Issue 97 | 2026
AUGUST

sait South African Institute of Taxation

Unstructured CPD 150mins

TAX CHRONICLES MONTHLY

Official Journal for the South African Tax Professional

EXCHANGE CONTROL
INTEREST RATE CAPS REMOVED FOR INWARD FOREIGN LOANS

TRUSTS
ACQUIRING AN INTEREST IN A VESTING TRUST FROM ANOTHER BENEFICIARY

CUSTOMS AND EXCISE
HIGH COURT GRANTS RELIEF IN MAJOR SARS VESSEL SEIZURE DISPUTE

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Mr KG Karro (Chairman), Prof KI Mitchell, Prof JJ Roeleveld, Prof DA Tickle, Ms D Hurworth.

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APPLIES THE GAAR TO DIVIDEND STRIPPING

The tax court (Cape Town) in July 2026 handed down judgment in *Company AF (Pty) Ltd and Others v Commissioner for the South African Revenue Service* (Case Nos *IT 76725* and *IT 76750* to *IT 76755*), applying the general anti-avoidance rules (GAAR) in Part IIA of Chapter III of the Income Tax Act, 1962 (the Act), to a dividend-stripping arrangement used in connection with the sale of shares in a self-storage business. The court found in favour of the Commissioner for the South African Revenue Service (SARS).

This judgment follows shortly after the Constitutional Court's decision in *Absa Bank Ltd and Another v Commissioner for the South African Revenue Service* [2026] ZACC 15.

FACTS

RASS Investments (Pty) Ltd (RASS) was incorporated in 2003 and built and leased self-storage facilities through wholly owned subsidiaries. Capital was invested mainly through shareholder loans, with shares issued at nominal value, and RASS applied its profits to new developments, paying no dividends throughout its existence.

In early 2015, RASS began a restructuring (Project Marbles) aimed at introducing new investors and allowing partial disinvestment. A tax adviser recommended that individual and trust shareholders first transfer their shares to investment companies on a tax-free basis in terms of section 42 of the Act, so that value could later be distributed as exempt intercompany dividends. While Project Marbles was being implemented, ANCIENT Ltd (ANCIENT) approached RASS with an offer to acquire all of its shares.

"Importantly, the court held that the statements made by the majority in *Absa* regarding the objective character of the purpose enquiry were not *obiter dictum* but formed part of the *ratio decidendi* and are therefore binding."

RASS' tax adviser confirmed that an outright sale of properties by RASS would attract capital gains tax (CGT) on the sale followed by dividend tax on the distribution of the proceeds by the investment companies. He advised, however, that there was another way to achieve the same commercial objective without attracting tax. In terms of this alternative structure, RASS would distribute its full value as a dividend, ANCIENT would subscribe for new shares at the underlying value, and the remaining shares would be sold at nominal value.

RASS' managing director informed all shareholders that ANCIENT would be acquiring 100% of RASS and that only dividends tax, and no CGT, would be payable. RASS and ANCIENT signed a memorandum of understanding recording the proposed structure, and Project Marbles was terminated. The non-corporate shareholders thereafter transferred their RASS shares to investment companies.

The transaction was implemented in four steps:

- RASS declared a distribution of ZAR274 666 901, payable only after receipt of the subscription amount.
- SRIA (ANCIENT's subsidiary) subscribed for new shares for ZAR280 325 530, giving it 99.99% of RASS.
- RASS used the subscription proceeds to pay the dividend.
- The exiting shareholders then sold their original shares for ZAR1 000.

Following an investigation and applying the GAAR, SARS issued additional assessments to RASS, disregarding the dividend and subscription steps and assessing CGT on a deemed disposal of shares for full value.

"Following an investigation and applying the GAAR, SARS issued additional assessments to RASS, disregarding the dividend and subscription steps and assessing CGT on a deemed disposal of shares for full value."

TAX BENEFIT

Following *Absa*, the court held that the comparator is not "no transaction" or a different transaction the taxpayer preferred, but the arrangement as implemented "shorn of the features whose only operation is fiscal". The documents confirmed that the implemented transaction was economically a disposal. For example, the Main Agreement records that the shareholders wished to "extract … the value created" and the subscriber wished to "acquire a 100% shareholding". Further, the shareholder circular described ANCIENT as "buying the shares".

SOLE OR MAIN PURPOSE

The court held that the commercial objective (ie, realising the value of the investment) could have been achieved by a straightforward sale. The pre-closing dividend funded by the purchaser's subscription

> "added nothing to the commercial result. Its one discernible function … was to convert what would otherwise have been taxable proceeds of sale into an exempt inter-company dividend".

The shareholder circular further stated that "[n]o Capital Gains Tax will be payable" and the tax advisers' opinions provided that only dividends tax would be payable when the investment companies ultimately distribute the proceeds to their individual or trust shareholders. Assessed objectively the court held the arrangement's main purpose was to obtain the tax benefit.

Importantly, the court held that the statements made by the majority in *Absa* regarding the objective character of the purpose enquiry were not *obiter dictum* but formed part of the *ratio decidendi* and are therefore binding. The court reasoned that the objective standard was "a step in the path to the disposition of both issues" before the Constitutional Court, and that a subordinate court is "not free to disaggregate an apex judgment into severable propositions and retain only the holdings it finds congenial".

The court also confirmed that while *Absa* reaffirmed the *Conhage* choice principle (by stating that "[t]he principle is part of our law and was not weakened by *Absa*"), it does not protect "a step grafted onto the chosen route whose only distinguishing operation is to alter the tax outcome". [*See Commissioner for Inland Revenue v Conhage (Pty) Ltd (Formerly Tycon (Pty) Ltd)* [1999].]

Conhage therefore permits a choice between routes to one commercial outcome, but it does not shield an additional step whose only function is to change the tax characterisation of what the taxpayer receives. In this regard, the court stated that "[w]hat *Conhage* protects is a choice between different means of achieving the same commercial result". whereas the "dividend-and-subscription mechanism was not an alternative means of effecting a sale. It produced the same commercial result as a sale while changing only the fiscal character of what the sellers received".

TAINTED ELEMENTS

The court held that the arrangement met the abnormality requirements set out in section 80A of the Act.

PENALTIES

The appellants obtained specific professional advice (in the form of both a draft and a final written opinion from their tax adviser), disclosed the arrangement as reportable before any audit, and acted in good faith on a genuinely unsettled question of law. The court observed that "a taxpayer bent on evading tax does not ordinarily volunteer the structure to the Commissioner". The court further held that the objective GAAR findings do not, without more, convert a reasonable error of legal judgment into culpable conduct, and the understatement penalties were accordingly remitted.

CONCLUSION

The court applied the new test for a "tax benefit" as set out in *Absa*, holding that the proper comparator is the arrangement actually implemented, stripped of its avoidance features, and not an alternative transaction.

Importantly, the court held that the statements made by the majority in *Absa* regarding the sole or main purpose test were not *obiter dictum* but formed part of the *ratio decidendi* and are therefore binding. The court confirmed that the majority judgment in *Absa* reaffirmed the choice principle as set out in *Conhage* but held that the principle did not assist the taxpayers in the circumstances.

A key aspect of this case was the declaration of the pre-acquisition dividend, which constituted an additional step in relation to the proposed transactions. The facts may therefore potentially be distinguishable from a subscription and buy-back structure, where the purchaser subscribes for new shares in a company and the company uses the subscription proceeds simply to buy back shares from the existing shareholder, without a separate dividend declaration.

Andries Myburgh, Peter Dachs & Emilé Cronje

ENS

Acts and Bills

- Income Tax Act 58 of 1962: Part IIA of Chapter III (sections 80A to 80L).

Cases

- *Company AF (Pty) Ltd and Others v Commissioner for the South African Revenue Service* [2026] (Case Nos *IT 76725* and *IT 76750* to *IT 76755*);
- *Absa Bank Ltd and Another v Commissioner for the South African Revenue Service* [2026] ZACC 15; [2026] JDR 2582 (CC);
- *Commissioner for Inland Revenue v Conhage (Pty) Ltd (Formerly Tycon (Pty) Ltd)* [1999] (4) SA 1149 (SCA).

Tags: dividend-stripping arrangement; additional assessments; understatement penalties

HIGH COURT GRANTS RELIEF IN MAJOR SARS VESSEL SEIZURE DISPUTE

The April 2026 Western Cape High Court judgment in Ocean Ark Shipping Ltd and Another v Commissioner for the South African Revenue Service *[2026] is likely to attract considerable attention within the maritime, logistics and energy sectors.*

The case concerns SARS' detention and seizure of the tanker MT Essien in connection with alleged contraventions under the Customs and Excise Act, 1964 (the C&E Act), and Value-Added Tax Act, 1991, arising from coastwise trade operations in South African waters.

The dispute raises important questions regarding the treatment of foreign-flagged vessels operating domestically, the scope of SARS' enforcement powers under the C&E Act, and the extent to which constitutional principles may limit forfeiture remedies in high-value commercial contexts.

BACKGROUND

The MT Essien, a Singapore-flagged products tanker owned by Ocean Ark Shipping Ltd (Ocean Ark), entered South African territorial waters in September 2023 to conduct coastwise transportation of fuel products for Astron Energy (Pty) Ltd (Astron). SARS subsequently formed the view that the vessel had effectively been imported into South Africa without the necessary customs declarations and VAT payments having been made.

In March 2025, SARS detained the vessel and later seized it under the C&E Act on the basis that it was liable to forfeiture. SARS' alleged exposure included approximately R124 million in import VAT, penalties and interest, while the vessel itself was valued at close to R400 million.

Ocean Ark, as owner of the vessel, and Astron, as time charterer, approached the High Court on an urgent basis seeking interim relief pending a review application already instituted in the Gauteng Division of the High Court. In the pending review application, the applicants challenged several SARS decisions, including the detention, seizure, deemed importation finding and refusal to release the vessel against security tendered in the form of a guarantee.

COURT EMPHASISES INTERIM NATURE OF RELIEF

Importantly, the court stressed that it was not deciding the ultimate legality of SARS' actions in the urgent application. Rather, the issue was whether the applicants had established a *prima facie* right warranting interim protection pending finalisation of the review proceedings.

The judgment nevertheless provides valuable insight into the court's preliminary assessment of several contentious issues.

The court recognised that the interpretation of the provisions of the C&E Act dealing with the importation of foreign-flagged vessels engaged in coastwise trade raises "genuinely difficult" legal questions with potentially broader implications for the maritime industry.

"While the review proceedings remain pending, the judgment is already likely to become an important reference point in disputes involving vessel detention, customs enforcement and the constitutional limits of forfeiture remedies in South Africa's maritime sector."

PROPORTIONALITY AND CONSTITUTIONAL CONSIDERATIONS

One of the more notable aspects of the judgment is the court's discussion of proportionality.

The applicants argued that the forfeiture of a R400 million vessel in circumstances where the alleged VAT liability was approximately R124 million would be disproportionate, particularly where the owner itself was not alleged to have been involved in any wrongdoing.

Although the court declined to finally determine the issue, it accepted that these considerations raised serious constitutional questions under section 25 of the Constitution, relating to arbitrary deprivation of property. The court also acknowledged that the owner's apparent good faith was a relevant factor in assessing SARS' refusal to release the vessel under section 93 of the C&E Act.

This aspect of the judgment may prove particularly significant in future customs enforcement disputes involving high-value commercial assets and the constitutional right to protection against arbitrary deprivation of property.

SECURITY THROUGH GUARANTEES

A central issue in the case was whether SARS could adequately be protected through the provision of financial security rather than continued physical detention of the vessel.

The applicants offered a Lombard Insurance guarantee exceeding R522 million, covering both the estimated value of the vessel and the alleged VAT exposure.

The court ultimately held that the revised guarantee provided security equivalent, "in all material respects", to continued detention of the vessel. The court noted that once adequate security was in place, the balance of convenience strongly favoured the release of the vessel, particularly given the ongoing commercial prejudice suffered by the applicants.

Astron alleged monthly losses of approximately R31 million arising from charter costs and substitute shipping arrangements played a role, while broader concerns were raised regarding fuel supply risks linked to Cape Town International Airport operations.

BROADER INDUSTRY IMPLICATIONS

The judgment serves as a reminder of the substantial regulatory and tax risks associated with coastwise shipping arrangements involving foreign-registered vessels.

Operators, charterers and financiers involved in maritime and energy logistics should carefully assess whether their operational structures could give rise to customs importation consequences, particularly where vessels remain engaged in local trade for extended periods.

The matter also illustrates the increasingly assertive enforcement stance adopted by SARS in relation to customs compliance and the willingness of courts to require carefully calibrated security arrangements balancing public revenue interests against commercial prejudice.

The judgment also resonates with the February 2026 decision in *Ferreira v Commissioner for the South African Revenue Service*, where the Gauteng High Court criticised SARS' refusal to suspend payment despite the taxpayer tendering security substantially exceeding the disputed tax debt. In that matter, the court found that SARS had failed to consider the commercial realities and adequacy of the security offered, ultimately substituting its own decision in favour of the taxpayer.

As in *Ocean Ark*, the courts appear increasingly willing to interrogate whether rigid enforcement positions adopted by SARS are genuinely necessary to protect the fiscus, particularly where adequate alternative security is available and the aforesaid versus continued enforcement risks causing disproportionate commercial prejudice or even avoidable economic loss to the fiscus itself.

While the review proceedings remain pending, the judgment is already likely to become an important reference point in disputes involving vessel detention, customs enforcement and the constitutional limits of forfeiture remedies in South Africa's maritime sector. [*Author's note*: SARS applied for leave to appeal against the judgment and order of the Western Cape High Court. SARS was successful and leave to appeal to the Supreme Court of Appeal was granted. Although the outcome of the appeal is unpredictable, the High Court's findings remain relevant in relation to SARS' enforcement powers, the limitations regarding adequate security and SARS' obligation to meaningfully consider security tendered when clearance is required for foreign flagged vessels.]

Freek van Rooyen, Nalini Maharaj & Johan Kotzé

Shepstone & Wylie

Acts and Bills

- Customs and Excise Act 91 of 1964: Section 93;
- Value-Added Tax Act 89 of 1991;
- Constitution of the Republic of South Africa, 1996: Section 25.

