, such as shares, do not apply in respect of a return of capital. Its position is that the determination of base cost only arises on disposal of a share and because there has not been a disposal, the taxpayer does not have the right to exercise an election as to how the base cost of shares is to be allocated.

Counter argument

Shares fall within the scope of "identical assets" as contemplated in paragraph 32 of the Eighth Schedule to the Act ("par 32"). Special rules in par 32 govern the determination of the base cost of identical assets. In summary, a taxpayer may, in respect of each class of identical assets, determine the base cost using the first-in first-out, weighted average cost or specific identification method. Once a method is elected in respect of a particular class of identical assets, that method must be applied until all the assets of that class that were subject to that election have been disposed of. When capital gains tax was introduced, the specific identification method was described in the Explanatory Memorandum to the Revenue Laws Amendment Bill, 2001:

> "Under the specific identification method the cost of each asset disposed of is discretely identified. This could be done, for example, by reference to share certificate numbers."

Base cost is defined in terms of paragraph 20 of the Eighth Schedule ("par 20"). The principal provision is that the base cost includes the expenditure directly incurred in acquiring the asset (par 20(1)(*a*)). Additional expenditure related to acquisition, control or improvement of the asset may also be included in base cost.

In so far as a person may recover expenditure incurred in acquiring an asset, par 20(3)(*b*) provides:

> "The expenditure contemplated in subparagraph (1) (*a*) to (*g*), incurred by a person in respect of an asset must be reduced by any amount which—
>
> a. …; or
>
> b. has for any reason been reduced or recovered or become recoverable from or has been paid by any other person (whether prior to or after the incurral of the expense to which it relates), to the extent that such amount is not—
>
>   (i) taken into account as a recoupment in terms of section 8 (4) (*a*) or paragraph (*j*) of the definition of "gross income";
>
>   (ii) reduced in terms of section 12P; or
>
>   (iii) applied to reduce an amount of expenditure incurred in respect of—
>
>   (aa) trading stock as contemplated in section 19 (3); or
>
>   (bb) any other asset as contemplated in paragraph 12A (3)…"

Par 20(1) is subject to (*inter alia*) par 32. This means that, in applying par 20(1) due regard must be had to the method adopted in terms of par 32. There is no conflict between par 20(3) and par 76B. Both provisions require that the expenditure incurred in respect of the asset must be reduced.

Par 32 does not prescribe the time when a taxpayer must elect a method relating to a class of identical assets. If, at the time that the taxpayer makes an election, that asset is part of a class of identical assets in respect of which no election has previously been made, the taxpayer is free to elect the method by which the base cost of that class is to be determined. If the taxpayer elects the specific identification method, the consequences of the transaction must be limited to the shares specifically identified by the taxpayer.

Par 76B does not exclude specific identification. The words "in respect of a share" and "that share" must take their context from the nature of the asset. In this case, the asset is part of a class of identical assets.

If a comparison is made with paragraph 35, which states that that proceeds on disposal of an asset are equal to the amount that accrues to the person "*in respect of that disposal*", it is evident that, where a method of accounting for shares is elected, "that disposal" relates to the shares identified.

SARS appears to consider that the election of a method for determining base cost may only be made on or after disposal of an asset:

> "The Act is silent as to when the election of the weighted-average method must be made. It follows that a taxpayer will be bound by the weighted-average method only once the first disposal of a class of asset takes place and evidence of the method adopted is reflected in the relevant return of income." (*Comprehensive Guide to Capital Gains Tax (Ninth Edition*) §8.36.3.1 at page 333)

Having made the statement concerning the time at which the election of the weighted

average cost method may be made, SARS, in its commentary on par 76B, contradicts itself with the following guidance:

> "[If] the base cost of the share is sufficient to absorb the return of capital a capital gain or loss will not arise. Shares bought on the same date at the same unit cost can, however, be lumped together for the purposes of applying para 76B. The problem of shares acquired on different dates does not arise when the weighted-average base cost method is adopted, since the return of capital will simply reduce the base cost of the pool." (*Comprehensive Guide to Capital Gains Tax (Ninth Edition*) §18.8 at page 331) (Emphasis added)

If, as SARS suggests, the problem does not arise if the weighted average base cost method is elected, the only inference that may be drawn is that SARS also contemplates that the election to adopt the weighted average base cost method may be made prior to a disposal (it being a condition for the application of par 76B that the return of capital precedes disposal). It is submitted that this is a reasonable conclusion.

