

Synopsis

Tax today

September 2019

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

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

Editor: Al-Marie Chaffey

SARS Watch: Linda Mathatho



Expatriate tax services are a taxable benefit



International groups frequently apply tax equalisation principles to protect employees on assignment in a foreign territory from an unwelcome reduction in their anticipated take-home pay because of differential tax treatment of the remuneration they derive between the host jurisdiction and the jurisdiction of residence. The groups typically engage the services of tax consultants to ensure that the tax liability in the host country is accurately and correctly determined. The question is whether the charges for these services give rise to a taxable fringe benefit.

The Supreme Court of Appeal ('SCA') handed down judgment on 6 September 2019 in the matter of *BMW South Africa (Pty) Ltd v Commissioner for the South African Revenue Service* [2019] ZASCA 107 (6 September 2019).

The facts can be summarised thus:

- BMW South Africa (Pty) Ltd ('BMW SA') is a member of an international group;
- Group employees are assigned from other companies within the BMW group to undertake employment with BMW SA from time to time;
- The BMW group has a tax equalisation programme which ensures that the employees will receive the same take-home pay as they would have received if they had not been assigned to another jurisdiction for a temporary period;

- In order to manage the equalisation, it is imperative that the tax liability in South Africa should be accurately established, and, to this end, BMW SA and the relevant employer in the country of residence engaged professional tax consultants to prepare the relevant tax calculations that form the basis of any equalisation payment or adjustment;
- The contract under which the employee undertook to perform the services in a foreign jurisdiction stated that professional consultants would prepare the income tax submissions of the employee in both the home and host country;
- In South Africa, three consultant firms were engaged and, at the expense of BMW SA, were required to register the employees as taxpayers, collect the relevant information for the preparation of any return from the relevant employees, prepare and file all returns on behalf of the employees and deal with any compliance-related issues arising out of the returns submitted.

In the course of an audit of BMW SA's PAYE returns, SARS formed the opinion that the services of the tax consultants were a taxable fringe benefit enjoyed by the employees and assessed BMW SA to additional employee's tax, penalties and interest.

In raising the assessments, SARS placed reliance on paragraph (i) of the definition of 'gross income' in section 1 of the Income Tax Act ('the Act'), which includes in taxable income:

'the cash equivalent, as determined under the provisions of the Seventh Schedule, of the value during the year of assessment of any benefit or advantage granted in respect of employment or to the holder of any office, being a taxable benefit as defined in the said Schedule ...'

In turn, the Seventh Schedule to the Act, in paragraph 2(e), deems a taxable benefit to have been granted to an employee if, as a benefit or advantage of or by virtue of employment:

'any service ... has at the expense of the employer been rendered to the employee (whether by the employer or by some other person), where that service has been utilized by the employee for his or her private or domestic purposes and no consideration has been given by the employee to the employer in respect of that service ...'

After its objection to the assessments had been disallowed, BMW SA appealed to the Tax Court, which had found in favour of the Commissioner. On further appeal to the High Court, the decision of the Tax Court was upheld. BMW SA then appealed to the SCA.

BMW SA's argument

The arguments advanced by BMW SA addressed two fundamental bases:

- The tax consultants were contractually bound to provide the services to BMW SA so that it could manage the remuneration of its employees under the tax equalisation programme, and the services were rendered to the employer and not to the employee;
- The tax equalisation programme was intended to ensure that the employees gained no benefit or advantage from the geographic location, so no benefit or advantage accrued to the employees.

The judgment

The judgment, delivered by Navsa JA, dealt first with the submission that the tax consultancy services were for the benefit of the employer and not the employee. At paragraph [21], the application of paragraph (i) of the definition of 'gross income' in section 1 of the Act was identified as the taxing provision:

'It is correct that the benefit or advantage contemplated in the definition of 'gross income' in s 1(i) of the Act must have been granted in respect of employment or to the holder of any office.'

In examining whether the services were granted in respect of employment, Navsa JA found, at paragraph [24]:

'The services rendered by the firms to expatriate employees ... were to ensure that the latter met their obligations to SARS. It is undisputed that the amount ... constitutes payments by BMWSA for the services rendered to the expatriate employees ... That payment was made in terms of the contract of employment. These were services that the expatriate employees would otherwise have had to

pay for personally. The ineluctable conclusion is that the services provided are a benefit or advantage as contemplated by s 1 of the Act, read with paragraph 2(e) of the Seventh Schedule.'

