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**1.2024**

**Editor's Note:**

In this first newsletter for 2024 we consider the following:

'Two-Pot' Retirement System implementation date 1 September 2024

The Thistle Trust v C: SARS, revisited

*Bona Fide* Inadvertent Error – recent case

Amendments to Section 7C

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SARS BGRs and BPRs Noter-Up

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## **TWO-POT RETIREMENT SYSTEM IMPLEMENTATION DATE CHANGE**

The so-termed 'two-pot' retirement system will now be implemented on 1 September 2024. (Previous dates were 1 March 2024, then 1 March 2025).

The National Assembly's Standing Committee on Finance (SCOF) accepted this compromise commencement date proposal by the Minister of Finance on 4 December

2023. The crux of the restructuring of the retirement system is to allow Retirement Fund members annual access to a savings component of their Fund value, without the requirement to terminate employment.

See our previous articles in Davey's Locker issues of 7.2022, 5.2023 and 7.2023.

### **THE THISTLE TRUST v C: SARS**

In the November 2022 issue 7 of this newsletter we commented on the decision in *C: SARS v The Thistle Trust 2023 (2) SA 120 (SCA), 85 SATC 347*. The case dealt with whether a capital gain can flow through multiple discretionary trusts under the common law conduit principle or section 25B of the Income Tax Act. The SCA found in SARS's favour, holding that it is only the trust that disposes of the asset that can attribute its capital gain to its beneficiary under paragraph 80(2) of the Eighth Schedule. When that beneficiary is a discretionary trust, the capital gain will be taxed in that trust and can flow no further. Another issue was whether SARS was entitled to additional tax of 50% which had been imposed on the Thistle Trust. The court had found that the Thistle Trust had made a *bona fide* inadvertent error and remitted the penalties.

The taxpayer applied to the Constitutional Court for leave to appeal the SCA judgment, while SARS lodged a cross appeal on the penalty issue. We understand that the case will be heard in the Constitutional Court on 8 February 2024.

### **BONA FIDE INADVERTENT ERROR - RECENT TAX COURT CASE**

In the recent tax court case of *SAMU v C: SARS (VAT 1788) 2023 ZATC 14 of 30 August 2023*, the Tax Court ordered SARS to remit the Understatement Penalty (USP) on the basis that the taxpayer's behaviour amounted to a *bona fide* inadvertent error having regard to the following:

- The tax returns were compiled by persons employed in different divisions, albeit of the same taxpayer company.
- Certain expenses were, according to the internal audit division, claimable.

- The external auditors did not raise any concerns about the taxpayer's tax approach.

The ambit of USP relief, was generously, in our view, extended to this in-house situation, in that one of the criteria for the relief to apply is that the error be inadvertent”.

Section 222(1) of the TAA provides for relief from the imposition of a USP in circumstances of a *bona fide* inadvertent error.

In this case, the taxpayer acted in the *bona fide* belief based largely on its internal staff's views (as distinct from an independent registered tax adviser's opinion which would have qualified for USP remittance under Section 223 (3)(b) of the Tax Administration Act (TAA)). SARS publication, Guide to Understatement Penalties (Issue 2) 18 April 2018, holds a contrary view to that adopted by the Tax Court in that an opinion if deliberately obtained is not inadvertent and thus the USP relief does not apply. SARS states as follows:

“Additionally, an error that reflects an opinion that is intentionally obtained cannot be said to be a *bona fide* inadvertent, or, using some of the synonyms above, a real involuntary mistake. A taxpayer who makes this kind of error may be found to have exercised reasonable care or assumed a reasonable tax position, but could not be said to have made a *bona fide* inadvertent error. An inadvertent error is one that does not result from deliberate planning (our underlining) and a *bona fide* inadvertent error is one that genuinely does not result from deliberate planning.”

Bear in mind, however, that judgments of a Tax Court are not binding but only of persuasive value on other Tax Courts, High Courts and the Supreme Court of Appeal (SCA).

### **AMENDMENTS TO SECTION 7C**

A new subsection (3A) to section 7C introduced by the Taxation Laws Amendment act 17 of 2023 clarifies that when the deemed donation as a result of the failure to charge interest at the official rate on a loan to a trust or company owned by a trust is

denominated in a foreign currency, it must be translated to rand using the average exchange rate for the relevant year of assessment.

One of the exemptions from section 7C in subsection (5)(d) relates to the situation in which a loan to a trust or a company owned by a trust funds the acquisition of a primary residence. Some uncertainty has existed whether this exemption extended to a loan that funded improvements to a primary residence. For example, a person may have funded the acquisition of vacant land and later provided a further loan to fund the erection of a primary residence on the land. Can it be said that the erection of the building was an 'acquisition'? *Collins English Dictionary* defines 'acquisition' as follows:

'If you make an acquisition, you buy or obtain something, often to add to things that you already have.'

Given that improvements to the primary residence, including any 'appurtenance belonging thereto and enjoyed therewith' form part of the primary residence, it would not be unreasonable to interpret section 7C(5)(d) as including improvements. Fortunately, however, the provision has now been amended to include the words 'or improvement' thus removing any doubt.