Furthermore, it is equally probable that the election of a method adopted may be reflected in a return of income following a return of capital, because the return of capital affects the expenditure actually incurred and, by logical extension, the base cost of the asset. Silence in the Act does not place a restriction on the right to an election in respect of the base cost of an asset by limiting the exercise of the right to the occurrence of only one particular capital gains tax event (i.e. a disposal).

The second counter argument relates to SARS asserting that the proviso to the definition of CTC requires that an equal amount of CTC is returned in respect of each share held. It is submitted that this interpretation is a leap too far:

- The proviso clearly states that a single shareholder may not receive more than his proportional share of the CTC related to that class of shares. It sets an upper limit on the amount that may be classified as a return of CTC to any single shareholder but does not prescribe that the CTC is deemed to be a specific amount in respect of each share held.
- SARS cannot claim support for its view from the Companies Act. SARS has made it clear that: "As with the definition of 'dividend' the concept [of CTC] is an artificial one unrelated to what happens in reality for accounting or company law purposes. A company could elect to reduce its CTC yet pay the amount out of profits. Conversely, a payment out of the company's share premium account will not represent a reduction of its CTC unless the directors elect that the company's CTC be reduced by an equivalent amount." (*Comprehensive Guide to Capital Gains Tax (Ninth Edition)* §18.1.2 at page 712) (Our emphasis)

Linking the reduction of CTC to provisions in the Companies Act that are admittedly unrelated to the concept of CTC is itself artificial. SARS cannot run with the hares and hunt with the hounds as suits its purposes. It follows that the provisions of the Companies Act cannot be applied in allocating a return of CTC.

It is submitted that a return of capital is a capital gains tax event. Where the event relates to identical assets, the manner in

which the taxpayer has elected to evaluate those identical assets is relevant to the event and the taxpayer would, in the return of income, provide the necessary evidence in support thereof. The taxpayer would then be at liberty to allocate the base cost among the shares in conformity with the method which has been elected.

The principles of interpretation of words used in a statute are now well established:

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document." (*Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA at paragraph 18)

If a court were to find that competing interpretations are equally plausible, it

is submitted that the interpretation that favours the taxpayer should prevail. The Supreme Court of Appeal has cited with approval the following statement:

> "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." (*Telkom SA SOC Limited v Commissioner for the South African Revenue Service* 2020 (4) SA 480 (SCA) at paragraph 19)

We submit that, under the law as it applied to returns of capital prior to 1 January 2023, a sensible and businesslike interpretation would be one in which business reality is preferred to fiscal fantasy. It is submitted that, in any event, there are plausible competing interpretations concerning the application of the proviso to the definition of CTC and the application of par 32 which would warrant a finding that a taxpayer may apply par 32 in relation to a return of capital.

Return of capital accruing on or after 1 January 2023

An amendment to the definition of CTC came into effect on 1 January 2023 in the form of a further proviso which states:

> "Provided further that an amount transferred by a company as contemplated in paragraph (a) or (b) must comprise a transfer of contributed tax capital only where—
>
> (i) the shares in a class of shares, in respect of which—
>
> (aa) a distribution is made; or
>
> (bb) consideration for the acquisition, cancellation or redemption is paid or payable by that company,
>
> are each transferred an equal amount of contributed tax capital in respect of that class of shares; and
>
> (ii) the amount of that transfer per share does not exceed the total amount of contributed tax capital in respect of that class of shares divided by the total number of issued shares within that class of shares."

The explanation for the amendment is:

> "However, it has come to Government's attention that some companies are exploiting the current provisions of the CTC by allocating CTC on the basis of an alleged 'share premium' contributed by a particular shareholder but not to all shareholders holding shares in the same class of shares."

In effect, the abuse that was identified was a practice of returning CTC selectively to shareholders who held shares which had a sufficiently high base cost to absorb the reduction in expenditure contemplated in par 76B or were not subject to CGT (e.g. because they are non-resident) while not also returning CTC to other shareholders who might suffer taxation on a capital gain arising from the return of CTC. The culprit in this explanation is the company making the distribution. The additional proviso therefore only recognises as a payment of CTC a distribution in terms of which the amount of CTC returned is proportionally allocated among all the shareholders in that class receiving distributions based on the number of shares held by each shareholder.

Paragraph (i) of the further proviso is directly targeted at this mischief. However, the purpose of paragraph (ii) of the proviso is less clear. The first proviso already provides that a transfer of CTC to a shareholder may not exceed their proportionate share of CTC (determined immediately before any distribution thereof). Paragraph (ii) takes that a step further by requiring that the transfer per share may not exceed a share's proportionate share of the CTC.

