SNG Grant Thornton

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Tax Articles - Will the recent Italian Supreme Court ruling influence the relevance of OECD Guidelines for Tax Authorities?

In a recent case (Cassazione Civile, Sezioni Unite, Sentenza n. 26432/2024, October 10, 2024) involving an Italian manufacturing company, the Italian Supreme Court ruled that the OECD Transfer Pricing Guidelines ("OECD Guidelines") serve as technical tools rather than legal sources, aiding in the application of transfer pricing laws.

The case centered on an Italian company that was assessed for its approach to determining the value of its intra-group transactions. The company preferred the comparable uncontrolled price method, while the tax authorities used the transactional net margin method. Both lower courts dismissed the company's appeal, and the Supreme Court upheld this decision, noting that the transactional net margin method was suitable due to the low-risk nature of the transactions. The court highlighted that it is the responsibility of the taxpayer and tax authorities to select the most appropriate method, without strictly adhering to the OECD Guidelines' recommended hierarchy.

The ruling by the Italian Supreme Court has raised important questions about the status of the OECD Guidelines and their application by tax authorities. By asserting that the OECD Guidelines are not legally binding but rather technical tools to support existing legislation, the court has broadened the interpretation of how the OECD Guidelines can be adopted in practice.

The ruling may influence tax authorities in other jurisdictions, prompting them to reconsider how they rely on the OECD Guidelines. If the OECD guidelines are viewed primarily as non-binding recommendations rather than strict rules, tax authorities might adopt a more flexible approach to their application. This may result in greater flexibility in choosing methods for determining transfer pricing and valuing intra-group transactions.

In South Africa, the OECD Guidelines are followed in the absence of specific guidance from local regulations, or the tax treaties. While the OECD Guidelines provides a valuable framework, the ruling emphasizes that adherence to these guidelines is not mandatory, and that local regulations and practices must also be taken into account.

Considering this development, it is possible that other tax authorities, including SARS, might follow suit and allow greater flexibility in the application of the principles outlined in the OECD Guidelines. This could result in a more tailored approach to transfer pricing, where methods are chosen based on the specific circumstances of each case rather than strictly adhering to the methods recommended in the OECD Guidelines.

Ultimately, the Italian Supreme Court's ruling has the potential to transform how tax authorities worldwide, including those in South Africa, interact with the OECD Guidelines. As global tax standards develop, this decision highlights the importance of reconciling international guidance with local legislative frameworks.

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How Non-Resident Taxpayers Can Avoid Being Double Taxed on their Two-Pots Savings Withdrawals in South Africa

Effective from 1 September 2024, the South African government introduced the "two-pots" retirement system into the retirement savings regime. With this system, retirement savings are split into three components: a "vested component," a "savings component," and a "retirement component."

A vested component is made up of retirement savings as of 31 August 2024. From the 1st of September 2024, the retirement contributions are split into two components, one-third of the contributions goes to the "savings component" and two-thirds goes to the "retirement component". From this date, members can withdraw funds allocated to the "savings component" once every tax year should they need to, for example, in the case of financial distress or emergency. The minimum withdrawal amount is R2 000 and is taxed at marginal income tax rates.

What happens if you are a non-resident taxpayer, and you are susceptible of being double taxed on your two-pots savings withdrawal both in South Africa and your country of residence?

South Africa is party to numerous Double Taxation Agreements (DTA), which are designed to prevent double taxation by ensuring that specific income is taxed only once. As a result, you may qualify for tax relief in South Africa, meaning that your two-pots savings withdrawal benefit income would be taxed solely in your country of residence.

You can apply for a directive for the relief of the withholding of Employees' Tax from your two-pots savings withdrawal benefit by completing the RST01 application form. The RST01 application process was initially designed by SARS to formalise claiming relief in terms of a DTA in respect of pensions and annuities, and now it also applies to two-pots savings withdrawals. This form is currently used as an interim measure to allow non-resident fund members to apply for the relief from South African tax on the two-pots savings withdrawal benefit income, effective from 1 September 2024.

