TAX & EXCHANGE CONTROL
ALERT

21 APRIL 2022

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INCORPORATING
KIETI LAW LLP, KENYA

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Riddle me a refund: An employee tax incentive saga

The Employment Tax Incentive Act 26 of 2013 (ETIA) creates a motivation, known as the employment tax incentive (ETI), whereby employees' tax may be reduced in terms of the formulae provided in the ETIA for the benefit of the employer. In its preamble, the ETIA explains that this measure aims to support employment growth in the face of South Africa's concerning rate of unemployment and for Government to share the costs of expanding job opportunities with the private sector.

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Riddle me a refund: An employee tax incentive saga

The Employment Tax Incentive Act 26 of 2013 (ETIA) creates a motivation, known as the employment tax incentive (ETI), whereby employees' tax may be reduced in terms of the formulae provided in the ETIA for the benefit of the employer. In its preamble, the ETIA explains that this measure aims to support employment growth in the face of South Africa's concerning rate of unemployment and for Government to share the costs of expanding job opportunities with the private sector.

In the case of *Taxpayer M v CSARS* (Case no: IT 45585) (as yet unreported), the appellant, Taxpayer M (Employer), was eligible to receive the ETI in respect of its qualifying employees. As required by the ETIA, the Employer timeously submitted its monthly employer declaration returns (known as an EMP201). During this time, an ETI in the amount of R3,757,633 was available to the Employer. However, in the employer reconciliation declaration (known as an EMP501), the Employer only claimed R2,344,503 of its available ETI. This was claimed as a reduction of its Pay-As-You-Earn (PAYE) debt to the South African Revenue Service (SARS).

In terms of paragraph 14(3)(a) of the Fourth Schedule to the Income Tax Act 58 of 1962, the EMP501 constitutes a "*self-assessment*". Approximately seven weeks after submitting the EMP501, the Employer objected to its self-assessment and submitted a revised EMP501 in order to correct the determination of its tax liability (or refund). In this revised EMP501, the Employer then included the amount of R1,413,130 (the understated amount) which it had underclaimed in its initial EMP501. It asked SARS to refund this amount.

SECTIONS 9(4) AND 10(3)

SARS rejected the objection, arguing that on a proper interpretation of sections 9(4) and 10(3) of ETIA, the Employer is not entitled to recover the understated amount.

Essentially, section 9(4) states that any amount of an ETI available to an employer that has not been used, will be deemed to be nil from the first day of the month following the end of the period for which the employer was required to submit a return, and cannot be rolled over to the next month. Employers are required to submit PAYE returns (EMP201's) on a monthly basis as PAYE is payable on a monthly basis. The monthly PAYE periods for employers are grouped into six-month periods; any unclaimed amounts within that monthly period can be rolled over to be claimed in the next month. However, this provision means that on the first day after the relevant six-month period has ended, the amount of an ETI available for rollover is deemed to be nil.

Section 10(3) similarly states than any excess amount claimed by an employer at the end of the relevant six-month period is nil in the month immediately following that period.

SARS contended that sections 9(4) and 10(3) create a time bar: no amounts may be claimed once the prescribed periods have expired. As the court noted, this argument amounts to a "*use it or lose it policy*". SARS was of the view that any unclaimed amounts would be forfeited in this case, which is consistent with the SARS Guide for Employers in respect of Employment Tax Incentive.

The Employer countered this argument by relying on fundamental statutory interpretation principles – emphasising that when reading these provisions in context and holistically as a whole act, it does not result in a forfeiture of its right to claim the understated amount.

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IMPORTANT RIDERS

As a point of departure, the learned judge relied on the seminal Constitutional Court case of *Cool Ideas v Hubbard* and *Another* [2014] (4) SA 474. In this case the Constitutional Court elucidated three "*important riders*" to the general principle that legislation should be given its ordinary grammatical meaning (unless doing so results in an absurdity):

1. statutory provisions should always be interpreted purposively;
2. the relevant statutory provision must be properly contextualised; and
3. all statutes must be construed consistently with the Constitution (i.e. to preserve their constitutional validity).

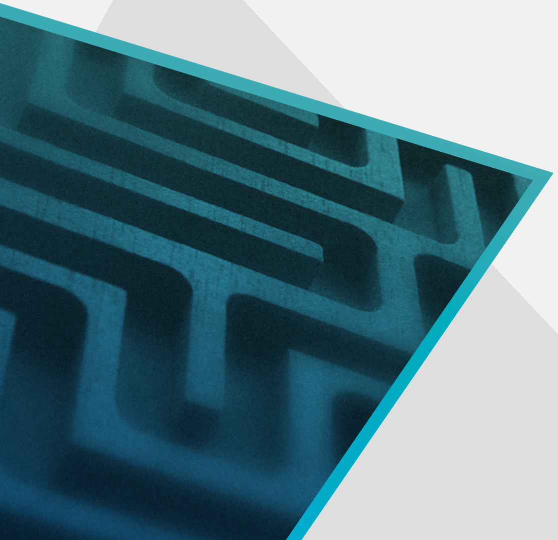
The court then considered National Treasury's explanatory memorandum (memo) on the Taxation Laws Amendment Bill 17B of 2016, which allows the ETI programme to be extended beyond its initial sunset date of 31 December 2016 (it has subsequently been extended to 28 February 2029).