That raises the question of what is intended by this provision. Arguably, it has the effect that a taxpayer cannot use the various methods for determining the base cost of identical assets in relation to distributions of CTC and must prorate the CTC across the entire shareholding.

If that is the case, the picture is not pretty. If, in the illustration provided, the company subsequently distributes the remaining R3,000,000 of the CTC, the shareholder will incur capital gains tax on the additional receipt of R1,500,000 in respect of the first tranche and have a residual base cost of R14,999 per share in respect of the second tranche. What has transpired is simply a return of the amount originally subscribed (a break-even), yet the law will have conjured up taxable capital gains of R1,499,900.

This form of fiscal alchemy is transparently objectionable, particularly when a shareholder is taxed on the repayment of the same amount that he or she contributed (or a lesser amount).

Whereas, before the enactment of the further proviso, the shareholder could effectively allocate the return of capital pro-rata to the contribution in respect of each share (accounting for the entire return of capital in respect of each share discretely), it now appears that the shareholder may be unable to allocate the return on a discretionary basis among the identical shares and may be compelled to apply the fixed amount deemed to have accrued to each share in reduction of the base cost as directed under par 76B. While we would certainly argue that this should not be the case and that the determination as to whether a transfer of an amount constitutes a return of CTC and the tax implications of a return of CTC are discrete, the amendment has certainly raised the uncertainty and the stakes at play.

The takeaway

Shareholders who receive a return of CTC must exercise caution to ensure that they do not fall prey to the further proviso to the definition of CTC.

Circumstances will vary and we would strongly advise shareholders contemplating a return of CTC to obtain advice before proceeding.

Esmarie Viljoen
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Curiosity saves the cat: I-CAT International Consulting (Pty) Ltd ("I-CAT") vs CSARS

The recent High Court case of *I-Cat International Consulting (Pty) Ltd ("**I-CAT**") v Commissioner For The South African Revenue Services ("**SARS**")(41667/2021) [2023] ZAGPPHC 268 (24 April 2023)*, dealt with inter alia, I-CAT's request for a reduced assessment in terms of section 93 of the Tax Administration Act, 28 of 2011 ("TAA") and whether the relevant assessment had prescribed when considering the provisions of section 99(2)(d)(i) and (iii) of the TAA.

Background to the matter

In 2013, prior to filing its 2014 income tax return, I-CAT sought a tax opinion from its Tax Advisors on the deductibility of an expense of R17,171,433, accounted for by I-CAT as cost of closing stock. The tax opinion stated that the expense could be claimed as a deduction against taxable income in terms of section 11(a) of the Income Tax Act, No. 58 of 1962 ("**ITA**"). I-CAT accordingly claimed the amount of R17,171,433 as a deduction in its 2014 tax return.

On 15 July 2015, SARS assessed I-CAT's 2014 tax return and disallowed the deduction. I-CAT lodged an objection against the disallowance of the amount and the objection was subsequently disallowed by SARS. I-CAT then proceeded to lodge a notice of appeal in this regard. Subsequently, I-CAT and SARS entered into Alternative Dispute Resolution ("**ADR**") proceedings; however, no consensus was reached. The matter then proceeded to be heard in the Tax Court.

On 28 October 2019, the matter was settled as the Tax Court made a settlement agreement between I-CAT and SARS as a consent order of court. The settlement agreement between I-CAT and SARS was signed and issued as a legal document enforced by the Court.

In terms of the consent order, an amount of R10,152,940 was settled as an expense disallowed for the 2014 year of assessment on the basis that it was not incurred in the production of income for that tax year. The R10,152,940 was accordingly deemed to be incurred in the production of income in the 2015 year of assessment.

Post the Tax Court's decision, on 13 December 2019, I-CAT submitted an application for a reduced assessment in respect of the 2015 year of assessment, in terms of section 93 of the TAA. SARS declined I-CAT's application for a reduced assessment, on the assertion that I-CAT's assessment had been prescribed in terms of section 99 of the TAA.

I-CAT did not accept SARS' decision in respect of its request for a reduced assessment and brought an application for review, in respect of SARS' disallowance of the request for the reduced assessment, on the basis that the 2015 year of assessment had prescribed.

