TAX RULINGS - CONTRIBUTION TO CERTAINTY: A SOUTH AFRICAN PERSPECTIVE

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Abstract

This article considers the use of tax rulings by the South African tax authorities as a tool to provide legal and commercial certainty, in particular where either the tax administration or a taxpayer challenges an interpretation set out in a ruling. The role of tax rulings, in the form of binding general rulings and advance tax rulings, in providing certainty is analysed through the lens of the provisions of South African tax administration legislation and judgements made by the South African courts. The article finds that tax rulings and other South African tax administration publications play an important role in promoting certainty even where the interpretation set out in the rule is disputed. The role of rulings to support certainty is supported by both the provisions of the South African tax administration and the judgements made by the South African courts.

Keywords: Certainty, Tax Administration, Tax Publications, Tax Rulings, South Africa.

1. INTRODUCTION

Many tax administrations use tax rulings as a mechanism for early dispute resolution as they can provide legal and commercial certainty about taxpayer transactions.[2] South Africa's tax administration is no different and, while the form and process of tax rulings have changed over time, South Africa's tax legislation has always, in some form, provided for the tax administration to issue tax rulings to taxpayers.[3]

The role and legal effect of these tax rulings in achieving such certainty have, however, been put to the test in recent South African tax disputes which came before the South African Constitutional Court[4] and the South African Supreme Court of Appeal.[5] Through these decisions, the South African courts confirmed the certainty provided by tax rulings, but also potentially undermined the certainty provided by the interaction between tax rulings and other publications of the tax administration. Where the tax administrator argued that it was not bound by a tax ruling because the ruling was based on an incorrect interpretation of the law, the South African Supreme Court of Appeal held that the tax administration was bound by its ruling.[6] On the other hand, the South African Constitutional Court questioned the legal basis of using

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[2] See Alarie et al. (2014) on pp. 362-363; Van de Velde (2015). See also Waerzeggers & Hillier (2016).
[3] Prior to the enactment of the South African Tax Administration Act, No.28 of 2011, hereinafter referred to as the SATAA (2011), tax rulings were issued in terms of the South African Income Tax Act, No. 58 of 1962, hereinafter referred to as the Income Tax Act (1962). The South African tax administration is referred to in South African legislation as the South African Revenue Service (SARS). The phrases "tax administrator" and "tax administration", as appropriate, will be used in this article.
[4] *Marshall NO and Others v Commissioner for South African Revenue Service* 80 SATC 400 (CC), hereinafter referred to as *Marshall* CC (2018).
[5] *Commissioner for South African Revenue Services v KWJ Investments Service (Pty) Ltd* 81 SATC 1, hereafter *KWJ* (2018).The Supreme Court of Appeal is the highest court in South Africa for non-constitutional law disputes and for disputes that are not in the public interest. See sections 165 to 170 of the Constitution of the Republic of South Africa Act, No. 108 (1996).
[6] See *KWJ* (2018).

interpretation notes issued by the South African tax administration when interpreting a tax ruling requested by a taxpayer.[7]

The introduction of specific provisions dealing with rulings in the SATAA (2011) also potentially puts the certainty provided by tax rulings, particularly advance tax rulings, to the test by providing for circumstances to set aside or amend tax rulings, both prospectively and retrospectively.

It is this role of tax rulings to provide both legal and commercial certainty to both the taxpayer and the tax administrator in the context of decisions made by the South African courts and the provisions of the SATAA (2011) that this article will consider. The article will consider the role played by tax rulings in achieving administrative certainty for the South African taxpayer and the factors to consider when implementing a tax ruling system through the lens of the SATAA (2011) and the South African courts. The article will firstly provide an overview of the basis for introducing a ruling system, as compared to other publications issued by a tax administration, followed by an overview of the current ruling system in South Africa. The article will then consider the role of rulings and other publications of the South African tax administration in bringing about certainty for taxpayers through the binding nature of rulings as interpreted and confirmed by the South African courts.

2. TAX RULINGS AND CERTAINTY

The Role of Certainty in Tax Law

The authority to issue rulings and, in particular, advance tax rulings is introduced into tax legislation on the assumption that rulings "are useful instruments for reducing taxpayer uncertainty and are conducive to sound tax administration" (Alarie et al., 2014, pp. 364-365).[8] If rulings, and other publications issued by a tax administration, are needed to reduce taxpayer uncertainty, what causes such uncertainty for taxpayers? It is often said that taxpayer compliance with tax legislation can be difficult due to an element of uncertainty in applying the relevant tax legislative provisions to a particular set of facts. The difficulty and concomitant uncertainty faced by the taxpayer arises from, inter alia, the language used in tax legislation, the complexity of the tax legislation, the (at least) annual amendments to tax legislation, plus a possible complicated commercial transaction.[9]

While it is generally accepted and agreed that uncertainty is undesirable in a legal system and undermines the rule of law, there is a view that fostering uncertainty can increase tax compliance.[10] While uncertainty may increase tax compliance, the fostering of uncertainty goes against the rule of law,[11] particularly in relation to a government entity's decisions and actions, and so cannot be encouraged.

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[7] *Marshall* CC (2018).

[8] See also Van de Velde (2015) on pp. 9-10; Givati (2009) on pp.139 and 147-149; Waerzeggers and Hillier (2016) on p. 3.

[9] See Adam et al. (2011) on p. 42, where it is stated that "lack of simplicity and neutrality invites tax avoidance" and the perpetual revision of tax law and litigation against avoidance schemes add to complexity and to the cost of implementation". See also Alarie et al. (2014); Van de Velde (2015) on p. 9; Givati (2009) on pp. 139 and 144-145; Monroe (2017) on pp. 85-86 and 105-106.

[10] See Alarie et al. (2014) on p. 367. In the South African context, the argument of uncertainty is sometimes used for the sparse disputes on certain provisions of the Income Tax Act (1962), such as the lack of litigation in respect of the complex controlled foreign company provisions and the general anti-tax avoidance provisions.

[11] See Alarie et al. (2014) on pp. 365-369. See also Waerzeggers and Hillier (2016) on p. 1.

Certainty can, of course, be achieved by amending the legislation to clarify the outcome of the relevant provisions or by a court decision, but these two possibilities may not always be feasible. For example, a dispute must first arise, with parties willing to take the step to litigation, before there is even the possibility of a court decision being made. It is in this context that publications by the tax administration may provide certainty in the interpretation and application of certain provisions. Publications are used to inform taxpayers of the manner in which the tax administrator will apply and interpret certain provisions. In addition to publications, provision can also be made for a tax administrator to provide a taxpayer with an interpretation or view on its interpretation and application of specific tax legislation provisions in response to a specific tax liability question. The latter is commonly referred to as a "ruling" by the tax administration.

These rulings and publications may provide guidance to a taxpayer in relation to the tax administrator's interpretation of a particular provision of the legislation, exercise of its discretionary power, and treatment of certain transactions (Alarie et al., 2014). Besides providing certainty for taxpayers, rulings and publications are also useful tools for governments and tax administrators, allowing them to fill gaps where the courts have not yet pronounced on the specific law. The use of rulings and publications is, of course, not without risk to the fisc, as there may be circumstances in which the interpretation or view set out in the binding ruling or publication is not legally correct and the fisc will have to bear the risk of the revenue lost.[12]

While providing certainty with a risk element for the tax administration, rulings and publications can also be seen as "indirect and extra-legal means by which tax administrations seek to impose their view of tax law on taxpayers" (Alarie et al., 2014, p. 365). Publications, in particular, are a means of interaction between the tax administration and the public, as they can act as a "tax law intermediary" and potentially play an important role in creating certainty for taxpayers, especially those facing tax complexity.[13] This tax law intermediary role is particularly important to non-expert taxpayers and can be viewed by these non-experts as being more than just explanations of substantive law.[14]

The level of certainty provided by these publications depends on the type of publication, whether the relevant legislation provides that the tax administration is bound by the view and interpretation set out in the publication, and whether a court has adjudicated on whether the tax administration is bound by the publication. The category of the publication may well be the determining factor in its ability to provide certainty for the taxpayer.

Private and Public Rulings

A publication that is categorised as a private ruling is likely to provide greater certainty than one that is categorised as a public ruling.[15] Public rulings are generally written opinions that interpret and apply tax law to taxpayers or a class of taxpayers generally, whereas private rulings apply to a specific taxpayer with a stated set of facts. Public rulings usually reflect the tax commissioner's opinion of how a provision of a tax law is expected to apply and are usually published in the form of interpretative notes or public administrative guidelines. The full and detailed opinion is made available to the public and the tax administrator is not necessarily

[12] See Alarie at al. (2014) on p. 366; Waerzeggers and Hellier (2016) on pp. 4 and 7.
[13] See Monroe (2017) on p. 90.
[14] See Monroe (2017) on p. 91. See also discussion on quasi-law on later in this paper.
[15] See Waerzeggers and Hillier (2016) on p. 1.

bound by the view set out in the public ruling,[16] which potentially limits the role of such public rulings in providing certainty to the taxpayer. By contrast, the view and interpretation set out in the private ruling is likely to be binding on the tax administration in relation to the specific taxpayer's set of agreed circumstances. Such a taxpayer can therefore approach the transactions with knowledge and certainty of the tax liability.

