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# BUSINESS TAX & COMPANY LAW

## QUARTERLY

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Siber Ink

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# In this Issue




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# Editorial

MILTON SELIGSON SC*

This issue of the *BTCLQ* features an important contribution to tax jurisprudence by Professor Fareed Moosa, Head of the Department of Mercantile and Labour Law at the University of the Western Cape, entitled 'Democratic Principles Underpinning Tax Administration in South Africa'. The article deals with the impact of constitutionalism under the South African Constitution on tax law and administration, and seeks to demonstrate that taxpayers are included among the beneficiaries of the fundamental rights incorporated in the Bill of Rights of the Constitution.

The author highlights that this constitutional protection includes the right to just administrative action by the South African Revenue Service and its officials when executing their duties and functions under the Tax Administration Act 28 of 2011, as well as under the plethora of tax legislation enacted in this country. This right entitles taxpayers to tax administration that is lawful, reasonable and procedurally fair. Additionally, taxpayers are entitled to written reasons for administrative decisions taken that adversely affect their interests.

Furthermore, the Constitution subjects all fiscal legislation and conduct in the administration thereof to constitutional control. The effect of this is that taxation and tax administration must conform to the rule of law and the values, principles and spirit that infuse the Constitution. The author points out, with ample reference to ground-breaking decisions of the Constitutional Court and other authorities, that the rule of law seeks to establish a legal regime that is underpinned by the principles of legality, equality, clarity, consistency and fairness and the advancement of human rights and freedoms for all citizens, including taxpayers. He contrasts this with the public administration that characterised the pre-constitutional, apartheid era.

Tax advisors and practitioners should find the comprehensive analysis of the operation of the rule of law in tax law and administration and the application of the principle of legality in those spheres, as well as the copious source references, helpful in dealing with the thorny problems that often arise at the intersection of constitutional and tax issues. For, in an era when taxpayers are often confronted by an increasingly aggressive tax administration seeking to exercise the broadly intrusive powers conferred on SARS, the protections afforded by the Constitution afford a significant and effective counterpoise. It should never be forgotten, either by taxpayers or by SARS and it's functionaries that, as the author reminds

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us in his conclusion, the Constitution envisages a public administration which is '… efficient, equitable, ethical, caring, accountable and respectful of fundamental rights …'.[1]

* * *

The second article in this issue, by Michael Rudnicki, also deals with an important, if somewhat esoteric issue—The Taxation of Carried Interest. Carried interest has nothing to do with interest in its usual tax connotation. It is a concept well known in the private equity industry and refers to the super profit that a private equity professional will earn if a private equity fund generates a profit for the general partner that manages the fund, in excess of what is known as 'the hurdle rate'. Such private equity professionals are employed by the fund manager and typically acquire their carried interests as beneficiaries in a vested trust.

The article delves into the private equity industry to explore the meaning of 'carried interest' and illustrates a typical private equity structure which usually has a limited partnership (partnership *en commandite*) at its centre, with a general partner that manages the private equity fund and its investments and is itself a separate partnership that becomes entitled to the 'carry'. The article discusses the general partner partnership and its entitlement to earn a disproportionate share of the surplus profits when a partnership return 'hurdle' of between 8% and 11% has been achieved by the private equity fund.

The article then discusses the tax treatment of a partnership and its partners in terms of section 24H of the Income Tax Act. It investigates various definitions of the term 'carried interest'. The author points out that, given the uncertainties in valuing the units which will be issued up front by the Trust to the executives of the general partner (fund manager) to reflect their share of the 'carried interest', it is commonly accepted by most valuation experts, as well as by Her Majesty's Revenue and Customs ('HMRC') in the United Kingdom, that the value of the carried interest on acquisition is nil. The article explores the *causa* for the acquisition of carried interest in the context of a private equity fund in South Africa and concludes that the benefit acquired up front is acquired 'by virtue of employment' and is therefore taxable as income in terms pf section 8C of the Act.

The author further submits that when, at a later stage, the Trust receives its proportionate share of the carried interest, the beneficiaries will acquire personal rights against the Trust to the agreed proportion of the relevant amount. This right will be distinct from the vested contractual right acquired up front by virtue of employment. The personal right will be acquired as a beneficiary of the Trust and will not be imbued with the character of

[1] *Per* Mokgoro J—majority judgment—in *Van der Merwe and Another v Taylor NO and Others* 2008 (1) SA 1 (CC) at para [72].

employment, and will, so the author argues, be taxed in accordance with the normal trust conduit principles and not under section 8C.

This article should be of considerable interest to tax practitioners as it sheds light on tax issues in the private equity industry, a topic of growing importance.

* * *

The third article in this issue, by Advocate Kevin Burt of the Johannesburg Bar, discusses the recent unanimous judgment of the Supreme Court of Appeal in *BMW South Africa (Pty) Ltd v The Commissioner for the South African Revenue Service*[1]. In that case, the Supreme Court of Appeal rejected the appeal brought by the taxpayer to establish the deductibility of fees paid by it to tax consultancy firms to ensure compliance with local tax laws by expatriate employees from abroad while they were seconded by their overseas employers to work for BMW in South Africa. BMW South Africa had agreed to pay the income tax due by the expatriate employees and had engaged and paid the tax consultancy firms. SARS had decided that the payment of such fees represented taxable fringe benefits in the hands of the expatriate employees.

The article considers the judgment of the Court (written by Navsa JA), in which it was held that the statement in Davis et al, *Juta's Income Tax* that, if the service provided by the employer was used partially for the business or affairs of the employer, it would fall outside the fringe benefit provision, was 'too strongly worded'. The Court found that the taxpayer's reliance on the tax consultancy firms' services being 'at least in part' utilised by BMW South Africa was misplaced—while there might have been 'some peripheral advantage' to the employer, that was irrelevant as the service had been utilised by the employees for private or domestic purposes, and SARS had correctly applied paragraph 2(*e*) of the Seventh Schedule in treating the services as taxable benefits in their hands.

The author is critical of the decision of the Supreme Court of Appeal and considers that the conclusion reached that the consultancy firms' services had only some 'peripheral advantage' is open to question for three reasons: *First*, the Court probably did not appreciate the full extent of BMW South Africa's reliance on the services in question on the basis discussed in the article. *Second*, the Court overlooked the fact that the expatriate employees were not given the option of choosing their own tax consultancies, because, as was common cause, the employer had made the payments to protect it's own and the BMW Group's interests, which the author points out would have included financial and reputational risk arising from the potential mis-statement of the expatriate employees' income tax liabilities. *Third*, the Court's conclusion that the services rendered were services

[1] 1156/18 [2019] ZASCA 6 September 2019.

for which the expatriate employees would otherwise have had to pay for personally was unrealistic, bearing in mind that they would have had to continue to pay for similar services in their home countries.

Finally, the author points out that in the circumstances the case does not settle the question as to what the position is, if on the particular facts the benefit to the employer is not peripheral or marginal.

# Democratic Principles Underpinning Tax Administration in SA

FAREED MOOSA*

**ABSTRACT**

South Africa is a constitutional State (*Rechtsstaat*) that is governed by a supreme, humanitarian orientated Constitution with an entrenched Bill of Rights whose spirit, purport and objects are infused with, and informed by, the values and principles of an open and democratic society based on human dignity, equality and freedom. Taxpayers are included among the beneficiaries of the fundamental rights incorporated in the Bill. This includes the right to just administrative action by the South African Revenue Service and its officials when executing their functions under the Tax Administration Act, 2011 and any other legislation in the myriad of tax laws enacted in South Africa. This fundamental right entitles taxpayers to tax administration that is lawful, reasonable and procedurally fair. In addition, taxpayers are entitled to written reasons for administrative decisions taken during tax administration that adversely affect taxpayers or their interests. Supremacy of the Constitution dictates that all fiscal legislation and conduct in the administration thereof is subject to constitutional control. Thus, taxation and tax administration must conform to the rule of law and the other values and principles enshrined in, for example, section 195(1) of the Constitution and the Promotion of Administrative Justice Act. The rule of law is a foundational value that forms part of the Constitution's spirit. When applied through the prism of the Constitution, the rule of law advances fiscal transformation because it ensures that tax laws and tax administration occur in a manner unlike that which marred public administration during South Africa's pre-constitutional, apartheid era. The rule of law establishes a legal landscape in the tax arena that is underpinned by legality, equality, uniformity, clarity, consistency, equity, non-retrospectivity, and the advancement of human rights and freedoms for taxpayers. Law or conduct is invalid if it is inconsistent with the prescripts of the rule of law.

## Introduction

In accordance with South Africa's ('SA') fiscal and economic policies, most, if not all, commercial transactions, even illegal ones, have tax consequences.[1] Although section 77(1) read with (3) of the Constitution of the

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[1] *MP Finance Group CC (in liquidation) v Commissioner, South African Revenue Service* (hereafter 'C:SARS') 2007 5 SA 521 (SCA) at para 12.

Republic of South Africa, 1996 ('the Constitution') deals with the passing of national taxes through money Bills, the duty to pay tax and perform acts ancillary thereto does not arise from the Constitution. Consistent with the English common-law tradition of SA,[2] this duty arises from legislation. Thus, taxation is a creation of statute. In SA, national taxation is fragmented into a panoply of taxes in a plethora of legislation. The tax structure[3] comprises a portfolio of direct taxes (such as income tax and estate duty) and indirect taxes (such as, value-added tax, transfer duty, and securities transfer tax).