The decision of the High Court

Section 99(1) of the TAA provides as follows:

> "An assessment may not be made in terms of this chapter –
>
> a. 3 years after the date of assessment of an original assessment by SARS; …"

The Court noted that the date of I-CAT's original 2015 assessment was 26 February 2016. In the premises the three-year period as provided for in section 99(1)(a) of the TAA in respect of I-CAT's 2015 tax assessment expired on 25 February 2019.[1] The right to assess in respect of I-CAT's 2015 year of assessment had thus become prescribed unless any of the exclusions to the prescription period as provided for under section 99(2) of the TAA found application in the present matter.[2]

I-CAT argued the provisions of section 99(2)(d)(i) of the TAA were applicable to the facts *in casu*, i.e. that section 99(1) does not apply where it is necessary to give effect to the resolution of a tax dispute.

1 See paragraphs 50 – 52 of the judgment.
2 See paragraph 53 of the judgment.

Section 99(2)(d)(i) of the TAA

I-CAT argued at paragraph 59 of the judgment, *inter alia*, that:

"[59.4] At the time when the parties entered into the compromise, SARS not only knew of the error that affected the 2014 year of assessment but also knew of the error affecting the 2015 year of assessment prior to the lapsing of the expiry of the 2015 assessment prescription period….

[59.5] The provisions contained in the Tax court order that relates to both the 2014 and 2015 years of assessment cannot be ignored as the provisions relate to the resolution of the dispute between the parties. In the premises in order to give effect to the resolution of the dispute between the parties the provisions of section 99(1) does not apply."

SARS argued at paragraph 60 of the judgment, inter alia, that:

"[60.7] I-cat did not object against the original assessment in respect of the 2015 year of assessment. In the premises there is no dispute as defined in Chapter 9 of the Tax Administration Act between I-cat and the Commissioner in respect of the 2015 year of assessment. Further in the premises there was no and could not be any resolution of the dispute under Chapter 9 of the Tax Administration Act in relation to the 2015 year of assessment. Accordingly the provisions of Section 99(2)(i) of the Tax Administration Act do not apply.

[60.8] Further the consent order between I-cat and SARS on the 29th of October 2019 resolved the tax dispute between the parties in respect of the 2014 year of assessment. As such, the underlining agreement of compromise has no bearing on the dispute between the parties in relation to the 2015 year of assessment. It is the question of the application for a reduced assessment in the 2015 year of assessment that is presently before this court for adjudication."

The Court considered the language of the Tax Court's consent order, the purpose thereof and the rules of interpretation of documents and found at paragraphs 92 and 93 of the judgment that:

"[92] At the time the compromise was entered between the parties SARS knew that the balance of the amount was incurred in 2015. On the contrary this was their alternative defence. What is clear from the last sentence of paragraph 6 of the consent order is that both parties agreed that I-cat will have the right to approach SARS again in respect of the 2015 year of assessment. Although the parties made it clear that SARS could not bind itself as to the outcome of such approach, by using the term "endeavour", at least I-cat had the right to apply. I can hardly imagine that SARS would be able to successfully raise the aforementioned defences again in respect of the 2015 assessment, but I make no finding to this effect as this is something that SARS will need to decide upon when it adjudicates upon I-cat's application for a reduce assessment in respect of 2015.

[93] If SARS' submissions are to stand, it follows that at the time they entered the compromise with I-cat, which compromise was made a consent order, SARS knew that I-cat's right to apply for a reduce assessment in respect of this balance amount in terms of Section 93 of the Tax Administration Act had already prescribed. In the premises SARS knew that I-cat would no longer possess any right to approach SARS. Notwithstanding SARS agreed to include such a clause in their compromise and consent order full well knowing that such provision served no purpose, was superfluous and insignificant."

The Court, in setting aside SARS' decision, found at paragraphs 97 to 99 that:

"[97] I am satisfied that the parties did not include the said paragraph 6 in their agreement and subsequent consent order of the 28th October 2019 [1] in error or to serve no purpose.

[98] I therefor find that it was in the parties' contemplation with paragraph 6 of the consent order that as part of their compromise, I-cat could approach SARS in terms of section 93 of the Tax Administration Act in respect of the 2015 year of assessment with an application for a reduce assessment. It was part and parcel of their resolution of the dispute which they dealt with under chapter 9. This would, however, only be possible if the 3-year prescription period as provided for in section 99(1) was not applicable.

[99] In view thereof that it is necessary to give effect to the resolution of the dispute under chapter 9 as contained in the consent order, the 3 year prescription period as provided in section 99(1) cannot not apply."

