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Editor's Note:

In this fifth newsletter for 2024 we consider the following:

Constitutional Court Coronation Judgment

Poulter v SARS: The next instalment (Guest Author)

Dissipation of Tax Debt – Third Party Liability

The new Two-Pot Retirement System, 1 September 2024 – one pot and three pots for some

Notice to Furnish Returns for the 2024 Year of Assessment

SARS Interpretation Notes (INs), BGRs, guides and draft guides Noter-Up

Tony Davey – Editor

Duncan McAllister – Co-Editor

tonyd@harding.co.za / www.tonydavey.com

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CONSTITUTIONAL COURT CORONATION JUDGMENT

In Davey's Locker 4.2023 we considered the Supreme Court of Appeal (SCA) judgement in favour of SARS.

The Concourt has overturned the SCA decision by upholding the appellant taxpayer Coronation's appeal that it's Foreign Business establishment (FBE) qualified for the FBE net income tax exemption under Section 9D of the Income Tax Act.

This will be a relief to dozens of other Asset Management Institutions that have also structured their offshore operations on this FBE basis.

SARS contended that the FBE did not meet the essential requirement of independent economic substance, as its primary operations, being in SARS view, investment management, were not based in Ireland but outsourced, *inter alia*, to the RSA.

Core to the Concourt's determination was to distinguish between Fund Management and Investment Management services. In the Concourt's view the SCA incorrectly characterised Coronation's FBE subsidiary as Investment and not Fund Management and thus in turn applied the tax law to the wrong facts.

The Concourt held that Fund management which latter function included corporate and statutory governance, administration and marketing was retained and performed by Coronation's FBE in Ireland and thus the FBE requirements were satisfied.

POULTER V SARS: THE NEXT INSTALMENT

In the May edition of Davey's Locker, 4.2024, we dealt with the decision of Candice-Jean Poulter in the High Court, where she appealed the Tax Court's decision refusing her father the right (as a layperson as distinct from a legal practitioner, being an Attorney or Advocate) to represent her in one of her many tax disputes that she has with SARS.

In short, a full bench of the High Court found that the Tax Court was not a court of law as contemplated in the Constitution, and accordingly Poulter could be represented by her father, and referred the dispute back to the Tax Court for hearing of the main dispute.

SARS has now approached the High Court seeking leave to appeal against its full bench decision. The court delivered its judgment on this application for leave to appeal, on the 28th of June 2024.

The High Court raised a jurisdictional question *mero moto*. The High Court analysed the nature of appeals and concluded that since its initial judgment was an appeal from the

Tax Court, any further appeal must follow the procedures outlined in Section 16(1)(b) of the Superior Courts Act 10 of 2013. The High Court thus determined it did not have jurisdiction to grant SARS leave to appeal and that SARS must seek special leave directly from the SCA. The application for leave to appeal was therefore struck from the roll, and costs were awarded to Poulter.

This decision emphasises the procedural requirements for appealing decisions from the Tax Court and the specific jurisdictional mandates of the Superior Courts Act.

Additional Comments

Clearly, SARS is not accepting the full bench of the High Court decision that the Tax Court is merely an administrative tribunal and not a court of law and remains intent on challenging the decision to permit layperson representation in the Tax Court

Despite its initial setback, SARS will likely now file an application for leave to appeal the High Court full bench decision at the SCA.

Mark Andrew Hawyes

Legal Practice Council and SARS accredited Tax Practitioner

DISSIPATION OF TAX DEBT – THIRD PARTY LIABILITY

The Supreme Court of Appeal (SCA) heard an appeal (*Christoffel Wiese and others v C: SARS 1307/2022 ZASCZ 111*, 12 July 2024) against the Western Cape High Court judgment pertaining to the recovery of the tax debt of the taxpayer company from third parties (directors and third party) who allegedly dissipated the company's sole asset. The said parties transferred a loan claim asset of the taxpayer company as a dividend *in specie* to its holding company thereby dissipating its asset in alleged contravention of Section 183 of the Tax Administration Act (TAA).

Section 183 provides that 'If a person knowingly assists in dissipating a taxpayer's assets in order to obstruct the collection of a tax debt of the taxpayer, the person is jointly and

severally liable with the taxpayer for the tax debt to the extent that the person's assistance reduces the assets available to pay the taxpayer's tax debt'.

Thus, there are two aspects to this matter being firstly, whether a tax debt (as defined) can exist prior to an assessment raised by SARS and secondly, whether the third party knowingly assisted a taxpayer in dissipating its assets to obstruct the collection of a tax debt.

Only the first aspect pertaining to the timing of a tax debt was adjudicated by the SCA as the second aspect will be adjudicated separately. The SCA thus had to consider the interpretation of the term 'tax debt' and the timing hereof, as to whether Section 183 contemplates an existing liability for tax or not, in circumstances in which an assessment has not yet been issued by SARS at the time the dissipation occurs.

The SCA in adopting a broad view of the term 'tax debt' held that such arises within a tax period and thus exists irrespective of a SARS issued assessment. An assessment merely renders it recoverable in accordance with the recovery mechanisms provided by the TAA.