Fiscal transformation requires that taxes are administered efficiently and effectively in accordance with tax laws read with SA's supreme, humanitarian-oriented Constitution.[4] In SA, general tax morality is low and there is a high rate of tax evasion and tax fraud.[5] This exemplifies the need for a strong tax collection agency equipped with adequate powers that give it bite to optimise tax collection that serves SA's fiscal interests. The administrative role referred to here is played by an organ of state, namely the South African Revenue Service ('SARS'). On 1 October 2012 the Tax Administration Act 28 of 2011 ('TAA')[6] came into effect. It is SA's premier tax administration statute. The TAA confers wide-ranging powers on SARS and its officials that are designed to enhance taxpayer morality and integrity, thereby cultivating a tax compliance culture.[7]

All administrative powers of SARS and its officials must be exercised in accordance with the rule of law, a founding value entrenched in section 1(*c*) of the Constitution. This applies to all tax laws and tax administration occurring pursuant thereto. The rule of law is an integral part of the spirit of the Constitution and the Bill of Rights (hereafter the Bill) which, in terms of section 39(2), must be promoted whenever a tax or other statute is interpreted. The rule of law is an alternative basis by which taxpayers may seek judicial review of tax laws over and above an inconsistency with

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[2] Dicey AV *Introduction to the Study of the Law of the Constitution* (1931) 311.

[3] 'Tax structure' refers to a set of national taxes responsible for the total tax revenue of SA.

[4] In SA's pre-constitutional era, its tax authority engaged in practices that were 'entirely inconsistent with modern values of openness and accountability in a democratically orientated administration' (*Jeeva v Receiver of Revenue, Port Elizabeth* 1995 2 SA 433 (SECLD) 441G).

[5] *Metcash Trading Ltd v C:SARS* 2001 1 SA 1109 (CC) (hereafter '*Metcash*') at para 20.

[6] For a discussion of its constitutionality, see Moosa F 'Taxation: Constitutionality of the Tax Administration Act' (2017) 28 *Stellenbosch LR* 638.

[7] For a discussion of the powers conferred on SARS by the TAA, see Moosa F 'The power to search and seize without a warrant under the Tax Administration Act' (2012) 24 *SA Mercantile LJ* 338; Moosa F 'A warrantless search of "premises" under the Tax Administration Bill' 2012 27 *Insurance & Tax Journal* 3; Keulder C and Legwaila T 'The constitutionality of third party appointments—before and after the Tax Administration Act' (2014) 77 *Tydskrif vir Heedendaagse Romeinse Hollandse Reg* 53.

the Bill or a procedural irregularity. Incongruence with the rule of law is a ground for a declaration of invalidity.

This article aims to discuss the operation of the rule of law in the tax arena. It commences by outlining in broad terms the administrative role played by SARS and its officials. Thereafter, the democratic principles engrained in the rule of law are distilled. Finally, the rule of law is discussed within the framework of South African law with a view to demonstrating the threshold requirements which must be satisfied for fiscal provisions and tax administration to pass constitutional muster under the rule of law.

## Administration of national taxes: a broad overview

No government can operate except through functionaries. Thus, for tax administration purposes, the South African Revenue Service Act 34 of 1997 ('SARSA') gave birth to SARS as 'an organ of state within the public administration', but operating 'as an institution outside the public service'. SARSA creates an organisational structure for SARS that is headed by the Commissioner of SARS who is both SARS's chief executive officer[8] and accounting officer responsible for those functions designated by SARSA.[9] For its purposes, the TAA creates other officials (such as a SARS official and senior SARS official).[10] Since SARS, C:SARS and the other officials referred to here are creations of statute, they have no inherent power and cannot arrogate authority not conferred by law.[11] Thus, they may only exercise powers and competencies arising from statute.

SARSA prescribes SARS's objective to be the efficient and effective collection of revenue.[12] Section 4 of SARSA outlines SARS's functions. These include securing the efficient and effective collection of revenue under legislation listed in Schedule 1 of the SARSA and any other legislation concerning the collection of revenue, assigned to SARS in terms of legislation or an agreement between SARS and the organ of state or institution

[8] In terms of the SARSA (s 9(2)), the C:SARS is, as chief executive officer, responsible for '(*a*) the formation and development of an efficient administration; (*b*) the organisation and control of the staff; (*c*) the maintenance of discipline; and (*d*) the effective deployment and utilisation of staff to achieve maximum operational results'.

[9] In terms of the SARSA (s 9(3)), the C:SARS is, as accounting officer, responsible for '(*a*) all income and expenditure of SARS; (*b*) all revenue collected by SARS; (*c*) all assets and the discharge of all liabilities of SARS; and (*d*) the proper and diligent implementation of Part 5'.

[10] For the definition of 'SARS official' and 'senior SARS official', see TAA (s 1). For a discussion thereof, see Keulder C 'What's good for the goose is good for the gander—warrantless searches in terms of fiscal legislation' (2015) 132 *South African LJ* 819 838–839.

[11] *AM Moolla Group Ltd v C:SARS* 2005 JOL 15456 (T) 3.

[12] Section 3, SARSA. 'Revenue' is defined in the SARSA (s 1) to mean income derived from taxes, duties, levies, fees, charges, additional tax and any other moneys imposed in terms of legislation, including penalties and interest in connection with such moneys.

entitled to the revenue concerned.[13] SARS also performs an advisory role to the Minister of Finance on 'all matters concerning revenue'.[14] SARS is obliged to perform all its functions 'in the most efficient and effective manner' and in conformity with the values and principles mentioned in section 195 of the Constitution.[15]

Section 5(1) stipulates that it 'may do all that is necessary or expedient to perform its functions properly, including' the general powers and competencies enumerated in sections 5(1)(*a*) to (*k*). These include: to employ staff and independent contractors, to perform legal acts, to sue or be sued, to own property, and to open and operate a bank account. 'Including' in section 5(1) is a word of extension. Its effect is that the powers and competencies listed are not a *numerus clausus*.[16] Section 5(1)(*k*) provides that SARS is empowered to 'do anything that is incidental to the exercise of any of its powers'. Although 'anything' suggests that this authority is cast very widely, it is submitted that, understood within its context, SARS can perform only such other acts as are *reasonably* related or ancillary to the powers conferred by law.

The TAA augments SARS's powers. Section 3(1) stipulates that SARS is responsible for the TAA's administration under 'the control or direction' of the C:SARS. Section 6(1) provides that the 'powers and duties of SARS under this Act may be exercised for the purposes of the administration of a tax Act'. In terms of section 3(2)(*a*)–(*j*), '[a]dministration of a tax Act' means to, *inter alia*, (i) obtain full information; (ii) ascertain whether a person has filed or submitted correct returns, information or documents as required by a tax Act; (iii) establish a person's identity for the purpose of determining a tax liability; (iv) determine a tax liability; (v) collect taxes and refund taxes overpaid; (vi) investigate whether a tax related criminal offence has been committed pursuant to the provisions of a 'tax Act' as defined in section 1 of the TAA and, if so, lay criminal charges and provide assistance for the investigation and prosecution of tax offences or related common-law offences; (vii) enforce SARS's powers and duties under a tax Act to ensure compliance; (viii) perform any other administrative function necessary to carry out the provisions of a tax Act; (ix) give effect to SA's obligation to provide assistance under an international tax agreement; and (x) give effect to an international standard.

The powers of SARS are not confined to a closed list in section 3(2) of the TAA. Under section 3(2)(*h*), SARS is empowered to perform 'any other

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[13] Sections 4(1)(*a*)(i) and (ii), SARSA.
[14] Section 4(1)(*b*)(i)), SARSA.
[15] Section 4(2), SARSA.
[16] For the legal effect of 'includes' in contra-distinction to 'means', see *Southern Life Association Ltd v CIR* 1985 2 SA 267 (C) at 269–270; *Birkenruth Estates (Pty) Ltd v Unitrans Motors (Pty) Ltd* 2005 3 SA 54 (W); *S v Dzukuda; S v Tshilo* 2000 4 SA 1078 (CC) at para 9; *City of Tshwane v Marius Blom* 2013 3 All SA 481 (SCA) at para 12.

administrative function necessary to carry out the provisions of a tax Act' (as defined). Hoexter[17] states that implied powers may be ancillary to the express powers granted to an administrator, or may exist either as a necessary or reasonable consequence of the express powers conferred on any such decision maker. Thus, according to Hoexter, 'what is reasonably incidental to the proper carrying out of an authorised act must be considered as impliedly authorized'.

Tax administration is part of public administration, a facet of governance. For constitutional purposes, SARS and C:SARS are 'organs of state' as defined in section 239 of the Constitution,[18] the relevant extract whereof reads:

> '(*b*) any other functionary or institution— … (ii) exercising public power or performing a public function in terms of any legislation …'.[19]

Whilst the Commissioner is a public functionary and SARS is a public institution, both exercise public power[20] in terms of fiscal legislation. In terms of section 8(1) of the Constitution, the Bill 'applies to all law'. This includes every fiscal statute. Section 8(1) also states that the Bill 'binds … all organs of state'. Consequently, in the execution of their functions, SARS and the C:SARS must respect taxpayers' rights in the Bill. By virtue of section 237 of the Constitution, this obligation 'must be performed diligently and without delay'. The strictness of this duty is reinforced by section 2 declaring conduct invalid if it is inconsistent with the Constitution. Such invalidity does not operate automatically. It arises from a declaration in terms of section 172(1)(*a*) to the extent of any constitutional incongruence.