BMW SA's argument that the fact that the services were rendered to assist and protect the employer indicated that they were not a benefit of employment was dealt with in paragraph [25] of the judgment:

'There will be instances in which benefits or advantages contemplated within s 1(i) read with the Seventh Schedule have some residual or marginal advantage for an employer. The primary question however, is whether an advantage or benefit was granted by an employer to an employee and whether it was for the latter's private or domestic purposes. In the present case, as stated above, the compelling conclusion is that the services were correctly valued and utilised for the employees' private or domestic purposes as contemplated by s 1 of the Act read with para 2(e) of the Seventh Schedule.'

As to the argument that the question of benefit could not arise because the purpose of the tax equalisation programme was to eliminate any benefit from the foreign services contract, Navsa JA endorsed the opinion of the Tax Court that the question of the professional services was a private issue between the company and the employees, and rejected the argument advanced by BMW SA at paragraph [26]:

'... [T]he confirmation of the assessment will not lead to the expatriate employees being worse off in terms of their employment with BMWSA. In terms of their tax equalisation policy, they will have to bear the additional tax burden on behalf of the expatriate employees. BMWSA's policy and terms of employment cannot dictate the application of the provisions of the Act.'

Judgment was accordingly given in favour of the Commissioner and the assessments were confirmed.

The takeaway

The matter here turned primarily on the contractual arrangements between the employee and employer on the one hand and the employer and consultants on the other hand. The contracts provided a clear road map that linked the services to the employee rather than to the employer. As a result, the benefit to the employer was considered residual or marginal and ultimately was disregarded as irrelevant.

The decision can however be criticised on the basis that the court decided to take an objective approach instead of looking at the facts subjectively. It can be argued that the main purpose of the arrangements between BMW SA and the tax consultants was to benefit BMW SA as the employer. In terms of the BMW group's tax equalisation programme, BMW SA will bear the additional tax costs of the expatriate employees. It is

therefore possible that the arrangements primarily benefited BMW SA and that they merely resulted in an ancillary benefit to the employees. The court, to a substantial degree, ignored the benefit to BMW SA.

Furthermore, it is possible, if the contract had required that the tax consultants advise BMW SA of the amounts of tax to be withheld from the remuneration of the employees, and to evaluate the employees' tax assessments to confirm the amounts of any refunds due to the employees, that the outcome may have been different.

Parties to an arrangement should identify and carefully consider the possible tax implications for the persons affected.

The old adage that the devil lies in the detail is well illustrated in this decision.



Gavin Duffy
Partner/Director
Employees Tax and Global Mobility Consulting
+27 (0) 11 797 4271
+27 (0) 83 410 2923
gavin.duffy@pwc.com



Claire Abraham
Senior Manager
Employees Tax and Global Mobility Consulting
+27 (0) 11 797 4172
+27 (0) 60 554 8025
claire.abraham@pwc.com

Article 9 in the Tax Director series

Change is happening – as responsible taxpayers, organisations need to level up to be fit for the future.

Transform* tax through automation (Part 3)

Most CFOs and heads of tax know that automation of tax processes has the power to change almost everything about the way they manage tax in the business – and could contribute significant to bottom-line savings. But what many leaders don't know is how to deploy automation in tax, not just in a pilot here or there, but throughout the organisation, where it can create maximum value. The 'why', 'what' and 'how' are the sticking point with any technology implementation.



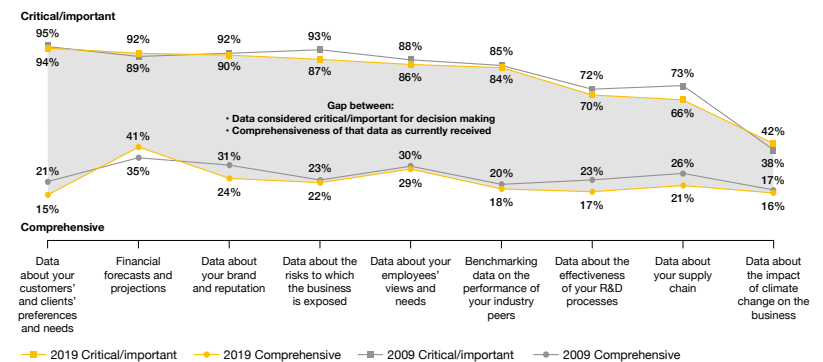
Since our July 2019 Edition of Synopsis our focal point in the Tax Director series has been to examine Transform* tax through automation. We explored the opportunities of achieving success by going smart, fast, and small, to help tax become a better strategic partner within the wider organisation. We also put the spotlight on emerging small automation trends such as robotic process automation (RPA) and artificial intelligence (AI) and their impact on the tax function.

