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Editor's Note:

In this fifth newsletter for 2023 we consider the following:

Public interest trumps tax privacy – Concourt judgement.

Offshore remittances from RSA by tax Non-Residents revisited.

Two-Pot Retirement System & Tax revisited.

Third Party Reporting by Trusts

New Tax Ombud

SARS Interpretation Notes (INs), BCRs, BGRs, BPRs, and guides Noter-Up.

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PUBLIC INTEREST TRUMPS TAX PRIVACY – CONCOURT JUDGEMENT

(Arena Holdings (t/a) Financial mail v SARS and others,

CCT 365/21 heard 23 Aug and 30 May 2023)

This matter was about the balance to be struck between competing rights. These are, on the one hand, the right to tax privacy and, on the other, the right of access to tax information of a taxpayer, by a third party other than SARS. The matter concerned the

constitutionality of sections 67 and 69 of the Tax Administration Act (TAA) and sections 35 and 46 of the Promotion of Access to Information Act (PAIA).

The Concourt confirmed the High Court findings:

- that sections 35 and 46 of PAIA are unconstitutional to the extent that they preclude access to tax records by a person other than the taxpayer (a requester).
- that sections 67 and 69 of the Tax Administration Act 28 of 2011 (TAA) are unconstitutional to the extent that they –
 - (a) Preclude access to information being granted to a requester in respect of tax records; and
 - (b) Preclude a requester from further disseminating information obtained as a result of a PAIA request.

Two criteria

The Concourt further held that section 46 is to be revised to read *inter alia* that a disclosure is permitted in circumstances in which such would “reveal evidence of a substantial contravention of or failure to comply with the law” and “the public interest in the disclosure of the record clearly outweighs the harm contemplated”.

In practice we ponder how a requester would establish the first criterion, namely, a substantial contravention of tax compliance, given that such requester, in the absence of the tax records, merely has a suspicion which is alleged. This threshold for a requester will need to be determined in due course.

Conclusion

Taxpayer confidentiality provisions in the TAA remain. However, this veil of tax privacy may be pierced if a requester successfully satisfies a two-tier hurdle, namely a breach of tax compliance and the public interest factors.

OFFSHORE REMITTANCES FROM RSA BY TAX NON-RESIDENTS REVISITED

In our Newsletter 4.2023 we canvassed this matter from a SARS and SARB perspective, having regard to their recent publications. SARB have issued a further updated Excon Manual on 23-05-2023 and certain Excon Circulars.

Distributions from a RSA Trust

A new development is contained in SARB's updated Excon Manual of 23-05-2023 and Excon Circular 3. Paragraph B.2(J)(xii)(a) states:

‘(a) In respect of income and capital distributions from *inter vivos* trusts, such distributions may be transferred abroad, subject to the TCS process being completed by the private individual and/or beneficiaries of the trust’ (our underlining).

The previous wording of this paragraph required the trustees of the RSA Trust (as distinct from the non-resident beneficiary), to complete the TCS process.

However, the crisp issue as per our previous Newsletter 4.2023 remains, being whether a normal Tax Compliance Status (TCS) certificate of good standing is required for income (as distinct from capital) transfers as per our reading of SARB's updated Excon Manual or the more complex and detailed Approved International Transfer (AIT) process of SARS, as more fully discussed in our previous newsletter.

We still await clarification from SARS and SARB.

TWO-POT RETIREMENT SYSTEM & TAX REVISITED

We first addressed this proposed amendment to Retirement Fund access as contained in the Revenue Laws Amendment Bill 2022, in Newsletter 6.2022.

In essence, the *raison d'être* of this new system, now proposed to be effective 1 March 2024, is to allow retirement fund members access to part of their retirement benefits without the requirement to actually terminate their employment.

The new system allows retirement fund members access to the Savings Component element without the requirement to terminate employment. Such access is however allowed only once in a twelve-month period with a minimum withdrawal of R2 000.

The Revenue Laws Amendment Bill, 9 June 2023, introduces certain further subtle amendments to the 2022 proposals as follows:

- The three components (previously termed “pots”) of a retirement fund benefit, remain a savings component, a retirement component and the vested component.
- In essence, contributions to any retirement fund (Pension, Provident, Preservers and Retirement Annuities) must effective 1 March 2024 be allocated on the basis of two-thirds to the ‘Retirement Component’ and one-third to the ‘Savings Component’ as defined in the section 1 definitions to the Income Tax Act.
- The third component termed the ‘Vested Component’, which is the value of a member’s retirement benefit (being contributions and investment growth as at 1 March 2024) can, under these new 2023 proposals, be accessed on a limited basis being 10% of the vested component as at 1 March 2024, to a maximum of R25 000.

Tax Implications:

Contributions

The current *status quo* remains in that the section 11F tax-deductible contributions are limited to 27,5% of taxable income with a maximum of R350 000 per tax year. Any excess contributions (which can be carried forward for deduction in a subsequent tax year) can be allocated only to the ‘retirement component’.

Savings Pot Access

Any receipts from this component, termed a 'savings component' withdrawal benefit' are included in the member's 'gross income' under a new paragraph (eC) of the said definition in section 1 of the Income Tax Act. Such amounts will thus be fully taxed at the member's marginal tax rate, with no concessions. Thus, compared to termination of service withdrawals and retirement scenarios, the tax is penal.