In accordance with section 33(1) of the Constitution, every taxpayer has the 'right to administrative action that is lawful, reasonable and procedurally fair'.[21] In general terms, administrative action refers to

> 'conduct of the bureaucracy (whoever the bureaucrats functionally might be) in carrying out the daily functions of the State which necessarily

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[17] *Administrative Law in South Africa* (2012) 43–44. The extract quoted was cited with approval in *Potwana v University of KwaZulu-Natal* 2014 JDR 0156 (KZD) at para 34.

[18] *C:SARS v Trend Finance (Pty) Ltd* 2007 (6) SA 117 (SCA) at para 25; *Pearse v C:SARS* (GNP) (unreported) case no 10498/2011 of 4 May 2012 paras 49–51.

[19] All issues concerning the exercise of power by an organ of state are constitutional matters within the contemplation of section 167(7) of the Constitution. See *Competition Commission v Loungefoam (Pty) Ltd* 2012 9 BCLR 907 (CC) at para 16.

[20] For the test to determine if a power is 'public' in nature, see *Police and Prisons Civil Rights Union v Minister of Correctional Services* 2006 2 All SA 175 (E) at para 53; *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry* 2010 5 SA 457 (SCA) paras 24, 38–40; *M&G Ltd v 2010 FIFA World Cup Organising Committee SA Ltd* 2011 5 SA 163 (GSJ) paras 220–222; *C:SARS v Brown* (EC) (unreported) case no 561/2016 of 5 May 2016 paras 47–49.

[21] See Croome B *Taxpayers' Rights in South Africa* (2010) 203–219.

involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.'[22]

Determining whether conduct is administrative is not a rigid, mechanical exercise. It is a process focussed on the nature of power, not on the nature of the functionary exercising power.[23] The exercise by SARS and the C:SARS of their statutory powers and competencies under the TAA involve decisions, or the omission to take decisions, 'which adversely affects the rights' of taxpayers and third parties 'and which has a direct, external legal effect'.[24] Consequently, they are 'administrators' performing 'administrative action' under section 33(1) of the Constitution read with the PAJA.[25] Any such conduct is judicially reviewable under the common law or the principle of legality in the rule of law discussed under 'Application of the principle of legality' on page 13 below.[26]

## Conceptualisation of the rule of law

The rule of law is the formula expressing the notion that in legal systems with a written constitution and Bill of Rights, the constitution (not statute and judicial *dicta*) is the source of security for those rights.[27] Indeed, the Universal Declaration of Human Rights, 1948, which is binding on SA as a member State of the United Nations, stipulates in its Preamble that 'it is essential … that human rights should be protected by the rule of law'. The exercise of public power and functions are kept within acceptable limits by the rule of law requiring the State and its officials to act lawfully.[28] The rule of law entails the absolute predominance of regular law; it excludes

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[22] *Platinum Asset Management (Pty) Ltd v Financial Services Board; Anglo Rand Capital House (Pty) Ltd v Financial Services Board* 2006 (4) SA 73 (W) at para 48.

[23] *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) paras 140–143; *ARMSA v President of the Republic of South Africa* 2013 7 BCLR 762 (CC) at para 41 (hereafter *ARMSA*).

[24] See the definition of 'administrative action' in s 1 of the Promotion of Administrative Justice Act 3 of 2000 (hereafter 'the PAJA'). For the requirements to be met for conduct to be 'administrative action' under the PAJA, see *Chirwa v Transnet Ltd* 2008 4 SA 367 (CC) at para 181.

[25] See also *Plasma View Technologies (Pty) Ltd v CSARS* 72 SATC 44 (T) 57. Smith J, in *C:SARS v Brown* (EC) (unreported) case no 561/2016 of 5 May 2016 paras 50–51, held that a request for 'relevant material' under the TAA is not administrative because it entails a preliminary investigation that does not adversely affect taxpayer's rights. This decision accords with *City of Cape Town v Bouley Properties (Pty) Ltd* (WCC) (unreported) case no 9410/2010 of 21 December 2010 at para 32 and *Corpclo 2290 CC t/a U-Care v Registrar of Banks* 2013 1 All SA 127 (SCA) at para 26. For examples of administrative decisions, see *Hendricks v City of Cape Town* 2011 6 SA 88 (WCC) at para 29; *Chittenden v C:SARS* 76 SATC 397 (GNP) at para 6.

[26] *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC) paras 93–96; *Democratic Alliance v Ethekwini Municipality* 2012 2 SA 151 (SCA) 160C–E; *Dumani v Nair* 2013 2 SA 274 (SCA) at para 26–33.

[27] Dicey *Introduction to the Study of the Law of the Constitution* (1931) 198–199.

[28] Devenish G *Commentary on the SA Bill of Rights* (1999) 14.

arbitrariness[29] and untrammelled prerogative or discretion in the hands of government officials. Thus, the rule of law is umbilically linked to the notion of a constitutional State (*Rechtsstaat*): principles of justice in governance requiring public institutions to be accountable to laws that are clear and publicly promulgated, equally enforced, uniformly interpreted, independently adjudicated, and are consonant with international human rights norms and standards.[30] When viewed in this light, the rule of law prohibits sanction, except for a clear breach of the law as may be established by a competent judicial or other authority following due legal process. In this way, the rule of law benefits and protects all taxpayers equally against capricious, oppressive, authoritarian or discriminatory tax laws and administrative conduct undertaken in terms thereof by SARS and its officials.[31]

The rule of law underlies the legal order created by the Constitution. Respect for the rule of law 'is crucial for a defensible and sustainable democracy',[32] of which the Bill is 'a cornerstone' as proclaimed by section 7(1) of the Constitution. The rule of law establishes a government of laws, not people. Although described as an 'unruly horse' and devoid of a fixed meaning,[33] a basic tenet of the rule of law is the equal subjection of everyone to the law administered by courts without fear, favour or prejudice.[34] Hence, under the rule of law, no person of whatever rank or status is above the law and cannot claim exemption from the duty to obey the laws governing everyone, nor can any person claim exemption from the courts' jurisdiction.[35] Consequently, by virtue of the rule of law, SARS and its officials cannot operate as if they are a law unto themselves.

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[29] Arbitrariness connotes caprice, or the exercise of the will instead of (justifiable) reason or principle, or a decision reached without consideration of the merits or without following due process. See *Johannesburg Liquor Licensing Board v Kuhn* 1963 4 SA 666 (A) 671C; *Woolworths (Pty) Ltd v Whitehead* 2000 (3) SA 529 (LAC) at para 128. In *ITC 1717* 64 SATC 32 40 Davis J held that a justifiable decision is one grounded in rational justification. See also *Carephone (Pty) Ltd v Marcus* 1998 10 BCLR 1326 (LAC) at para 37.

[30] United Nations *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General* (August 2004) 4 http://www.un.org/en/rule of law.

[31] *First National Bank of SA Ltd t/a Wesbank v C:SARS* 2002 (4) SA 768 (CC) paras 62–71; *New National Party of SA v Government of the Republic of SA* 1999 3 SA 191 (CC) paras 19, 24 (hereafter '*New National Party*').

[32] *Lesapo v North West Agricultural Bank* 2000 1 SA 409 (CC) paras 16–17.

[33] Matthews AS 'A bridle for the unruly horse' (1964) 81 *South African LJ* 312 313.

[34] *Van der Walt v Metcash Trading Ltd* 2002 4 SA 317 (CC) paras 65–68, 76 (hereafter '*Van der Walt*'). See also *Savoi v National Director of Public Prosecutions* 2014 5 BCLR 606 (CC).

[35] In *Speaker of the National Assembly v De Lille* 1999 4 SA 863 (SCA) at para 14 Mahomed CJ explains the operation of rule of law as follows: 'No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship, and no official, however efficient or well-meaning, can make any law or perform any act which is not sanctioned by the Constitution.'

The rule of law requires measures that serve to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to and fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency. The Constitution adds depth, weight and content to the rule of law through, *inter alia*, the core founding values in section 1, constitutional supremacy in section 2, the fundamental rights entrenched in the Bill, and the delineation between the powers of the three arms of government, namely, the legislature (section 40), executive (sections 83, 85, 125, 156) and the judiciary (section 165). Consequently, by virtue of the Constitution taken with the rule of law, all fiscal statutes (i) must yield to the Constitution, (ii) are infused with constitutional values, and (iii) may not limit taxpayers' fundamental rights, except to the extent permitted by section 36(1) of the Constitution.

The rule of law is not 'an empty vessel into which any law could be poured'.[36] The Court in *Savoi v NDPP*[37] commented that this sacrosanct rule is paramount to the success of all nations. Ngcobo J, in *Masetlha v President of the Republic of South Africa*,[38] linked the rule of law to the founding values of accountability, openness and responsibility, and held that non-arbitrariness 'refers to a wider and deeper principle: fundamental fairness'. The operation of the rule of law ensures that government and its officials at all levels perform their functions subject to the law. The rule of law, as a legal-*cum*-political code of conduct, is a true benchmark against which the constitutionality of the exercise of power pursuant to any fiscal provision may be tested. An application of the rule of law may also lead to the invalidity of such a provision where, for example, the language of a provision is so inarticulate, vague or unclear that it creates a reasonable degree of uncertainty as to its precise meaning or import.[39] Likewise, this would be the case if, viewed objectively, there is no rational connection between, on the one hand, a measure adopted in fiscal legislation and, on the other, the purpose sought to be achieved thereby,[40] or the purpose for which a particular public power is conferred.[41]

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[36] Chaskalson, World Justice Forum, 2008 http://www.ifaisa.org/Accountability_and_the_rule_of_law.html.