Cases

- *Ocean Ark Shipping Ltd and Another v Commissioner for the South African Revenue Service* [2026] JDR 2065 (WCC);
- *Ferreira v Commissioner for the South African Revenue Service* [2026] ZAGPPHC 47.

Tags: review proceedings; arbitrary deprivation of property; disputed tax debt; disproportionate commercial prejudice.

SCA SETS ASIDE SARS DEMAND AGAINST CLEARING AGENT

*The Supreme Court of Appeal (SCA) on 3 July 2026 ruled in favour of customs clearing agent, QI Logistics (Pty) Ltd (QI), setting aside decisions by the Commissioner for the South African Revenue Service (SARS) to hold QI liable for more than R35 million linked to fuel shipments transported from Mozambique to Zimbabwe and Botswana. [*See QI Logistics (Pty) Ltd v Commissioner for the South African Revenue Service *[2026] ZASCA 96).]*

The court found that SARS failed to demonstrate that it had properly considered evidence submitted by QI and did not provide adequate reasons for its decisions, rendering the process procedurally irrational.

BACKGROUND

QI operates as a licensed clearing agent under the Customs and Excise Act, 1964 (the C&E Act). In 2020, QI launched a review application after SARS demanded payment of just over R35 million.

The dispute arose from fuel consignments imported from Mozambique during 2018 and moved in transit to Zimbabwe and Botswana. QI, as clearing agent, simply cleared the goods for transit through South Africa. They did not otherwise have control over or an interest in the goods.

SARS alleged that QI did not provide sufficient proof that the fuel had been exported and sought to hold QI liable for duties, levies, VAT and forfeiture amounts in lieu of the goods.

QI had received the so-called acquittal documents, which it presented to SARS as proof of export. SARS, however, subsequently disputed the veracity of such acquittals and deemed the goods to be diverted.

HIGH COURT DECISION

In August 2024, the Gauteng High Court dismissed QI's application, holding that under the C&E Act, liability depended on whether the clearing agent could satisfy statutory requirements proving that goods were duly exported. The High Court concluded that QI failed to establish compliance with those requirements and upheld the demand by SARS: Customs for all taxes, as well as forfeiture in lieu of the goods.

FOCUS OF THE APPEAL

QI's appeal to the SCA focused on whether SARS' decision-making process was lawful and rational. QI argued that SARS failed to properly engage with extensive evidence submitted in response to notices of intention and failed to provide reasons for the demand; and consequently, that QI had not been given an opportunity to make representations before SARS exercised its discretion to demand an amount in lieu of forfeiture.

PROCEDURAL IRRATIONALITY

The SCA found that SARS' letter of demand contained only brief assertions that certain entries were not endorsed for arrival and exit at border posts. It did not explain why the substantial documentary evidence submitted by QI was rejected or regarded as insufficient.

According to the judgment, there was no contemporaneous record showing that SARS had properly evaluated the acquittal documents supplied by QI, which included detailed representations and multiple files of supporting evidence.

The court emphasised that a reviewing court must determine whether there was a rational connection between the information before the decision-maker and the decision reached.

The court said that "both the process by which the decision is made and the decision itself must be rational. An irrational step in that process may therefore taint the ultimate decision and render it reviewable."

The court said that where there is procedural irrationality, one does not get to the merits of the decision.

FAILURE TO PROVIDE REASONS CRITICISED

A significant factor in the court's decision was SARS' failure to provide reasons as required in terms of section 5 of the Promotion of Administrative Justice Act, 2000. QI requested clarification on why its export documents were inadequate and on what basis the forfeiture-related demand had been imposed. SARS did not respond. A failure to respond is *prima facie* procedurally unfair. The court held that "a failure to provide reasons can ordinarily not be remedied by an *ex post facto* rationalisation in litigation".

"The judgment reinforces the principle that administrative decisions must be lawful, reasonable and procedurally fair."

The SCA held that the absence of reasons strengthened the inference that the Commissioner had failed to properly engage with relevant evidence and had not adequately exercised the discretion granted under the C&E Act.

SEPARATE FORFEITURE DECISION ALSO INVALID

The court drew a distinction between liability for customs duties and the separate decision to demand an amount in lieu of forfeiture under section 88(2) of the C&E Act.

While liability for duties may arise automatically if statutory requirements are met, the forfeiture provision grants SARS a discretionary power. The SCA found no evidence that SARS considered relevant factors, invited representations from QI, or independently assessed whether a forfeiture-related demand was appropriate.

As a result, the forfeiture decision was also found to be procedurally irrational and unlawful.

OUTCOME

The SCA set aside the demand on review, with costs, and referred the matter back to SARS.

The judgment reinforces the principle that administrative decisions must be lawful, reasonable and procedurally fair. A decision maker must allow the opportunity for a party adversely affected to be properly heard and must then consider the information before the decision maker before reaching a decision.

Quintus van der Merwe & Taryn Hunkin

Shepstone & Wylie

Acts and Bills

- Promotion of Administrative Justice Act 3 of 2000: Section 5;
- Customs and Excise Act 91 of 1964: Section 88(2).

Cases

- *QI Logistics (Pty) Ltd v Commissioner for the South African Revenue Service* (180/2025) [2026] ZASCA 96).

Tags: acquittal documents; SARS' letter of demand; export documents.

CAN A LOST REFUND CLAIM BECOME A DEDUCTIBLE TAX LOSS?

Although Judge Mali marked her judgment in the April 2026 IT 24852 *tax court case as neither reportable nor of interest to other judges, the decision provides important clarification regarding the deductibility of "losses" under section 11*(a) *of the Income Tax Act, 1962 (the Act).*

This is particularly relevant to taxpayers, practitioners and courts alike, given the complexity surrounding what constitutes a deductible "loss" in these circumstances and the timing of when such a deduction may properly be claimed.

The case examines whether the loss of a statutory refund claim through prescription can amount to a deductible loss for income tax purposes.

The matter concerned a fuel distributor that exported fuel products outside South Africa and, in the ordinary course of business, paid excise duties and levies on fuel purchased from local manufacturers. Under the Customs and Excise Act, 1964 (the C&E Act), exporters are entitled to claim refunds of those duties and levies, provided the claims are lodged within the prescribed two-year period under section 76B of the C&E Act.

THE BROADER CUSTOMS AND EXCISE CONTEXT

The dispute in *IT 24852* also fits within a broader line of South African customs and excise jurisprudence dealing with statutory refund claims and prescription.

In *3M South Africa (Pty) Ltd v Commissioner for the South African Revenue Service* [2010], the Supreme Court of Appeal confirmed that refund claims under section 76B of the C&E Act are strictly limited by the statutory time periods prescribed by the legislation. The court emphasised that taxpayers cannot escape those statutory limitations merely because of delays occasioned by SARS or because an earlier determination was incorrect. The onus rests upon the claimant to ensure that such claims are submitted timeously.

Similarly, in *Distell Ltd v Commissioner, South African Revenue Service* [2012], the Supreme Court of Appeal again dealt extensively with the operation of customs and excise refund mechanisms, tariff determinations and retrospective corrections. The court recognised that although taxpayers may succeed in correcting erroneous determinations, the statutory framework governing refunds remains decisive in determining the extent and timing of any recovery.

Against this backdrop, the taxpayer in *IT 24852* faced a fundamentally different difficulty. Unlike *3M* and *Distell*, the taxpayer no longer sought recovery under the C&E Act itself. Instead, after the refund claims had prescribed, it attempted to claim the irrecoverable amounts as a deductible "loss" under section 11*(a)* of the Act.

IT 24852

In *IT 24852*, the taxpayer's clearing agent failed to submit certain refund applications timeously, resulting in refund claims of about R38.8 million being prescribed. Instead of claiming the excise duties as deductible expenditure in the tax years in which the fuel purchases occurred, the taxpayer later attempted to claim the prescribed refund amount as a "loss" in its 2015 year of assessment under section 11*(a)* of the Act.

SARS disallowed the deduction, imposed a 10% understatement penalty, and levied interest. The tax court ultimately dismissed the taxpayer's appeal in its entirety.

THE CENTRAL ISSUE

At the heart of the dispute was whether the prescribed refund claims constituted a deductible "loss" actually incurred during the 2015 year of assessment, or whether the amounts represented expenditure incurred in earlier years that could not subsequently be shifted into a later assessment period.

Section 11*(a)* permits deductions in respect of "expenditure and losses actually incurred in the production of income, provided such expenditure and losses are not of a capital nature".

The taxpayer argued that the loss only crystallised once the refund claims were prescribed under the C&E Act. Until that point, the taxpayer maintained that the claims remained recoverable. The prescription of the claims, according to the taxpayer, represented an involuntary and fortuitous deprivation capable of qualifying as a deductible loss.

SARS, however, contended that the liability to pay the excise duties arose when the fuel was originally purchased during the 2011 to 2013 years of assessment. Consequently, the expenditure had already been incurred in those years and could not later be re-characterised as a deductible loss.

EXPENDITURE VERSUS LOSS

The tax court undertook a detailed analysis of the distinction between "expenditure" and "loss". Relying on established authority, including *Sentra-Oes Koöperatief Bpk v Kommissaris van Binnelandse Inkomste* [1995] and *Joffe & Co (Pty) Ltd v Commissioner for Inland Revenue* [1946], the court confirmed that expenditure generally involves voluntary disbursements made in the course of trade, whilst losses usually arise from involuntary or fortuitous events.

Importantly, the court focused on the true nature of the transaction rather than the eventual financial consequence. The excise duties were paid voluntarily as part of the purchase price of the fuel. The fact that the taxpayer expected to recover those amounts through statutory refunds did not alter the original character of the payments.

Accordingly, the court held that the expenditure was "actually incurred" at the time the fuel purchases took place, not when the refund claims later prescribed.

A key aspect of the judgment is its reaffirmation of the principle that income tax is assessed annually. Expenditure must generally be deducted in the year in which it is incurred.

PENALTIES AND INTEREST

The tax court further upheld SARS' imposition of a 10% understatement penalty under the Tax Administration Act, 2011. The taxpayer's conduct was found to constitute a "substantial understatement", because the tax prejudice exceeded R1 million.

The court rejected the suggestion that the error was inadvertent. Instead, the taxpayer had consciously adopted a legal position that SARS and the court ultimately found to be incorrect.

Interest imposed under section 89*quat* of the Act was likewise upheld. The court found that the circumstances giving rise to the additional tax liability were not beyond the taxpayer's control, particularly since the taxpayer bore responsibility for appointing and overseeing its clearing agents' conduct.

PRACTICAL IMPLICATIONS

The judgment serves as an important reminder that taxpayers must carefully distinguish between the timing of expenditure and subsequent commercial consequences arising from failed recoveries or lost claims.

"Instead of claiming the excise duties as deductible expenditure in the tax years in which the fuel purchases occurred, the taxpayer later attempted to claim the prescribed refund amount as a 'loss' in its 2015 year of assessment under section 11*(a)* of the Act."

Businesses operating in refund-driven regulatory environments, particularly in customs and excise matters, should ensure strict compliance with statutory time limits and requirements. Failure to do so may result not only in the permanent loss of the refund itself, but also in the inability to secure any compensating income tax deduction.

The case also highlights the importance of accurate tax treatment in the correct year of assessment. Taxpayers cannot ordinarily remedy omissions from earlier years by attempting to recast those amounts as losses in later years.

Nalini Maharaj & Johan Kotzé

Shepstone & Wylie

Acts and Bills

- Income Tax Act 58 of 1962: Sections 11*(a)* & 89*quat*;
- Tax Administration Act 28 of 2011;
- Customs and Excise Act 91 of 1964: Section 76B.

Other documents

- Rule 31 statement of grounds of assessment.

Cases

- *IT 24852 (Taxpayer EPP v Commissioner for the South African Revenue Service* [2026] ZATC 5);
- *3M South Africa (Pty) Ltd v Commissioner for the South African Revenue Service* [2010] ZASCA 20;
- *Distell Ltd v Commissioner, South African Revenue Service* [2012] (5) SA 450 (SCA); [2012] ZASCA 88;
- *Sentra-Oes Koöperatief Bpk v Kommissaris van Binnelandse Inkomste* [1995] (3) SA 197 (A);
- *Joffe & Co (Pty) Ltd v Commissioner for Inland Revenue* [1946] AD 157.

Tags: deductible loss; excise duties and levies on fuel; refund claims; understatement penalty; production of income; actually incurred.