Withdrawal Tax Table Upon Termination of Employment Service

The *status quo* remains as is, being as follows:

R27,500 tax free, 18% up to R726,000, 27% up to R1 089,000 and the balance thereafter 36%.

Retirement (including death)

The *status quo* remains as is, being as follows:

R550,000 tax free, 18% up to R770,000, 27% up to R1,155,000 and the balance thereafter 36%.

Transfer between Retirement Funds

Transfers between retirement funds remain tax free. Certain caveats are that transfers from a 'retirement component' can be made only into another recipient 'retirement component'. Thus, a 'retirement component' cannot be transferred to a 'savings component'. A 'savings component' can be transferred to a 'retirement component' but as stated above, not vice versa.

THIRD PARTY REPORTING BY TRUSTS

On 30 June 2023 a revised third party notice to submit returns was published in GN 3631 GG 48867. It covers the period commencing on 1 March 2023 and now includes trusts other than collective investment schemes and Employment Share Incentive Scheme

Trusts. The notice requires trusts to submit the following Data compiled in accordance with SARS' Business Requirement Specification: Any amount vested in a beneficiary IT3(t); or including income net of expenditure), capital gains and capital amounts. The relevant return for the 2024 year of assessment (1 March 2023 to 29 February 2024) must be submitted by 31 May 2024. SARS has confirmed to the author that the initially proposed interim submission of the IT3(t) by 30 September 2023 is no longer required. SARS still needs to update its website in this regard.

NEW TAX OMBUD

On 30 June 2023 the Office of the Tax Ombud announced that Ms Yanga Mputa, currently Chief Director: Legal Tax Design had been appointed as the new tax ombud with effect from 1 July 2023 for a period of five years. She replaces Prof Thabo Legwaila who had been acting in the post since 1 October 2022.

INTERPRETATION NOTES

Date of issue	IN	Tax	Section	Description
12.07.2023	101 (Issue 2)	IT	24I	Gains or losses on foreign exchange transactions
30.06.2023	115 (Issue 2)	IT	50A to 50H	Withholding tax on interest
30.06.2023	6 (Issue 3)	IT	1(1)	Resident – Place of effective management (Companies)
08.06.2023	130	IT	10(1)(yA)	Exemption for international aid received or accrued under an Official Development Assistance Agreement
24.05.2023	129	TAA	222(5)	Understatement penalty: Meaning of 'maximum tax rate applicable to the taxpayer'
16.05.2023	74 (Issue 3)	IT	11(d) & 8(4)(a)	Deduction and recoupment of expenditure incurred on repairs

BINDING GENERAL RULINGS

Date of issue	BGR	Tax	Section	Description
21.06.2023	64	VAT	18D, 18(1), 16(3)(o), 10(29) & 9(13)	Temporary application of new dwellings for exempt supplies simultaneously held by developers for taxable purposes

BINDING CLASS RULINGS

Date of issue	BCR	Tax	Section	Description
26.05.2023	086	IT	Sections 1(1) – paras (c) & (i) of the definition of 'gross income', 10(1)(e) & 19, para 2 OF THE FOURTH SCHEDULE, para 2(h) OF THE SEVENTH SCHEDULE AND paras 12A & 20(3)(b) of the eighth schedule	Waiver of debt by an employer relating to the unwinding of a share purchase scheme

BINDING PRIVATE RULINGS

Date of issue	BPR	Tax	Section	Description
15.06.2023	394	IT	Section 1(1) – definition of 'gross income', 11(a), 23(g), 24(1), 24J(1) – definition of 'interest' & 50A – definition of 'interest'	Instalment sale agreements and their sale to a non-resident
15.06.2023	393	IT	SECTIONS 1(1) – definition of 'trading stock', 41(1) – definition of 'capital asset', 42(1) – definition of 'asset-for-share transaction', 42(2), (7), & (8) & para 1 of the Eighth Schedule to the Act – definition of 'asset' & 'capital asset'	Income tax consequences resulting from consecutive asset-for-share transactions

15.06.2023	392	IT	Sections 9D(2A) & 9H(3)(b)	Sale of shares in a controlled foreign company (CFC)
15.06.2023	391	IT	Paragraph 1 – definition of ‘asset’, ‘disposal’ & ‘value shifting arrangement’, & para 11 of the Eighth Schedule to the Act	Tax consequences of the termination of an <i>en commandite</i> partnership
15.06.2023	390	IT, VAT & TD	Section 47 & para 12A of Eighth Schedule to ITA; s 8(25) of VATA; s 9(1)(j) of TDA	Disposal in anticipation of liquidation
06.06.2023	389	IT	Section 1(1) – paras (c) AND (i) of the definition of ‘gross income’, & definition of ‘relative’; s 10(1)(q); para 1 – definition of ‘taxable benefit’ & para 2 of the Seventh Schedule	Bursaries awarded by a resident company

GUIDES

Date of issue	Description
27.06.2023	Guide on Income Tax and the Individual (2022/23)
27.06.2023	Guide on the Determination of Medical Tax Credits (Issue 15)
23.05.2023	Dispute Resolution Guide: Guide on the Rules Promulgated in terms of Section 103 of the Tax Administration Act, 2011 (Issue 3)