Advance Tax Rulings

Of all the publications issued by a tax administrator, advance tax rulings are probably the best option in terms of ensuring that taxpayers are certain of their tax liabilities for prospective future transactions. To give the taxpayer the certainty required in determining their tax liability, the tax administrator must be bound by the interpretation and view set out in the advance tax ruling. In this way, advance tax rulings seek to promote clarity and consistency for both the taxpayer and the tax administration. While the purpose of introducing advance tax rulings may be to provide certainty in respect of taxpayers' future tax liabilities, taxpayers are likely to consider the certainty that advance tax ruling bring alongside other strategic considerations, such as the risk to the taxpayer and the cost of applying for a ruling.[17] Risk would include considerations such as the risk of audit by revenue authorities, scrutiny by capable public servants, the likelihood that the revenue examiner (auditor) is more likely to make a mistake in the assessment, the taxpayer's commitment to carrying out the transaction, and whether the ruling would impact on the actual transaction.[18]

While certainty would be an important consideration, a tax administration that wants to support certainty for taxpayers would have to ensure that the legislation for, and the practice of, advance tax rulings take into account the taxpayer's other strategic considerations and risk concerns.

The Binding Nature of Rulings

The certainty that rulings provide is that the tax administration cannot change the view and interpretation set out in the ruling provided to the taxpayer, or can only do so under limited circumstances. Put another way, certainty requires that the decision and view set out in the ruling must be legally binding on the tax administrator.[19] The binding nature of rulings should also protect the taxpayer, who relies on the ruling, from additional tax, penalties, and interest.[20]

Where the tax legislation does not provide that rulings and publications are binding on the tax administration, and such rulings and publications can be changed by the tax administration at any time, the certainty provided by the tax law intermediary is limited. A taxpayer can attempt to enforce the view or interpretation expressed by the tax administration in the ruling or publication through the use of the doctrine of legitimate expectations or a long-standing administrative custom. The use of litigation and dispute resolution mechanisms does, however, defeat the purpose of rulings and publications in achieving or supporting the achievement of certainty.[21]

[16] See Waerzeggers and Hillier (2016) on p. 1.
[17] See Alarie et al. (2014) on pp. 364 and 379-382.
[18] See Alarie et al. (2014); Givati (2009) on p. 140.
[19] See Seiden and Russell (2018) on p. 438; Alarie et al. (2014) on pp. 368 and 370-373.
[20] See Waerzeggers and Hillier (2016) on pp. 2 and 7.
[21] See Alarie et al.(2014) on pp. 382-383.

The Impact of Revising or Withdrawing a Ruling

The potential revision, withdrawal, or amendment of a ruling or publication clearly impacts on the level of certainty promised. Given the different levels of certainty provided by different types of publication, it can be argued that a taxpayer who relies on a ruling or a publication without checking the legal status does so at their own peril. A counter to the aforementioned statement is that there is a reasonable expectation that the tax administration will follow interpretations and views set out in publications, but this too can be countered as the certainty and reasonable expectation depend on the category of the publications and rulings. For example, the purpose of introducing private and advance tax rulings is to provide certainty as to the tax treatment of a specific taxpayer's transactions. For such rulings, the ability of the tax administration to ignore, revise, or state that a ruling no longer applies must be limited.[22] The ability to revise a private and advance tax ruling directly affects a taxpayer's entitlement to rely on a favourable ruling and defeats their expectation to be assessed for tax in accordance with the original ruling.[23] If such rulings can be revised or set aside, and to support certainty, the circumstances under which a ruling can be set aside and no longer followed must be clearly set out. The timing of that withdrawal and setting aside must also be clearly indicated, either in the relevant legislation that introduces the binding nature of the ruling or by the courts. A withdrawal and setting aside should be communicated timeously to taxpayers so that they can make the necessary adjustments in order to determine the tax liability based on the adapted version of the ruling or the tax administration's new interpretation. This would especially be the case where the tax administration finds that there is a mistake in its interpretation or application of the law.[24]

Assumptions and Certainty

Such a mistake or incorrect application can arise because of the assumptions made by the tax administrator when analysing and providing its view and legal interpretation. This may occur, in particular, where an assumption is made about a future event or other matter in a ruling. To ensure that such mistakes are limited, the tax administrator should notify the taxpayer applicant of the assumptions being made as reliance on assumptions has the potential to undermine the certainty of a ruling.[25]

The Relationship Between the Taxpayer and the Tax Administration

While the issue discussed in this article is the certainty that rulings and publications can provide, it would be remiss not to at least mention the view that rulings are seen as playing a role in reducing litigation and compliance costs, and in engendering a better relationship between the revenue authorities and taxpayers.[26] It is said that tax rulings can viewed as expressions of the trustworthiness of the tax administration where, for example, a binding ruling is offered when there is a gap in the law that has not been resolved either through the amendment of the legislation or the court's intervention.[27]

[22] See Azzi (2016) on pp. 1097 and 1116.
[23] See Azzi (2016) on p.1119.
[24] See Waerzeggers and Hillier (2016) on p. 7.
[25] See Seiden and Russell (2018) on p. 440.
[26] See Alarie et al. (2014) on p. 383.
[27] See Alarie et al. (2014) on p. 383.

The trust relationship will, according to the traditional view of rulings, be stronger if the taxpayer has certainty that the tax administrator will not subsequently challenge the interpretation or view set out in the rulings. Where a tax administrator subsequently changes its views, the trust relationship will suffer and will most likely have a negative impact on taxpayer morale, especially on the honest taxpayer who follows the rules and complies with the tax administrators' views.

One argument against the use of tax rulings in relation to trust and morale is that it may also induce a government that is seeking to attract foreign direct investment to influence or "persuade" the tax administration to issue a ruling in favour of a taxpayer where such a favourable ruling is linked to investment by the taxpayer. A taxpayer may also indicate that they will not proceed with an investment if the tax treatment in the tax ruling is not in their favour. This is a particular concern for countries that depend on foreign direct investment and where such governments actively seek such investment.

Certainty and the Binding Nature of Rulings

It is, of course, the binding nature of the tax ruling that is the foundation of its role in providing certainty to the taxpayer to whom the ruling applies. That binding nature can be found in the legislation, which provides that rulings are binding on the tax administrator so that if they change their view or interpretation, it has a limited effect on the taxpayer to whom the ruling applies. The binding nature can also be located in the doctrine of estoppel or the doctrine of legitimate expectations. In South Africa, that binding nature is located in legislation and in a ruling, or even a publication, being regarded as "practice generally prevailing" (Arendse et al., 2022, paragraph 2.35). The binding nature of rulings and other types of publication issued by the South African tax administration was formalised with the insertion of provisions into the Income Tax Act (1962) in 2004,[28] which dealt with rulings, but it was the introduction of the SATAA in 2011[29] that made rulings an integral part of the administrative aspects of the South African tax system.

3. THE INTRODUCTION OF TAX RULINGS IN SOUTH AFRICA

While the South African tax administration attends to both the charging and administrative aspects of the tax system, with the enactment of the SATAA (2011), the charging provisions of tax legislation were separated from the procedural provisions of tax legislation.[30] According to the South African National Treasury, the separation supported the effective and efficient collection of taxes.[31]

The procedural provisions in the SATAA (2011) include those setting out the legal implications of the different publications issued by the South African tax administration. These publications,

[28] Sections 76B to 76S were introduced by the Second Revenue Laws Amendment Act, No 34 of 2004 and repealed by section 271 read with paragraph 64 of Schedule 1 of the SATAA (2011).
[29] The commencement date of the SATAA (2011) is 1 October 2012.
[30] The charging legislation includes the Income Tax Act (1962) and the Value-Added Tax Act, No. 89 of 1991, hereinafter referred to as the VAT Act (1991).
[31] See section 2 of the SATAA (2011), which sets out the methods used to achieve this effective and efficient collection including, on the one hand, prescribing the rights and obligations of taxpayers and, on the other hand, prescribing the powers and duties of persons engaged in the administration of the SATAA (2011). See also the discussion paper published in 2003 by the South African Revenue Service (SARS) relating to the proposed system for advance tax rulings (SARS, 2003).

defined as "official" and "unofficial",[32] are in line with the mandate and vision of the South African tax administration to facilitate and provide "direction on the uniform application and interpretation of all tax legislation administered by [SARS]" (SARS, 2023e).

Official and Unofficial Publications

The difference between official and unofficial publications is that an official publication is classified as a "practice generally prevailing" and is binding on the South African tax administration.[33] Prior to the distinction being made between official and unofficial publications, the South African courts had pronounced on the binding nature of all types of publications issued by the tax administration.[34] The courts held that publications issued by the tax administration would only bind the South African tax administration if the relevant publication was classified as a "practice generally prevailing"[35] or met the requirements of the doctrine of legitimate expectations.[36] Neither the legislation at the time nor the courts distinguished between official and unofficial publications. Probably as a reaction to the decisions made by the courts and to distinguish between the various publications issued, section 5(1) of the SATAA (2011) now provides a list of official publications which qualify as being "practice[s] generally prevailing" and bind the tax administration to the views and interpretations set out in these publications. This means that a taxpayer now has certainty as to which publications are binding on the tax administration and the circumstances under which such a publication ceases to be a "practice generally prevailing".[37] As previously noted, the list of official publications includes binding general rulings, interpretation notes, practice notes, and public notices.[38] These are publications which are made available to the public at large: a type of "public" publication.