INTEREST RATE CAPS REMOVED FOR INWARD FOREIGN LOANS

SARB relaxes inward foreign loan rules – but related-party funding still needs transfer pricing support

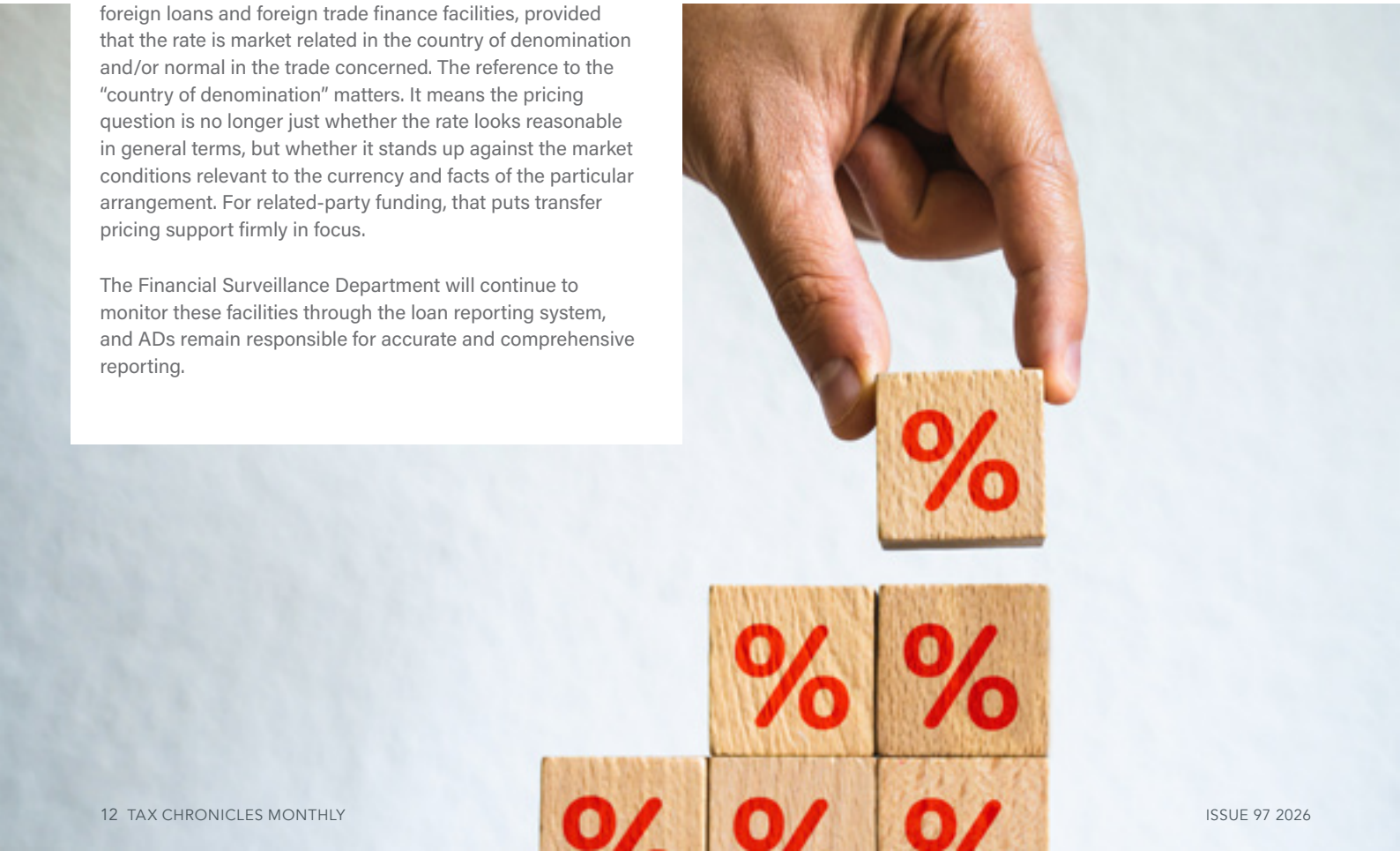
South African businesses raising offshore funding have been given more flexibility. In March 2026, the SARB signalled that it would remove the prescribed interest rate criteria for inward foreign loans and foreign trade finance facilities obtained by South African residents from non-residents. That proposal has now been finalised. Exchange Control Circular 5/2026, issued on 8 April 2026, confirmed the release of final Exchange Control Circulars 6/2026 to 14/2026 after public comment, with Exchange Control Circular 14/2026 dealing specifically with inward foreign loans and foreign trade finance facilities.

The immediate headline is that the old prescribed interest rate criteria have fallen away. That should make it easier to structure inbound funding, but it does not remove the need to demonstrate that the pricing is commercially supportable. Authorised dealers (ADs) may now approve new inward foreign loans and foreign trade finance facilities, provided that the rate is market related in the country of denomination and/or normal in the trade concerned. The reference to the "country of denomination" matters. It means the pricing question is no longer just whether the rate looks reasonable in general terms, but whether it stands up against the market conditions relevant to the currency and facts of the particular arrangement. For related-party funding, that puts transfer pricing support firmly in focus.

The Financial Surveillance Department will continue to monitor these facilities through the loan reporting system, and ADs remain responsible for accurate and comprehensive reporting.

THE TP POSITION

From a transfer pricing perspective, the tax rules have not changed. What has changed is the practical importance of having the right support ready when related parties are involved. In those cases, ADs must obtain confirmation from senior management of the applicant company that transfer pricing documentation is maintained in line with SARS requirements. They are also directed to SARS Interpretation Note 127, which deals with the transfer pricing and interest limitation issues relevant to connected-party cross-border loans ("*Determination of the taxable income of certain persons from international transactions: intra-group loans*" – issued on 17 January 2023). In practice, that means businesses should expect transfer pricing to play a more visible role in getting related-party funding over the line.



"From a transfer pricing perspective, the tax rules have not changed. What has changed is the practical importance of having the right support ready when related parties are involved."

Importantly, this is not the first time exchange control administration has leaned on transfer pricing. A similar approach has already been adopted for certain related-party royalties and fee payments, where ADs were expected to rely on transfer pricing support and senior management confirmation instead of a separate prior approval process. Circular 14 therefore fits into a wider pattern: SARB is streamlining formal approval processes, but expecting stronger transfer pricing support and internal governance in return.

The message is simple: easier does not mean light-touch. Groups using cross-border related-party funding should act now to test whether their intercompany loan pricing is defensible by reference to the relevant currency market, whether their transfer pricing documentation is current and transaction-specific, and whether management can confidently give the confirmations that their AD will expect. The same discipline should also be applied more broadly across related-party royalties, service fees and other cross-border payments. For many groups, the real issue is no longer whether approval is theoretically available, but whether the underlying transfer pricing support is strong enough when the bank asks the questions.

BROADER CONTEXT

This development should also be seen against a wider policy backdrop. National Treasury and the SARB published the draft Capital Flow Management Regulations, 2026 for public comment on 17 April 2026. Those draft regulations are intended to replace the Exchange Control Regulations, 1961 in due course. For now, however, they remain proposals only. Until any new regime is formally introduced, the 1961 Regulations and the existing AD manuals, circulars and exemptions continue to apply.

Hanro Pienaar & Marcus Stelloh

BDO

Other documents

- Exchange Control Circular 5/2026, issued on 8 April 2026;
- Exchange Control Circulars 6/2026 to 14/2026;
- Interpretation Note 127 ("*Determination of the taxable income of certain persons from international transactions: intra-group loans*" – issued on 17 January 2023);
- Draft Capital Flow Management Regulations, 2026 (published on 17 April 2026 – *see* Government Notice 54520 in *Government Gazette* 7375);
- Exchange Control Regulations of 1961 (made in terms of Currency and Exchanges Act 9 of 1933);
- Authorised Dealer manuals, circulars and exemptions (continue to apply until Capital Flow Management Regulations come into effect).

Tags: prescribed interest rate criteria; authorised dealers (ADs); country of denomination; connected-party cross-border loans.

ALL LITIGANTS ARE EQUAL, BUT SARS MAY BE MORE EQUAL THAN OTHERS

THE "EQUITY PRINCIPLE" IN LITIGATION

An essential feature of litigation is the equilibrium among the parties, particularly when the state is one of them. This is evident in criminal litigation, where the accused citizen is presumed innocent, and the state bears the burden of proving their guilt beyond a reasonable doubt. A similar dynamic underpins tax litigation in South Africa, where the taxpayer is likewise pitted against the state.

The rationale behind this lies in the inherent imbalance between the state and the citizen: the state has far greater resources and investigative powers, whereas the citizen may lack the means to prove their innocence. The system is designed this way to level the playing field and protect citizens from unjust convictions, going a step beyond the enshrined "equality before the law" principle and striving instead for "equity before the law", so to speak.

DOES THE EQUITY PRINCIPLE APPLY IN TAX LITIGATION IN SOUTH AFRICA?

Off the cuff, there is a basis for arguing that the equity principle should apply in tax litigation in South Africa, where the citizen, ie, the taxpayer, is again pitted against the state, ie SARS – picture, for the moment, a natural person against an institutional SARS in a David-vs-Goliath scenario.

Tax litigation is, however, *sui generis*, with the taxpayer in a rather unique litigious position.

On the one hand, tax litigation is considered akin to civil litigation between two equal citizens, as seen in the June 2025 *Virgin Mobile* judgment [*Commissioner, South African Revenue Service v Virgin Mobile South Africa (Pty) Ltd* [2025]]. On the other hand, however, one of the parties (generally the taxpayer) often bears a repute akin to that of an accused in criminal litigation. Perhaps the earliest (and, with hindsight, humorous) illustration of this is Conradie JA's referral in a tax case to the taxpayer as "the accused" in a somewhat Freudian slip. Although now amusingly referred to, the irony is that an accused in criminal litigation is arguably a better off litigant. Not only does the taxpayer not benefit from a presumption of innocence, but instead suffers a "presumption of guilt" to some degree, with SARS being entitled to make an additional assessment based solely on its satisfaction that the taxpayer's return (read: "version") is incorrect.

Therefore, the equity principle does not appear to feature in tax litigation, which may explain the pro-fiscus trend in tax judgments in recent years.

THE *VIRGIN MOBILE* JUDGMENT

The *Virgin Mobile* judgment illustrates the above.

There, the Supreme Court of Appeal held that SARS need not apply for condonation for the late filing of its first pleading (often referred to as a "Rule 31 statement") in appeal proceedings before the tax court, where the taxpayer calls out the lateness (in what is, in turn, referred to as a Rule 56(1) notice), and SARS then files the pleading within the prescribed period in response.

The court reasoned that a Rule 56 notice is akin to a notice of bar in civil litigation, in that it:

> "assists an innocent party to advance the appeal, either by ensuring compliance or by securing a default judgment".

The court further noted that the majority of the High Court in the court *a quo* found it irrational that "a party" could ignore the Tax Court Rules and simply wait for a Rule 56(1) notice to comply with and so avoid applying for condonation. It then, however, followed through by simply stating:

> "[this] is how the Rules were designed. They allow a party to play possum even beyond non-compliance with a Rule 56(1) notice but before default judgment is granted".

And then, somewhat confusingly, it concluded by stating:

> "In an adversarial system such as ours... it is important for the innocent party to timeously invoke a Rule that is aimed at ensuring compliance with the Rules. The innocent party must be vigilant."

TAX LITIGATION IS DIFFERENT FROM CIVIL LITIGATION

As observed by Dr Albertus Marais (*see* "*Letter to the Editor*" featured in *The Taxpayer* (Vol 75 Nos 1&2 Jan-Feb 2026)), the problem with this approach is that it fails to appreciate the distinction between civil and tax litigation.

As outlined above, SARS is entitled to make an additional assessment unilaterally. Once it has done so, that assessment stands and has immediate effect. The taxpayer becomes liable for the tax debt reflected in that additional assessment, even though they likely believe (or worse, know) it to be incorrect. The taxpayer must then weigh the potential benefit of disputing the assessment against the cost of doing so, which usually involves incurring professional fees. This assumes, of course, that the taxpayer has the means to challenge the assessment in the first place. Should the taxpayer choose to engage the dispute process, it is true that they at least have the respite of a suspension request – but again, usually at a fee.

THE PRACTICAL IMBALANCE

Furthermore, the notion that "a party" (implying the taxpayer or SARS, equally) is at liberty to play possum under the rules is, with respect, a stretch. In reality, that liberty belongs to SARS alone. To illustrate: if a taxpayer is late in filing their first pleading (often referred to as a "Rule 32 statement"), SARS, as the innocent party in that instance, has no obligation nor incentive to advance the appeal. After all, the additional assessment is already in place.

The effect of the current approach, as a result of the *Virgin Mobile* judgment, is therefore the following:

- Where SARS is late in filing, it would be better off playing possum and waiting for a Rule 56(1) notice (a somewhat *novus actus interveniens*, to avoid applying for condonation.
- Where a taxpayer is late in filing, for whatever reason, they are hard-pressed to not only file as quickly as possible to overturn the status quo of SARS' additional assessment, but must also always apply for condonation because SARS has no obligation nor incentive to file a Rule 56(1) notice to disturb the condonation requirement.

The practical consequence is that the procedural latitude described by the court operates almost exclusively in SARS' favour.

AT LEAST EQUALITY BEFORE THE LAW?

Lastly, one cannot unsee the paradox in the court's suggestion that the obligation falls on the innocent party (which, ironically, will always be the taxpayer) to call out SARS' lateness timeously.

Surely equality before the law dictates that the emphasis rather be placed on each party's obligation to observe the rules to begin with – particularly in the context of tax litigation in South Africa, where the balance between taxpayer and state remains under scrutiny?

Jacky Labuschaigne

AJM

Other documents

- *The Taxpayer*: Vol 75 Nos 1&2 Jan–Feb 2026 – Letter to the Editor (Dr Albertus Marais);
- Tax Court Rules;
- Rule 56(1) notice;
- Rule 31 statement;
- Rule 32 statement.

Cases

- *Commissioner, South African Revenue Service v Virgin Mobile South Africa (Pty) Ltd* [2025] (5) SA 427 (SCA).

Tags: equality before the law; additional assessment; Rule 32 statement.

EXPATRIATES: INACTIVE TAX NUMBERS

Dormant or inactive tax numbers, often the result of prolonged non-compliance or outdated personal details, can send unsuspecting taxpayers down a dead-end street very quickly.

It is a nuisance that can soon turn into a devastating dilemma – especially for South African expatriates abroad for whom a dormant tax number can bring critical processes to an abrupt standstill.

Many South Africans who emigrated years ago assume that their tax affairs automatically ended when they left the country, but the South African Revenue Service (SARS) does not close a taxpayer profile simply because they have relocated abroad.

Instead, tax numbers often become dormant, deregistered, or inactive, and the taxpayer's profile is restricted. This issue frequently only comes to light when a taxpayer attempts to apply for offshore transfer approvals or formally cease South African tax residency.

WHAT DOES A DORMANT OR INACTIVE TAX NUMBER MEAN?

A dormant or inactive tax number indicates that SARS has restricted the taxpayer's profile. This commonly occurs when –

- tax returns have not been submitted for multiple years;
- personal or contact details are outdated;
- SARS cannot verify the taxpayer's identity; or
- the profile was deregistered due to inactivity.

When this happens, SARS will not allow key processes to proceed, including tax residency cessation applications (the formal process of confirming that a taxpayer is no longer regarded as a South African tax resident for tax purposes) or Tax Compliance Status/ Approval of International Transfer PIN requests. Crucially, a tax practitioner is also unable to access or act on the taxpayer's SARS eFiling profile until the tax number has been fully reactivated.

Simply put: an inactive tax number blocks everything.