In this month's edition we summarise the 'why', 'what' and 'how' of a responsible tax automation roadmap and find innovative ways to collect and process financial data, moving away from manual manipulation and reconciliation to more forward-thinking analytics for real-time decision-making.

Why?

As organisations turn to what they can control inside the organisation they confront shortcomings in their own capabilities, especially information and skills. Financial information (including tax information) is rated as the second most critical factor for long-term success. However, it seems that in the last ten years the gap between what information is required to make business decisions and the information actually received remained the same.¹

Data used to make decisions about the long-term success and durability of the business

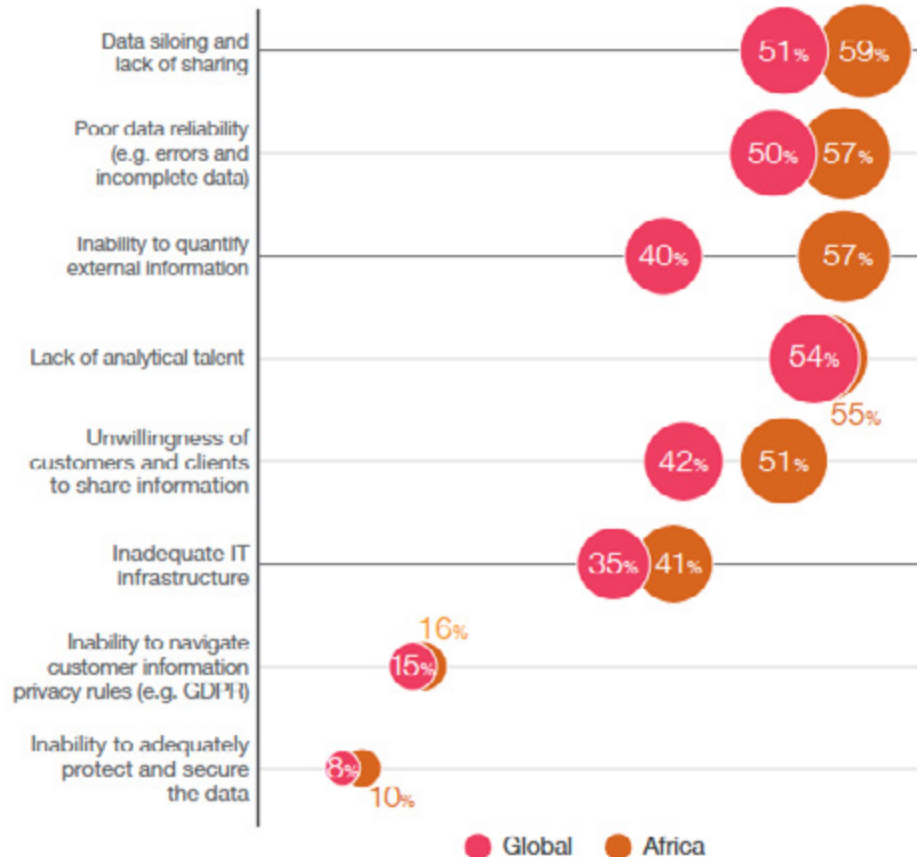


Source: PwC, 22nd Annual Global CEO Survey

¹ PwC. (2019). Africa business agenda

It seems that organisations are struggling to convert data into usable and actionable intelligence, the main reasons being data-siloing and poor data reliability. Lack of analytical talent is also one of the main reasons.

Primary reasons why data received is not adequate



Source: PwC, 22nd Annual Global CEO Survey

Business leaders are leaning on finance and tax functions to assume more responsibility, by delivering more meaningful consultative 'partnerships' within their organisations, being visionary by organising themselves for the modern way of working and being available 24/7. This means that these functions require advanced skills and capabilities. What does this mean for the tax function?