In the memo, National Treasury explains that it proposes certain refinements to the application of the ETI programme, including a limit on back-dated claims. Essentially, the memo indicates that after the date for each six-monthly reconciliation, no further claims for that period are allowed. Rather, at that time any excess becomes available as a refund. The court noted that the memo does not contemplate the forfeiture of the benefit. In fact, the court found that except for section 8 of the ETIA (which does not apply in the current circumstances) there is no express forfeiture provision in the ETIA.

WHEN THE DEEMING PROVISIONS COME INTO PLAY

After considering a slew of case law, the learned judge agreed with SARS that the deeming provisions in both sections 9(4) and 10(3) are exhaustive. The court held that on a purposive and contextual reading, section 9(4) aims to prevent the rolling over of any excess amount at the end of the relevant six-month period. But, this does not mean the excess amount cannot be claimed as of that date. While the new period starts with a clean slate, the intention is not for an employer to lose the benefit of the entire unclaimed amount. Yes, an employer is prevented from rolling the excess forward, but it is not barred from claiming it as a payment from SARS. By reading this in context, the court held that the deeming provisions do not intend for the benefit to be lost to an employer; only from rolling the benefit forward and receiving that benefit twice.

The court agreed with the Employer that there is no link between these deeming provisions (i.e. sections 9(4) and 10(3)) and the date on which the Employer was obliged to render the EMP501. The deeming provisions only come into play on the date after the relevant six-month period ended.



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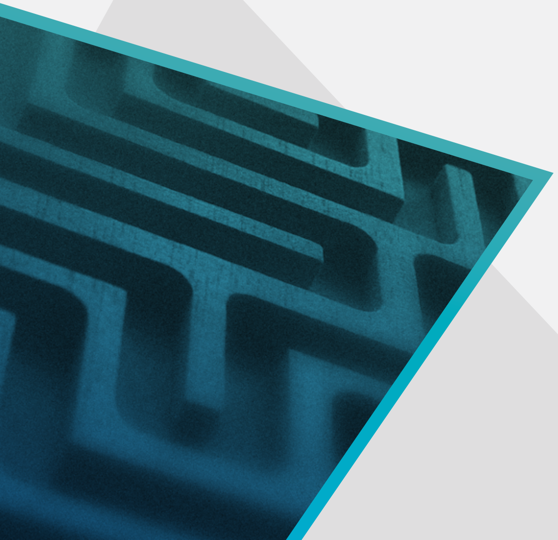
The court concluded that this interpretation is consistent with the stated purpose of the ETIA: to provide employers with a benefit to encourage job creation. Furthermore, the court confirmed that forfeiture of a benefit is an important consideration with serious consequences which the Legislature would have expressly addressed if that was the intention.

The court further held that if SARS' interpretation were to be followed, it would create uncertainty and taxpayers would be in a position where they would be unsure of whether they could rely on the ETI.

The court rejected SARS' contention that the Employer had forfeited the unclaimed amounts. Rather, the court ordered that the Employer is entitled to claim and receive payment of the understated amount.

The decision reached by the court is commendable. Post COVID-19 the ETI has been embraced more enthusiastically than before and it is a comfort to employers that unclaimed ETI amounts may be claimed as a refund. It is also a useful reminder that tax legislation is subject to the same principles of interpretation as any other legislation.

TAIGRINE JONES
OVERSEEN BY HOWMERA PARAK



2022 RESULTS

CHAMBERS GLOBAL 2018 - 2021 ranked our Tax & Exchange Control practice in Band 1: Tax.

Emil Brincker ranked by **CHAMBERS GLOBAL 2003 - 2022** in Band 1: Tax.

Gerhard Badenhorst was awarded an individual spotlight table ranking in **CHAMBERS GLOBAL 2022** for tax: indirect tax. **CHAMBERS GLOBAL 2009–2021** ranked him in Band 1 for tax: indirect tax.

Mark Linington ranked by **CHAMBERS GLOBAL 2017 - 2022** in Band 1: Tax: Consultants.

Ludwig Smith ranked by **CHAMBERS GLOBAL 2017 - 2022** in Band 3: Tax.

Stephan Spamer ranked by **Chambers Global 2019-2022** in Band 3: Tax.

TOP RANKED
Chambers
Global
2022

Cliffe Dekker Hofmeyr

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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