[37] 2013 3 All SA 548 (KZP) at para 105.

[38] 2008 (1) SA 566 (CC) at para 179 (hereafter '*Masetlha*').

[39] *Veldman v DPP, Witwatersrand Local Division* 2007 3 SA 210 (CC) at para 26.

[40] The Court held, in *New National Party* at para 19, that 'there must be a rational relationship between the scheme … and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional.' See also *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) at paras 74–75 (hereafter '*Affordable Medicines*'). Thus, an arbitrary, capricious or unnecessary tax or one not aimed at achieving a social, economic or other constitutionally desirable objective of tax, is unsustainable.

[41] *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) paras 85–90 (hereafter '*Pharmaceutical*

The rule of law is a bedrock value upon which the culture of constitutionalism rests. Constitutionalism is a national commitment or compact to limit public power and balances fundamental values against the exercise of such power.[42] The notion of a *Rechtsstaat* cannot be reconciled with untrammelled or uncontrolled public power by State authorities, organs of state, functionaries and institutions. The exercise thereof is always subject to constitutional control.[43] Thus, in *Pharmaceutical Manufacturers*,[44] the Court held that the Constitution is a legal watershed, shifting constitutionalism from the realm of the common law to the prescripts of a written instrument. However, constitutionalism means more than simply limiting governmental arbitrariness. It combines two main pillars. First, the idea of a government and its organs limited in its action by constitutional constraints based on clearly defined core values. Secondly, a government and its organs are accountable to the citizenry for their actions by way of a clearly defined mechanism for ensuring that the limitations placed on them are legally enforceable. Fombad[45] identifies the core elements of constitutionalism as: (i) the recognition and protection of fundamental rights and freedoms; (ii) the separation of powers between the legislature, executive and judiciary; (iii) an independent judiciary; (iv) the review of the constitutionality of laws; (v) the control of amendments to the Constitution; and (vi) the presence of institutions that support or reinforce democracy.

It is submitted that, based on the foregoing discussion, the following principles lie at the heart of the rule of law as it applies in SA under its Constitution:

(*a*) equality of all persons before the law and the right of all persons to equal protection of the law. This principle is encapsulated in the Constitution (s 9(1));

(*b*) the protection of rights and liberties. This principle is incorporated in the Constitution (s 1) in so far as it provides for 'the advancement of human rights and freedoms' as well as the adoption of the Bill in Chapter 2.

(*c*) a uniform interpretation of the law. This is provided in s 39 of the Constitution.

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*Manufacturers')*. Rationality in this sense means that if, viewed objectively, a rational connection is lacking then the exercise of the taxing power is irrational, arbitrary and, thus, unlawful.

[42] Cachalia et al *Fundamental Rights* (1994) 3 explain constitutionalism to be 'about balancing the principles of liberty and equality against power'.

[43] *Minister of Justice & Constitutional Development v Chonco* 2010 4 SA 82 (CC) at para 27 (hereafter '*Chonco*'); *Democratic Alliance v Speaker of the National Assembly* 2015 4 SA 351 (WCC) at para 29.

[44] At para 45.

[45] Fombad CM 'The Constitution as a source of accountability: The role of constitutionalism' (2010) 24 *Speculum Juris* 41 44.

(*d*) the government, its organs and their officials are accountable under the law. This democratic principle is contained in section 195(1)(*f*) of the Constitution;
(*e*) laws must be clear, publicised, stable and fair, and protect fundamental rights, including the security of persons and their property;[46]
(*f*) the process whereby laws are enacted, administered, amended and enforced is accessible, comprehensible, predictable, fair and efficient.[47] These principles are grafted into the Constitution in, for example, sections 33 and 195(1)(*d*) and (*g*); and
(*g*) access to, or the pursuit of, justice (section 34) requires competent, independent, impartial and ethical adjudicators (judicial officers) who are of sufficient number, have adequate resources and reflect the make-up of the society they serve.

## Operation of the rule of law in taxation and tax administration

### *Implications of vagueness in tax legislation*

Croome and Olivier[48] state: 'It is an international phenomenon that the rules governing the administration of taxes are often complicated, confusing and arbitrary.' Such a state of affairs runs counter to the rule of law. Complexity in a tax system fosters uncertainty. Simplicity and certainty are hallmarks in the design of a credible tax system.[49] They are engrained in the values of accountability, openness and the rule of law. The Meade Committee[50] emphasised that certainty and simplicity mean that taxpayers are empowered with sufficient information to determine, without much further ado, the principle on which the tax base is chosen, the intended purpose of a particular tax, what is taxable and what is not in a given set of circumstances, and what the law commands of a taxpayer and what it forbids. Adam Smith[51] succinctly explained the importance of clarity in taxation by pointing out that 'a very considerable degree of inequality … is not near so great an evil as a very small degree of uncertainty'.

Stability in law is part of the rule of law established by consistency in the interpretation and application of tax laws. Stability breeds certainty. The judiciary in SA adheres to the doctrine of precedent encapsulated in the maxim *stare decisis* ('to stand by previous decisions').[52] By this doctrine, a lower court is bound by a precedent set by a decision of a court with superior status; and a court of final jurisdiction will not depart from a

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[46] Currie I and De Waal J *Bill of Rights Handbook* (2014) 10.
[47] *Minister of Safety and Security v Van der Merwe* 2011 5 SA 61 (CC) at para 52.
[48] Croome B and Olivier L *Tax Administration* (2015) xxi.
[49] Margo Commission *Report of the Commission of Inquiry into the Tax Structure of the Republic of South Africa* (1987) ch 4 part III.
[50] Meade Committee *Structure and Reform of Direct Taxation* (1978) ch 2.
[51] Smith A *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) 677.
[52] *Van der Walt* at para 39; *Daniels v Campbell* 2004 5 SA 331 (CC) paras 94–95.

prior decision of its own unless it is satisfied that the earlier decision was clearly wrong. The operation of this doctrine promotes the basic tenets of the rule of law: certainty, predictability, reliability, equality, uniformity and convenience.[53] Thus, s*tare decisis* is a manifestation of the rule of law in the interpretation and application of all tax and other laws. Section 32 of the TAA provides that a judgment of the Tax Court 'must be published for general information'. Although its judgments do not create binding precedent, this provision promotes stability to the extent that judgments of the Tax Court may have persuasive value in later tax cases.[54] In practice, SARS issues interpretation notes that outline its understanding of the correct interpretation of a fiscal provision. These notes reinforce stability. This is so despite the notes not being law and, generally, not binding on taxpayers, and should be disregarded by a court when interpreting a statutory provision in accordance with constitutionally compliant precepts.[55] The notes permit taxpayers to know in advance SARS's interpretation of tax provisions. Thus, taxpayers can manage their fiscal affairs in a manner consistent with the notes.

Croome, Keulder and Erasmus[56] contend that a taxpayer's right to administrative justice, taken with the doctrine of legitimate expectation incorporating *estoppel*, binds SARS to an interpretation in its notes, except if it contains an error of law. Stability in tax law is accentuated by the TAA providing, in section 5(1), for the binding nature of a practice generally prevailing as 'set out in an official publication regarding the application or interpretation of a tax Act'. This was exemplified by the general rule applied in statutory interpretation, namely, evidence that a provision 'has been interpreted in a consistent way for a substantial period of time by those responsible for the administration of the legislation is admissible and may be relevant to tip the balance in favour of that interpretation'.[57] The rule of law is reinforced by the advance tax ruling system applicable in SA.

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[53] *Camps Bay Ratepayers' and Residents' Association v Harrison* 2011 4 SA 42 (CC) at para 28. Brand AJ held further (at para 28): 'To deviate from this rule is to invite legal chaos.' Also, see *Turnbull-Jackson v Hibiscus Coast Municipality* 2014 6 SA 592 (CC) at para 55.

[54] Decisions of the Tax Board and Tax Court are binding only on immediate parties. See *Estate Brownson v President and Members of the Income Tax Special Court* 1933 WLD 116.

[55] By virtue of the TAA (s 89(3)), an interpretation note is legally binding if it constitutes a 'binding general ruling' as defined in the TAA (s 75). For the legal status of SARS's interpretation notes generally, see *ITC 1675* 62 SATC 219 229 and *Marshall NO and Others v C:SARS* 2019 (6) SA 246 (CC) at para [10] (hereafter '*Marshall*').

[56] Croome *Taxpayers' Rights in South Africa* (2010) 249–253.

[57] *CSARS v Bosch* 2015 2 SA 174 (SCA) at para 17. See also *Nissan SA (Pty) Ltd v CIR* 1998 4 SA 860 (SCA) 870E–H. However, in *Marshall supra* at para [10], the Court held that, in a constitutional democracy, a unilateral practice by C:SARS, an organ of state, cannot play a role in determining the meaning of a statutory provision, except in those instances 'where the practice is evidence of an impartial application of a custom recognised by all concerned'.

This is evident from the TAA. Section 76 stipulates that the 'purpose of the 'advance ruling' system is to promote clarity, consistency and certainty regarding the interpretation and application of a tax Act by creating a framework for the issuance of an advance ruling'. Section 82 stipulates that an advance ruling[58] has 'binding effect' on SARS in relation to persons to whom it applies. This is so unless the ruling is either rendered void (section 83), ceases to have effect upon the occurrence of any circumstance described in section 85(1), or is withdrawn (section 86).