This formulation of the underlying or pre-existing indebtedness versus the assessment of the amount of indebtedness was previously set out in a previous judgment of the SCA, namely *Namex (Edms) Bpk v Kommisaris van Binnelandse Inkomste (Namex)*.

The SCA quoted with approval from this case: 'Relying on precedent, the appellant's counsel argued that a tax liability arises at the latest at the end of a tax year, that is, prior to an assessment being issued. This argument has merit. From the case law referred to it transpires that the issuance of an assessment may be a requirement for the enforcement of a tax debt, *but the debt as such exists prior to that event*'.

As regards the second aspect, yet to be adjudicated, to invoke Section 183, SARS will further have to prove that the third party must knowingly have assisted in a dissipation for the purpose of obstructing the collection of a tax debt. Whether that requirement and the requisite intention is established will be a matter dependent upon the facts. This aspect will feature in the continuation of this matter in due course.

THE NEW TWO-POT RETIREMENT SYSTEM, 1 SEPTEMBER 2024 – ONE POT AND THREE POTS FOR SOME

The retirement fund components (termed originally 'two-pot') system, effective 1 September 2024 (see Davey's Locker 1.2024 and 7.2023) is correctly described for new retirement fund members joining a retirement fund (pension, provident or retirement annuity) on or after 1 September 2024.

However, for existing retirement fund members the system is a three-pot scenario and further to this, members of provident funds who were age 55 or older as at 1 March 2021 have only one pot by default, and the existing tax and fund rules continue to apply to such latter persons, unless they elect to participate in the new system.

Thus, it is important to classify for retirement fund tax purposes, the three different types of membership as this impacts upon firstly, access to their retirement funds and secondly, the tax treatment thereof, especially as regards the withdrawal tax.

For example, new members can access and withdraw annually whilst still employed, the balance in the Savings Component which comprises one-third of contributions plus investment growth thereon. This is taxed at the members' marginal rate. There is no access prior to retirement or death to the Retirement Component. Upon retirement or death, the normal retirement tax table and fund rules apply.

In contrast, although an existing member can also access the Savings Component on the same tax basis as above, in addition, upon termination of employment pre-retirement a member can access a full withdrawal of the Vested component which is taxed according to the existing concessional Withdrawal table, not marginal rates. This table provides for R27 500 tax free, thereafter 18% to R726 000 and thereafter progressive bands of 27% and 36%. Upon retirement or death, the normal retirement tax table and fund rules apply. The Retirement table remains at R550 000 tax free, thereafter 18% to R770 000 and thereafter progressive bands of 27% and 36%.

NOTICE TO FURNISH RETURNS FOR THE 2024 YEAR OF ASSESSMENT

On 31 May 2024 SARS published the annual notice to submit returns for the 2024 year of assessment (GN 4918 GG 50741) in accordance with section 66 of the Income Tax Act 58 of 1962. This notice was followed by a correction notice issued on 7 June 2024 (GN 4948 GG 50770) which corrected the tax thresholds.

The dates by which income tax returns must be submitted are as follows:

- Companies, PBOs and recreational clubs: Within 12 months of the end of their year of assessment
- All other persons: On or before 21 October 2024
- Provisional taxpayers and trusts: On or before 20 January 2025

Persons who have permission to submit accounts to a date ending after 29 February 2024 but on or before 30 September 2024: Within six months of the date of such accounts.

INTERPRETATION NOTES

Date of issue	IN	Tax	Section	Description
04.07.2024	95 (Issue 3)	IT	12L	Deduction for energy efficiency savings

BINDING GENERAL RULINGS

Date of issue	BGR	Tax	Section	Description
03.07.2024	20 (Issue 4)	IT, TD	10(1)(cN), 10(1)(cO), 10(1)(cQ), 30B AND 30C, & paras 63A & 63B of the Eighth Schedule; s 9(1)(c) of the TD Act	Meaning of the expression 'substantially the whole'
22.05.2024	14 (Issue 4)	VAT	1(1), 7, 8(8), 8(8A), 9, 11, 16, 20, 21 & 54	VAT Treatment of Specific Supplies in the Short-Term (Nonlife) Insurance Industry

21.05.2024	72	Particulars to be Contained in a Credit Note for a Valid Deduction under Section 16(3)(a)(v) for Prepaid Vouchers		
21.05.2024	64 (Issue 2)	VAT	18D, 18(1), 16(3)(o), 10(29), 9(13) & 72	Temporary Application of New Dwellings for Exempt Supplies Simultaneously Held by Developers for Taxable Purposes
16.05.2024	71	IT	18A(2)	Section 18A Receipt: Donation of Property in Kind
16.05.2024	70	IT	18a(1) & (2)(a)	Issue of a Single Section 18A Receipt to a Donor Taxpayer for Multiple <i>Bona Fide</i> Donations

GUIDES

Date of issue	Description
05.07.2024	Tax Exemption Guide for Small Business Funding Entities
10.06.2024	FAQs on Domestic Reverse Charge Regulations

DRAFT GUIDES

Date of issue	Description
05.07.2024	Draft Guide to Income Tax Benefits in Special Economic Zones
27.06.2024	Guide on Income Tax and the Individual (2023/24)
	Guide on the Determination of Medical Tax Credits (Issue 16)