It is essential to point out that the requests on the RST01 application form should be in terms of the existing DTA between South Africa and your country of residence. The tax office in the country of your residence must certify on the RST01 application form that you are a resident of that country in terms of the DTA between South Africa and your country of residence. You will also be required to provide a tax residency certificate from the tax office in the country of your residence.

What is the duration of Validity of the RST01 Tax Directive?

The tax directive for the two-pots savings withdrawal benefits is valid until the end of the tax year in which the withdrawal takes place and must be applied for every year of withdrawal from Savings Component.

Additional Considerations:

- Savings Withdrawal Benefit tax directive: the RST01 directive outcome must be provided to the fund to submit with the IRP3(a) for Two Pot Savings Withdrawal Benefit application as confirmation of the tax rate applicable to the Savings Withdrawal Benefit.
- Tax emigration: if you have emigrated from South Africa, it is recommended that you formalise your tax residency status with SARS first before lodging an RST01 application.
- When to submit your tax directive application: The tax year runs from March to February every year, so you will need to apply for the tax directive before the end of the tax year while ensuring that SARS has sufficient time to review your application and issue the tax directive within this period. If you are uncertain about your eligibility or the application process, consider consulting a tax professional for guidance. Our qualified tax practitioners and consultants can assist you in completing the necessary forms and paperwork in order to avoid any delays.

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Changes to SARS verification requests

On 11 December 2023, the South African Revenue Service (SARS) issued communication indicating that estimated assessment functionality for VAT which may be issued in terms of section 95(1)(c) of the Tax Administration Act (TAA) has been implemented. An estimated assessment is an assessment that SARS may raise when a vendor fails to submit the supporting documentation requested by SARS within the required timeframe in respect of the tax period which has been selected for verification.

SARS previously issued standard system generated requests, i.e. the so-called "Verification of Value-Added Tax Declaration VAT 201" letters, to vendors in which certain information would be requested for the tax period selected. With the announcement made by SARS on 11 December 2023, we have observed that SARS requests comprehensive information which extends beyond the declarations made in the particular tax period under verification. Such information may require extensive time and involvement to compile and submit to SARS. If a vendor fails to submit the relevant information to SARS within the stipulated timeframe, SARS may raise an estimated VAT assessment including penalties and interest.

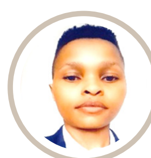
It should be noted that a request for correction will not be permissible where SARS has raised an estimated assessment for the same tax period. However, in terms of section 95(6) of the TAA, a vendor may, within 40 business days from the date of assessment, or a longer period as the Commissioner may prescribe by public notice, request SARS to make a reduced or additional assessment by submitting a true and full return or the relevant material. A vendor is allowed to submit a request for extension should they not be able to submit the required documentation within 40 business days provided that reasonable grounds exist.

It should be noted that an estimated assessment is not subject to an objection or an appeal until a final outcome is issued by SARS after the submission of the supporting documents by the vendor.

Where an estimated assessment results in the taxpayer being in a tax payable position, the taxpayer is allowed to submit a request for suspension of payment.

We therefore encourage vendors to take note of this announcement and ensure that SARS is provided with all the required information or documentation within the stipulated timeframes to avoid any delays in payment of refunds and/or unnecessary assessments being issued.

Authors:



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Case Law (Summary of the recently issued judgement)

IT 45781

In this case, the Taxpayer appealed against the additional assessment issued by the Commissioner for the South African Revenue Service (SARS) pertaining to its income tax return for the 2013 year of assessment. In raising additional assessment, SARS disallowed the deduction of advance payments amounting to R1.737 billion on the basis that they do not meet the requirements of section 11(a).

The facts of the case are briefly as follows:

The Taxpayer entered into a contractual business arrangement with the foreign supplier in terms of which the Taxpayer purchased from the foreign supplier the PGM-bearing material to extract PGM. The Taxpayer was required to pay the purchase price for each delivery on the settlement date after refining the materials. The purchase price for the materials became quantifiable and payable when refined metals emerged from the "pipeline, some five months after delivery date had elapsed. The taxpayer was required to make advance payments that will be used to reduce the purchase price of the materials once the price becomes quantifiable.