The power to tax is an incident of representative democracy. The manner and extent to which taxes are raised and appropriated must yield to the democratic will as expressed in law.[59] The rule of law obliges taxpayers to comply with tax laws. A tax debt is sourced from the clear and unambiguous wording in a fiscal enactment.[60] Effect is given to a statute's aim to tax a particular person in respect of property, unless the words 'are intractable'.[61] Verbal precision in a taxing statute is essential because '[n]othing that is not stated is to be read in'.[62] The so-called doctrine of vagueness in the rule of law requires that, to be lawful, every rule, regulation, convention or other law must be clear, accessible, comprehensible and predictable.[63] Thus, every law must be framed in language that is precise in the sense of 'reasonable certainty' and not perfect lucidity.[64] Reasonable certainty implies that 'some imprecision is unavoidable'.[65] Some measure of vagueness is permitted because of the generality with which legislation is drafted.[66] A fair balance must be struck between constitutionally impermissible vagueness and permissible generality.

From a tax administration perspective, there are various benefits arising from precision in fiscal statutes. These include: (i) it minimises the costs

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[58] The TAA (s 75) defines 'advance ruling' to mean 'a 'binding general ruling', a 'binding private ruling' or a 'binding class ruling'. Each term bears the meaning ascribed in the TAA (s 75).

[59] *SA Reserve Bank v Shuttleworth* 2015 (5) SA 146 (CC) at para 42 (hereafter '*Shuttleworth*').

[60] *CIR v Insolvent Estate Botha t/a Trio Kulture* 1990 2 SA 548 (A) 558 (hereafter '*Trio Culture'*).

[61] *CIR v MacNeillie's Estate* 1961 3 SA 833 (A) 838.

[62] *Metcash* at para 53.

[63] *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) paras 96–104; *De Reuck v DPP, Witwatersrand Local Division* 2004 1 SA 406 (CC) at para 57. In *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) at para 46 the Court held: 'Laws must … be written in a clear and accessible manner. Impermissibly vague provisions violate the rule of law … . For the "law" to "rule", it must be reasonably clear and certain.' See also *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) at para 47.

[64] *Affordable Medicines* paras 108–109. See also *Kruger v President of the Republic of South Africa* 2009 1 SA 417 (CC) paras 64–67.

[65] *Per* O'Regan J in *Bertie van Zyl (Pty) Ltd v Minister of Safety and Security* 2010 2 SA 181 (CC) at para 102 (hereafter '*Bertie van Zyl'*).

[66] *Bertie van Zyl* at para 52.

associated with taxation, both to the taxpayer and the fiscus; (ii) it ensures legislative clarity and avoids complexity; (iii) it enables SARS officials to understand their powers and duties thereby rendering tax administration easier by persons untrained in law; (iv) it promotes enhanced understanding by taxpayers of their rights and duties; (v) it fosters improved tax compliance because of a taxpayer's ability to comprehend his duties and to appreciate the penalty regime for non-compliance; and (vi) it minimises tax disputes and costly litigation. Thus, the language of a fiscal statute must be sufficiently clear to enable taxpayers to know (i) their rights, (ii) their duties, and (iii) the powers of SARS. Such reasonable clarity would enable taxpayers to conform their conduct in compliance with the relevant legislation.

### *Application of the principle of legality*

The principle of legality is an incident of the rule of law.[67] During the apartheid era, this 'value-neutral'[68] principle was construed narrowly at common law to be no more than a limitation on administrative action. This failed to reflect a broad normative commitment to the rule of law in a substantive sense.[69] Legality is, in SA's post-apartheid democratic era, wider in meaning. It is a constitutional principle requiring public power to be exercised in a just, fair, rational, non-arbitrary, non-capricious manner. Also, legality requires public power to be duly authorised in a law that is both accessible to the public and couched in clear, non-contradictory, understandable language.[70] By regulating the way in which all public power is exercised, the Constitution sets boundaries for the lawful exercise thereof.[71] Hoexter[72] describes legality as evolving into a 'complete parallel universe of administrative law'. Fundamental to this principle is determining the proper source of power. All public power, including the power to tax, stems from the Constitution or legislation contemplated by it.[73] Subjecting public power to legality is a primary object of constitutionalism, namely, 'the idea of legality writ large'.[74]

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[67] *Chonco* at para 27.
[68] Currie and De Waal *Bill of Rights Handbook* (2014) 12.
[69] Baxter L *Administrative Law* (1984) 77–79.
[70] Hoexter C *Administrative Law in South Africa* (2012) 122 states: 'The fundamental idea it [legality] expresses is that "the exercise of public power is only legitimate where lawful".'
[71] *Limpopo Province v Speaker, Limpopo Provincial Legislature* 2011 6 SA 396 (CC) paras 20–22; *Premier: Limpopo Province v Speaker, Limpopo Provincial Legislature* 2012 4 SA 58 (CC) at para 2.
[72] Hoexter *Administrative Law in South Africa* (2012) 124.
[73] *Pharmaceutical Manufacturers* paras 17–20; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) paras 56–59 (hereafter *Fedsure Life*).
[74] Michelman FI 'The Rule of Law, Legality and the Supremacy of the Constitution' in Woolman S et al (eds) *Constitutional Law of South Africa* 2 ed vol 1 (Original service 02–05) at 11–27.

Legality regulates the behaviour of all persons, spheres of government, state organs, structures and institutions exercising any constitutional power as autonomous agents.[75] The Court, in *Fedsure Life*,[76] emphasised that legality constrains the legislature and executive so that 'they may exercise no power and perform no function beyond that conferred upon them by law'. The Constitution decentralises power from the national government by conferring original taxing powers on the three spheres of government.[77] Within constitutional limits, Parliament may, as part of representative democracy, select such criteria it deems necessary for a person to fall within the tax net.[78] The process by which a decision is made to impose a tax must satisfy the principle of legality. This requires that a tax law (i) must be aimed at achieving a legitimate governmental purpose, (ii) must be rationally related to achieving that purpose,[79] (iii) must be passed in accordance with all procedural and substantive legal requirements, (iv) must be *intra vires* the powers of the legislative authority enacting it,[80] (v) must impose or regulate the administration of a constitutional financial charge or monetary burden, and (vi) must authorise tax administration techniques which are reasonably justifiable in an open and democratic society based on human dignity, equality and freedom. Thus, a taxing provision cannot be indiscriminate (or arbitrary), irrational, capricious or despotic. If it is, then such provision is susceptible to a declaration of invalidity for want of legality.

Constitutionalism, as part of the rule of law, requires that, for the lawful exercise of a taxing power, a financial charge or monetary burden imposed as a tax must serve a constitutional purpose. It is not required that such purpose be the main or sole objective sought to be achieved by a taxing statute. It suffices if this is a secondary or ancillary objective.[81] Therefore, constitutionalism constrains a legislature to exercise its powers within the straightjacket of the Constitution. This entails that (i) a taxing power must be exercised *intra vires*; (ii) a taxing power may not be misconstrued; and (iii) a decision to impose a tax or other related measure must be rationally

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[75] Kruger 2010 *PELJ* 477–478. See also *Judicial Service Commission v Cape Bar Council* 2013 1 SA 170 (SCA).

[76] At at para 58. The Court, in *Ngqukumba v Minister of Safety and Security* 2014 5 SA 112 (CC) at para 13, held that legality requires not only that government entities act under the 'colour of a law' but also within the law.

[77] *Kungwini Local Municipality v Silver Lakes Home Owners Association* 2008 6 SA 187 (SCA) paras 14, 44 (hereafter '*Kungwini*').

[78] Section 44(4), the Constitution. Yakoob J, in *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 1 SA 343 (CC) at para 29, held: 'The exercise of public power is always subject to constitutional control and to the rule of law or, to put it more specifically, the legality requirement of our Constitution.'

[79] *Matatiele Municipality v President of the Republic of South Africa* 2006 5 SA 47 (CC) at para 100 (hereafter '*Matatiele Municipality*').

[80] *Kungwini* at para 44.

[81] *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* 1993 176 CLR 555 569.

connected to the purpose for which the power was conferred.[82] If these requirements are not met, then the exercise of any such power is arbitrary and at odds with the Constitution. Thus, it is permissible for a tax to be levied as a means of bringing about redistributive justice.[83] Such an aim is consistent with the Constitution's social justice and human rights objectives. However, the legality of such a measure will, by and large, be determined with reference to whether the burden imposed is in the mould of a 'tax'[84] or a punitive, arbitrary or discriminatory imposition.[85]

South African law requires that all taxes must satisfy certain minimum standards for constitutionality. A constitutional tax is a prerequisite for lawful tax administration to occur.[86] When determining the constitutionality of an impugned fiscal provision, consideration must be given to whether there is a rational relationship between the scheme adopted by Parliament and the advancement of

> 'a legitimate governmental purpose in consonance with the rule of law and the very essence of constitutionalism.'[87]

To survive a rationality review, a provision under review need not be shown to be reasonable or appropriate.[88] The enquiry into rationality is objective.[89] A finding of rationality must be reasonably supported by concrete evidence. A fiscal statute, or a provision therein, may be declared invalid because its purpose is inconsistent with the Constitution, irrespective of its actual effects.[90] However, although a 'statute is facially neutral',[91] it may be declared invalid if the effect of the statute is unconstitutional. A taxpayer who objects to a fiscal statute or a provision therein bears the onus to establish the lack of a constitutional purpose or a rational link.[92]

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[82] *Democratic Alliance 1* at para 27; *Pharmaceutical Manufacturers* at para 20; *Masetlha* at para 81.
[83] Deak D 'Pioneering decisions of the Constitutional Court of Hungary to invoke the protection of human dignity in tax matters' (2011) 39 *Intertax* 534 539.
[84] As to the requirements for qualifying as a tax, see *Shuttleworth* paras 47–56.
[85] When determining the reasonableness or justifiability of any tax, relevant factors include the nature of any right infringed thereby, the underlying purpose of the tax, the extent and urgency of the mischief sought to be remedied thereby, the disproportion (if any) of its imposition, and the prevailing conditions at the time of its imposition. See *Balaji v IT Officer* AIR 1962 SC 123.
[86] Tax laws must conform to democratic principles and norms that express the rule of law (such as, legality, equality, fair play, annuality, certainty and non-retroactivity). See Luoga FDAM 'Taxpayers' rights in the context of democratic governance: Tanzania' (2002) 33 *IDS Bulletin* 1 at 3.
[87] *Sarrahwitz v Martiz* 2015 4 SA 491 (CC) at para 51.
[88] *New National Party* at para 24; *Pharmaceutical Manufacturers* paras 86 at 89–90.
[89] *Pharmaceutical Manufacturers* at paras 85–86; *ARMSA* at para 50.
[90] *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) at para 123.
[91] *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC) at para 90.
[92] *Matatiele Municipality* at para 100; *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) at para 55.