Being a value partner:

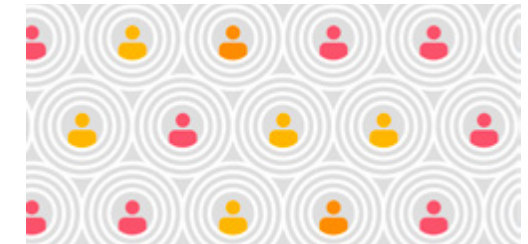
- Turning insights into action
- Working beyond the traditional compliance and accounting mindset
- Adding value all day, every day
- Focus beyond driving efficiency to creating agility
- Being their own activist for change and transformation

A visionary:

- Being agile, adaptable and willing to change
- Aligning tax with organisation's adoption of emerging technologies
- Relying on RPA, AI and machine learning to do the heavy lifting and number crunching ... better data, faster
- Top talent – focused on effective predictive and analytical models

Available 24/7:

- Real-time management dashboards
- Single version of the truth and real-time tax numbers
- Self-service capability
- Harnessing insights



The World Economic Forum estimates that 15 to 20 million young people will join the African workforce every year for the next two decades. By 2030, Africa will be home to more than a quarter of the world's population under 25, who will make up 60% of the continent's total population. By then, 15% of the world's working-age population will be in Africa, and the continent's urbanised population will exceed 700 million (more than 50%). To make these initiatives pay off, organisations need to define their current and future workforce needs, considering the impact of emerging technologies across their value chain, from strategy to execution, and preparing their workers to be fit for purpose.²

² World Economic Forum. (2019). Why the skills gap remains wider in Africa

What?

In part 1 (July 2018) and 2 (August 2019) we discussed the return on investment of a tax technology strategy, which should focus on five dimensions of data:

- Breath of information;
- Depth of information;
- Integration of data;
- Tax management practices; and
- Quality of data.

We explored how small automation allows organisations to respond to the demand for quality data and technology-enabled processes, but in a more measured and controlled manner. While AI such as advanced machine learning and natural language processing are being applied to tax functions in advanced tax technology strategies, there are also certain self-service automation solutions that are reasonably easy to incorporate in tax processes and within the larger organisational technology ecosystem:

- Extract, transform, and load tools which are used to integrate, manipulate and perform simple to very complex transformation of data from disparate sources.
- RPA-coded software to perform rule-based processes which mimics the interactions of user; and
- Advanced analytics and data visualisation (e.g. dynamic/interactive dashboard displays).

Projects to put these technologies into action are generally not complicated and generate immediate benefits.

How?

Unlocking the value of data and tech-enabled business processes cannot be done without substantial investment in talent. Executives know they cannot hire their way out of the need for upskilled employees. Workers are keenly focused on organisations that will invest in their development and help secure their future in a digital, data-driven economy.

Upskilling can be a key enabler for driving the data, digital, and technology agenda, while also helping employees secure their own personal future and relevance. While employees must opt in to their own digital upskilling, and invest the time and effort required to acquire knowledge and new skills, leaders also need to commit to not leaving anyone behind and to making investments that support the lifelong learning that's essential for the 21st century. Digital upskilling is fundamentally about culture and people experience – and bringing to life a shared growth mindset among individuals and teams, and across the entire organisation.³

In 2019 PwC compiled a report identifying the most important organisational capabilities that businesses need to consider when preparing for tomorrow's work, workers and workplace. Over 1,200 organisations in 79 countries were surveyed to find out how they are getting ready for the future and the key areas

³ Harvard Business Review. (2019). How We Teach Digital Skills at PwC

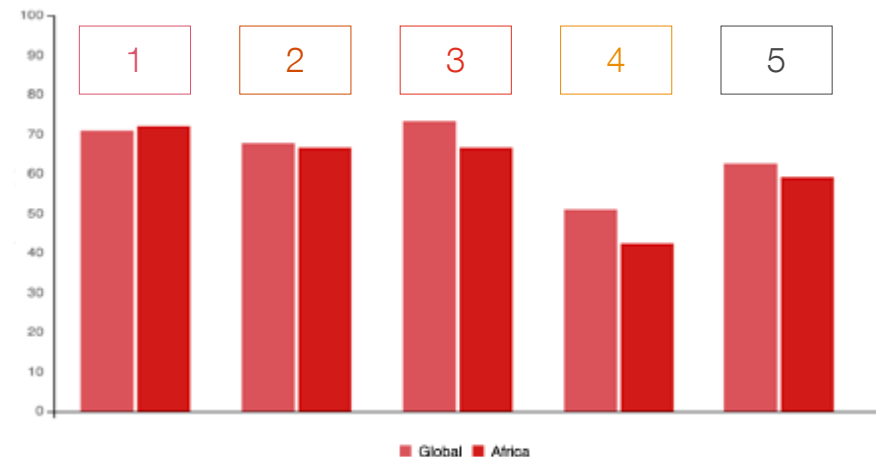
of risk they face. In the graph below (1–5) the importance of brand and bots in collaboration for the future of the organisation is indicated:

1. **72%** of African respondents (Global 71%) indicated that decisions on the automation of tasks and jobs are primarily based on how best to deliver corporate purpose.
2. **67%** of African respondents (Global 68%) indicated that areas of repeatable activity and options to automate it are mapped.
3. **67%** of African respondents (Global 73%) indicated that they are identifying and building future skills created by the impact of technology.

4. **43%** of African respondents (Global 51%) indicated that they are exploring how AI and RPA can enable the entire redesign of human work in the organisation.
5. **59%** of African respondents (Global 63%) indicated that their HR teams have an in-depth understanding of and insight into the technology landscape to help determine the demand for skill and talent.



The importance of brains and bots in collaboration for the future of an organisation



Source: PwC. (2019). Preparing for tomorrow's workforce, today.

Establishing a digitally fit tax function involves so much more than just learning new skills on new technology. It requires a shift in mindset, pushing teams and leaders to look at solving problems in a totally new way. Looking at old processes in new ways empowers people to innovate, test new operating models and adjust to a new way of working.

We identified five critical truths to guide a people strategy for a digitally fit tax function:

- **People are different:** Everyone has different digital skills and levels of adaptability. You need to design your strategy to address different needs so teams have what they need to succeed.
- **People expect technology to be easy to use:** There's too much focus on functionality and features during implementations. Instead, focus on people first. Design tools that deliver the user experience and ease-of-use that they want.
- **People follow leaders:** People want their leaders to both 'say and do'. Leaders need to both communicate change and model target behaviours.
- **People get bored:** People easily lose interest. Past experience with failed transformations means they may not easily buy in to new objectives. Look for fresh ways to make the transformation personal, fun and engaging for everyone.

- **People don't change overnight:** Think of transformation as a journey, not as a project. While go-live is critical, it isn't the final stop. In fact, this is where the journey truly begins. To get the most value, you need to provide ongoing support to help teams embrace working in new ways.

For more information view our Tax Function of the Future [here](#).




Gert Meiring

Lead: Tax Reporting and Strategy
 +27 (0) 11 797 5506
 +27 (0) 83 703 2254
gert.meiring@pwc.com

We value your input

Our way of working is to take the time to understand your business, your tax function and the issues and challenges you are facing, specifically around tax technology, so that we can use our local and global knowledge to help you introduce and deliver appropriate tax technology strategies that work specifically for you.

To this end, we have designed a survey to gain insight into your specific needs so that we can work with you to chart a course to creating a tax function that is fit for the future.

Click on the link to access the survey: 

The survey takes approximately ten minutes to complete and your responses will be held in the strictest confidence. Any data published will be presented in aggregate.