Private and Public Rulings

Official publications, while made available to the public at large, are not all necessarily public rulings as per the distinction between private and public rulings. This distinction would appear to apply to the SATAA (2011) distinction between binding general rulings on the one hand, categorised as public rulings, and binding private and binding class rulings on the other, the

[32] The definition of "official publication" in section 1 of the SATAA (2011) is "a binding general ruling, interpretation note, practice note or public notice issued by a senior SARS official or the Commissioner".
[33] Section 5(1) of the SATAA (2011) provides that a "practice generally prevailing is a practice set out in an official publication regarding the application or interpretation of a tax Act".
[34] See, for example, *Commissioner for Inland Revenue v SA Mutual Unit Trust Management Co Ltd* 1990 (4) SA 529 (A); *Commissioner for South African Revenue Service v Hulett Aluminium* (Pty) Ltd (337/98)[2000] ZASCA; 2000 (4) SA 790 (SCA).
[35] See, for example, *Commissioner for Inland Revenue v SA Mutual Unit Trust Management Co Ltd* 1990 (4) SA 529 (A); *Commissioner for South African Revenue Service v Hulett Aluminium* (Pty) Ltd (337/98)[2000] ZASCA; 2000 (4) SA 790 (SCA).
[36] See Arendse et al. (2022) at paragraph 3.30.
[37] See sections 5(2) and (3) of the SATAA (2011).
[38] See the definition of "official publication" in section 1, read with section 5 of the SATAA (2011). Although this discussion is beyond the scope of this article, it is questionable as to whether this is a closed list and precludes "unofficial publications" becoming "practices generally prevailing".

latter two being grouped as advance tax rulings.[39] Prior to the enactment of the SATAA (2011), the authority to issue rulings was found in the general legislation that imposed a particular tax. For example, earlier versions of the Income Tax Act (1962) contained provisions that authorised the tax administration to issue rulings to taxpayers.[40]

Since the enactment of the SATAA (2011), the authority for the tax administration to issue rulings is generally contained in that one statute,[41] although certain types of rulings are still provided for in certain charging legislation, such as those issued in terms of the VAT Act (1991).[42] The South African National Treasury (2011), when introducing the rulings provisions in the SATAA (2011), stated that:

> The advance ruling system currently regulated in the Income Tax Act and the Value-Added Tax Act is incorporated in the TAB [Tax Administration Bill]. The provisions establish the framework for the system and set out basic rules regarding the application process, fees, exclusions and refusals, the effect of rulings, the impact of subsequent law changes, retrospectivity and the publication of rulings. They also provide for specific rules in respect of the three primary types of rulings, i.e. binding general rulings, binding private rulings and binding class rulings. (p. 191)

It is worthwhile, at this point, to bear in mind that tax rulings (and other decisions) made by the South African tax administration fall into the realm of administrative actions.[43] Such an administrative action must, therefore, conform to the relevant provisions of the Constitution of the Republic of South Africa (1996)[44] and the Promotion of Administrative Justice Act 3 (2000). As administrative actions, these rulings (and decisions by the tax administration), being decisions of a public body, can be reviewed by the courts and set aside.[45] However, the ability of the courts to set aside such decisions is constrained by the SATAA (2011), which provides that rulings are binding on the tax administration and can only be set aside or amended in limited circumstances.[46] Likewise, the tax administration's ability to set aside, ignore, or withdraw a ruling is limited. In this way, rulings, through the limited ability to be set aside and amended, are able to provide a level of certainty for the taxpayer.

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[39] Section 75 of the SATAA (2011) groups the three types of rulings as advance tax rulings but distinguishes between binding general rulings on the one hand, and private and class rulings on the other. The South African tax administration also distinguishes between binding general rulings and "advance tax rulings", the latter comprising private and class rulings. Other South African tax administration publications, which are beyond the scope of the article, include interpretation notes, public notices, guides, and unofficial publications. The legal effect and legislative framework for publications by the South African tax administration is set out in section 5 of the SATAA (2011), read together with chapter 7 of the SATAA (2011) on advance tax rulings. The legislative framework of rulings consists of the Constitution of South Africa (1996), as the supreme law, the South African Revenue Services Act, No. 34 of 1997, and the SATAA (2011).

[40] See the now repealed sections 76B-76S of the Income Tax Act (1962).

[41] See sections 75-90 of the SATAA (2011).

[42] See section 41B of the VAT Act (1991).

[43] The South African tax administrator, referred to as SARS, is the established by separate legislation, the South African Revenue Services Act (1997), and is not part of the South African public service.

[44] Section 33 of the Constitution of the Republic of South Africa, Act 108 (1996) provides for just administrative action, and section 195 provides for the basic values and principles governing public administration.

[45] See *Wenco International Mining Systems Ltd. v CSARS* 83 SATC 463, hereafter *Wenco* (2021); Admin law text.

[46] See sections 5(2), 5(3), 85 and 86 of the SATAA (2011). The detail and circumstances of rulings and notices being able to be set aside in terms of the Constitution of the Republic of South Africa, Act 108 (1996) and the Promotion of Administrative Justice Act 3 (2000) is beyond the scope of the paper.

4. THE SOUTH AFRICAN TAX RULING SYSTEM

The SATAA (2011) sets out as its purpose as being the effective and efficient collection of taxes[47] and, based on the discussion above, rulings support this purpose by, inter alia, providing certainty and promoting the consistent (equitable) treatment of taxpayers. The role and need for certainty in the South African tax system has been recognised by the South African Supreme Court of Appeal. In *KWJ* (2018), the court stated that:

> This appeal involves a set of transactions designed to exploit the tax code in ways that would enhance the profitability of the participants, while avoiding any liability for tax. It also concerns the relationship between appellant's response thereto and the right of taxpayers to enjoy certainty in the administration of tax legislation. (paragraph 2)

If the purpose of advance tax and binding general rulings is to provide certainty for both the taxpayer and the tax administration, the SATAA (2011)'s provisions on rulings must have features which, on the one hand, enhance such certainty and, on the other, limit the risks and concerns of such a system. The ability of a South African taxpayer to rely on rulings issued by the South African tax administrator may also influence the trust relationship between the taxpayer and the tax administrator,[48] particularly where the taxpayer is certain that the tax administrator is bound by, or will follow, the rulings issued. But what if the taxpayer uses a ruling to support a tax avoidance scheme, particularly where the original ruling was issued in tax neutral circumstances and is subsequently used in a set of transactions that reduces its tax liability? Should certainty trump tax avoidance in these circumstances? Although decided under now repealed provisions dealing with rulings in the Income Tax Act (1962), the South African Supreme Court of Appeal answered the latter question in the affirmative in the matter of *KWJ* (2018). It is, however, questionable as to whether the certainty provided by the judgement has, to an extent, been eroded by the provisions of section 86 of the SATAA (2011), which allow the South African tax administrator to modify or withdraw advance tax rulings retrospectively if, inter alia, "the effect of the ruling will materially erode the South African tax base and it is in the public interest to withdraw or modify the ruling retrospectively".

Certainty in South African Tax Law: *KWJ* (2018)

In the case of *KWJ* (2018), the South African Supreme Court of Appeal had the opportunity to determine whether a taxpayer could rely on a ruling made by the tax administration and provide certainty to such a taxpayer. The tax administrator, despite having issued rulings indicating the tax treatment of the particular transactions, changed the way in which it assessed these transactions. It assessed the taxpayer on the basis that a dividend right was an amount that accrued to the taxpayer unconditionally. The disputed rulings were issued in terms of the now repealed provisions of the Income Tax Act (1962), which provided that a ruling made by a tax administrator was binding on the tax administration if the ruling was a "practice generally prevailing".

The question before the court was thus whether the particular ruling made by the tax administration was a "practice generally prevailing". The legal issues were twofold: one, whether the lower court was correct in its decision that the taxpayer was party to a tax

[47] See section 2 of the SATAA (2011).
[48] See earlier discussion. See also Alarie et al. (2014) on pp. 364 and 383; Van de Velde (2015) on p. 9.

avoidance arrangement, and two, whether the South African tax administration had, through its practice, "endorsed" the arrangement even though the tax administration had based its ruling on an incorrect interpretation of the law. Thus, the question of whether the taxpayer, KWJ, could rely on the rulings, binding the South African tax administration to the incorrect interpretation of the law, arose.

KWJ was an investment company, making a profit on the difference between the dividends received and paid. In terms of the relevant income tax law at the time, dividend income received was exempt from income tax, and KWJ's only tax liability was the secondary tax on companies payable by it on the distribution of dividends. The tax dispute arose when KWJ invested surplus investment capital and received a return described as the right to receive "dividends declared, but not yet accrued" with the value of the right calculated in terms of a formula (*KWJ*, 2018, paragraph 3). The substantive tax law dispute was whether this return (in effect, the right to receive dividends) was an amount which accrued to KWJ. In deciding that this right was a form of property with a monetary value, the Supreme Court of Appeal held that it was "an unconditional receipt of a right which has a monetary value" (*KWJ*, 2018, paragraph 41), a ruling in favour of the South African tax administration. A detailed analysis and critique of the substantive law ruling is beyond the scope of this paper, save to say that the decision is in line with earlier South African tax law decisions which held that, as long as a right has a monetary value, the value of that right can be included in the determination of the tax liability of the owner of the right.[49] A further point outside of the scope of this analysis but of interest is that the South African Supreme Court of Appeal did not consider, as did the court a quo, whether the accrual of that right was conditional.