No tax is payable, and no taxpayer can be burdened with a tax liability or penalty, at the whim of SARS or its officials. Under the principle of legality, their conduct is lawful provided a power exercised by them is authorised in an enabling statute and their mode of conduct conforms thereto. This is a basic principle of tax law in section 143(1) of the TAA.[93] To be valid, administrative conduct must satisfy the requirements of legality. Rationality of decisions is a legal prerequisite. Rationality entails a rational connection existing between a decision taken in terms of a power conferred (that is, the means employed) and the aim sought to be achieved by the power (that is, the end).[94] For such rationality to exist, a decision must be 'founded upon reason — in contradistinction to one that is arbitrary — which is different to whether it was reasonably made'.[95]

## Conclusion

During apartheid, taxpayers were treated with indignity by administrators[96] (such as SARS's predecessor). The Constitution is a silver lining evidencing a crucial paradigm shift from SA's disgraceful past. It is a mirror reflecting the soul of SA's people and their commitment to a holistic program of transformation. This is the signature tune of the Constitution. Its spirit, purport and objects seek to create a transformed society in which every person, including the taxpayer, is fully and equally protected by, and benefits from, the rights and freedoms in the Bill, all of which are potent symbols of the hard-won transition to democracy and serve as a safe and stable foundation of the law. The Constitution envisages tax administration, a facet of broader public administration, which is 'efficient, equitable, ethical, caring, accountable and respectful of fundamental rights'.[97] This article shows that, by virtue of constitutional supremacy, taxation and tax administration are no longer regulated solely by SA's fiscal laws but also by the Constitution, the rule of law embodied in its spirit, as well as by PAJA which is legislation enacted in accordance with section 33(3) of the Constitution.[98] This article demonstrates further that the rule of law is a crucible for determining the validity of all tax laws and conduct relating to tax administration occurring in terms thereof.

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[93] Section 143(1) reads: 'A basic principle in tax law is that it is the duty of SARS to assess and collect tax according to the laws enacted by Parliament and not to forgo a tax which is properly chargeable and payable.'

[94] *ARMSA* paras 50–51.

[95] *Minister of Home Affairs v Scalabrini* 2013 (6) SA 421 (SCA) at para 65.

[96] *Van der Merwe v Taylor* 2008 1 SA 1 (CC) at para 72.

[97] *Van der Merwe v Taylor* 2008 1 SA 1 (CC) at para 72.

[98] For a discussion of fulfilling human rights through tax administration, see Moosa F 'Fulfilling human rights through taxation in South Africa' (2017) 32 *Insurance and Tax Journal* 9; Moosa F 'Tax Administration Act: Fulfilling human rights through efficient and effective tax administration' (2018) 51 *De Jure* 1.

# The Taxation of Carried Interest

MICHAEL RUDNICKI*

**ABSTRACT**

'Carried interest' is a term that is defined as the super profit that a private equity professional will earn if a private equity fund generates a profit in excess of its 'hurdle rate'. Carried interest forms part of the general partner's interest (the general partner bears the risk of loss of the partnership to the extent that it exceeds the limited partners' contribution to the partnership) in an *en commandite partnership* (silent partnership) and is disproportionate to its co-ownership in the underlying partnership assets. Partnerships are attractive from a tax perspective, as they are see-through vehicles that allow income and capital proceeds to flow directly to the partners of the partnership. Private equity professionals are employed by a fund manager and acquire their interests in the 'carry', typically in the form of a beneficiary interest in a vested trust. The vested rights to income are awarded to private equity professionals based on their seniority and experience.

The award of carried interest is usually characterized by a direct link to employment and, because the legal mechanism to acquire the benefit of the carry is in the form of a beneficiary interest in a trust, the acquisition is likely to constitute an equity instrument for purposes of section 8C of the Income Tax Act, 1962. The equity instrument is acquired up front and is unconditional, and therefore if the instrument is not restricted in terms of section 8C, the tax event from an employees' tax perspective arises at acquisition. There is a dichotomy, though, in the disparity between the value of carry acquired up front (regarded internationally as being nominal given the various probability variables in determining the future super-profit) and the potential gainful outcome which private equity professionals may generate, to the extent that the partnership assets perform favourably.

As the employment benefit is acquired and taxed up front (on the basis that the equity instrument is unrestricted), future benefits acquired by beneficiaries, in the form of income or capital proceeds derived by the trust, will retain their tax character in terms of legislated *conduit pipe* principles. The disparate tax treatment has caused a number of international legislators to apply particular tax rates, or to remove inflationary benefits to capital gains generated by the carried interest, which passes though the private equity structures, ultimately to the private professionals. Emphasis on this analysis suggests that the beneficiary interest is unrestricted for section 8C purposes. However, forms of disposal restrictions and so-called 'leaver' provisions are often required by various stakeholders, such as the remuneration committee and the limited partners, which may not achieve the same tax result.

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## Introduction

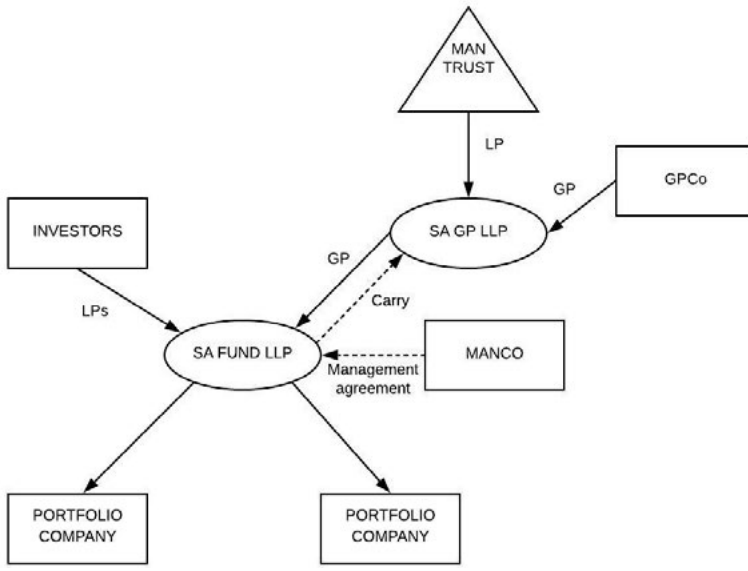
The taxation of carried interest has often been written about without a clear explanation of what the concept actually is. As is often the case when analysing the tax implications of complex transactions and terminologies, the trick really is to ignore the confusing labels and delve into the rights and obligations of the product or transaction. That is the precise intention of this article. The term 'carried interest' is synonymous with the private equity industry. Little has been written in this journal about this industry and the related tax consequences, and so besides this article, it may be useful, in an economy where growth is dismal and investment opportunities often appear below the surface, that many more articles covering the private equity industry are written.

The article starts with an illustration of a typical private equity legal structure and a brief description of its components and their purpose. The article then considers the salient tax principles associated with partnerships. The discussion up to this point is important in order to establish how and where carried interest fits into a private equity structure and what its purpose is. The article then deals with the fundamental tax principles associated with carried interest.

## A private equity partnership structure

Before dealing with the meaning of 'carried interest', it is important to understand how a typical Private Equity Fund is structured from a legal perspective.

The diagram below illustrates a typical Private Equity Fund Structure:



A typical Private Equity Fund is constituted by an *en commandite* partnership. The partners consist of limited liability partners, or partners *en commandite*, and a general partner who is also the managing partner of the partnership. The LPs comprise the investors in the fund. The GP typically takes the form of a partnership itself. Its partners are usually a vehicle such as a trust that houses the carried interest that accrues to management together with a partner that is exposed to the creditors' obligations outside the ring-fenced liability of the LPs.

> 'In a partnership en commandite, the partners en commandite are not liable to the partnership's creditors for partnership debts, but are liable only to the principal or disclosed partners, while a partner en commandite is liable only to the amount of his or her contribution to the partnership and is not disclosed to the public as being a partner.'[1]

Each partner contributes to the partnership and the contributions are collectively applied to invest in the underlying portfolio or investee companies. This type of partnership is common internationally in the Private Equity industry, as well as in South Africa, as it constitutes a see-through vehicle for tax purposes (discussed below).