Key takeaways

This judgment acknowledges taxpayers' rights to be protected from unlawful, unreasonable and procedurally unfair administrative action taken by SARS.

The Courts ascribe a sensible and business-like meaning when interpreting documents. Relief may therefore be sought if a taxpayer enters into an agreement with SARS and subsequent decisions by SARS are impractical or contrary to the purpose of the agreement.

It is interesting that I-CAT's request for a reduced assessment was declined by SARS on the basis of section 99 rather than on the requirements as set out in section 93 of the TAA.

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We would like to acknowledge the contribution made by Ashley Mhona to this article.

SARS Watch

SARS Watch 1 May 2023 – 31 May 2023

Legislation		
29 May 2023	Table 3 – Rates at which interest-free or low interest loans are subject to income tax	The prescribed rate will increase to 9,25% (currently 8,75%) from 1 June 2023.
4 May 2023	Table 2 – Interest rates payable on credit amounts	The prescribed rate will increase to 7,25 % (currently 6,75%) from 1 July 2023.
4 May 2023	Table 1 – Interest rates on outstanding taxes and interest rates payable on certain refunds of tax	The prescribed rate will increase to 11,25% (currently 10,75%) from 1 July 2023.
3 May 2023	Explanatory Memorandum	Explanatory memorandum to Notice issued in terms of Paragraph 2D of the Second Schedule to the Income Tax Act, 1962
3 May 2023	Notice in terms of paragraph 2D of the Second Schedule to the Income Tax Act, 1962, relating to the tax exemption of bulking payments to former members of closed retirement funds	Notice 3356 published in Government Gazette no 48487 with an implementation date of 3 May 2023.
Interpretation		
24 May 2023	Interpretation Note 129	This Note provides clarity on the interpretation and application of the phrase "maximum tax rate applicable to the taxpayer" used in section 222(5) of the Tax Administration Act 28 of 2011 when the tax rate applicable to the shortfall determined under subsections (3) and (4) is applied.
16 May 2023	Interpretation Note 74 (Issue 3)	This Note provides guidance on the interpretation and application of section 11(d) of the Income Tax Act 58 of 1962, which allows a deduction for expenditure incurred on repairs for the purposes of trade.
Binding rulings		
26 May 2023	Binding Class Ruling 086	This is a ruling on the interpretation and application of the following in the Income Tax Act 58 of 1962– • *section 1(1) – paragraphs (c) and (i) of the definition of "gross income";* • *section 10(1)(nE);* • *section 19;* • *paragraph 2 of the Fourth Schedule;* • *paragraph 2(h) of the Seventh Schedule;* • *paragraph 12A; and* • *paragraph 20(3)(b) of the Eighth Schedule.*
Customs and excise		
31 May 2023	SACU members sign mutual recognition arrangement	The Heads of Revenue Administrations in Botswana, Eswatini, Lesotho, Namibia and South Africa, have agreed to recognise each other's importers and exporters who have been granted the status of an Authorised Economic Operator (AEO). Traders who are AEOs across the SACU region will benefit from fast-tracked controls and reduced administration costs for customs clearance.
29 May 2023	Amendment to rules under sections 19A and 120 – Amendment of rule 19A1.01 to provide for the retrospective approval of licensing applications in respect of vaping solutions (DAR246)	Notice R.3473 published in Government Gazette no. 48669 with effect from 1 June 2023.