Legal issue:

The court was called upon to consider whether the advance payments were in substance loans, as SARS contended, or pre-payments or advanced payments in respect of the purchase price for PGM-bearing materials as contended by the taxpayer.

Taxpayer's arguments:

The Taxpayer argued that the advance payments made by it to its foreign supplier of PGM-bearing materials, in terms of the relevant (initial and subsequent) agreements, properly interpreted, were payments in advance or part-payments in respect of the purchase price of the unrefined PGM-bearing materials purchased by it, and constitute expenditure incurred in the production of income, thus ,qualify for tax deductions. The taxpayer's main contention was that the payments were explicitly structured and intended by the parties to be advance payments or part-payments towards the eventual purchase price of the PGM materials supplied by a foreign supplier.

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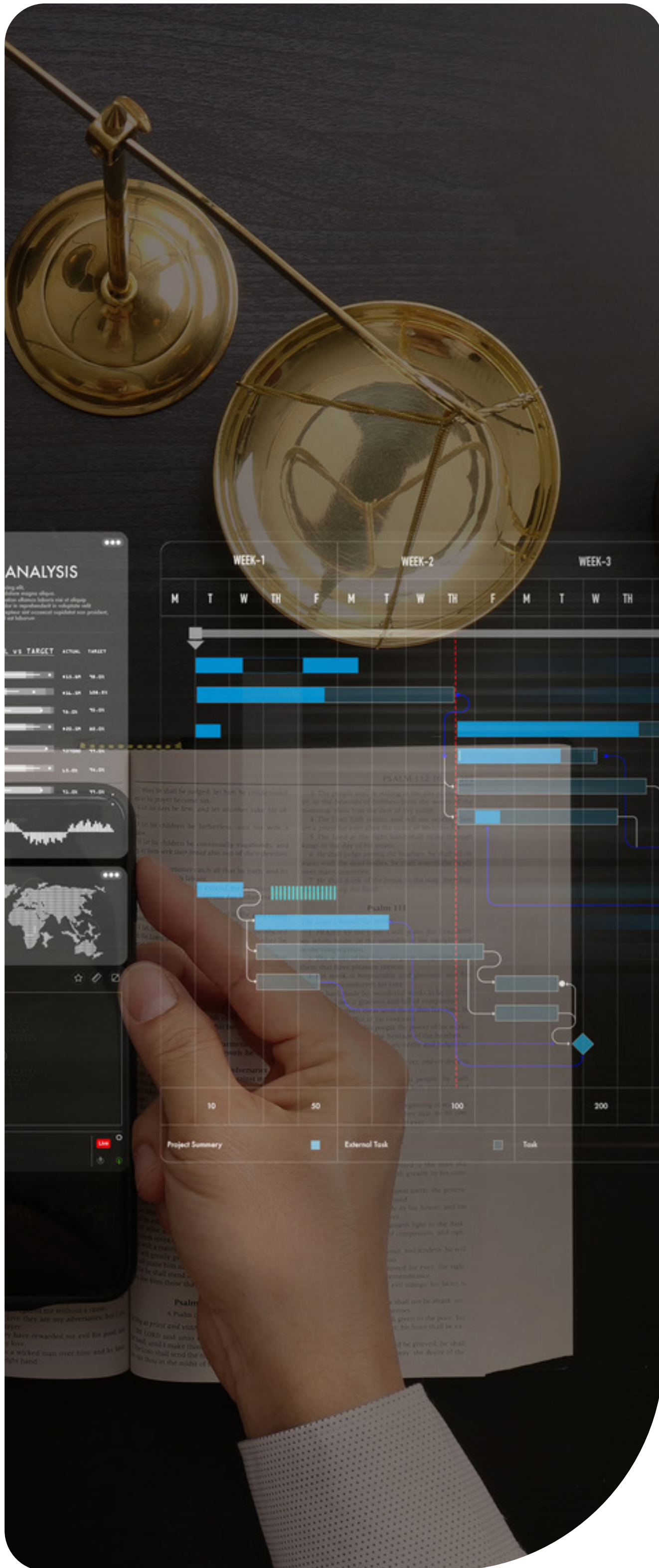