Although the South African Supreme Court of Appeal agreed with the South African tax administrator's substantive law argument, the court found that the South African tax administrator could not enforce the "correct" interpretation and agreed with the taxpayer's reliance on rulings issued by the tax administrator. The South African tax administrator had sought to raise the additional tax assessment in 2011 based on its current interpretation of the relevant provisions. However, in terms of the provisions of the tax legislation at the time, an additional tax assessment could not be raised if the original 2008 and 2009 tax assessments were issued in terms of a "practice generally prevailing".[50] All the taxpayer had to do to prevent the additional tax assessment and the increased tax liability was to show evidence of a "practice generally prevailing".[51] The phrase "practice generally prevailing" was not defined in tax legislation, but the South African Appellate division had previously stated that:

> a practice "generally prevailing" is one which is applied generally in the different offices of the Department in the assessment of taxpayers and in seeking to establish such a practice in regard to a particular aspect of tax assessment it would not be sufficient to show that the practice was applied in merely one or two offices.
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> Moreover, the word "practice", in this context, means "a habitual way or mode of acting" (see Oxford English Dictionary, meaning 2.c); and consequently, in general, it would also not be sufficient to show that, in regard to an aspect of assessment, a certain attitude had been adopted by the assessors concerned only in some instances. (*Commissioner for Inland Revenue v SA Mutual Unit Trust Management Co Ltd* 1990 (4) SA 529 (A), paragraphs 21-22)

[49] See *CSARS v Brummeria 2007* (6) SA 601 (SCA); 69 SATC 205.
[50] In terms of the now repealed section 79(1)(b) of the Income Tax Act (1962).
[51] In terms of the now repealed section 79(1)(b) of the Income Tax Act (1962).

On the evidence presented before the court, the South African tax administration had been aware of the tax structure since 2000 and had issued rulings in 2003 exempting the disputed income from tax.[52] The taxpayer was able to present evidence of five transactions dealing with the right to receive undeclared dividends that the South African tax administration had assessed on the basis that exempt dividends were received, and not on the basis that the value of the right was an amount to be assessed.[53] The evidence also included a 2003 ruling sought by a financial institution and issued by a division of the South African tax administration.[54] This ruling dealt with an indivisible composite instrument made by a financial institution in favour of one dividend income fund and provided that the right to the ceded dividends was exempt from tax.[55] A similar ruling was issued later in 2003 with respect to another dividend income fund where, although the fund had taken the view that the receipt of rights to dividends was a separate accrual from the accrual of the dividends, the South African tax administration had concluded that there was no separate accrual of dividend rights.[56] The South African tax administration was also unable to show that it had assessed other taxpayers differently from its rulings. Thus, five transactions assessed by the South African tax administrator exempted the disputed income from tax and no other transactions were assessed differently from the practice. The South African tax administration sought to argue that "notwithstanding this evidence regarding other transactions, when it initially assessed respondent" it was in not in "possession of sufficient evidence to know about the cession of dividend rights and hence to levy tax thereon" (*KWJ*, 2018, paragraph 53).[57] The court, however, dismissed this argument as the taxpayer had submitted annual financial statements to the tax administration together with their income tax returns.[58] It appeared that the practice of the South African tax administration only changed after the rulings were made, which resulted in the attempt to issue an additional assessment on the taxpayer.

In considering the role of the rulings in providing certainty to the taxpayer, the South African Supreme Court of Appeal held that the taxpayer had provided sufficient evidence for the rulings by the South African tax administration to qualify as a "practice generally prevailing" and that the South African tax administration did not provide evidence to contradict that provided by the taxpayer.

Based on this judgement, South African law does take both commercial and legal certainty into account, ensuring that a taxpayer can follow the practices and rulings of a tax administration, even when the courts disagree with the interpretation of the law set out in a ruling by the tax administration. The case illustrates the tension between "certainty" in the application of the law through the practice of the tax administration and the correct interpretation of the law itself, with the judgement appearing to confirm the possibility that "certainty" for a taxpayer can trump the ability of the tax administration to apply anti-tax avoidance provisions. The hypothesis that *KWJ* (2018) appears to support is that, under certain circumstances, differing interpretations and practices of provisions of tax legislation can be resolved by tax administrator publications and practices, even though these are incorrect interpretations and practices of the provisions. These incorrect interpretations and practices may, furthermore,

[52] See *KWJ* (2018) at paragraphs 48-52.
[53] See *KWJ* (2018) at paragraph 48.
[54] See *KWJ* (2018) at paragraph 49.
[55] The dividends were exempt in terms of section 10(1)(k) of the Income Tax Act (1962) and the ruling further provided that neither section 24J nor section 24K of the Income Tax Act (1962) would apply to the transaction as set out in the statement of agreed facts.
[56] See *KWJ* (2018) at paragraph 49.
[57] See *KWJ* (2018) at paragraphs 44-45 and 53.
[58] See *KWJ* (2018) at paragraph 53.

apply to transactions made by a taxpayer who has acted on them even as the tax administrator has sought to amend them through litigation. It further illustrates that there are circumstances in which a court cannot undo the certainty created by the original incorrect publication and practice of the tax administrator. Any change to or withdrawal of a practice that qualifies as a "practice generally prevailing" cannot apply retrospectively, which would also imply that taxpayers must have been notified of the change or withdrawal. It must, however, be noted that *KWJ* (2018) was decided under now repealed provisions of the Income Tax Act (1962) and the question arises as to whether this decision by the court would still apply to the provisions in the subsequently enacted SATAA (2011).[59]

According to the judgement in *KWJ* (2018), the SATAA (2011) sought to abolish the principle of "practice generally prevailing".[60] The court is likely referring to the abolishment of the principle as interpreted by the courts because the SATAA (2011), as indicated earlier, now specifically states which publications qualify as being a "practice generally prevailing". Section 92 of the SATAA (2011) also provides that: "If at any time SARS is satisfied that an assessment does not reflect the correct application of a tax Act to the prejudice of SARS or the *fiscus*, SARS must make an additional assessment to correct the prejudice".

However, the ability of the South African tax administration to make an assessment, including an additional assessment, is limited if the original assessment was made or no return was required in accordance with a practice generally prevailing at the time of the original assessment, except in cases of fraud, misrepresentation, or non-disclosure of material facts.[61] While the tax administration may be able to make the additional assessment to correct the prejudice, such a correction is not possible where the tax administration has made a binding general ruling, even where it has applied or interpreted the law incorrectly to the "prejudice of" of the South African fisc. If such a correction can be made, the certainty that official publications seek to support would be undermined.

Advance Tax Rulings and Binding General Rulings

Unlike the earlier legislation relating to the provisions on rulings as considered in *KWJ* (2018), the SATAA (2011) distinguishes between private and public rulings. Private rulings are identified as advance tax rulings, where a taxpayer requests a ruling prior to undertaking the proposed transaction, and binding general rulings, which apply to all taxpayers.[62] Advance tax rulings are particularly important in providing certainty about a specific proposed transaction which is likely to be economically significant to the taxpayer. However, both private and public rulings are important where taxpayers are sensitive to the risk of future unexpected exposures. Both types of ruling can provide certainty and protection against unexpected additional future tax liabilities. The SATAA (2011) sets out the process and requirements for issuing binding general rulings and advance tax rulings.[63]

[59] The Income Tax Act (1962) did not provide for rulings but instead made provision for practices of the South African tax administration that would qualify as practices generally prevailing. See the now repealed section 79 of the Income Tax Act (1962).
[60] See *KWJ* (2018) at paragraph 45.
[61] See section 99 of the SATAA (2011).
[62] See section 75 of the SATAA (2011).
[63] Section 75 of the SATAA (2011) provides that a "binding private ruling" is "a written statement issued ...regarding the application of a tax Act to one or more parties to a 'proposed transaction', in respect of the 'transaction'" and that a binding class ruling is "a written statement issued...regarding the application of a tax Act to a specific 'class' of persons in respect of a 'proposed transaction'".

A binding general ruling is a "written statement issued by a senior South African Revenue Service official…regarding the interpretation of a tax Act or the application of a tax Act to the stated facts and circumstances" (SATAA, 2011, section 75).[64] According to SARS (2023c), as a public ruling, "a binding general ruling is issued on matters of general interest or importance and clarifies the Commissioner's application or interpretation of the tax law relating to these matters". The SATAA (2011), however, does not indicate which circumstances qualify as "matters of general interest and importance" (SARS, 2023c) and such circumstances will be determined by the tax administration. Binding general rulings have been issued for a wide range of matters (SARS, 2023g), from comments on decisions by the courts[65] and for the VAT treatment of e-commerce transactions.[66]

While a binding general ruling applies to all taxpayers, advance tax rulings only apply to the applicant taxpayers and to the "proposed transaction", defined as a "'transaction' that an 'applicant' proposes to undertake, but has not agreed to undertake, other than by way of an agreement that is subject to a suspensive condition or is otherwise not binding" (SATAA, 2011, section 75). Advance tax rulings can be categorised as written statements issued by the South African tax administration,[67] requiring an application to be made by the person(s) undertaking the proposed transaction.[68]

While the tax administration is bound by, and has to follow, the interpretations and decisions set out in both binding general rulings and advance tax rulings, the basis for being bound differs. A binding general ruling is listed as an official publication and the view set out in the ruling is therefore a "practice generally prevailing".[69] To distinguish, it is presumed, binding general rulings from other official publications (for example, practice notes), the publication must state that it is a binding general ruling and stipulate the period for which it operates.[70] A "practice generally prevailing" is defined as "a practice set out in an official publication regarding the application or interpretation of a tax Act" (SATAA, 2011, section 5) which has to be followed by the tax administrator.[71] If a taxpayer follows a practice generally prevailing and files a tax assessment in accordance with such a practice, as indicated earlier, the South African tax administration is limited in terms of its ability to challenge the assessment.