WHY REACTIVATION MUST HAPPEN FIRST

Before SARS will consider a tax residency cessation request, the taxpayer's profile must be fully active, accessible, and compliant.

Reactivation allows SARS to verify the taxpayer's identity, update personal, contact, and banking details and restore eFiling access. It furthermore enables the tax authority to assess outstanding returns, penalties, or compliance issues and confirm the taxpayer's overall compliance status.

Without completing this step, SARS cannot assess the taxpayer's position, and any cessation application will either be rejected outright or delayed indefinitely. Reactivation is therefore not optional, but a mandatory prerequisite.

Many expatriates only discover this after a cessation application is rejected or an offshore transfer is unexpectedly delayed.

THE CHALLENGE FOR EXPATRIATES ABROAD

For South Africans living abroad, reactivating a tax number presents an added layer of complexity. In most cases, SARS does not permit this process to be completed entirely online. Taxpayers are often referred to a SARS branch for in-person identity verification.

Securing branch appointments from abroad can be extremely difficult, and travelling back to South Africa solely for this purpose is rarely practical.

As a result, expatriates typically need to rely on a tax practitioner, granting them power of attorney (POA) to attend the SARS branch on their behalf, submit the required documentation, facilitate the reactivation, and liaise directly with SARS officials. Until this process is completed, no further action can be taken on the taxpayer's profile.

"For South Africans living abroad, reactivating a tax number presents an added layer of complexity. In most cases, SARS does not permit this process to be completed entirely online."

WHY THIS MATTERS BEFORE TAX RESIDENCY CESSATION

SARS will not process a tax residency cessation unless the taxpayer's profile is both active and compliant. Attempting to bypass reactivation often results in –

- rejected applications;
- extended delays;
- unexpected penalties; and
- increased exit tax exposure.

Reactivating the tax number first, ensures that SARS can accurately assess the taxpayer's profile and allows the cessation process to proceed efficiently and without unnecessary complications.

TURNING COMPLEXITY INTO CLARITY

Dormant or inactive tax numbers remain one of the most common, and most overlooked, obstacles for expatriates seeking to formally exit the South African tax system.

The first step for any expatriate considering tax residency cessation should always be confirming whether their SARS tax number is active and accessible. With the right professional support, reactivation can be managed efficiently, restoring access to the taxpayer's profile and creating a clear path forward. Incorrect advice can fuel expat misconceptions.

By addressing this issue upfront, expatriates place themselves in a far stronger position to complete their tax residency cessation smoothly, compliantly, and without avoidable delays.

Rendani Makatu & Alex Mahundla

Tax Consulting SA

Other documents

- Tax Compliance Status/Approval of International Transfer PIN requests.

Tags: dormant or inactive tax numbers; tax residency cessation request.

APA PROGRAMME AND STRATEGIC RECRUITMENT

The South African Revenue Service (SARS) is poised for one of the most consequential shifts in its international tax administration in years with the formal rollout of an Advance Pricing Agreement (APA) programme, and a targeted recruitment drive designed to strengthen its technical capabilities in transfer pricing (TP) and multinational tax matters.

A NEW ERA FOR MULTINATIONAL TAX CERTAINTY

APAs are internationally recognised tools that allow a taxpayer and tax authority/(ies) to agree in advance on the TP methodology, assumptions, and pricing outcomes for cross-border related-party transactions, which remains a central issue in TP compliance and a frequent source of dispute between multinational enterprises and tax authorities. Under an APA, pricing methodologies and arm's length outcomes are negotiated and set for a defined period, reducing uncertainty and costly disputes.

Until now, South Africa lacked a formal APA regime, despite draft legislation and proposals stretching back several years. In 2023, draft legislation to introduce an APA framework was released for public comment as part of the Tax Administration Laws Amendment Bill. This framework is designed to give statutory footing to APAs, including provisions on eligible transactions, methodology, and compliance obligations for taxpayers.

This position has changed. Amendments to the Income Tax Act, 1962, have introduced a comprehensive statutory framework for APAs under sections 76A to 76P (inserted by section 10 of the Tax Administration Laws Amendment Act, 2023), formally empowering the Commissioner to enter into APAs with qualifying taxpayers.

With the legal framework now in place, SARS has confirmed that it is moving towards practical implementation of the APA programme with the expectation that APA applications from multinational companies would be accepted as early as June 2026. This marks a significant shift, signalling that South Africa is ready to better align with international best practice and offer taxpayers a predictable, transparent framework for cross-border pricing arrangements.

"Historically, one of the main challenges in introducing a robust APA programme has been the relative scarcity of in-house expertise capable of negotiating complex TP deals."

WHY THE APA ROLLOUT MATTERS

For multinational enterprises, APAs offer predictability and a meaningful reduction in the risk of double taxation arising from TP disputes. By agreeing methodologies, assumptions, and pricing outcomes up front, taxpayers can better forecast tax liabilities and mitigate the risk of protracted rulings or litigation.

For SARS, the APA regime is an instrument not only for certainty but also for strengthened compliance. It demonstrates a shift towards proactive engagement with taxpayers, moving from reactive enforcement to collaboration, where appropriate, while retaining decisive action against non-compliance.

Importantly, the APA rollout is part of a broader strategic agenda at SARS that includes technological upgrades, digitalisation of services, and enhanced data analytics tools (for example, the acquisition, early in 2026, of TP benchmarking software from Moody's Analytics to support audit and compliance work).

KEY ISSUES FROM TP MINDS AFRICA 2026

In one of the panel discussions at the TP Minds Africa 2026 conference that was held in Johannesburg from 24–25 April 2026, African tax authorities from the continent (including SARS) spoke briefly about APAs and some of the key issues from that session were the following:

- An APA is a lengthy process and can typically take approximately two to four years to conclude;
- An APA only relates to TP matters and does not have any bearing on other direct or indirect taxes (even those related to the same transaction(s) as the APA);
- An APA only relates to a specific transaction and not to all affected transactions that a taxpayer engages in;
- Due to the relatively costly nature of APAs, taxpayers are encouraged to focus on complex transactions that may be difficult to value;
- Taxpayers are encouraged to allocate sufficient resources to the APA process (ie, technical, senior individuals who have the authority to enter into those discussions);
- Taxpayers must be prepared to be open with the tax authorities and provide as much relevant information as possible.

STRATEGIC RECRUITMENT: STAFFING UP FOR TECHNICAL EXCELLENCE

Integral to this transition is SARS' recruitment of highly specialised professionals with substantial experience in TP and international tax. Historically, one of the main challenges in introducing a robust APA programme has been the relative scarcity of in-house expertise capable of negotiating complex TP deals.

To address this, SARS secured funding for eight specialist positions within its APA unit. These recruits bring technical skills that are essential for assessing APA applications, negotiating methodology and pricing terms with taxpayers and other tax authorities particularly in the context of bilateral APAs, which are the primary focus of the legislation, and drafting clear guidance to support voluntary compliance.

SARS has also committed to publishing clear APA guidelines and directives, aimed at helping multinational taxpayers understand the scope of affected transactions, eligibility requirements, and the application process, a step that should enhance clarity and confidence in the programme.

Taxpayers who think that APAs might be a worthwhile solution for them are encouraged to liaise with experts who can guide them in negotiating APAs with tax authorities.

Mathabang Melato

Regan van Rooy

Acts and Bills

- Income Tax Act 58 of 1962: Chapter III (Part IA – *Pricing Agreements*): sections 76A to 76P;
- Tax Administration Laws Amendment Bill 37 of 2023;
- Tax Administration Laws Amendment Act 18 of 2023: Section 10 (inserts sections 76A to 76P in the Income Tax Act, 1962).

Tags: Advance Pricing Agreement (APA) programme; cross-border related-party transactions.

ACQUIRING AN INTEREST IN A VESTING TRUST FROM ANOTHER BENEFICIARY

Following the decision of the Constitutional Court in The Thistle Trust v Commissioner, South African Revenue Service *[2025], the author has encountered two cases in which a discretionary trust beneficiary disposed of its interest in a vesting trust to the remaining beneficiaries of the vesting trust.*

This arrangement enables the seller to escape the consequences of the *Thistle Trust* case, but does it saddle the remaining beneficiaries of the vesting trust with future capital gains arising in the vesting trust?

The facts of the *Thistle Trust* case were briefly that the Thistle Trust was a beneficiary of 10 vesting trusts – for ease of reference it is assumed that there was only one vesting trust. The vesting trust had disposed of immovable property and vested the resulting capital gain in the Thistle Trust. Thistle in turn vested the same amount in its natural person beneficiaries, seeking to attribute the capital gain to them under paragraph 80(2) of the Eighth Schedule to the Income Tax Act, 1962 (the Act). The Constitutional Court held that the capital gain had to be accounted for by Thistle as it was the beneficiary of the trust that disposed of the asset.

If it is assumed that the vesting trust was the type in which the beneficiary (Thistle) had a vested right to the trust capital (assets less liabilities) as opposed to the trust assets, Thistle would not have had a vested right in the vesting trust assets and thus the vesting trust would not have been holding its assets as a quasi-agent or pure administrator on behalf of Thistle. If the vesting trust had been such an administrator, Thistle would have been able to on-distribute the capital gain as it would have been the beneficial owner of the asset, and the disposal of that asset would have been an action on behalf of Thistle.

Most vesting trust deeds in South Africa confer a vested right to the trust capital rather than granting a vested right to trust assets. The term "trust capital" is used because the trustees are usually empowered to borrow money to fund the trust's assets. If the deed conferred a vested right to the assets, the trust would be left insolvent because it would be without any assets to meet its liabilities. In essence, there is a trust with an asset worth R100 and a liability of R80. The trust capital is R20 or whatever the R20 changes to in the future as the market value of the asset and liability increases or decreases.

It has been suggested that the beneficiaries may have a vested right in the asset on the basis that the liability is incurred on their behalf. This argument can be explored with reference to the position in Australia and the United Kingdom, as, rather surprisingly, it is accepted by the tax authorities in those countries.

In Australia the ATO issued draft tax determination TR 2004/D25 in 2004. [https://www.ato.gov.au/law/view.htm?docid=DTR/TR2004D25/NAT/ATO/00001 [Accessed 18 March 2026].] It states:

> "17. The fact that there is a mortgage, encumbrance or other charge over the asset in favour of a third party does not of itself prevent a beneficiary being absolutely entitled to the asset as against the trustee (see Explanation paragraphs 62 to 63)."
>
> *"A security does not prevent absolute entitlement*
>
> 62. On the same basis, it is considered that the existence of a mortgage, encumbrance or other charge over the asset in favour of a third party with no interest in the trust does not of itself prevent a beneficiary being absolutely entitled to the asset as against the trustee. This is because the existence of such a charge does not prevent the trustee from 'stepping aside' and, for example, transferring the asset to the beneficiary subject to the charge. That is, such a charge does not affect the beneficiary's relationship with the trustee.
>
> 63. The position of a sole beneficiary who has all the interests in a trust asset that is subject to a mortgage can be contrasted with that of a remainderman whose interest in the trust asset is subject to the interest of the life tenant. The remainderman will not be absolutely entitled until the death of the life tenant or the surrender by the life tenant of their interest. Until then the remainderman cannot demand the transfer of the whole of the asset to them because such a transfer would defeat the interest of the life tenant. On the other hand, a beneficiary with all the interests in a trust asset can be absolutely entitled to the asset despite it being subject to a mortgage. The asset can be transferred to the beneficiary subject to the mortgage."

A similar view is taken in the United Kingdom by HMRC. [https://www.gov.uk/hmrc-internal-manuals/capital-gains-manual/cg34320 [Accessed 18 March 2026].]

However, this interpretation is not universally accepted in Australia. See "*Absolute Entitlement*" by Michael Thomas Flynn dated 10 October 2017. [https://taxboard.gov.au/sounding-board-plus/all-ideas/1506?utm_source=copilot.com [Accessed 18 March 2026]] He cites the case of *Oswal v FCT* [2013] FCA 745, in which the court held that if a trustee has a power of sale over a trust asset, a beneficiary cannot be absolutely entitled to it, and that a beneficiary is not absolutely entitled to an asset if the trustee has properly incurred liabilities in connection with the administration of the trust.

It is little wonder that the ATO has never issued its Taxation Determination in final form.

Under South African law a trust cannot simply delegate a debt to its beneficiary without the creditor's consent. In *Flexi Holiday Club v La Lucia Sands Shareblock Limited* [2006 JDR 0265 (D) in [17]] Patel J stated the following:

> "It is a trite proposition of our common law that a delegation of obligations requires the consent of the creditor."

It is therefore unlikely that SARS would be persuaded by the approach taken by the ATO and HMRC.

Returning now to the subject of this article, paragraph 80(2), stripped of its exceptions, currently provides as follows:

> "(2) [W]here a trust [the vesting trust] *determines a capital gain in respect of the disposal of an asset* in a year of assessment during which a beneficiary of that trust [Thistle] ... who is a resident has a vested right or acquires a vested right (including a right created by the exercise of a discretion) to an amount derived from that capital gain but not to the asset disposed of, an amount that is equal to so much of the amount to which that beneficiary of that trust is entitled in terms of that right –
>
> *(a)* must be disregarded for the purpose of calculating the aggregate capital gain or aggregate capital loss of the trust [the vesting trust]; and
>
> *(b)* must be taken into account as a capital gain for the purpose of calculating the aggregate capital gain or aggregate capital loss of that beneficiary [Thistle]."
>
> (Own emphasis.)

It was thus the vesting trust that "determines a capital gain in respect of the disposal of an asset" and which was entitled to attribute the capital gain to its beneficiary. Thistle did not determine a capital gain in respect of the disposal of an asset and fell outside paragraph 80(2).

The problem for discretionary trusts such as Thistle is that they cannot on-distribute the capital gain attributed to them from the vesting trust. They must then pay CGT at 36% (80% inclusion rate × 45% flat rate). If they were able to on-distribute the capital gain to their resident natural person beneficiaries, those natural persons would pay CGT at a maximum rate of only 18% (40% inclusion rate × 45% maximum marginal rate).

So, what are the implications for the discretionary trust if it disposes of its vested interest to one or more of the remaining vested beneficiaries or even a new vested beneficiary?