SARS' Arguments:

SARS argued that the so-called "advance payments" made by the Taxpayer to its foreign supplier under the various agreements were not actually advance payments or part-payments for the purchase of unrefined PGM-bearing materials but were in substance capital loans.

SARS noted that the subsequent agreements expressly acknowledged, recorded and disclosed the outstanding amounts as "loans" that needed to be repaid by foreign supplier to the Taxpayer with interest, further indicating the true nature of the payments.

The Taxpayer, as noted by SARS, recorded and disclosed these advanced payments as loan accounts in its own Annual Financial Statements (AFSs). This further demonstrates, according to SARS, that the parties themselves recorded and disclosed the advance payments as loan accounts.

Court decision:

The court considered and interpreted various agreements entered into between the Taxpayer and the foreign supplier. The court concluded that the loan obligation was created with subsequent conduct of the parties involved.

The court found that advance payments were converted into long term loans with specific repayment terms, which attract interest.

As a result of the subsequent conduct of the Taxpayer and foreign supplier, the court concluded that the advance payments were loans, not pre-payments or advanced payments in respect of the purchase price for PGM-bearing materials, thus not deductible for income tax purposes.

The Taxpayer's appeal was dismissed accordingly, and SARS' additional assessments confirmed.

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Recently Published Binding Rulings

Binding General Rulings

Number	Date of issue	Applicable Legislation	Subject
BGR 74	03 October 2024	Vat Added Tax, 1991.	VAT treatment of certain supplies of goods or services made by municipalities to a national or provincial government.

Binding Class Rulings

Number	Date of issue	Applicable Legislation	Subject
BCR 90	05 August 2024	Income Tax Act, 1962 Securities Transfer Tax Act, 2007.	Award of listed shares under a share incentive scheme.

Binding Class Rulings

Number	Date of issue	Applicable Legislation	Subject
BPR 412	24 October 2024	Income Tax Act, 1962	Tax consequences of the issue of a long-term loan for the issuer and holder
BPR 411	10 October 2024	Income Tax Act, 1962 Value-Added Tax Act, 1991	Tax consequences of a deemed input tax deduction under the VAT Act
BPR 410	11 September 2024	Income Tax Act, 1962	Disposal by a controlled foreign company of equity shares in a foreign company
BPR 409	5 August 2024	Income Tax Act, 1962 Securities Transfer Tax Act, 2007	Acquisition by a public benefit organisation of forfeited share incentive scheme shares
BPR 408	2 August 2024	Income Tax Act, 1962 Securities Transfer Tax Act, 2007	Corporate restructuring using section 42 of the Act
BPR 407	2 August 2024	Income Tax Act, 1962	Generation and supply of renewable energy

Available from: https://www.sars.gov.za/legal-counsel/interpretation-rulings/published-binding-rulings/