Another issue that arose related to the size of residential land that qualified for the exemption under section 7C. At one extreme it could be argued that a loan funding land did not qualify because land was not a primary residence' as defined in paragraph 44 of the Eighth Schedule, while at the other extreme it might have been argued that there was no size limit as long as the land was used for domestic or private purposes with the residence. The legislation has now been clarified to indicate that the qualifying land (including unconsolidated adjacent land) is limited to two hectares used mainly for domestic or private purposes, which brings section 7C in line with paragraph 46 of the Eighth Schedule.

These amendments come into operation on 1 January 2024 and apply in respect of years of assessment commencing on or after that date. For individuals this means the 2025 and subsequent years of assessment.

## **FAREWELL PROF LINDSAY MITCHELL 22.1.1952 – 5.12.2023**

It is with a profound sense of sadness that we record the passing of Prof Lindsay Mitchell, former head of the School of Accounting at UKZN. He was well known as the editor of *Income Tax Reporter* and *Tax Planning (Corporate and Personal)*. His publication *Graded Questions on Income Tax in South Africa* will be familiar to many tax students.

I first met Lindsay around the 1990s while I was working at SARS Durban. He invited me to attend the moot court which was held in the Howard College Building and presided over by the prevailing tax court judge such as Friedman J and later Galgut J. The arguments by the students were of a high standard and the issues finely balanced. The moot court was followed by a rather festive party attended by various guests and academics. Around 2000 he asked me to write an article for *Tax Planning* which was published in the same year and was my first published tax article. I learned a great deal from that experience about editing, style and presentation. Lindsay was always assisted by his capable secretary, Sue Trollip, who used to do all the formatting and layout of *Tax Planning* and type his handwritten notes.

He was also well known for his annual tax update seminars which he presented with his brother Kevin. I always looked forward to their excellent presentations and the detailed set of bound notes that accompanied them.

Lindsay made a substantial contribution to the tax profession in South Africa, particularly in the field of academic writing and training of countless numbers of students. The tax world will be a poorer place with His passing and he will be greatly missed by those of us who had the privilege to know him. ***Duncan McAllister***

I too enjoyed a friendship with Lindsay, spanning three decades. I guest-lectured for over a decade at the UKZN's acclaimed Post Graduate Tax honours degree on the tax treatment of Insurers, Retirement Funds and related investment products.

As an *ad hoc* contributing author to the professional journal *Tax Planning*, edited by Lindsay, I appreciated his infectious enthusiasm and insight in debating complex tax topics. ***Tony Davey***

## PROMULGATION OF AMENDING ACTS

On 22 December 2023 the following amending acts were promulgated:

Taxation Laws Amendment Act 17 of 2023

Tax Administration Laws Amendment Act 18 of 2023

Rates and Monetary Amounts and Amendment of Revenue Laws Act 19 of 2023

## FINAL DATE FOR PROVISIONAL TAXPAYERS TO LODGE THEIR INCOME TAX RETURNS

The final date for provisional taxpayers to submit their income tax returns for 2022/23, is 24 January 2024.

## BINDING GENERAL RULINGS

Date of issue	BGR	Tax	Section	Description
1.12.2023	68	VAT	16(2)(g) & 72	Acceptable documentation for input tax on upward adjustments on imports
29.11.2023	67	IT	10(1)(y), 12P(2) & the Eleventh Schedule	Income tax exemption of a grant received under the clothing, textiles, footwear & leather growth programme
27.11.2023	66	VAT	1(1) definition of 'input tax' & ss 16(2)(d), (dA), 16(3)(a)(iii) & (b)(ii)	Value-added tax implications of overpayments on the importation of goods

### BINDING PRIVATE RULINGS

Date of issue	BPR	Tax	Section	Description
14.12.2023	403	IT	24JB	Taxation of covered persons in respect of equity-linked notes
14.12.2023	402	IT/VAT	1(1) – Definition of ‘gross income’, 11(a), 25B(1), 28(1) – definitions of ‘short-term insurer’, ‘short-term insurance business’, ‘short-term policy’ & ‘branch policy’, 28(2), 28(3A), 28(4), 29A(1) – definitions of ‘adjusted IFRS value’ & ‘negative liability’, 29A(12), paras 11(1), & 11(2)(a), of the Eighth Schedule  2(1)(c), 2(1)(d), 2(1)(f), 2(1)(h), 8(16), 10(4), 12(a), 16(3)(h), & 23(1) of the VAT Act	Transfer of long-term insurance business to a local branch of a foreign reinsurer
14.12.2023	401	IT	11(h)	Leasehold improvement allowance
14.12.2023	400	IT	54, 55, 56 & 58	Donations tax implications on the issue of shares at nominal value to enhance BBBEE credentials
12.12.2023	399	IT	8(4)(e), 12C & 42(7) & paras 10 AND 66 of the Eighth Schedule	Asset-for-share transaction and replacement asset
17.11.2023	398	IT	1(1) – Definitions of ‘contributed tax capital’, ‘gross income’, ‘dividend’ & ‘equity share’, 8E, 8EA, 40C & para 43A of the Eighth Schedule; 1, 2 AND 6 of the STT Act	Disposal of shares pursuant to a property development arrangement