18 May 2023	Diesel refund to manufacturers of foodstuffs	SARS issued a letter to stakeholders to provide clarity on the extension of the diesel refund to manufacturers of foodstuffs.
17 May 2023	Amendment to Part 1 of Schedule No. 2 by the insertion of various items under heading 204.05, in order to impose anti-dumping duties on frozen potato chips originating in or imported from Belgium, Germany and the Netherlands, classifiable under tariff subheadings 2004.10.21 and 2004.10.29 – ITAC Report 706	Notice R.3413 published in Government Gazette no. 48605 with an implementation date of 17 May 2023.
11 May 2023	Prohibited and Restricted Imports and Exports list updated	Tariff heading 9028.30 now needs Letter of Authority from NRCS.
5 May 2023	Amendment to Part 2 of Schedule No. 4, by the insertion of rebate item 460.16/8415.10.10/01.08, in order to provide for a rebate of the duty payable in Schedule No. 1 Part 1 for air-conditioning machines having a rated cooling capacity not exceeding 8,8 kilowatts, classifiable in tariff subheading 8415.10.10 – ITAC Report 681	Notice R.3372 published in Government Gazette no. 48518 with an implementation date of 5 May 2023.
Case law		
In accordance with the date of judgment		
31 May 2023	Commissioner for The South African Revenue Service v Free State Development Corporation (1222/21) [2023] ZASCA 84	This appeal turns on whether the Tax Court was correct in granting an order permitting the Free State Development Corporation to withdraw its statement of grounds of appeal, filed in terms of Tax Court Rule 31 (2), and to file an amended statement of grounds of appeal against additional assessments levied by SARS. SARS sought to overturn the Tax Court's decision on the basis that the amended statement was premised on a new ground of objection not originally raised.
30 May 2023	Arena Holdings (Pty) Ltd t/a Financial Mail and Others v CSARS and Others (CCT 365/21) [2023] ZACC 13	The matter concerns the constitutionality of sections 67 and 69 of the Tax Administration Act (TAA) and sections 35 and 46 of the Promotion of Access to Information Act (PAIA). The issue is whether the order granted by the High Court, declaring section 35 and section 46 of PAIA unconstitutional and invalid to the extent that they preclude access to tax records by a person other than the taxpayer even in circumstances where the requirements set out in subsections 46(a) and (b) of PAIA are met, should be confirmed.
18 May 2023	Commissioner for the South African Revenue Service v Nyhonyha and Others (1150/2021) [2023] ZASCA 69	This is an appeal by the Commissioner for the South African Revenue Service against an order setting aside the winding-up of Regiments Capital (Pty) Ltd ('Regiments'). The appeal raises two main issues: whether the setting aside of a winding-up under s354 of the Companies Act 61 of 1973 constitutes the exercise of a discretion in the strict sense, and whether Regiments was commercially solvent at the time of the hearing in the court a quo.
Guides and forms		
31 May 2023	Permission for Interruption of Transit of Goods through the Republic	This guide provides information on obtaining permission for interruption of transit of goods through the Republic for purposes of performing certain activities.
23 May 2023	Guide on the Rules Promulgated in terms of Section 103 of the Tax Administration Act, 2011 (Issue 3)	This document is a general guide dealing with the resolution of tax disputes in South Africa.
8 May 2023	Guide to Bulk and additional payments on eFiling	This document serves as a guide to assist eFiling users to use the Bulk and Additional Payment function on eFiling
Other Publications		
31 May 2023	OECD: Global Forum Secretariat assists members to ensure the effective implementation of automatic exchange of financial account information	The Global Forum Secretariat has developed a Model Administrative Compliance Strategy in order to assist jurisdictions in developing, improving and implementing their own administrative compliance strategy to ensure the effectiveness of the Standard for Automatic Exchange of Financial Account Information in Tax Matters (AEOI).

26 May 2023	OECD: Global Forum Secretariat and ATAF deliver seminar on automatic exchange of financial account information for Kenyan tax officials	The Secretariat presented the key requirements of the AEOI standard and detailed the essential prerequisites for its effective implementation. Participants were also briefed on the Global Forum's AEOI peer review methodology and process. The event helped attending tax officials better understand the key concepts and requirements for an effective implementation of the AEOI standard, in preparation for Kenya's first automatic exchanges in 2024.
23 May 2023	OECD: Viet Nam deposits its instrument for the ratification of the Multilateral BEPS Convention	Viet Nam became the 81st country to deposit its instrument of ratification for the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS Convention), underlining its strong commitment to prevent the abuse of tax treaties and BEPS by multinational enterprises. The BEPS Convention will enter into force on 1 September 2023 for Viet Nam.
16 May 2023	OECD: Latin America and the Caribbean: Economic recovery and higher commodity prices drive rebound in tax revenues	Tax revenues as a share of GDP in Latin America and the Caribbean (LAC) rebounded to their pre-pandemic level in 2021 amid an economic recovery and higher commodity prices, according to a new report.
10 May 2023	OECD: OECD and IGF invite public comments on draft toolkits to support developing countries in addressing base erosion and profit shifting risks when pricing minerals	As part of the ongoing work of the OECD/IGF partnership on BEPS in the mining programme, the OECD and IGF are seeking public comments on two toolkits. The first toolkit provides a framework that is designed to support developing countries in addressing the transfer pricing challenges faced when pricing minerals. The second toolkit applies this transfer pricing framework to a specific mineral (bauxite). Comments must be submitted by 14 July 2023.

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