Advance tax rulings are not official publications and, accordingly, do not qualify as being a "practice generally prevailing". The binding nature of advance tax rulings is specifically set out in the SATAA (2011) which provides that if an advance tax ruling applies to a person, the South African tax administration "must interpret or apply the applicable tax Act to the person in accordance with the ruling" (SATAA, 2011, section 82).[72]

[64] Section 75 read together with section 89 of the SATAA (2011) provides that a senior SARS official may issue a binding general ruling that is effective for either a particular tax period, or other definite or indefinite period.
[65] See *Binding General Ruling (Income Tax) 8 (Issue 3)* (2022).
[66] See *Binding General Ruling (VAT) 28 (Issue 3)* (2023).
[67] See section 75 read with section 82 of the SATAA (2011). See also *Binding General Ruling (VAT) 28 (Issue 3)* (2023).
[68] See sections 75, 78, and 79 of the SATAA (2011).
[69] See section 5 of the SATAA (2011).
[70] See section 89 of the SATAA (2011), which also provides that a binding private ruling may be issued for an indefinite or finite period. See also sections 89(3) and 5 of the SATAA (2011).
[71] See section 5, read together with the definition of "official publication" in section 1, of the SATAA (2011).
[72] See section 82, read with section 83, of the SATAA (2011).

The SATAA (2011) provides that a Senior SARS official can issue a binding general ruling[73] while an advance tax ruling can be issued by the SARS.[74] The difference in who can issue a ruling may give rise to the expectation that binding general rulings carry more weight and provide more certainty.

While binding general rulings can be made on any provision of a tax Act,[75] the scope of advance tax rulings in the SATAA (2011) seems to indicate that advance tax rulings are issued for purely technical applications of a tax Act where no interpretation is required, while a binding general ruling involves interpretational issues.[76] These definitions are somewhat unfortunate, as a reading of the prescribed form and manner of applications of such rulings provides that the applicant, in addition to setting out a complete description of the proposed transaction, must provide:

> a statement of the applicants' interpretation of the relevant statutory provisions or legal issues, as well as an analysis of relevant authorities either considered by the 'applicant' or of which the 'applicant' is aware, as to whether those authorities support or are contrary to the proposed ruling being sought.(SATAA, 2011, section 79[4][i])

In addition, the types of advance tax ruling applications that the South African tax administration can reject include certain matters which include the interpretation of the law,[77] thus implying that advance tax rulings can include interpretation of the law—but limited to the specific set of facts as set out in the proposed transaction. While an advance tax ruling may be made on any provision of a tax Act,[78] certain matters fall outside the parameters of these rulings. These limitations are set out in the SATAA (2011).[79]

Reliance on Rulings

While the above is illustrative of the differences between the types of tax ruling, the main difference which affects certainty is the ability of taxpayers to rely on the rulings and the effect of such reliance. The South African tax administration and any taxpayer can rely on a binding general ruling in proceedings, including court proceedings, and may cite such a ruling,[80] whereas advance tax rulings can only be relied upon in proceedings involving the respective applicants.[81] The ability to use these rulings in court proceedings and the reliance placed upon them, therefore, differs. It does, therefore, appear that a binding general ruling creates greater certainty for all taxpayers while advance tax rulings (binding private and class rulings) only create certainty for the specific applicant taxpayer. The question is whether the level of

[73] See section 75, read with section 89, of the SATAA (2011).
[74] See section 75, read with section 78, of the SATAA (2011).
[75] See section 77 of the SATAA (2011).
[76] Section 75 of the SATAA (2011) defines a "binding private ruling" as a "written statement issued by SARS regarding the application of a tax Act" and defines a "binding general ruling" as a "written statement issued by a senior SARS official ...regarding the interpretation of a tax Act or the application of a tax Act to the stated facts and circumstances".
[77] Section 80(1)(a)(ii) of the SATAA (2011) refers to the interpretation of the laws of a foreign country, while section 80(1)(c) refers to the interpretation of a general or specific anti-avoidance provision or doctrine.
[78] See section 77 of the SATAA (2011).
[79] See section 80 of the SATAA (2011). See also Republic of South Africa (2013); and Republic of South Africa (2016), which sets out the categories of applications that the tax administration may reject.
[80] See section 82(3) of the SATAA (2011).
[81] See section 82(4) of the SATAA (2011).

certainty provided, namely the ability of the tax administration to withdraw or amend the ruling, differs.

However, before considering the potential differences in the level of certainty, it is interesting to note that sections 83 and 88 of the SATAA (2011) use the terminology of being able to "cite" the ruling in court to indicate the difference in who is bound by the tax ruling. The use of the word "cite" is a somewhat ambiguous and strange way of indicating who is bound, as the ability to cite a ruling or a case in court is different from that ruling or case being binding on the court. Being able to cite a ruling or a case can mean that the ruling or case is a precedent that has to be followed or can indicate how a court applied the law to a similar set of facts. Given that only the applicant taxpayer and the South African tax administration is able to cite the advance tax ruling in a court, another taxpayer who is aware of the ruling or who has a similar set of facts cannot rely on the advance tax ruling or cite it in court, except perhaps in the context of legitimate expectations.[82] It does seem odd that a taxpayer is not able to use the ruling as a type of persuasive or soft law but, as discussed later, the Constitutional Court may well be seen to agree with the South African tax administration on this point.

The reliance of only the party to the advance tax ruling and the inability of other taxpayers to cite or rely on rulings does, to a degree, validate the criticism that rulings may result in the privatisation of tax law.[83] This potential privatisation of the law is bolstered by a fee being charged for a ruling and the fact that rulings are limited to specific types of transactions. For a fee, taxpayers can get a specialist to provide a detailed legal opinion which is binding on the tax administration. Advance tax rulings can make the law directly applicable to individual taxpayers and, therefore, extensive detail is not needed in the legislation. In this sense, advance tax rulings can be seen as soft law. Given the binding nature of these advance tax rulings on the tax administrator, it could be argued that such a ruling has the force of a type of quasi-legislation. To prevent advance tax rulings from becoming quasi-legislation, only the applicant taxpayer can rely on the ruling, with no other taxpayer deriving legal rights from the ruling and no other taxpayer being able to formally cite the ruling as legal authority. The risk of a ruling being used in a more general application as a type of quasi-legislation is, therefore, limited, but the risk that a taxpayer can use the advance tax ruling system as its own quasi-legislation still exists. A further consideration is whether advance tax rulings must only consider issues of fact and not decide the law. If rulings only consider facts and not interpretation of the law, it may reduce the possibility that rulings are conceived as quasi-legislation.

However, as seen in the South African case of *KWJ* (2018), a general ruling can become de facto law, in that it has to be followed even if incorrect. The same concern about de facto law, however, does not necessarily apply to all publications issued by the South African tax administration. This notion of de facto or even quasi-legislation was questioned by the South African Constitutional Court in the case of *Marshall* CC (2018), where the court questioned the basis on which a court should defer to an interpretation note, referred to by the court as "an administrative body's interpretation of legislation" (paragraph 3). It is submitted that the same principle would apply to binding general rulings and advance tax rulings. The Constitutional Court is correct, it is further submitted, in making a distinction between those who are bound by the tax administrator's interpretation—the taxpayer, the tax administration, or a court?

[82] A discussion of legitimate expectations is beyond the scope of the article.
[83] See Waerzeggers and Hillier (2016) on p. 4; Givata (2009) on pp.158-161.

The taxpayer in *Marshall* CC (2018) had first appealed to the South African Supreme Court of Appeal[84] and then to the South African Constitutional Court. By way of background, the taxpayer applied for a binding private ruling in October 2012 in order to clarify that the payments that it had received from certain provincial departments for services rendered qualified for a VAT zero-rating. The South African tax administration took a different view and issued a binding private ruling stating that the services rendered were subject to VAT at the standard rate. In February 2013, the South African tax administration issued an interpretation note setting out the VAT treatment of contracts entered into between public benefit organisations and government authorities.[85] Based on the unsuccessful 2012 ruling, the taxpayer applied to the court for a declaratory order on the interpretation of the relevant provisions of the VAT Act (1991).