When the vested interest is disposed of, it is the discretionary trust that "determines a capital gain in respect of the disposal of an asset". The asset forming the subject of the disposal is now the vested interest held by the discretionary trust and not the actual asset held by the vesting trust. The discretionary trust is thus able to take advantage of paragraph 80(2) and can vest any capital gain on disposal of the vested interest in its resident natural person beneficiaries.

This scenario is undoubtedly advantageous for the seller, but are the remaining vested beneficiaries not burdened with any future capital gain realised by the vesting trust? This question is examined in the following example:

Example – Acquisition of vested right in a trust in which beneficiaries do not have a vested right in the trust assets

Facts:

The John Family Trust and the Tim Family Trust are both discretionary trusts with resident natural person beneficiaries. They each invest R20 in a vesting trust. The vesting trust deed entitles the trustees to borrow money, and while it provides that the beneficiaries can be asked to stand surety for the trust debts and advance loan funds to the trust, it is not a foregone conclusion that they are liable for any trust debts. The trust deed defines "trust capital" as assets less liabilities. According to a schedule to the deed, the beneficiaries each have a 50% interest in the trust capital.

The vesting trust takes out a mortgage bond of R160 from a bank and buys an office building for R200, funding the balance of the purchase price with the trust capital of R40.

A few years later the property is worth R300, and the Tim Family Trust sells its vested interest to the John Family Trust for R70. The selling price represents the Tim Family Trust's share of the trust capital, namely, an asset with a market value of R300 less the bond of R160 = R140 × 50% = R70. The trustees of the Tim Family Trust vest the resulting capital gain of R50 (R70 – R20) in equal shares in Rachel and Bob, who are both major resident beneficiaries of the trust.

A year later the trust sells the property for R300 and vests the capital gain of R100 (R300 proceeds less R200 base cost) in the John Family Trust. The trust capital of R40 is retained and represented by R40 in cash. In other words, R160 is paid to the bank to settle the bond, R40 is deposited in a savings account and R100 distributed in cash to the John Family Trust as a capital gain. On the face of it, the John Family Trust will have to pay CGT on the full capital gain attributed to it of R100, even though half the gain should by rights have been taxed in the Tim Family Trust.

Result:

Tim Family Trust (seller)

The Tim Family Trust has a capital gain of R50 on disposal of its vested interest (proceeds of R70 less base cost of R20). Under paragraph 80(2) it must disregard the capital gain of R50, and Rachel and Bob must each account for R25 as a capital gain.

John Family Trust (buyer)

The base cost of the John Family Trust's interest in the vesting trust will increase from R20 to R90 with the additional cost incurred of R70 under paragraph 20(1)*(e)* being the cost of improving the vested interest.

The John Family Trust must account for a capital gain of R100 under paragraph 80(2).

The trust is, however, worth only R40 represented by the trust capital, which in turn is represented by the balance in the savings account.

Is there a way in which the John Family Trust can claim a loss of R50 without terminating the trust and disposing of its entire interest in the trust?

It is submitted that in distributing the capital gain of R100 to the John Family Trust, this has triggered a part-disposal of the John Family Trust's interest in the vesting trust. When the John Family Trust purchased the 50% interest from the Tim Family Trust for R70, it acquired R20 of trust capital plus R50 of unrealised capital gain. That unrealised capital gain has now been realised, and it would therefore be appropriate to treat it as having been disposed of under paragraph 11(1)*(b)* as a redemption or *(c)* as a "scrapping, loss or destruction of an asset". A capital loss of R50 would result. When set off against the capital gain of R100 attributed under paragraph 80(2), the capital loss of R50 would leave the John Family Trust with an aggregate capital gain of R50.

This treatment makes sense because the Tim Family Trust has already accounted for a capital gain of R50.

"Most vesting trust deeds in South Africa confer a vested right to the trust capital rather than granting a vested right to trust assets."

One can imagine that determining how much of a trust interest has been partly disposed of could become a lot more complicated if there are multiple properties and beneficiaries of the vesting trust. If the analysis is correct, it would be advisable to keep a record of the unrealised gains making up the purchase price of any vested interest acquired from another vested beneficiary.

The example illustrates how the remaining discretionary trust beneficiaries of a vesting trust that acquired the interest of a former vested beneficiary can reduce their CGT liability by releasing expenditure incurred on purchasing unrealised capital gains when those amounts become realised and are distributed to them by the vesting trust. This benefit, however, does not solve the Thistle Trust problem of them not being able to on-distribute such net remaining capital gains to their natural person beneficiaries.

Could SARS argue that the vested interest can be disposed of only when it is sold to another beneficiary or upon termination of the trust? It is submitted that such an argument ignores the part-disposal rules in paragraph 33 read with paragraph 11(1)*(b)* and *(c)* and gives rise to an interpretation that is neither sensible nor businesslike, to cite *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012].

Duncan McAllister

Webber Wentzel

First published in ASA of May 2026

https://magazine.accountancysa.org.za/asa-may-2026/page-86

Acts and Bills

- Income Tax Act 58 of 1962: Eighth Schedule – paragraphs 11(1)*(b)* & *(c)*, 20(1)*(e)*, 33 & 80(2).

Other documents

- Draft tax determination TR 2004/D25 (issued by the Australian Taxation Office (ATO) in 2004. [https://www.ato.gov.au/law/view.htm?docid=DTR/TR2004D25/NAT/ATO/00001 [Accessed 18 March 2026]]: paragraphs 17 & 62–63;
- UK Capital Gains Manual: HMRC. [https://www.gov.uk/hmrc-internal-manuals/capital-gains-manual/cg34320 [Accessed 18 March 2026]];
- "*Absolute Entitlement*" by Michael Thomas Flynn (dated 10 October 2017). [https://taxboard.gov.au/sounding-board-plus/all-ideas/1506?utm_source=copilot.com [Accessed 18 March 2026]].

Cases

- *The Thistle Trust v Commissioner, South African Revenue Service* [2025] (1) SA 70 (CC), 87 SATC 103;
- *Oswal v FCT* [[2013] FCA 745];
- *Flexi Holiday Club v La Lucia Sands Shareblock Limited* [2006 JDR 0265 (D) in [17];
- *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] (4) SA 593 (SCA) at 604.

Tags: vesting trust; natural person beneficiaries; trust capital; discretionary trusts; unrealised capital gain.

ATTRIBUTION RULES OF TRUST-TO-TRUST DISTRIBUTIONS

For decades, trusts have served as highly effective estate planning vehicles and, given South Africa's challenging economic and political landscape, the use of offshore trusts has become a central consideration for residents strategising around asset protection and intergenerational wealth transfer.

Historically, however, their application in a cross-border context was severely restricted by onerous exchange control regulations. Because South African resident trusts are generally restricted from directly investing offshore or advancing cross-border loans, a direct distribution remains the only effective mechanism to externalise these assets. However, resident trusts were historically prohibited from making capital or income distributions directly to non-resident trusts without the prior, exceptional approval of the Financial Surveillance Department of the South African Reserve Bank (SARB).

As a result of these limitations, the established practice required a resident trust to make a distribution or advance a loan to a resident individual beneficiary. This individual would then externalise the funds using their annual foreign investment allowance to fund an offshore trust, typically via a loan bearing market-related interest. This approach created severe cash-flow mismatches and commercial friction. The resident individual suffered a "dry" income tax charge on the deemed or actual interest (often under section 31 and/or section 7C of the Income Tax Act, 1962 (the Act)), having to fund the tax liability without receiving the underlying cash. Concurrently, the offshore trust, lacking liquidity, saw its capital growth eroded by compounding interest charges causing the offshore trust to become technically insolvent. Furthermore, routing capital through a resident beneficiary brings those assets back into their personal estate, exposing the wealth to future estate duty and defeating the primary objective of the offshore estate-planning structure.

In a significant policy shift, the SARB relaxed these provisions, signalling a recognition that legitimate offshore trust structures play a vital role in international estate planning, provided that transparency is maintained. Following the relaxation of the exchange control framework, the South African Revenue Service (SARS) introduced a manual tax compliance process whereby taxpayers must obtain a letter of compliance which is then presented to the authorised dealer to facilitate the capital export. To this extent, the administrative oversight shifted from SARB to SARS, necessitating a careful consideration of the stance taken by SARS in respect of this arrangement.

This approval is, however, subject to certain requirements. The non-resident trust must be a specifically named beneficiary of the resident trust, and the distribution must align with the terms and conditions of the local trust deed. Furthermore, the resident trust must demonstrate tax compliance, proving that all tax liabilities in respect of the distribution have been or will be settled. Once the compliance letter is issued, it must be submitted to an authorised dealer to lodge the capital export application.

While the regulatory mechanics have been clarified, a substantive question remains regarding the income tax and capital gains tax consequences of a direct trust-to-trust distribution. A primary area of debate is whether such a distribution triggers the anti-avoidance attribution rules.

DONATIONS TAX

From a donations tax perspective, the position is relatively clear. No donations tax should be levied on distributions by a resident trust to a beneficiary, as section 56(1)*(l)* of the Act specifically excludes property disposed of under and in pursuance of any trust. As confirmed by the Supreme Court of Appeal in *Abraham Krok Trust v Commissioner for South African Revenue Service* [2010], the legislature deliberately enacted this section to ensure that all valid trust distributions, executed in accordance with the trustees' powers and the trust objects, are unequivocally protected from donations tax.

THE SECTION 7(8) ATTRIBUTION THRESHOLD

The far more contentious issue is, however, whether a trust-to-trust distribution constitutes a "donation, settlement or other disposition" for the purposes of section 7(8) of the Act. Section 7 contains a series of deeming provisions which act as statutory anti-avoidance measures. As established in *Estate Dempers v Secretary for Inland Revenue* [1977] these provisions are fundamentally aimed at combating schemes where a taxpayer attempts to minimise liability by diverting income-producing property away from themselves. In this context, section 7(8) targets the expatriation of income, stipulating that if any donation, settlement or other disposition by a resident results in income accruing to a non-resident, that income must be attributed back to the resident donor.

Because historic exchange control restrictions prevented direct cross-border trust distributions, there is a distinct lack of judicial precedent addressing section 7(8) in this specific context. Despite this vacuum, SARS appears to have adopted a broad and potentially overreaching interpretation in its *Comprehensive Guide to Capital Gains Tax,* asserting that the vesting of assets by a trust may constitute a disposition for the purposes of the attribution rules. The critical enquiry is not simply whether the distribution constitutes a donation or settlement, but whether the trustees can properly be said to have made a disposition of the kind contemplated by section 7(8). Section 7 is directed at arrangements whereby a taxpayer voluntarily diverts income-producing property while avoiding the incidence of tax. In this regard it is submitted that a trustee occupies an entirely different legal position.

It is submitted that a distribution of trust capital by a resident trust to an offshore trust does not constitute a donation as understood in the legislation or at common law. A donation requires a gratuitous disposal of property. The courts have consistently held that this necessitates an element of liberality or generosity on the part of the donor, who must act voluntarily while receiving nothing in return. In the context of a discretionary trust, trustees do not possess the capacity to act out of personal liberality. They are firmly constrained by the trust deed and bound by a strict fiduciary obligation to distribute property solely for the benefit of the beneficiaries. Consequently, the distribution by a trustee is the performance of a pre-existing legal duty, completely lacking the gratuitous element essential to a donation. Similarly, the transaction is not a new settlement of property, but rather the administrative implementation of assets already settled into the resident trust estate.

Put differently, trustees possess no beneficial interest in the trust assets, derive no personal economic benefit from their administration and cannot voluntarily impoverish themselves by distributing property. They merely perform fiduciary obligations imposed by the trust deed in administering assets previously settled upon the trust. Properly characterised, the trustees are not making a fresh disposition of their own property but implementing the founder's original disposition in accordance with the terms of the trust.

QUALIFYING DISPOSITIONS

Having excluded a donation, the analysis turns to the phrase "settlement" or "other disposition". Applying the *eiusdem generis* rule, this term must be restricted to dispositions sharing the essential characteristics of a donation, namely an appreciable element of gratuitousness. As the Appellate Division confirmed in *Ovenstone v Secretary for Inland Revenue* [1980] and *Joss v Secretary for Inland Revenue* [1980], these phrases cannot capture every legally recognised alienation of property. It is a misconception to suggest that the mere absence of a commercial *quid pro quo* elevates a fiduciary distribution to a statutory disposition. The trustees act out of a binding legal mandate, which remains fundamentally distinguishable from the benevolent transfers section 7(8) was designed to capture. It is submitted that the operative disposition occurred when the founder settled assets into the resident trust, not when the trustees later exercise their discretion.

To demonstrate the theoretical hazard of interpreting a trust-to-trust distribution as an attributing disposition, one must consider the practical consequences. Imagine a resident trust founded decades ago that has accumulated capital upon which it has paid all required income taxes. The trustees resolve to vest a portion of this capital in a non-resident beneficiary, who then uses the funds to purchase an investment property in London. If SARS' broad interpretation holds, the rental income derived from that foreign property would be perpetually attributable to the South African trust. While section 6*quat* of the Act does provide a theoretical rebate mechanism for foreign taxes paid by the offshore beneficiary in such attribution scenarios, its practical application creates an administrative nightmare. To claim this rebate, the South African trustees would bear the onus of sourcing final foreign tax assessments from offshore beneficiaries, navigating mismatched foreign tax years, applying complex exchange rate translations and performing intricate proportionate limitation calculations. This broad interpretation effectively forces local trustees to become shadow accountants for non-resident beneficiaries, imposing a perpetual and unworkable compliance burden on the local trustees.

To aggravate matters, paragraph 72 of the Eighth Schedule functions as the capital gains counterpart to section 7(8). Should the broad interpretation be accepted, a resident trust would be transformed from a tax-neutral conduit into a permanent tax-reporting surrogate for the offshore trust. If the offshore trust invests the distributed funds into foreign equities and later realises a profit, that gain would have to be included in the resident trust's aggregate capital gain. This imposes a perpetual compliance burden on local trustees, forcing them to perform complex deemed-resident calculations on the gains of a foreign entity over which they exercise no administrative control.