The Limited Partners are protected in relation to their liability towards creditors in an amount equal to their contribution to the partnership, but are not held out to the world as partners—hence the term 'silent partners'. The General Partner ('GP') assumes unlimited liability.

Partnership law in South Africa is dealt with in terms of common law. The law is complex but two key *essentialia* of a partnership in a private equity context are:

- the entitlement to share profits; and
- co-ownership.

### *Profit sharing*

> 'One of the essentialia is that each partner must be entitled to share in the net profits of the partnership….The proportion in which partners share the profit is one of the naturalia and can be agreed to by the partners.'[2]

This is an important aspect in a Private Equity partnership model. Partners in a private equity context will share profits in a complex manner, often in a manner that is disproportionate to their partnership contributions, particularly the GP. In the diagram above, the GP Partnership will generate income commensurate with its capital contribution to the main partnership, but will generate a share of the profits disproportionate to its capital contribution when a partnership return hurdle is achieved.

The so-called super profit, or carried interest, is usually triggered once a specific profit hurdle is achieved (in South Africa usually between 8% and

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[1] Silke, electronic version, paragraph 11.9.
[2] *The New Companies Act Manual* 2 ed LexisNexis at 193.

11%). Income is distributed to partners in a Private Equity Fund in terms of a tiered payment system or waterfall.

A typical income distribution waterfall is the following:

- Return of capital
- Return of management fees
- Preferred return or hurdle
- Super-profit (80% distributed to limited partners and 20% (carried interest) to the fund management, usually held by a trust).

### *Co-ownership*

> 'One of the naturalia of a partnership is that partners are co-owners of the assets of the partnership in joint undivided shares, because a partnership is not a legal entity……The partnership fund comprises all the assets and rights which are jointly owned by the partners or to which they are jointly entitled …'[3]

The co-ownership element of a partnership interest is an important consideration for the taxation of partners. The distinction between the cost to a partner of a partnership interest and the cost to a partnership of acquiring an interest in the undivided property has been judicially considered.[4]

> 'That distinction was made by this court in Rane Investments Trust v Commissioner, South African Revenue Service 2003 (6) SA 332 (SCA) … at para 35:
>
> "The Commissioner argued further, however, that Ranes's expenditure was in respect of its acquisition of its partnership share, not in the acquisition of the film. That argument loses sight of the principle that in acquiring the share, Rane was also acquiring, as part of the business of the former partnership, a share in the film—already an asset. It was the expenditure on the film as an asset taken over by the new partnership that was deductible, and not the amount of R90 000 paid to become a partner."'[5]

## Tax treatment of a partnership and its partners

The tax treatment of a partnership *en commandite* per se is ignored (a partnership is not a person at common law or under section 24H of the Act)[6] and each partner will deal with income and expenditure derived in common in their respective capacities as partners.[7] The income of the partnership shall be apportioned among the partners and:

> '… determined in accordance with any agreement between such members as to the ratio in which the profits or losses of the partnership are to be shared …

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[3] *The New Companies Act Manual* 2 ed LexisNexis, page 194.
[4] In *Chipkin (Natal) (Pty Limited v Commissioner, South African Revenue Service* 2005 (5) SA 566 (SCA)]..
[5] *Chipkin supra*, at at para [9].
[6] *Chipkin supra,* at at para [11].
[7] Section 24H of the Income Tax Act 58 of 1962 ('the Act').

> such income shall, notwithstanding anything to the contrary contained in any law or the relevant agreement of partnership, be deemed to have been received by or to have accrued to each such member individually on the date upon which such income was received by or accrued to them in common.'[8]

Section 24H of the Act specifically defines a 'limited partner' as:

> 'any member of a partnership en commandite, an anonymous partnership, or any similar partnership or foreign partnership, if such member's liability towards a creditor of the partnership is limited to the amount which the member has contributed or undertaken to contribute to the partnership or is in any other way limited'.

A partnership, for tax purposes, is a see-through vehicle which is an attractive legal vehicle for private equity purposes, as multiple corporate layers between investors and portfolio companies, which may result in possible tax leakage, are avoided. Accordingly, limited partners' and the general partner's interest from a tax perspective are determined solely with reference to the underlying assets (or portfolio companies) and the profit-sharing ratio contained in the partnership agreement.

## What is carried interest?

The discussion above establishes the legal and tax principles applied to interests in an *en commandite* partnership. These principles look through the various structures starting from the respective partners to the underlying portfolio companies. The carry return is reflected in the diagram above which flows from the main partnership to the GP partnership.

The term 'carried interest' is well known in the private equity industry. The term possesses a mystery, often in the minds of those who do not participate in the industry, as to its purpose and effect and legal meaning. It is often thought of as super profits for private equity professionals: it is why they are 'in the game'.

Various definitions are contained in different sources around the world, but the definitions are usually consistent from an international perspective.

> 'Carried interest—an interest in a partnership which provides that the holder is entitled to participate in the "super profit" made by the fund which is allocated to the carried interest holders.'
>
> 'Carried interest holders—individuals who are partners in the fund partnerships … who are employees or directors of the general partner or an associated company, who normally provide only capital to the partnership and who are entitled to share in the "super profit" made by the fund.'[9]

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[8] Section 24H(5) of the Act.

[9] Memorandum of Understanding between the BVCA and the UK Department of Inland Revenue on the income tax treatment of Venture Capital and Private Equity Limited Partnerships and Carried Interest, 25 July 2003.

> 'The sponsor of a private equity fund is entitled to a profit participation (also known as carried interest, carry or success fee) that is usually a set percentage of profits (typically 20%, but can be higher or lower).'[10]

The carried-interest holder, usually structured via a partnership (refer above diagram), houses management's interest in the carry vehicle. The 20% carried interest is attributed to the GP partnership, and usually the bulk of the GP partnership's distribution of the carry is to management and the remainder to the GP Company which acts as the general partner of the GP partnership, and is usually the entity that bears the risk of loss of any amount above the LP's contribution

Management's share of the carry is usually held in a vesting trust. The Trust will issue units or vested rights to income and capital to the fund manager's executives. Given the various degrees of uncertainty and probabilities inherent in these units' value up front, it is commonly accepted by most valuation experts as well as HM Revenue and Customs ('HMRC') in the United Kingdom, that the value of carried interest upon its acquisition is zero. Therefore, by implication, the value of the trust units must be negligible too.

## What is the *causa* for the acquisition of carried interest?

The discussion above, echoed by many international tax authorities, suggests that the securities (in whatever form, but in South Africa, commonly constituting beneficial interests in a vesting trust) are employment related, if the right to acquire them is made available by the employer or a person related to the employer.[11] HMRC in the UK also regards the carried-interest value to be equal to the amount actually paid for it, if a number of conditions are satisfied, viz:

> 'the only restrictions applying to carried interest are leaver, vesting restrictions, and general transfer restrictions'.

From a South African tax perspective, the question is whether the vested rights acquired by beneficiaries of the trust (a personal right to the income of the trust) are acquired by virtue of employment. And if these units meet the 'by virtue of employment' test, consideration would need to be given to the provisions of section 8C of the Act. This article focuses specifically on the *causa* of the trust unit acquisition and not on a detailed analysis of the provisions of section 8C.

The 'by virtue of employment' concept has been examined in various decided cases. The phrase contemplates a causal link between the rights

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[10] *Private Equity Fund Formation*, Scott W. Naidech, Chadbourne & Park LLP, Practical Law Company, 2011, page 6, http://us.practicallaw.com/3-509-1324

[11] See also Employment Related Securities Manual, HM Revenue & Customs, published 18 May 2016, updated 19 February 2018.?

acquired and employment and services rendered.[12] The determining cause or *causa causans* is a defining test in establishing the link with employment or services rendered.[13]

In the context of Private Equity, the determining reason and a causal relationship between joining a Private Equity organization and the acquisition of trust units that are acquired to generate carried interest must be established.

Private Equity professionals are employed by a Fund Manager whereby they earn their salary and often a bonus. The Fund Manager funds its operation expenses from fees it charges to the Limited Partners. The main reason an individual would take up employment with a Private Equity manager is the possibility of generating super profits from the Private Equity Fund. It is highly unlikely that a Private Equity professional would take up employment without this potential benefit.

The carry benefit award (i e the vested right acquired) is determined based on the seniority of the particular professional and is awarded up front. In other words, performance conditions do not determine the ultimate super profit quantum. The right to the super-profit is determined up front and no further conditions need to be met in order to ultimately benefit from this right. It may happen that the professional is promoted within the fund manager over time and in this instance, the individual concerned may be awarded additional vested rights.

The beneficiary rights are usually capable of transfer within a restricted market and at market value and often 'leaver' terms will be regulated in the trust deed.

Accordingly, it is submitted that if the up-front benefit acquired by an employee of the fund manager is a benefit with a determinative employment *causa,* then that benefit must be acquired 'by virtue of employment' and taxed accordingly in terms of the provisions of section 8C of the Act. As the value of the right acquired up front is nominal, and if the right is unrestricted, as contemplated in section 8C of the Act, the employment benefit, vis-à-vis the carry, will be taxed upon acquisition and on its nominal value at the time. These rights are usually unrestricted in terms of section 8C. Super profits are generated by effluxion of time, which achieves an implied employeeretention objective. In other words, given the fact that typically, the rights only produce value towards the end of the holding period of the portfolio company/ies (usually around 7 to 10 years), the decision to leave the employ of the fund manager before the end of the holding period is by implication curtailed. This feature often supports the objective of not imposing restrictions on the vesting rights.