The substantive tax dispute on appeal was whether the taxpayer and the South African Red Cross Air Mercy Service Trust were "exempt from paying VAT on payments received for actual services rendered to provincial health departments" operated by the government (*Marshall* CC, 2018, paragraph 1). The interpretation note became an issue when the Supreme Court of Appeal used it to support its decision that the taxpayer did not qualify to be exempt from paying VAT.[86] In considering the interpretation note, the Supreme Court of Appeal stated that:

> These Interpretation Notes, though not binding on the courts or a taxpayer, constitute persuasive explanations in relation to the interpretation and application of the statutory provision in question. Interpretation Note 39 has been in circulation for years and has not been brought into contention until now. (Footnote omitted). (*Marshall* SCA, 2016, as cited in *Marshall* CC, 2018, paragraph 2)

On appeal to the South African Constitutional Court, the extent to which a "court may consider or defer to an administrative body's interpretation of legislation, such as the Interpretation Note" (*Marshall* CC, 2018, paragraph 3) was considered. The issue was whether the South African Supreme Court of Appeal should have considered the view expressed in the interpretation note. At least two views were presented to the Constitutional Court. The first view, espoused by the taxpayer, was that the interpretation note should not be considered at all.[87] According to paragraph 3 of *Marshall* CC (2018), the arguments for this view were that:

> a) "Courts must independently interpret the meaning of the relevant legislation";
> b) Taking an administration body's interpretation into account would breach sections 9 and 34 of the South African Constitution in that the litigating parties would not have a fair hearing;
> c) Taking the interpretation note into account would go against the contra fiscum rule;
> d) The interpretation note is "inadmissible opinion evidence";
> e) Consideration of the interpretation note would be inconsistent with the principle "that the content of a regulation made under powers derived from a statute may not be relied upon as an aid to the construction of the statute itself";
> f) The use of the interpretation note is "a relic of the outdated approach to interpretation, namely to seek to ascertain the subjective intention of the legislature

[84] *CSARS v Marshall* 79 SATC 49 (SCA), hereinafter referred as *Marshall* SCA (2016).
[85] See *Marshall* CC (2018) at paragraph 2.
[86] See *Marshall* CC (2018) at paragraph 2.
[87] See *Marshall* CC (2018) at paragraph 4.

> rather than to adopt the proper purposive interpretation", which seeks to determine the "objective purpose of the legislation".

The second view, argued on behalf of the South African tax administration, posited that a court:

> may have regard to an administrative body's interpretation of legislation only to the extent that this interpretation constitutes evidence that it has been interpreted in a consistent way for a substantial period of time by those responsible for its administration, in order to tip the balance in the case of marginal statutory interpretation. (*Marshall* CC, 2018, paragraph 5)

According to this argument, the Supreme Court of Appeal "interpreted the relevant provisions independently of the Interpretation Note and its reference to it only served to confirm its interpretation" (*Marshall* CC, 2018, paragraph 5). It is interesting that in *KWJ* (2018), the South African tax administration argued to ignore a long-standing practice while in *Marshall* CC (2018), the argument was to take its interpretation into account. *KWJ* (2018) involved a ruling given to taxpayers on the tax liability of a specific type of transaction, while *Marshall* CC (2018) involved an interpretation note, which was likely to fall into the category of a binding general ruling. A superficial comparison of the two cases makes the South African tax administration appear contradictory—on the one hand, it does not want to be bound by a tax ruling (*KWJ*, 2018) while on the other hand, it appears to want an interpretation note to be taken into account in a court's decision, which indirectly makes an interpretation note binding on a taxpayer and thus law, allowing the tax administrator to make law, taking over the role of the legislature, which is arguably not in line with the rule of law.

In considering the approach taken by the Supreme Court of Appeal, the Constitutional Court agreed that the Supreme Court of Appeal had correctly, in accordance with the concept of judicial precedent, taken the approach indicated in a 2015 Supreme Court of Appeal decision.[88] However, the Constitutional Court considered whether the approach required a re-examination[89] and, in particular, whether it took into account the change in South Africa from legislative supremacy to constitutional democracy[90] and the extent to which an administrative body's interpretation of legislation should be considered.[91] Referring to an interpretation note as an administrative body's interpretation of legislation, and commenting on the role of "a unilateral practice of one part of the executive arm of government in the determination of the reasonable meaning to be given to a statutory provision", the Constitutional Court stated that such a practice can "conceivably be justified where the practice is evidence of an impartial application of a custom recognised by all concerned", but cannot be justified "where the practice is unilaterally established by one of the litigating parties" (*Marshall* CC, 2018, paragraph 10). The Constitutional Court further stated that "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" and that "it is best avoided" (*Marshall* CC, 2018, paragraph 10).

[88] In *CSARS v Bosch* 2015 (2) SA 174 (SCA); 77 SATC 71 at paragraph 17, the Supreme Court of Appeal stated that there is authority that, if a provision "has been interpreted in a consistent way for a substantial period of time by those responsible for the administration of the legislation", such evidence "is admissible and may be relevant to tip the balance in favour of that interpretation". The court further stated that this approach is consistent with a contextual approach to interpretation and that the "conduct of those who administer the legislation provides clear evidence of how reasonable persons in their position would understand and construe the provision in question".
[89] See *Marshall* CC (2018) at paragraph 7.
[90] See *Marshall* CC (2018) at paragraph 10.
[91] See *Marshall* CC (2018) at paragraph 10.

Despite the role that publications play in providing certainty to the taxpayer, public, and tax administration, as seen in *KJW* (2018), it would seem that the Constitutional Court did not take kindly to them fettering the interpretation of statutory provisions and perhaps indirectly binding the taxpayer to the interpretation set out in the interpretation note. The Constitutional Court in *Marshall* CC (2018) is considered to be correct in making the distinction between a unilateral practice in determining the interpretation of legislation and a long-term practice (referred to in paragraph 9 of the judgement as "custom") which is used by all parties. In terms of the provisions of the SATAA (2011), the former may, if it meets the definition as set out in the Act, become a "practice generally prevailing". An interpretation note is specifically mentioned as a "practice generally prevailing" in the SATAA (2011) and, accordingly, the tax administration, but not the courts or the taxpayer, would be bound by the interpretation set out in the interpretation note. A long-term practice may also, when applying *KWJ* (2018), become a "practice generally prevailing" and bind the tax administration. However, the Constitutional Court is correct in stating that neither the court nor, for that matter, the taxpayer is bound by the interpretation set out in the interpretation note and, further, that the court does not have to consider the interpretation note when interpreting the provisions of tax legislation, especially when, as in the case of *Marshall* CC (2018), the interpretation note was issued subsequent to the unsuccessful ruling given to the taxpayer. In other words, an interpretation note is not quasi-legislation and is not retrospective.

Paragraph 10 of *Marshall* CC (2018) does raise the question of the point at which a unilateral practice becomes "an impartial application of custom recognised by all concerned". Based on this statement by the Constitutional Court, not only would the tax administration be bound by this practice, as per *KWJ* (2018) or SATAA (2011) provisions, but such a practice could then be considered in determining a "reasonable meaning to be given to a statutory provision" based on it being a "custom recognised by all concerned" (*Marshall* CC, 2018, paragraph 10). A further point raised by *Marshall* CC (2018) is whether the concept of a "custom recognised by all concerned" (paragraph 10) used by the Constitutional Court is different from the concept of a "practice generally prevailing", with the latter potentially only binding the tax administration and the former having a broader role in interpreting a provision? From the case law and the wording of the SATAA (2011), the concept of a "practice generally prevailing" only binds the tax administration and is not seen as an interpretative tool. The Constitutional Court, it seems, has now potentially added a further category, namely "long-standing custom", which can be used as an interpretative tool, but it is questionable as to whether this category binds any of the parties. It seems that even though the legislature has sought to abolish the case law concept of a "practice generally prevailing", the principle of the courts' interpretation of "practice generally prevailing" may have been resurrected by the Constitutional Court through the concept of "long-standing custom" which means that an unofficial publication can be binding on the tax administration. It also raises the question of the role played by the doctrine of legitimate expectations in binding the tax administration to interpretations and views set out in interpretation notes.[92] While a detailed discussion on the concept of "long-standing custom" and the doctrine of legitimate expectations is beyond the scope of this article, the use of these concepts can only support the certainty needed by a taxpayer who follows unofficial publications issued by the South African tax administration.

[92] See Arendse et al. (2022) at paragraph 3.30.

Consistency of Rulings

The certainty of long-standing custom and practices in both official and unofficial publications arises from the consistent treatment or application of particular provisions of the tax legislation. This consistency is seen through the long-term application of the particular interpretation, as seen in *KWJ* (2018) and in binding general rulings being treated as "practice[s] generally prevailing". Similarly, advance tax rulings, it is assumed, should be consistent with the similar or same treatment of taxpayers with the same or similar facts and legal issues. The limitation of being binding on the specific taxpayer or class of taxpayer, together with non-citation rule, makes it difficult to determine whether such a level of consistency has been achieved. The risk of differing advance tax rulings being made despite the same or similar facts and legal issues can be reduced if the officials who issue such rulings are highly-skilled tax professionals, and through the use of an internal peer review and committee decision-making when finalising a ruling. The employment of such a group of highly-skilled professionals by a tax administration must, however, be considered in the context of whether: a country has such professionals given the skill shortages in many developing countries; the tax administration is able to provide pay and benefits that are commensurate with those available in the private sector to these professionals; and such skilled professionals are willing to be employed by the tax administration.