THE CAUSAL NEXUS AND THE CORPORATE VEIL

Even if a court were to classify a trust-to-trust distribution as a qualifying disposition, the attribution rules are further limited by the requirement of a causal nexus. Section 7(8) only applies to amounts that would have constituted income had the non-resident been a resident. If the offshore trust utilises the distribution to invest in a foreign company that generates dividend income through operating subsidiaries, one must ask if that dividend would constitute taxable income in South Africa? Under section 10B of the Act, a resident holding at least 10% of the equity shares and voting rights (but less than 50%) in a foreign company is exempt from normal tax on foreign dividends. Consequently, the dividend would not constitute income, limiting the potential for attribution. Furthermore, the Act provides specific mechanisms, such as the controlled foreign company rules under section 9D, to capture and tax offshore corporate income where the requisite South African control thresholds are, ultimately, met. This demonstrates that the legislature already has mechanisms for taxing offshore corporate income, thus rendering a broad application of section 7(8) to the underlying company profits rather inappropriate.

"It is submitted that a distribution of trust capital by a resident trust to an offshore trust does not constitute a donation as understood in the legislation or at common law."

In addition, SARS would face significant legal hurdles in looking beyond the offshore trust to attribute the trading income of the underlying foreign subsidiaries to the South African trust. The legislation requires the income to be "attributable to" the disposition, necessitating an unbroken causal chain. Where an offshore trust invests funds into an active corporate structure, the proximate cause of the subsequent income is the independent corporate machinery and commercial operations of the foreign entities, not the initial trust distribution. This view aligns with the principles in *Commissioner for Inland Revenue v Widan* [1955], where the court acknowledged, albeit under a different statutory context, that intervening factors such as business management and labour attenuate and break the causal link to the original funding. This position is also confirmed by Binding Private Ruling 157, wherein SARS noted that section 7(8) limits attribution to amounts generated directly in the trust and does not extend to amounts generated by underlying corporate entities. Consider another practical example where an offshore trust receives a trust-to-trust distribution and subsequently advances those funds as an interest-bearing loan to its wholly-owned offshore operating company. The company uses the loan to fund its active trading operations, generating trading profits, while paying interest back to the offshore trust. If the requirement for a strict, proximate causal nexus is ignored, SARS might attempt to look through the corporate veil and attribute not only the interest received by the trust, but also the active trading profits generated by the subsidiary back to the South African trust. This would be legally untenable as it conflates the yield on the funding with the fruits of the business, ignores the separate legal personality of the subsidiary and fails to recognise that the proximate cause of the trading profit is owing to independent commercial activities, the independent corporate machinery, management expertise and use of labour of that company rather than the initial funding in the form of the first trust distribution. Stated differently, it would conflate the contractual return on capital with independent fruits of a separate business enterprise.

CONCLUSION

In summary, the author submits that trust-to-trust distributions do not constitute a "donation, settlement or other disposition" as contemplated in section 7(8). Relying on the principles established in *Ovenstone*, the fiduciary nature of trust distributions wholly distinguishes them from the gratuitous transfers targeted by the anti-avoidance rules. Furthermore, even if the rules were engaged, the requisite causal nexus is effectively severed when distributed assets are pooled and subjected to the independent commercial operations of foreign entities.

Notwithstanding these substantial technical grounds, it is appreciated that taxpayers are inherently risk-averse, and the absolute lack of binding judicial authority warrants a measured approach. It is likely SARS is already considering ruling requests on the subject of trust-to-trust distributions. Given the technical complexity, trustees are advised to closely monitor these administrative developments. Should a ruling be issued that is insufficiently broad or inconsistent with the principles of fiduciary administration, the recommended course of action is to submit a bespoke application for a Binding Private Ruling on behalf of the specific trust where the commercial value of certainty justifies the cost. Such a ruling will provide the required absolute regulatory certainty, ensuring that families can safely utilise the relaxed exchange control landscape to achieve their intergenerational wealth-planning objectives without the risk of SARS taking a different view.

Stephan Spamer

Cliffe Dekker Hofmeyr

Acts and Bills

- Income Tax Act 58 of 1962: Sections 6*quat*, 7 (emphasis on subsection (8)), 7C, 9D, 10B, 31 & 56(1)*(l)*; Eighth Schedule: Paragraph 72.

Other documents

- Binding Private Ruling 157 (*Receipt of foreign assets and subsequent donation thereof to a non-resident trust*) (18 November 2013).

Cases

- *Abraham Krok Trust v Commissioner for South African Revenue Service* (58/2010) [2010] ZASCA 153; [2011] 2 All SA 591 (SCA); 73 SATC 105 (29 November 2010);
- *Estate Dempers v Secretary for Inland Revenue* [1977] (3) SA 410 (A); 39 SATC 95;
- *Ovenstone v Secretary for Inland Revenue* [1980] (2) SA 721 (A); 42 SATC 55;
- *Joss v Secretary for Inland Revenue* [1980] (1) SA 674 (T); 41 SATC 206;
- *Commissioner for Inland Revenue v Widan* [1955] (1) SA 226 (A); 19 SATC 341.

Tags: intergenerational wealth transfer; non-resident trusts; annual foreign investment allowance; offshore estate-planning structure; donation, settlement or other disposition; income-producing property; cross-border trust distributions; gratuitous disposal of property; *eiusdem generis* rule; foreign tax assessments; trust-to-trust distribution.

BGR 16 AND THE DIVIDEND TRAP

Most operating companies that receive dividends assume that their value-added tax (VAT) position is straightforward.

The business makes taxable supplies, VAT on expenses is fully deductible, and the dividend arrives exempt. Binding General Ruling (VAT) 16 (Issue 3), effective for all financial years commencing on or after 1 January 2024, changes that assumption. Importantly, BGR 16 is mandatory, unless SARS has agreed a different apportionment method.

THE FORMULA AND THE "C" PROBLEM

Section 17(1) of the Value-Added Tax Act 89 of 1991 requires apportionment where a vendor acquires goods or services partly for the purpose of making taxable supplies and partly for another purpose. BGR 16 prescribes the standard turnover-based method as the default formula: $y = A / (A + B + C) \times 100$, where A is taxable supplies, B is exempt supplies, and C is any other income received or accrued during the period, whether or not it arises from a supply.

The "C" bucket is where the issue arises. Dividends, including dividends *in specie*, must be included in the formula to reflect underlying investment activity, even though they are not consideration for any supply. An operating company that would otherwise qualify for full input tax deductibility may, upon receiving a single dividend, find itself with an unanticipated apportionment obligation. SARS notes that "C" will typically include dividends. There is nothing inadvertent about this.

HOW DIVIDENDS ENTER THE FORMULA

BGR 16 does not bring dividends into the formula in full. Under adjustment A3, the amount to be included is the three-year moving average of dividends received, multiplied by the spread between the prime rate and JIBAR. That proxy substantially reduces the impact, but **it does not eliminate it**.

The adjustment introduces layered complexity. Where no dividends were received in the current year, a three-year moving average of the preceding years may be used. Where dividends were absent for at least two of those three years, a five-year average applies. A holding company that charges management fees and received no dividends for two out of five years must substitute those fees as the proxy, without any averaging. Vendors that do not qualify for any proxy must approach the Commissioner for an alternative method.

The position on trust distributions is more contested. SARS does not accept that distributions retain their income tax character for apportionment purposes. A distribution comprising interest, dividends, and capital gains is treated as analogous to a profit share from a joint venture, subject to the same adjustment and averaging. That position is arguable, but SARS has not moved from it.

WHEN ARE DIVIDENDS EXTRAORDINARY INCOME?

BGR 16 excludes extraordinary income from the formula under exclusion E4, defining it as non-recurring income received due to exceptional circumstances unlikely to be repeated. The rationale is that such income would significantly distort the apportionment ratio without affecting normal recurring expenses. Critically, the only express example given is dividends received as a result of a reorganisation or liquidation under sections 44, 46 or 47 of the Income Tax Act, 1962. SARS' use of dividends as the illustrative example confirms that certain dividends can qualify for exclusion entirely.

Where an operating company receives a very large, non-recurring dividend outside a restructuring transaction, it may be arguable that the dividend constitutes extraordinary income. However, BGR 16 contains a specific provision for dividends in A3, creating a tension with the general exclusion in E4.

"BGR 16 excludes extraordinary income from the formula under exclusion E4, defining it as non-recurring income received due to exceptional circumstances unlikely to be repeated."

The counter-argument rests on the principle of *generalia specialibus non derogant*, which holds that the specific overrides the general. BGR 16 contains a specific mechanism for dividends in A3. SARS could argue that the general extraordinary income exclusion in E4 should not override A3. Where a dividend does not arise from sections 44, 46, or 47, it is arguable that the dividend-specific rule in A3 governs, regardless of the dividend's size or one-off character.

The taxpayer has a compelling rebuttal. Had SARS intended A3 to be the exclusive treatment for all dividends, it would not have used dividends as the E4 example. E4 is not truly a general rule in relation to dividends. It targets a qualitatively different category of income, being income that is non-recurring, exceptional, and unlikely to be repeated, as distinct from the recurring investment dividends that A3 is designed to address. The two provisions operate in different spheres: A3 governs ordinary, recurring dividend income, while E4 provides an exclusion for truly extraordinary dividends.

Further, the sections 44, 46 and 47 dividends example is illustrative, not exhaustive. An extraordinarily large, one-off dividend arising from exceptional circumstances outside those sections is capable of meeting the E4 definition on its own terms.

The argument is viable where the dividend is genuinely non-recurring and arose from exceptional circumstances. E4 and A3 are best interpreted as complementary. A3 addresses ordinary, recurring dividends; E4 addresses the extraordinary. The fact that BGR 16 itself uses dividends as the example of extraordinary income is the most persuasive point in the taxpayer's favour. The point has not, however, been authoritatively resolved.

PRACTICAL IMPLICATIONS

Operating companies that receive dividends, whether regularly or as a one-off event, should not assume that their input tax position is unaffected. BGR 16 requires active engagement with the formula, its adjustments, and its exclusions. The cost of overlooking the issue is a retrospective apportionment obligation, potential penalties, and interest. Early identification of the risk, proper classification of dividend income, and, where appropriate, an application to the Commissioner for an alternative method remain the most effective safeguards.

Professor Des Kruger & Joon Chong

Webber Wentzel

Acts and Bills

- Income Tax Act 58 of 1962: Sections 44, 46 & 47;
- Value-Added Tax Act 89 of 1991: Section 17(1).

Other documents

- Binding General Ruling (VAT) 16 (Issue 3): *Standard turnover-based method of apportionment* (27 November 2023): Adjustment A3 & Exclusion E4.

Tags: apportionment method; standard turnover-based method; input tax deductibility; trust distributions; extraordinary income; retrospective apportionment.

CROSS-BORDER DIGITAL SERVICES

INTRODUCTION

South Africa was among the first jurisdictions on the African continent to introduce VAT on cross-border digital services, initially doing so in June 2014 and substantially widening the net through revised electronic services regulations that took effect in April 2019. The policy rationale was clear: as consumers increasingly purchased streaming, software, and other digital products from offshore suppliers, a growing slice of consumption was escaping VAT entirely, distorting competition with domestic suppliers and eroding the revenue base.

More than a decade on from the original rules, and several years after the 2019 expansion, this article will explore whether the initial policy intent has translated into effective and comprehensive revenue collection. The answer, examined below, is that while the legislative framework is commendable and broadly fit for purpose, meaningful compliance and enforcement gaps persist. These gaps are likely to widen as the digital economy grows and new digital products are introduced and consumed unless targeted reforms are considered.

THE LEGISLATIVE FRAMEWORK: AN OVERVIEW

The Value-Added Tax Act, 1991 (the VAT Act), read in conjunction with the iterative electronic services regulations of 2014, 2019, and 2025, requires non-resident suppliers of "electronic services" (defined in section 1(1) of the VAT Act) to South African consumers to register as vendors once their taxable supplies exceed the standard mandatory registration threshold. Crucially, following the announcement by the Minister of Finance in his 2026 Budget Speech, this compulsory registration threshold was significantly elevated from R1 million to R2.3 million per annum, effective 1 April 2026. The draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill, 2026 (published on 25 February 2026), includes a provision proposing to amend section 23 of the VAT Act, to give effect to the Minister's announcement.

The "closed-list" definition of electronic services in the 2014 regulations was broadened considerably by the "open-list" definition of electronic services in the 2019 regulations, which included all services supplied by means of an electronic agent, electronic communication or the internet for any consideration.

An additional exclusion from the definition of electronic services was introduced by the 2025 regulations regarding services supplied by a non-resident person from an export country, solely to VAT-registered vendors in the Republic. The intent behind this "business-to-business" (B2B) exclusion is that foreign suppliers providing specialised services exclusively to other South African corporate entities will not be deemed to be conducting an enterprise in South Africa and are thus absolved from the friction of registration. However, this relief must be applied with caution. The explanatory memorandum to the 2025 regulations and prevailing interpretive practice indicate that the statutory use of the word "solely" is absolute, and does not operate as an apportionment mechanism. A single supply of electronic services to an unregistered entity or a private end-consumer can invalidate the exclusion, forcing the non-resident supplier to register and account for output VAT on all subsequent South African supplies, including those made to registered corporate vendors. Given the automated nature of borderless digital checkouts and the technological difficulty in verifying localised VAT registration numbers in real time, this strict standard poses an ongoing operational risk for foreign suppliers seeking to rely on the B2B exclusion.

> "The initial 2019 shift of VAT liability to electronic intermediaries and platforms was a sensible evolution in tax policy, recognising that centralised digital platforms are better equipped to handle mass compliance than fragmented individual software developers."

Several features of the framework are worth noting for purposes of this analysis:

- The regime now targets business-to-consumer (B2C) supplies. The exclusive supply of electronic services by a non-resident to South African VAT-registered businesses is excluded from the VAT regime. However, to the extent that the South African business acquires electronic services from a non-resident for private, exempt, or other non-taxable purposes, it must self-account under the imported services provisions of section 7(1)*(c)* of the VAT Act, which is a separate and, as discussed below, significantly under-enforced mechanism.