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[12] *Stevens v Commissioner, South African Revenue Service* 2007 (2) SA 554 (SCA) at para 20.
[13] *Stander v Commissioner for Inland Revenue* 1997 (3) SA 617 (C), 59 (1997) SATC 212 (C).

Upon receipt by the Trust of its proportionate share of the carried interest, the beneficiary (employee) will acquire a personal right to the agreed proportion of the trust's income. This personal right is distinct from the vested, contractual right acquired up front, acquired by virtue of employment. This personal right, it is submitted, is acquired *qua* beneficiary and therefore is not imbued with an employment characteristic. The personal right is the potential enjoyment feature acquired up front and is distinct from the right acquired up front *by virtue of* employment. Accordingly, while the right acquired up front is acquired by virtue of employment (which is likely to be taxed in terms of section 8C of the Act albeit at a nominal or zero value) the personal right acquired as a beneficiary of the trust is likely to be taxed in terms of the normal trust *conduit pipe* principles.

# Expatriate Employees:

## TO FACILITATE AND PAY FOR THEIR TAX COMPLIANCE IS A TAXABLE BENEFIT

KEVIN BURT*

**ABSTRACT**

The author discusses the recent unanimous judgment of the Supreme Court of Appeal in *BMW SA (Pty) Ltd v C:SARS*. BMW SA brought the appeal because it was aggrieved by SARS's decision to assess, as taxable benefits, payments BMW SA had made to tax consultancy firms that had assisted expatriate employees to comply with South Africa's tax laws during their secondments in South Africa. The focus of the discussion is the rejection by the Supreme Court of Appeal of the BMW SA's contention that the firms' services were 'at least in part' utilised by BMW SA. In the light of his analysis of the judgment, the author concludes that the conclusion reached by the Supreme Court of Appeal that the firms' services had only some 'peripheral advantage' to BMW SA is open to question.

### Introduction

Until the judgment of the Supreme Court of Appeal in *BMW SA (Pty) Ltd v Commissioner, South African Revenue Service*[1], which was delivered on 6 September 2019, companies in South Africa that employ individuals seconded to work in South Africa by companies for whom they work overseas, understood that they would not be granting a taxable benefit to these employees by paying for the services of professional (mostly accounting) firms, which would assist their complying with our tax laws during their secondments in South Africa. They understood that SARS would not attempt to assess such necessary payments as being taxable benefits in the hands of these employees. This was on the understanding that facilitating compliance with our tax laws was to the advantage of SARS and the country. The judgment is, therefore, likely to be controversial.

I have a few observations regarding the judgment. However, let me first summarise the facts, which culminated in the appeal to the Supreme Court of Appeal.

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[1] [2019] ZASCA 107.

## Factual background

Employees of the BMW Group, who resided overseas, were seconded to work for BMW SA (Pty) Ltd ('BMW SA') in South Africa (they are referred to as 'expatriate employees' in the judgment). While they were working in South Africa, the expatriate employees were obliged to register with SARS and to prepare and submit annual income tax returns. In the 2004–2009 tax years, these obligations were imposed by the Income Tax Act 58 of 1962 ('the Act'). They were, also, obliged to prepare and submit annual income tax returns in their home countries. BMW SA, in accordance with the tax equalisation policy of the BMW Group, agreed to pay the income tax due by the expatriate employees for each of those tax years. BMW SA engaged tax consultancy firms ('the firms') to ensure compliance by the expatriate employees with their local tax obligations. The firms charged a flat fee for each expatriate employee to whom they rendered these services. BMW SA paid the fees of the firms. SARS queried the payments made to the firms and concluded that they were taxable benefits in the hands of the expatriate employees.

## Discussion

The legislative scheme applicable to the taxation of taxable benefits, which are also commonly called fringe benefits, consists of paragraph (i) of the definition of 'gross income' in section 1 of the Act and the provisions of the Seventh Schedule to the Act.

Paragraph (i) of the definition of 'gross income' in section 1 provides that there shall be included in gross income in relation to a tax year:

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

One such taxable benefit, under paragraph 2(*e*) of the Seventh Schedule, is the rendering of any service, whether by the employer or by some other person, to an employee, where the service has been utilised by the employee for his or her private or domestic purposes and no consideration has been given by the employee to the employer for the service. Accordingly, if any service is rendered to an employee without his or her having to pay for it, as a benefit or advantage of or by virtue of the employee's employment with the employer or as a reward for services rendered or to be rendered by the employee to the employer, it is a taxable benefit.

It is the second of BMW SA's contentions before the Supreme Court of Appeal, which is the central point of this article. BMW SA contended that the services of the firms were, also, procured by it 'in pursuit of its tax

equalisation policy'.[2] Thus, so it was contended, the firms' services were 'at least in part' utilised by BMW SA. BMW SA relied on the proposition as stated in D Davis et al Juta's Income Tax[3]:

> 'The use [of the service] must be wholly private or domestic—if used partially for the business or affairs of the employer, it falls outside this provision.'

At paragraph [25] of the judgment, the Supreme Court of Appeal held that the above statement by D Davis et al is 'too strongly worded'. According to the Supreme Court of Appeal, BMW SA's reliance upon it was misplaced. The Supreme Court of Appeal went on to hold that, whilst 'there might have been some peripheral advantage to BMW SA', in that the income tax returns of the expatriate employees 'could be utilised in checking the accuracy of their own [i e BMW SA's] calculation[s] and otherwise utilising the data', that is irrelevant and that SARS correctly applied paragraph 2(*e*). The Supreme Court of Appeal accepted that there will be instances in which a service rendered by an employer or some other person, which is a taxable benefit granted by the employer to the employee under paragraph 2(*e*), may advantage the employer residually or marginally, but that is irrelevant if the service has been utilised by the employee for private or domestic purposes and the employee has not paid for it.

I would observe three things in regard to the part of the judgment of the Supreme Court of Appeal referred to above. Firstly, by holding that the advantage of the firms' services was a 'peripheral advantage' to BMW SA, the Supreme Court of Appeal reveals, it is submitted, that it might not have fully appreciated the extent of BMW SA's reliance on the firms' services. The firms, assisted by professional firms in the expatriate employees' home countries, would have calculated the income tax payable by the expatriate employees in their home countries, and notionally deducted it from their home pay to calculate their home net pay, to which would have been added any allowances to which they were entitled in South Africa, in order to calculate their local net pay. The firms would, then, have calculated the income tax due in South Africa on their local net pay for each tax year, and would have also calculated the amount by which their local net pay would have to be grossed up, to account for the fact that payment of their income tax was itself a taxable benefit in their hands.

There was no evidence led by BMW SA that it made its own calculations, which it then checked against the calculations made by the firms. The probabilities are that BMW SA and BMW AG, its parent company in Germany, had to have placed more than 'marginal' or 'residual' reliance on the firms' calculative output. The cost of paying the expatriate employees' income tax would have been a large part of the total cost to the company of the secondments, and would have been information utilised by it in

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[2] See paragraph [20] of the judgment.
[3] Volume 3, Schedule 7, paras 2–5.

planning the number of secondments and the duration of each secondment. With respect, the remark by the Supreme Court of Appeal that BMW SA might have otherwise utilised 'the data', loses sight, in my view, of just how vital this information would have been in the taking of company decisions regarding inbound expatriate employees.

Secondly, the Supreme Court of Appeal did not ask itself why BMW SA did not give the expatriate employees a choice to utilise the services of a professional firm of their own choosing in South Africa. Therefore, it did not occur to it that, had it left the choice to the expatriate employees, it would have given rise to the potential of the expatriate employees' annual income tax liabilities being understated or overstated. Either result would have exposed BMW SA to financial and reputational risk, which is anything other than a 'marginal' or 'residual' risk. It was common cause that the payments to the firms were 'in order to protect the interests of BMW SA and the BMW Group'.[4] Yet the Supreme Court of Appeal did not make any reference to this common cause fact in the judgment.

Thirdly, as the remark made at paragraph [24] of the judgment quoted below reveals, the Supreme Court of Appeal did not appreciate reality:

> '[The services rendered by the firms] were services that the expatriate employees would otherwise have had to pay for personally.'

To posit, as the Supreme Court of Appeal did (and the Full Court and the Tax Court before it did), that local employees of BMW SA would have had to pay for the services of a professional firm and thus so would the expatriate employees have had to pay for these services had they not been paid for by BMW SA, was, in my view, to make a false comparison. The expatriate employees would not have paid personally to comply with the tax laws of South Africa. They had, it must be remembered, to continue to pay the fees of professional firms in their home countries to comply with the tax laws there.[5] Had BMW SA not agreed to pay for the services to be rendered by the firms, they would in all likelihood not have agreed to be seconded.

## Conclusion

In light of the aforegoing observations, the conclusion reached by the Supreme Court of Appeal that the firms' services had only some 'peripheral advantage' to BMW SA is open to question. Which raises the question, what if, on particular facts, the advantage to the employer is indeed not 'peripheral', 'marginal', or 'residual'. In such a case, the question whether the service was for the employee's private or domestic purposes is not settled by the judgment of the Supreme Court in *BMW SA (Pty) Ltd v C:SARS*.

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[4] See paragraph [4.9] of the judgment of the Tax Court.
[5] See paragraph [5] of the judgment.

# In This Issue

- Democratic Principles Underpinning Tax Administration in SA
- The Taxation of Carried Interest
- Expatriate Employees: To Facilitate and Pay for Their Tax Compliance is a Taxable Benefit

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