The level of consistency in the decision-making process is, to some extent, assisted by the publication and reasoning of the rulings. The South African tax administration website provides a list of the advance tax rulings, referred to as binding private and binding class rulings, issued since 2007.[93] It is worth noting that not all of these were issued under the provisions of the SATAA (2011); some were issued under the now repealed provisions of the Income Tax Act (1962).[94] While binding general rulings are made available to the public, with the ruling setting out the reasoning and basis for its interpretation, the reasonings and bases for the decisions made in advance tax rulings are only made available to the applicant taxpayer, with a redacted version published and made available to the public.[95] These rulings are published for general information only and with the consent of the applicant or class of applicants, as provided in section 87(1) of the SATAA (2011). The redacted publication removes the content which could identify the taxpayer to whom the relevant advance tax ruling was issued and contains a general summary of the transaction. An "applicant" for a "binding class ruling" may consent in writing to the inclusion of information identifying it or the proposed transaction to facilitate communication with the "class members".

The redacted publication further sets out the conclusion, indicating how the relevant tax provisions applied to the transaction. Prior to its publication, the applicant is provided with a draft for review and editing. While the comments and proposed edits made by the applicant will be considered, the South African tax administration is not required to accept these. The publication of the redacted version is in line with the limited reliance on advance tax rulings as only the applicant taxpayer can rely on them. On the other hand, if the purpose is to just inform taxpayers generally that such rulings have been made and that they could apply for similar rulings, it would be more useful if greater detail of the analysis and application of the law is made available to the taxpayer. The publication of the redacted version does, however, promote transparency and supports the general objectives of certainty and consistency. The publication

[93] Between 2007 and October 2023, around 394 binding private rulings (SARS, 2023d) and 86 binding class rulings (SARS, 2023b) have been published.
[94] The now repealed sections 76B-76S of the Income Tax Act (1962).
[95] See section 87 of the SATAA (2011). See also Waerzeggers and Hillier (2016) on p. 8.

of rulings has the potential to reduce uncertainty, in that taxpayers will have some idea of and insight into the way in which the tax administration will apply the tax legislation. One criticism of the publication of redacted versions is that it may benefit the tax administration, in that it does not have to publicise the detail if it allowed or consented to a taxpayer friendly approach.[96] A second criticism is that, while the redacted versions of favourable advance tax rulings are published, rejected or unfavourable advance tax rulings are not published. For the purposes of certainty, clarity, and transparency, it would be useful if the tax administration published an annual report on the issuing of advance tax rulings, setting out the number of rulings granted and the number of rejected applications. An estimate of the revenue impact of the advance tax ruling system should also be included in such an annual report.

The Binding Nature of Rulings

The certainty provided by advance tax rulings is that the South African tax administrator is bound by the view or interpretation set out in the ruling in relation to the applicant or class of applications.[97] Similarly, a binding general ruling is binding on the South African tax administration with respect to the provisions indicated in the aforesaid ruling. This means that the South African tax administrator is bound by the interpretation, view, or opinion set out in the binding general and advance tax rulings. The binding nature of the advance tax ruling is, however, largely one-sided in that the rulings are only binding on the South African tax administrator and not on the taxpayer. Although the SATAA (2011) makes it clear that advance tax rulings are only binding on the parties to that ruling,[98] this element is clarified by a preamble on the published advance tax rulings. The preamble to the published binding private rulings states that the binding private ruling is published by consent and is not a "practice generally prevailing".[99] A similar preamble is included in published class rulings. The wording of the preamble to the published binding private ruling is as follows:

> This binding private ruling is published by consent of the applicant(s) to which it has been issued. It is binding as between SARS and the applicant and any co-applicant(s) only and published for general information. It does not constitute a practice generally prevailing. (*Binding Private Ruling 308,* 2018)

If the applicant disagrees with the advance tax ruling issued or the tax administration does not provide a favourable ruling, the applicant can either ignore the ruling and continue with the proposed transaction or take the ruling on review. There is a practice in the South African tax administration that the relevant tax officials will, prior to issuing an unfavourable ruling, inform a taxpayer that the ruling will be unfavourable, allowing the taxpayer an opportunity to withdraw it. The ruling will then not be issued, with the result being that the potential unfavourable ruling is not made available to other departments, such as the auditing department of the tax administration. The taxpayer who does not withdraw the application and is granted the unfavourable ruling, who then follows through with the proposed transaction, ignoring the unfavourable ruling, and who implements the transaction according to their own interpretation and legal opinion, takes their chances with the courts when the tax administration issues an assessment using the interpretation in the ruling.

[96] See SARS (2023f). See also SARS (2023h)
[97] See section 82(1) of the SATAA (2011).
[98] See section 82 of the SATAA (2011) read with sections 83 and 84.
[99] With effect from *Binding Private Ruling: BPR 308* (2018).

In *Wenco* (2021), the taxpayer applied to the High Court for a review of an unfavourable ruling made by the South African tax administration. The taxpayer wanted, firstly, the court to declare a VAT ruling unlawful and set it aside, and secondly, to direct the tax administration to issue a VAT ruling as per the taxpayer's interpretation of the relevant provisions.

Wenco was a company with a South African branch, both of which were incorporated in Canada. While Wenco's principal place of business was in Canada, its branch was registered in South Africa as an external company, with its principal place of business and registered address being in South Africa. While Wenco developed and supplied software to its South African clients, the branch provided related services to, inter alia, the South African clients for and on behalf of Wenco. The branch was paid a management fee for rendering these services.

In 2018, to obtain certainty on its VAT registration obligations, Wenco applied to the South African tax administration for a VAT ruling.[100] A similar ruling, which had been applied for in 2017, was subsequently withdrawn. The South African tax administrator issued an unfavourable ruling in respect of the 2018 application, resulting in the review application. Pertinent to this article, the taxpayer's basis for the review was that "the content of and conclusions reached in the VAT ruling" were, inter alia, "materially influenced by an error of interpretation and application of the law to the information that was provided in the application" and, further, "that the VAT ruling is not rationally connected to the purpose as envisaged in the aforesaid provisions of the VAT Act, the information before the respondent and the reasons given for it by the respondent" (*Wenco,* 2021, paragraph 10). The substantive law issue that required interpretation was the meaning and interpretation given to the phrase "carrying on an enterprise" (VAT Act, 1991, section 1[1] read together with section 8[9]) and whether Wenco and the branch were separate persons, each carrying on an enterprise, for the purposes of the VAT Act (1991). A discussion of the substantive issues is beyond the scope of this paper,[101] except to state that, in deciding on the interpretation of the relevant provisions of the VAT Act (1991), the Gauteng division of the High Court set out the way that statutes are to be interpreted in South Africa by referring to the Supreme Court of Appeal case, *Natal Joint Municipality Pension Fund v Endumeni Municipality* (2012),[102] and stating that:

> the process entails attributing meaning to the relevant statutory provision, in the light of the language used, the context in which the provision is set, including the material known to the drafters, and the purpose which the provision is intended to serve. In addition thereto, an interpretation that is sensible and business-like is to be preferred over one that leads to insensible consequences or those that appear to frustrate the statutory objective. (*Wenco,* 2021, paragraph 40)

The tax administration's tax treatment of the taxpayer and the decision of the High Court that there was no basis to set aside the ruling appear to have surprised tax commentators:

> since it has always generally been SARS' practice to allow for similar business structures to be arranged in such a manner to that of the applicants, thus effectively putting a South African branch structure on the same footing as a South African subsidiary structure for VAT purposes. (PricewaterhouseCoopers Tax Services [PwC], 2021, p. 2)

[100] In terms of section 41B of the VAT Act (1991).
[101] For a detailed analysis, see Kruger (2021).
[102] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) par [18].

Of interest is that the decision by the court, according to commentators, changed the long-standing practice of the tax administrator and taxpayers.[103] The judgement does not indicate whether the arguments before the court included whether there was a long-standing practice which was potentially a "practice generally prevailing" as per *KWJ* (2018) or custom as per *Marshall* CC (2018).

Information About and Knowledge of a Taxpayer

One of the concerns that arises in the context of a taxpayer deciding to ignore an unfavourable advance tax ruling and implement the transaction based on their own legal opinion is whether the unfavourable advance tax ruling is known to all departments of the tax administration. Does, or should, the tax administration department responsible for issuing advance tax rulings inform the auditing department about the unfavourable advance tax ruling with the intention that the auditors should monitor the taxpayer's transactions? Should there be a fire or ethical wall between those who issue advance tax rulings and those who issue assessments, with advance tax rulings being issued by a specialised unit, separate from the collection agents?[104] Should the two departments work together, co-operating in order to limit tax avoidance schemes?