SARS Watch

SARS Watch 26 August 2019 – 25 September 2019

Legislation

20 September	Amendment to Part 1 of Schedule No. 1 by the substitution of tariff subheadings 1001.91 and 1001.99 as well as 1101.00.10, 1101.00.20, 1101.00.30 and 1101.00.90 to reduce the rate of customs duty on wheat and wheaten flour from 95.80c/kg and 143.69c/kg to 66.47c/kg and 99.71c/kg respectively, in terms of the existing variable tariff formula – Minute 06/2019	Notice R. 1219 published Government Gazette 42718 with an implementation date of 20 September 2019
19 September	TLAB, TALAB, Rates Bill & Income Tax Amendment Bill: Treasury & SARS response to public submissions	Treasury and SARS response to public submissions on the 2019 draft Tax Bills to the Standing Committee of Finance
16 September	TLAB, TALAB, Rates Bill & Income Tax Amendment Bill_ public hearings	Minutes from the public hearings on the 2019 Draft Tax Bills held before the Standing Committee of Finance on Tuesday, 10 September 2019
13 September	Amendment of rules 49A.01, 49B.10(9)1 and 49B.10(9)9	Notice R.1165 published in Government Gazette No. 42698 with an implementation date of 13 September 2019
12 September	Draft tariff amendment notices to implement the 2020 Economic Partnership Agreement phase-downs as well as various technical amendments, with effect from 1 January 2020	Comments must be submitted to SARS by Thursday, 10 October 2019.
11 September	Draft rule and tariff amendment notices and forms relating to the environmental levy in respect of carbon tax imposed in terms of the Carbon Tax Act	Comments must be submitted to SARS by Friday, 11 October 2019.
10 September	TLAB, TALAB, Rates Bill & Income Tax Amendment Bill	Minutes from the joint presentation to the Standing Committee of Finance and Select Committee on Finance by SARS and Treasury on 3 September 2019.
05 September	Draft rule amendment notices and forms to insert rule 107A relating to requirements in respect of tobacco leaf dealers	Comments must be submitted to SARS by Friday, 27 September 2019.
05 September	Table 1 – Interest rates on outstanding taxes and interest rates payable on certain refunds of tax	SARS updated the table 1 on 5 September 2019.
05 September	Table 2 – Interest rates payable on credit amounts	SARS updated the table 2 on 5 September 2019.
27 August	Draft tariff amendment notices – The draft amendments are proposed to rebates and refunds items	Comments must be submitted to SARS by Wednesday, 11 September 2019.
27 August	Draft amendment to Schedule 1 of the VAT Act as a consequence of the amendment in Part 1 of Schedule No. 4 to the Customs and Excise Act,	Comments must be submitted to SARS by Wednesday, 11 September 2019.

Case law

According to judgment date

06 September	BMW South Africa (Pty) Ltd v CSARS (1156/2018) [2019] ZASCA 107	Whether payment by employer to tax consultants to render assistance to expatriate employees is a taxable 'benefit or advantage' as contemplated in the definition of 'gross income' in section 1 of the Income Tax Act 58 of 1962 read with section 2(e) or (h) of the Seventh Schedule.
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Interpretation Note		
12 September	Draft Interpretation Note 18 (Issue 4) rebates and deduction for foreign taxes on income	Comments must be submitted to SARS by Friday, 15 November 2019.
Rulings		
20 September	BPR 328: Consecutive asset-for-share transactions	This ruling determines the income tax consequences of consecutive asset-for-share transactions within a period of 18 months.
20 September	BPR 327: Tax implications of a group restructuring	This ruling determines the tax consequences of a group restructuring which includes liquidation distributions.
19 September	BPR 326: Group restructuring transactions in a foreign jurisdiction	This ruling determines certain tax consequences of a proposed group restructuring.
17 September	Draft BGR 18: Determination of the threshold for applying the higher rate of donation tax	Comments must be submitted to SARS by Saturday, 30 November 2019.
Guides and forms		
12 September	Comprehensive guide to dividends tax (Issue 3)	The purpose of this guide is to assist users in gaining a more in-depth understanding of dividends tax.
04 September	Taxation in South Africa 2019	This is a general guide providing an overview of the most significant tax legislation administered in South Africa by the Commissioner for the South African Revenue Services.
30 August	Internal Administrative Appeal	External policy for administrative appeals effective from 1 September 2019.
26 August	Guide on income tax and the individual (2018/19)	The purpose of this guide is to inform individuals who are South African residents of their income tax commitments under the Income Tax Act 58 of 1962.
Other publications		
13 September	Tax Alert – Taxable fringe benefits: Services provided at the expense of the employer	This alert discusses BMW South Africa (Pty) Ltd v CSARS judgement regarding the tax implications of services provided by tax practitioners in assisting a company's expatriate employees.
10 September	Tax Alert – Efficient cash and treasury management through Mauritius	The alert discusses the Mauritius International Financial Centre cross-border financing activities service offering.
09 September	OECD Taxation Working Paper: The Potential of Tax Microdata for Tax Policy	This paper explores one distinctive form of the 'big data' of economics individual tax record microdata and its potential for tax policy analysis.
26 August	Deputy Minister's speech at the Tax Indaba	Speech made by deputy minister of finance on the 26 August 2019 to the attendees at the Tax Indaba.



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