



DON'T BE INTIMIDATED INTO RELYING ON A SARS INTERPRETATION NOTE

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The SARS states, on its website (www.sars.gov.za), that its "Interpretation Notes are intended to provide guidelines to stakeholders (both internal and external) on the interpretation and application of the provisions of the legislation administered by the Commissioner".

However, this statement was brought into question by the Constitutional Court last year, in application for leave to appeal to that court in *Marshall NO v Commissioner for the South African Revenue Service*. While the application for leave to appeal was refused due to the applicant's poor prospects of success, the court decided to give its views on the reliance on the Interpretation Notes by courts when interpreting the tax legislation.

In this case, the High Court and the Supreme Court of Appeal were required to interpret provisions of the VAT Act. The Supreme Court of Appeal, in its judgment regarded Interpretation Note 39 as a persuasive, although non-binding, explanation of the meaning and application of the relevant provisions of the VAT Act.

In a short judgment, the Constitutional Court gave its view on the issue as follows:

"Missing from this reformulation is any explicit mention of the further fundamental contextual change, that from legislative supremacy to constitutional democracy. Why should a unilateral practise of one part of the executive arm of government play a role in the determination of the reasonable meaning to be given to a statutory provision? It might conceivably be justified, where the practice is evidence of an impartial application of a custom recognised by all concerned, but not where the practice is unilaterally established by one of the litigating parties. In those circumstances, it is difficult to see what advantage evidence of the unilateral practice will have for the objective and independent interpretation by the courts of the meaning of legislation, in accordance with constitutionally compliant precepts. It is best avoided."

In our view, this clarification of the status of Interpretation Notes by the Constitutional Court is to be welcomed. However, this does not mean that Interpretation Notes have no significance.

In terms of section 5(1) of the Tax Administration Act, a "practice generally prevailing" is "... a practice set out in an official publication regarding the application or interpretation of a Tax Act". An "official publication" is defined in section 1 of the Tax Administration Act to specifically include an Interpretation Note. The significance of this, is that if one is assessed in accordance with a practice generally prevailing, the SARS cannot subsequently change its mind and assess the taxpayer differently. Similarly, if there is no assessment by the SARS, e.g. for PAYE or VAT, if the taxpayer calculated its tax liability in accordance with the practice generally prevailing, the SARS cannot assess the taxpayer differently.

In conclusion, taxpayers are free to use an Interpretation Note as guidance, and even to rely on its provisions in support of a tax position taken. But equally, taxpayers are free to disagree with what is stated in the Interpretation Note and are in no way bound by its contents.

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