- A "South African consumer" is determined by three indicators: the South African residency of the recipient, the payment originating from a South African bank and the business, residential or postal address of the recipient being within South Africa. Although these are more reliable indicators than the IP address or SIM card information of the consumer, given the multitude of transactions and the inability to verify certain information (such as the residency of the recipient) the electronic services supplier acts in good faith on the available data.

- Since 2019, where a non-resident supplier uses an electronic platform or marketplace as an intermediary, liability to account for VAT may shift to that intermediary under certain circumstances.

- Although non-residents can forward their VAT registration application to a specific email address, the VAT registration process within SARS appears to be the same as the process for residents with no special dispensation provided for the suppliers of electronic services.

- Compliance by non-residents to register for VAT and thereafter submit returns and make payments is mostly voluntary although subtle changes have been made which will be discussed below.

THE COMPLIANCE PICTURE: WHAT DO WE ACTUALLY KNOW?

SARS does not publish data on the number of non-resident vendors registered for VAT under the electronic services regime, nor on the amount of VAT collected from this category. This lack of information is potentially a concern since neither Parliament nor the profession can meaningfully assess whether the regime is working.

Whilst one is confident that the large, consumer-facing global platforms such as Netflix, Spotify, Meta, Google, Apple, and similar household names are broadly compliant since these entities have sophisticated tax functions, operate in multiple VAT jurisdictions globally, and have commercial reputations to protect, it is submitted that the compliance challenge lies elsewhere.

The range of digital services is vast and growing. SaaS platforms (Software-as-a-Service platforms), niche subscription services, online coaching and education providers (if not falling into the specific exclusion), AI-powered tools, adult content platforms and offshore gambling sites collectively represent significant turnover directed at South African consumers. Many of these suppliers are unlikely to be registered with SARS, and the practical risk of detection is negligible given the current enforcement architecture. Comparative data from more mature regimes supports this concern. The European Union, whose VAT on digital services regime pre-dates South Africa's, has found persistent non-compliance among smaller and medium-sized non-resident suppliers despite its sophisticated One Stop Shop (OSS) registration mechanism.

VAT rate volatility and the constitutional context

A further layer of complexity affecting the compliance picture is the recent uncertainty surrounding the standard VAT rate itself. Global digital services vendors rely on automated pricing engines, ERP systems (enterprise resource planning systems) and localised billing gateways. These systems require certainty regarding jurisdictional tax rates to function compliantly and avoid customer billing disputes.

In the February 2025 Budget Speech, the Minister of Finance announced a staggered increase in the national VAT rate to 15.5% and eventually 16%, relying on the provisional executive taxing power in section 7(4) of the VAT Act. The announcement required compliant non-resident platforms to recalibrate billing systems for South African transactions at short notice. Following political opposition and an urgent court application, the Minister withdrew the proposed increases in April 2025. Digital platforms then had to roll back their systems to the 15% baseline and manage potential billing discrepancies.

The executive mechanism that permitted this episode was subsequently struck down. On 5 March 2026, a full bench of the Western Cape High Court delivered judgment in *Democratic Alliance v Minister of Finance and Others* [2026], declaring section 7(4) unconstitutional and invalid on the basis that it amounted to an impermissible delegation of legislative power to the executive. The court suspended the declaration of invalidity for 24 months to afford Parliament an opportunity to remedy the constitutional defect, and the order has been referred to the Constitutional Court for confirmation. The legislature subsequently promulgated the Rates and Monetary Amounts and Amendment of Revenue Laws Act 3 of 2026, which formally prevented the increase of the rate announced in the 2025 budget and confirmed the standard VAT rate at 15%. While the stabilisation of the rate is welcome, the episode highlights the administrative friction that may deter voluntary compliance. When the rate-setting mechanics of a jurisdiction are subject to sudden executive alteration and subsequent withdrawal, the perceived operational and fiduciary risk of engaging with that jurisdiction's tax framework increases, potentially driving marginal foreign suppliers further from the registered base.

ENFORCEMENT CHALLENGES: WHY THE GAPS PERSIST

Identification and detection

SARS faces a fundamental structural challenge of having no automatic mechanism to identify non-resident suppliers who have crossed the registration threshold but have not registered as a VAT vendor. There is no equivalent in South African law of the EU's DAC7 Directive, which requires digital platforms to report data on sellers using their platforms to tax authorities, or the OECD's Model Reporting Rules for Digital Platforms. Without this pipeline of third-party data and the ability to conduct joint cross-border audits, SARS must rely on voluntary compliance or resource-intensive ad hoc enquiries.

Legal protection and the safe harbour for suppliers

This relates to legal protection for suppliers who act in good faith on available data but reach the wrong conclusion. South African VAT law does not contain an explicit safe harbour for non-resident digital services suppliers who misclassify a supply based on the indicators available to them at the time of the transaction. This contrasts with the EU's VAT regime, which provides that where a supplier relies on two non-contradictory pieces of evidence pointing to a customer location, the supplier is not liable for VAT in another jurisdiction. The absence of an equivalent safe harbour in the South African framework imposes a degree of residual legal risk on compliant non-resident suppliers that is difficult to quantify and manage and may deter voluntary registration.

Furthermore, the regulations do not address the data collection burden – specifically, how a supplier is expected to obtain evidence of residency or address in a digital transaction where the customer provides only an email address and payment details. Unlike a bank, which conducts FICA due diligence and holds address data, a digital content platform may have very limited customer information. In practice, many non-resident suppliers rely heavily on the bank indicator because it is the most readily available, raising the question of what constitutes sufficient evidence of the other two indicators.

Registration friction

The non-resident VAT registration process, while it has reportedly improved in recent years, remains more burdensome than equivalent processes in comparable jurisdictions. Obtaining a South African tax reference number as a foreign entity, navigating the representative vendor requirements, and meeting banking requirements for VAT remittance, impose compliance costs likely to deter smaller willing compliers. By contrast, the EU's OSS portal allows a non-resident supplier to register in a single member state and account for VAT across the entire EU.

Audit and enforcement reach

Even where non-compliance is suspected, SARS' practical ability to enforce against an entity with no physical presence, no South African bank account, and no assets in the country, is limited. This limitation was included in the explanatory memorandum to the 2025 regulations as one of the reasons for introducing the B2B exclusion since compliance can be more easily enforced domestically than across borders. Joint and several liability for both the principal and intermediary is also designed to incentivise compliance.

In addition, penalties that are meaningful in a domestic context may be commercially irrelevant to a foreign supplier operating outside SARS' enforcement reach. This is not a uniquely South African problem but reflects the broader challenge of enforcing tax obligations across borders in the absence of bilateral enforcement assistance agreements.

The intermediary rule in practice: a proposed reframing of commercial agency

The initial 2019 shift of VAT liability to electronic intermediaries and platforms was a sensible evolution in tax policy, recognising that centralised digital platforms are better equipped to handle mass compliance than fragmented individual software developers. A further refinement occurred with the 2025 amendment of section 54(2B), which allowed non-residents to use intermediaries irrespective of the principal's underlying VAT registration status, simplifying the administrative burden for platforms managing mixed-residency portfolios. The 2026 amendment of section 54(2B) further removed the requirement that the principal must be a non-resident, easing the burden on intermediaries that must distinguish between resident and non-resident principals in mixed marketplaces.

The most significant structural shift in the electronic services regime, however, was set out in Annexure C of the 2026 Budget Speech (delivered on 25 February 2026). Under the proposal, the statutory default position would be inverted: the intermediary (the digital platform, app store, or freelance marketplace) would be liable by default to account for output VAT on the supply, unless a written agreement to the contrary places the tax burden back onto the principal. The joint and several liability of principal and intermediary would remain applicable. This proposal has been included as part of the Draft Taxation Laws Amendment Bill, 2026, published on 30 July 2026 and is expected to be formally enacted via the Taxation Laws Amendment Act later in the 2026 legislative cycle. In the interim, the current position – which requires an explicit written agreement before the intermediary is deemed to be the supplier – continues to apply. Clarification is also still awaited on whether the inverted default would apply regardless of whether the recipient is a registered vendor or a consumer, ie, whether the B2C/B2B distinction will fall away entirely.

This proposed amendment is designed to address a compliance vulnerability for SARS. It is administratively costly to pursue thousands of small-scale foreign electronic principals across multiple jurisdictions. By placing the default liability on intermediaries, SARS would in effect rely on global digital marketplaces as its primary collection agents.

Commercially, this proposal would create significant contractual disruption once enacted. Many global intermediaries operate on standardised terms of service based on common-law agency principles, disclaiming indirect tax liabilities on behalf of their underlying users and positioning themselves as technological facilitators. South African domestic law would override these global contractual norms by default. Global platforms that do not put in place tailored opt-out agreements with every principal operating in the South African market would inherit the VAT liability for all transactions flowing through their platform. Managing this transition will require legal review by foreign intermediaries, many of whose legacy operating agreements were not drafted to accommodate the liability-defaulting mechanism anticipated under the amended South African VAT Act. Transitional arrangements accompanying the eventual amendment would be welcomed. The fact that the proposed default can be contracted away – even where that may not reflect the economic and commercial substance of the arrangement – also remains worth scrutinising.

LEGISLATIVE AND POLICY GAPS

Beyond enforcement, several structural gaps in the current legislative framework may warrant attention:

The B2B imported services gap

South African VAT-registered businesses that receive electronic services for private, exempt, or other non-taxable purposes from non-resident suppliers are required to self-account for VAT as the recipient. This obligation is, in practice, widely underreported. SARS has limited visibility into these transactions, and the administrative burden of self-accounting deters compliance among smaller businesses.

The definition of electronic services

When initially introduced in 2014 the electronic services regulation contained a closed-list definition of electronic services. While the 2019 revision broadened that list considerably, new digital service categories continue to emerge – these include generative AI tools, virtual world services, tokenised assets and similar emerging service categories which will continue to test the boundaries of the current definition.

The definition has been clarified to some degree by the explanatory memorandum to the 2025 regulations, which categorically states that the concept of "minimal human intervention" was never introduced in the electronic services regime by the VAT Act or the electronic services regulations.

However, an open-ended, principles-based definition, like those adopted in other jurisdictions such as Australia, Singapore and New Zealand, would future-proof the legislation. For example, the New Zealand Goods and Services Tax Act, 1985. defines "remote services" as any service where, at the time of supply, there is no necessary connection between the physical location of the recipient and the place where the services are physically performed. The location-independence criteria rather than the technical delivery mechanism are more likely to accommodate future digital service categories.

The VAT treatment of free digital services supported by advertising revenue

This issue is not unique to South Africa, but a significant proportion of the digital economy operates on a model where the service is provided to the consumer free of charge although the economic reality is that the consumer's data and attention are being monetised with advertising revenue being the consideration received. How should the triangular relationship between the intermediary/supplier, consumer and advertiser be characterised for South African VAT purposes?

The VAT treatment of multi-sided platforms

This is related to the point above and applies to multi-sided platforms that simultaneously supply services to two or more distinct customers, each for different amounts or nothing at all. Examples would be ride-hailing platforms, food delivery apps and accommodation booking platforms. Is the platform making a single composite supply or multiple separate supplies? Where the platform charges no consideration or a discounted consideration to one of the customers, how will the consideration for the two distinct services be apportioned?

RECOMMENDATIONS

It is submitted that the following targeted reforms could materially improve the effectiveness of the regime without requiring a wholesale redesign:

- A dedicated, simplified online registration portal for non-resident digital services suppliers, modelled on the EU OSS, should be introduced. Reducing compliance friction for willing registrants is most likely the lowest-cost tool available to SARS.

- The endorsement of the anticipated amendment to section 54(2B) of the VAT Act (discussed above and currently proposed in the Draft Taxation Laws Amendment Bill, 2026) – this will shift VAT accounting obligations from the underlying supplier to the platform, intermediary or marketplace through which supplies are made. This will concentrate the compliance burden on a small number of commercially significant intermediaries.

- The creation of a safe harbour for suppliers and perhaps the issuing of an interpretation note addressing the above-mentioned data collection burden and indicating what criteria can be applied when determining the three indicators of a South African consumer.

- The future-proofing of legislation, specifically the definition of electronic services, against the continuous evolution of the digital economy.

- The transition from voluntary e-reporting to mandatory continuous transaction controls (CTC) to address the lack of third-party verification that constrains cross-border enforcement. The promulgation of the Tax Administration Laws Amendment Act 4 of 2026 in April 2026 is a useful foundational step, defining structured data formats such as the "e-invoice" (definition inserted in section 1(1) of the VAT Act) and inserting section 74(1B) into the VAT Act to establish the statutory framework for a voluntary e-reporting system. However, to meaningfully capture non-resident digital revenue, this framework should evolve beyond voluntary participation. SARS should leverage this legislative architecture to transition to a hybrid centralised clearance model with mandatory platform reporting obligations. By aligning with the OECD's Model Reporting Rules for Digital Platforms and drawing on the European Union's DAC7 directive, SARS could require digital platforms to transmit structured transactional data on their underlying sellers to a central tax hub in near real time. This would provide the independent, third-party data pipeline currently missing from the regime, reducing reliance on the goodwill of foreign entities.

- Bilateral and multilateral data-sharing arrangements targeting digital economy revenues should be pursued actively, thereby leveraging South Africa's membership of the G20 and the OECD Inclusive Framework on BEPS.

- The publication of annual transparency data on non-resident VAT registrations and collections under the electronic services regime.

CONCLUSION

South Africa's VAT framework for cross-border digital services was pioneering for its time and remains ahead of most African jurisdictions. The 2019 expansion demonstrated a legislative willingness to keep pace with a rapidly changing digital landscape. However, in an environment that is changing at an exponential rate, the regime is showing its age relative to global best practice, and the gap between the VAT theoretically collectible from non-resident digital suppliers and the VAT actually collected is likely material and growing.

The digital economy is not a niche. For many South African consumers, it is increasingly the primary channel for purchasing content, software, and services. The cost of leaving the current compliance and enforcement gaps unaddressed compounds annually. A focused package of administrative modernisation and legislative reform – most of which has already been proven in other jurisdictions – would allow South Africa to realise significantly more of the revenue its existing policy framework was designed to collect.