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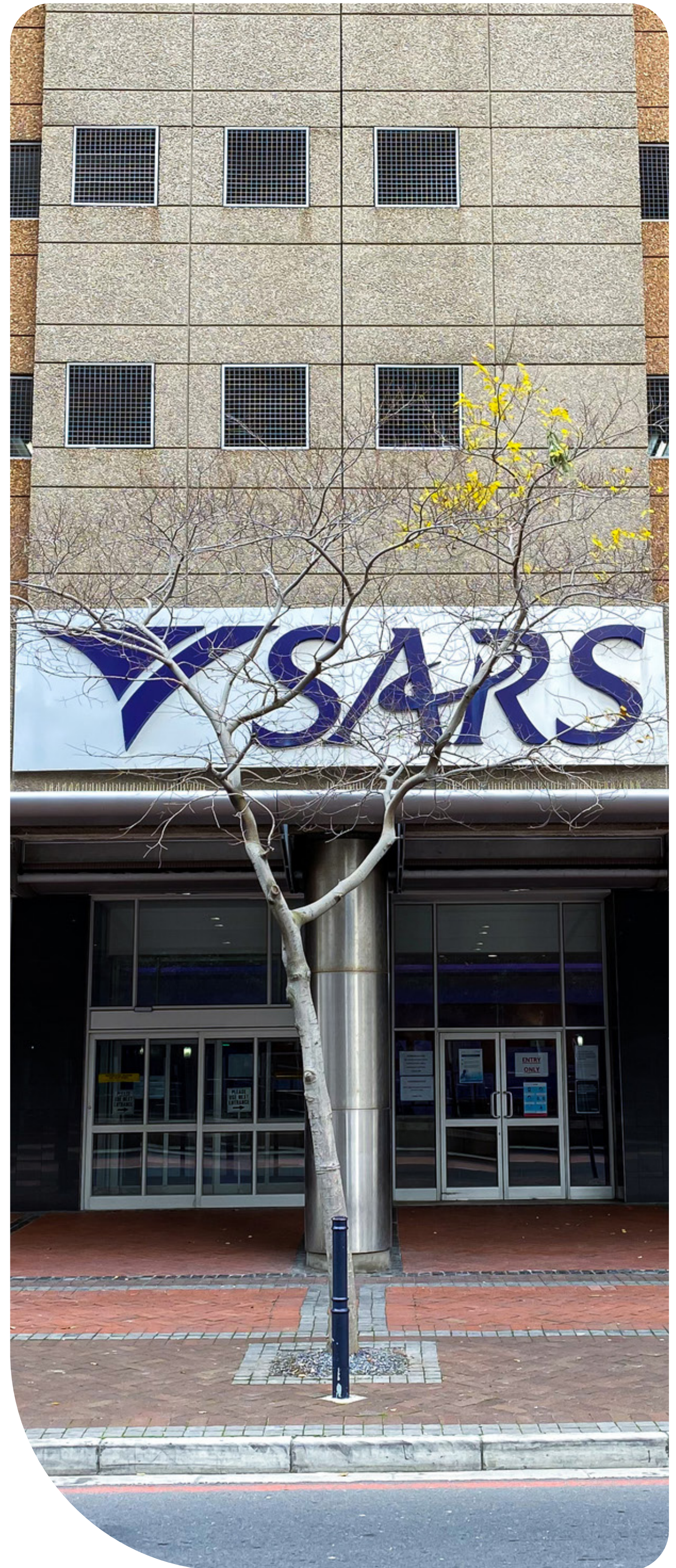
SARS Updates



Invitation to submit technical Annexure C tax proposals for 2025 Budget

The Minister of Finance announces new tax proposals in the Budget in February every year. The Budget Review, published with the Budget Speech, provides additional information on the tax proposals made in the Budget as well as proposed changes to tax legislation. The National Treasury invites taxpayers, tax practitioners and members of the public to submit technical tax proposals to be considered for possible inclusion in Annexure C of the 2025 Budget Review. The technical tax proposals requested in this invitation must be limited to unintended anomalies, revenue leakages, loopholes and technical matters applicable to the current tax legislation that require correction. The requested technical proposals should be submitted by no later than Monday, 25 November 2024.

SARS is keeping your eFiling and tax information safe with biometrics

On 01 November 2024, SARS announced that new eFiling registrations for Personal Income Tax may now require facial recognition. Biometric facial recognition authentication is being introduced for all individuals who register for eFiling using a valid South African ID. This applies to the eFiling website, the SARS MobiApp and the SARS Self Service Kiosks.

Donations Tax Declaration Form

With effect from 1 November 2024, the Donations Tax Guide has been updated with details of the latest version of the Donations Tax Declaration Form (IT144). The purpose of the guide is to assist with the completion of the IT144 form.

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