As part of the application for an advance tax ruling, a taxpayer must not only set out all the details of the proposed transaction but also provide their own interpretation and legal opinion.[105] The taxpayer must provide all of the relevant information for the proposed transaction. In addition, when determining the veracity of the taxpayer's legal opinion and determining its own legal opinion, the tax administration may request information from the taxpayer.[106] When setting out their legal opinion, the taxpayer may attract the attention of the tax administrator's auditors, especially if the legal opinion is about a complex transaction which is of benefit to the taxpayer. Where the tax administrator agrees with the taxpayer's legal opinion, but that opinion is to the disadvantage of the tax administrator, the tax administrator may be disposed to propose an amendment to the law to remove the benefit. This amendment of the law may be problematic where the legislature applies the law retrospectively. In addition, providing detailed information means that the tax administration has access to information which it otherwise would not and the taxpayer possibly exposes themself to scrutiny and increased attention from the tax administration. This concern is especially pertinent where the proposed transaction is complex, novel, and provides significant tax benefits to the taxpayer. The taxpayer also risks receiving queries from the tax administration about issues related to the ruling requested but which the taxpayer may be reluctant to provide, especially if the tax administration can use such information for tax assessments, can re-open past assessments based on the information provided, or must provide information to a third party in response to a request for information. If the taxpayer gets a negative ruling or decides not to continue with the proposed transaction, such attention from the tax administration may increase. The possible exposure and attention, especially where the taxpayer is seeking a ruling on a complex transaction or seeking certainty about an ambiguous legal provision, may impact on their decision to request a ruling or to not use the private or advance tax ruling system. The South African advance tax ruling provisions do not directly deal with this concern. However, the practice of the relevant advance tax ruling department may attempt to separate the granting of

[103] See PwC (2021).
[104] See Waerzeggers and Hillier (2016) on p. 6.
[105] See Section 79(4) of the SATAA (2011). See also SARS (2013), paragraph 4.3.1, pp. 31-33.
[106] Sections 79(4), 79(5), and 80(3) of the SATAA (2011). See also SARS (2013), paragraph 1.22, pp 4-5, and paragraph 4.36, p. 35.

rulings and the information supplied from the auditing and assessment department. Whether or not such a practice exists is not clear, as this detail is not made available to the taxpayer. On the other hand, it can be argued that the taxpayer should not be afraid of sharing such information as it presumed that the taxpayer has nothing to hide from the tax administration. No comment is made on whether such a presumption is correct.

The Cessation of the Binding Nature of a Ruling

Once a binding ruling is issued, the certainty that the ruling provides is affected by the ability of the tax administrator to set aside, withdraw, or amend the ruling. While advance tax rulings are binding for a specific time period[107] and can be declared void,[108] provision is made for binding general rulings to cease to be binding on the tax administrator.[109]

According to section 84 of the SATAA (2011):

> (1) A 'binding private ruling' or 'binding class ruling' is void *ab initio* if—
> *(a)* the 'proposed transaction' as described in the ruling is materially different from the 'transaction' actually carried out;
> *(b)* there is fraud, misrepresentation or non-disclosure of a material fact; or
> *(c)* an assumption or condition imposed by SARS is not satisfied or carried out.
>
> (2) For the purposes of this section, a fact described in subsection (1) is considered material if it would have resulted in a different ruling had SARS been aware of it when the original ruling was made.

When a ruling is declared void, the South African tax administration, not being bound by the ruling any longer, it is presumed, can assess the applicant taxpayer accordingly. Given that the ruling is then void, meaning that it has no legal effect at all, it is, in effect, a nullity. A question that arises in the context of consistency and certainty is whether the ruling and reasoning behind the ruling would still apply if the same taxpayer brought another application based on the same set of facts and law, and meets the requirements? Or can a different ruling be given?

Advance tax rulings and binding general rulings, like other official publications,[110] cease to be binding when a provision of a tax Act is amended[111] or when a court overturns or modifies an interpretation of the relevant tax Act.[112] Unlike other official publications, an advance tax ruling and binding general ruling that is overturned or modified by a court remains binding if the court decision is appealed or is fact-specific, or if the comments by the courts are obiter dicta.[113] The South African tax administration may also withdraw or amend such rulings.[114] Likewise, other official publications may also be withdrawn or modified, with the withdrawn

[107] See section 78(3)(h) of the SATAA (2011).
[108] See section 84 of the SATAA (2011).
[109] See section 85 of the SATAA (2011).
[110] Such as interpretation notes, practice notes, and public notices. See the definition of "official publications" in section 1 of the SATAA (2011).
[111] Section 85(1)(a) of the SATAA (2011) provides that the amendment can be in the form of a repeal or in a manner which materially affects the ruling.
[112] Section 85(1)(b) of the SATAA (2011) provides for changes to advance tax rulings on subsequent changes to the law.
[113] Section 85(1)(b) of the SATAA (2011) provides for changes to advance tax rulings on subsequent changes to the law.
[114] Section 86 of the SATAA (2011).

or modified version ceasing to be a "practice generally prevailing". The certainty provided by rulings is, therefore, constrained by possible amendments to legislation, court decisions, and modifications to the rulings. When using interpretation notes, binding general rulings, and publications, taxpayers must be cognisant of any such changes.

The Costs of a Ruling System

Given the possibility of a review by a taxpayer taking place, and the binding nature on the tax administration, the costs of setting up a system to provide for tax rulings must be considered against the benefits of such a system. Where a country is still developing its tax administration and focussing on other critical tax reform priorities, the cost of administering a tax ruling system, whether in the form of advance tax rulings or binding general rulings, must be considered against the need for a different focus. The certainty provided by the taxpayer ruling system, being the major benefit of the system, especially in an advance tax ruling system, must outweigh the cost of the system. This cost must be considered from the perspectives of the taxpayer and the tax administration. The cost and benefit of an advance tax ruling includes the length of time it takes for a ruling to be issued or published. A lengthy delay may undermine one of the key objectives, especially in a commercial transaction, which is to provide certainty in the context of a particular transaction. Provision can be made for an expedited ruling process, which may then add an extra fee to the ruling request.[115]

If the taxpayer is charged a fee to obtain an advance tax ruling, the benefit to the taxpayer of having the certainty provided by the ruling must outweigh the cost of the ruling. Another way of stating this is that the elimination of the tax risk must outweigh the cost of the ruling. While there is no fee for a binding general ruling, the South African tax administration requires payment of a fee for advance tax rulings. This fee is said to comprise a cost recovery and research element.[116] The number of published advance tax rulings[117] would seem to indicate that the fee is not a deterrent to obtaining certainty and the type of matters ruled upon appear to indicate that certainty and the elimination of the tax risk outweighs the cost of the ruling.

5. CONCLUSION

Given the number of rulings requested and made, both binding general and advance, it would appear that they do provide tax administrative certainty. The certainty is supported by the South African ruling system through the SATAA (2011) and judgements made by the South African courts. Certainty, as seen in the case of *KWJ* (2018), trumps the changed view and interpretation of the South African tax administration, even where the tax administration attempts to renege on the certainty provided and even where fisc may be prejudiced. The courts and the SATAA (2011) are also clear that the view and interpretation provided by the tax administration must be honoured by the tax administration, and that it is the tax administration, and not the court or taxpayer, that is bound by the ruling or interpretation note, as illustrated in *Marshall* CC (2018). Tax administrative certainty is supported by both binding general rulings and advance tax rulings, even though the basis for such certainty differs, the former being a "practice generally prevailing" and the latter being based on specific provisions in the SATAA (2011).

[115] See SARS (2023a). See also SARS (2013), paragraph 2.3.1, p. 9.
[116] See section 81 of the SATAA (2011) read together with Republic of South Africa (2013), which provides details of the cost recovery fees for binding private and binding class rulings.
[117] See SARS (2023b) and SARS (2023d).

General rulings, advance tax rulings, and even interpretation notes differ and are used by different taxpayers for different reasons. It is likely that the target market for advance tax rulings are those taxpayers who are undertaking economically significant transactions, who are sensitive to risk of future unexpected exposure, and whose management of the tax risk is critical to their financial and reputational standing. For these taxpayers, the decision to apply for a tax ruling is, therefore, both a strategic and a cost consideration. It is, thus, imperative that the ruling system provides certainty for these taxpayers on conclusion of the transaction and once the transaction has been implemented. For the targeted taxpayers, the certainty that the tax administration cannot, without reason, change the legal implications of the ruling is paramount. By limiting the circumstances under which the South African tax administration can change its view or interpretation and apply that changed view or interpretation to an issued ruling, the SATAA (2011) ensures that the taxpayer has this certainty.

The target market for binding general rulings or interpretation notes is the broader taxpayer community. The provisions of the SATAA (2011) and judgements made by the South African courts both enable and support the certainty provided by binding general rulings and even by other publications, such as interpretation notes. Court decisions, such as *KWJ* (2018), recognise the certainty provided by a long-standing practice and, despite the reluctance of the Constitutional Court in *Marshall* CC (2018) to give interpretation notes quasi-law status, the court recognised that interpretation notes are binding on the tax administrator. The inclusion of the binding nature of a "practice generally prevailing" in the SATAA (2011), and the possibility that a long-standing practice can be custom and binding, support tax certainty, taxpayer trust, and confidence in the rulings and publications issued by the South African tax administration.

While the ruling system may attract some criticism, it is clear that the rulings and publications issued by the South African tax administration provide certainty in a cost-effective and efficient manner. Given the hurdles that must be overcome in order to achieve certainty in the interpretation of tax legislation, or even just a consistent application of an interpretation, and the possibility that the tax administration may change its view on the interpretation and application of provisions of tax legislation, the ability to rely on binding general rulings and advance tax rulings does provide certainty about the tax outcome for the taxpayer who applies for an advance tax ruling and the taxpayer who uses the view and interpretation in a binding general ruling. Despite the fact that issues such as the possible privatisation of the law attract criticism, the use of this system of tax rulings in South Africa has the potential to reduce conflict before a formal dispute arises and create a relationship of trust (or even just non-conflict-based interaction) between the South African taxpayer and the South African tax administration.

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