Duane Shipp & Dr Hendri Herbst

WTS Renmere

Acts and Bills

- Value-Added Tax Act 89 of 1991: Sections 1(1) (definition of "electronic services"), 7(4), 54(2B) (amended in 2025 and 2026) & 74(1B);

- Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill, 2026 (published on 25 February 2026);

- Draft Taxation Laws Amendment Bill, 2026 (published on 30 July 2026);

- Tax Administration Laws Amendment Act 4 of 2026;

- New Zealand Goods and Services Tax Act 141 of 1985: Section 2(1) (definition of "remote services").

Other documents

- Rule 31 statement of grounds of assessment;

- "*Regulations Prescribing Electronic Services for the Purposes of the Definition of 'Electronic Services' in section 1(1) of the (VAT) Act*" (Electronic services regulations of 2014, 2019, and 2025 ("business-to-business" (B2B) exclusion));

- Explanatory memorandum to the 2025 regulations;

- 2025 Budget Speech of the Minister of Finance;

- 2026 Budget Speech of the Minister of Finance (delivered on 25 February 2026): Annexure C;

- DAC7 Directive of the European Union (EU);

- OECD's Model Reporting Rules for Digital Platforms.

Cases

- *Democratic Alliance v Minister of Finance and Others* (2025/045530) [2026] ZAWCHC 102; [2026] (4) SA 232 (WCC).

Tags: cross-border digital services; electronic services; business-to-business (B2B) exclusion; business-to-consumer (B2C) supplies; non-resident vendors registered for VAT; SaaS platforms (Software-as-a-Service platforms); One Stop Shop (OSS) registration mechanism; bilateral and multilateral data-sharing arrangements.

PASSENGER TRANSPORT EXEMPTION FOR AMBULANCE-RELATED SUPPLIES

SARS released Binding General Ruling (VAT) 75 on the VAT treatment of ambulance services on 30 June 2026.

The ruling is best understood against the background of SARS' previous guidance on the section 12*(g)* exemption, including VAT Practice Note 7 (*Passenger Transport* – 10 February 1992) and the later draft interpretation note dealing with transport services. That earlier guidance addressed exempt domestic passenger transport by road or rail and recognised that a fare may be paid by someone other than the passenger. In practice, this left some uncertainty about whether patient transport by ambulance could fall within the exemption. BGR 75 resolves that uncertainty by making it clear that an ambulance service is not exempt passenger transport simply because the patient is conveyed from one place to another.

The earlier SARS guidance was not directed specifically at emergency medical transport. VAT Practice Note 7 considered the passenger transport exemption in the context of operators carrying fare-paying passengers, while SARS' draft interpretation note discussed the requirements for exempt domestic transport services more broadly. BGR 75 now deals with the ambulance context directly and separates ordinary passenger transport from a service whose essential character is medical response or medically supervised transfer.

WHAT DOES BGR 75 SAY?

The key point in BGR 75 is that an ambulance service is not characterised solely by the physical movement of the patient. The service is ordinarily required because the patient needs emergency assistance, clinical support, monitoring, stabilisation or transfer under medical supervision. SARS therefore treats the transport element as part of a wider healthcare-related service, rather than as the supply of exempt passenger transport.

Accordingly, where a registered vendor supplies ambulance services in the course or furtherance of its enterprise, the supply will generally be subject to VAT at the standard rate unless a separate exemption, zero-rating or other relieving provision applies, based on the facts.

WHY THIS MATTERS FOR CLIENTS

The ruling is relevant to ambulance operators and to organisations that fund, arrange or reimburse ambulance services, including healthcare groups, medical schemes, insurers, employers and event organisers. It may also be relevant to vendors that have not historically accounted for output tax on the basis that the service was treated as exempt.

More broadly, the ruling illustrates the need to identify the true nature of a supply before applying a VAT exemption. A service does not qualify for an exemption merely because one component resembles an exempt activity; the statutory language, purpose of the exemption and commercial character of the supply must all be considered.

VAT CONSIDERATIONS

- **Output tax:** Suppliers should confirm whether VAT must be charged on ambulance services that were previously billed as exempt.
- **Pricing impact:** Contracts and fee schedules should be reviewed to determine whether VAT is recoverable in addition to the agreed consideration or absorbed within the agreed price.
- **Input tax:** If the supply is taxable, the vendor's input tax position may change, subject to the normal documentary and apportionment rules.
- **Historical position:** Prior VAT periods should be reviewed to identify any corrections, disclosures or SARS engagement that may be required.

The ultimate commercial effect will depend on the contract terms, the billing arrangement, the party liable for payment and whether the agreed consideration was expressed or understood to include VAT.

SUGGESTED NEXT STEPS

- **Identify affected services:** Compile a list of ambulance-related supplies, reimbursements and procurement arrangements.
- **Confirm the VAT classification:** Reassess whether each category of supply is taxable, exempt or outside the scope of VAT.
- **Align systems and documents:** Update VAT codes, invoice wording, rate cards and billing processes where necessary.
- **Review contractual clauses:** Determine whether VAT can be passed on to customers, schemes, insurers or other funders.
- **Evaluate prior periods:** Consider whether historic VAT returns, claims or disclosures need to be addressed.
- **Maintain support:** Keep a record of the analysis, the relevant SARS guidance and the basis for the VAT treatment adopted.

BGR 75 gives taxpayers clearer direction on SARS' approach to ambulance services. The ruling indicates that the passenger transport exemption should not be applied merely because an ambulance transports a patient. Affected businesses should revisit their VAT treatment, update operational processes where needed and assess whether any historic positions require attention. The ruling is valid from 1 January 2027.

"Accordingly, where a registered vendor supplies ambulance services in the course or furtherance of its enterprise, the supply will generally be subject to VAT at the standard rate unless a separate exemption, zero-rating or other relieving provision applies, based on the facts."

Seelan Muthayan

BDO

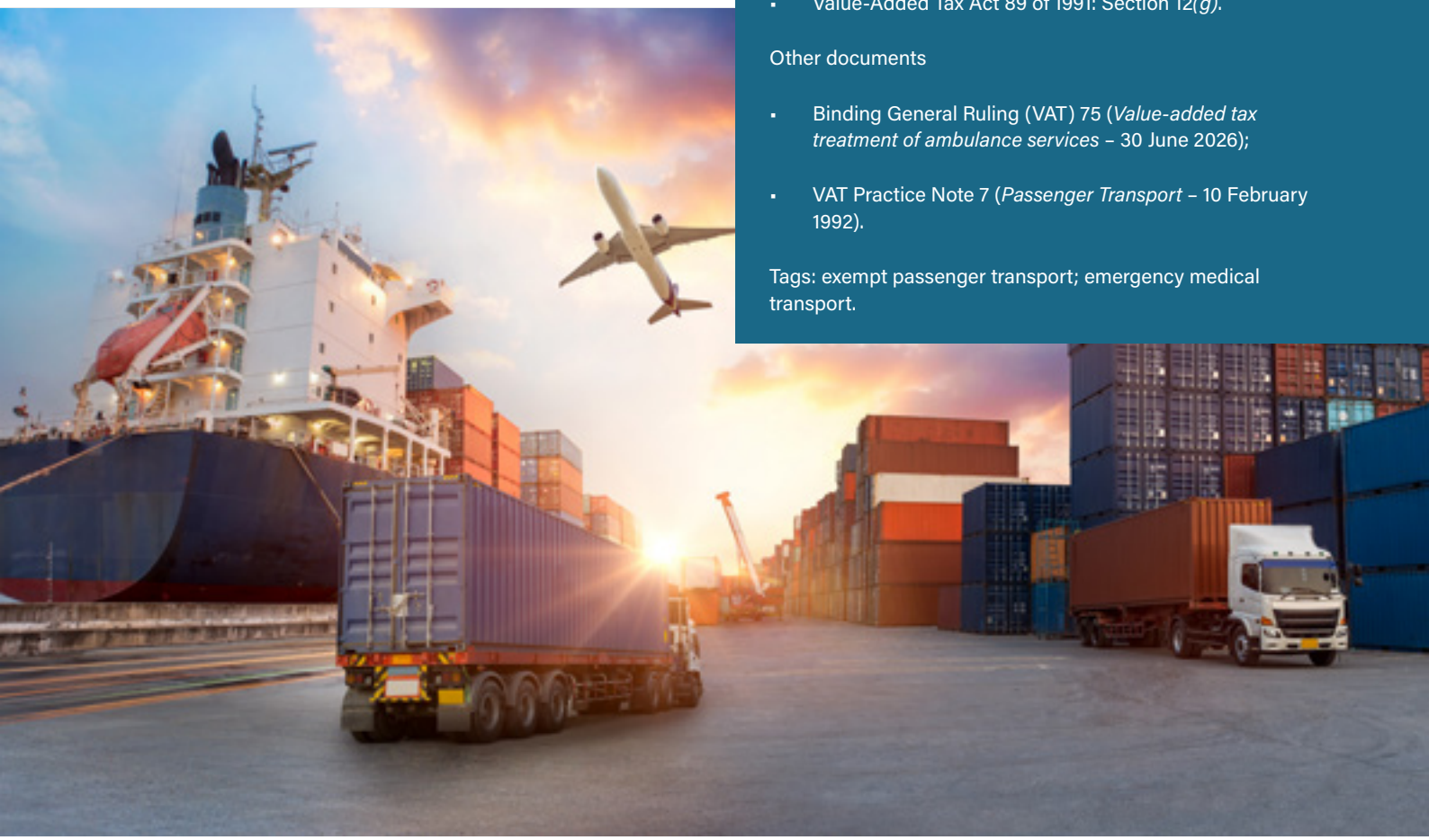
Acts and Bills

- Value-Added Tax Act 89 of 1991: Section 12*(g)*.

Other documents

- Binding General Ruling (VAT) 75 (*Value-added tax treatment of ambulance services* – 30 June 2026);
- VAT Practice Note 7 (*Passenger Transport* – 10 February 1992).

Tags: exempt passenger transport; emergency medical transport.



VAT CASE 32679 – VAT REACTIVATION AND LIABILITY DATES

The tax court judgment in Case No: VAT 32679 (Taxpayer ABC v Commissioner for the South African Revenue Service)*, delivered on 18 December 2025, considers a dispute between a taxpayer and the Commissioner for the South African Revenue Service (SARS) regarding the effective date of VAT registration following a reactivation.*

The case provides important guidance on how ambiguous SARS correspondence should be interpreted and the consequences that such ambiguity may have for VAT assessments.

The taxpayer had previously been registered as a VAT vendor but became dormant and was deregistered during 2010. In 2017, the taxpayer resumed trading after successfully bidding for a municipal tender valued at approximately R60 million, with services commencing in February 2018.

During January 2018, the taxpayer contended that it submitted a VAT101 application reflecting 1 February 2018 as its VAT liability date, although SARS disputed receipt of this application. A further VAT101 was submitted in June 2018, again reflecting a VAT liability date of 1 February 2018. On 28 June 2018, SARS issued a letter approving the taxpayer's request for VAT reactivation, but the letter did not specify the effective date of reactivation.

THE ISSUE BEFORE THE COURT

The central issue before the tax court was whether the taxpayer should be treated as a VAT vendor from 1 February 2018, as contended by SARS, or from 28 June 2018, being the date of the reactivation letter, as contended by the taxpayer. This determination had a direct impact on the validity of the additional VAT assessments raised by SARS for the 2018 tax periods.

INTERPRETATION OF THE REACTIVATION LETTER

The court found that the reactivation letter issued by SARS was ambiguous, as it approved the request for reactivation but failed to state the date from which the reactivation was effective. The letter was capable of more than one interpretation: either that reactivation took effect on the date of the letter, or that it applied retrospectively from an earlier VAT liability date.

Importantly, the court accepted that the taxpayer *bona fide* interpreted the letter as confirming VAT registration with effect from 28 June 2018, and that this interpretation was reasonable in the circumstances. The court emphasised that where SARS determines a VAT registration date under section 23(4)*(a)* of the Value-Added Tax Act, 1991, that date must be clearly and adequately communicated to the taxpayer.

SARS' AUDIT APPROACH

During a VAT audit conducted in 2020, SARS assessed the taxpayer on the basis that it was a VAT vendor from 1 February 2018, relying on internal system data rather than the wording of the reactivation letter. This resulted in additional VAT assessments for the period February to July 2018, together with understatement penalties.

The court found that the SARS auditor failed to properly consider the legal effect of the reactivation letter and instead implemented the VAT registration date reflected on SARS' internal systems.

THE COURT'S FINDINGS

The tax court held that –

- the reactivation letter did not clearly communicate a retrospective VAT registration date;
- the taxpayer's interpretation that VAT registration was effective from 28 June 2018 was reasonable and *bona fide*; and
- SARS ought to have audited and assessed the taxpayer on the basis that it was a VAT vendor from 28 June 2018, and not from 1 February 2018.

The court did not set aside the assessments outright. Instead, the matter was referred back to SARS for reconsideration and reassessment based on the correct VAT registration date. Penalties and interest were likewise required to be reconsidered. No order as to costs was made.

KEY LESSONS

This judgment highlights several important principles for VAT vendors:

- SARS correspondence affecting VAT registration or reactivation must clearly state the effective date.
- Where SARS communication is ambiguous, a reasonable and *bona fide* taxpayer interpretation may prevail.
- VAT audits must have due regard to what SARS has communicated to the taxpayer, and not rely solely on internal system records.

CONCLUSION

Case No: VAT 32679 underscores the importance of clarity and precision in SARS communications and confirms that taxpayers should not be prejudiced by ambiguity in official correspondence. The judgment serves as a reminder that VAT liability dates must be properly determined and clearly communicated, failing which SARS may be required to reassess VAT liabilities on a basis more favourable to the taxpayer.

Seelan Muthayan

BDO

Acts and Bills

- Value-Added Tax Act 89 of 1991: Section 23(4)*(a)*.

Other documents

- VAT101 application form.

Cases

- Case No: VAT 32679 [2025] (*Taxpayer ABC v Commissioner for the South African Revenue Service*) (18 December 2025).

Tags: request for VAT reactivation; VAT registration date.

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