SARS South African Revenue Service

INTERPRETATION NOTE: NO. 73

DATE: 24 April 2013

ACT	**:**	**INCOME TAX ACT NO. 58 OF 1962 (the Act)**
SECTION	**:**	**SECTIONS 11(*a*), 11(*e*), 20(1), 23A AND 25D**
SUBJECT	**:**	**TAX IMPLICATIONS OF RENTAL INCOME FROM TANK CONTAINERS**

Preamble

In this Note unless the context indicates otherwise –

- **"section"** means a section of the Act;
- **"tank container"** means a large metal container, usually of standard size, used for transporting freight; and
- any word or expression bears the meaning ascribed to it in the Act.

1. Purpose

This Note provides guidance on the income tax implications of the letting of tank containers.

2. Background

Tank containers are used for bulk transportation of various cargoes such as liquids, chemicals, gas, foodstuff and bitumen to all parts of the world. The most frequent users of tank containers are local and international shipping, leasing and operating companies.

Investment in tank containers is common, not only for companies, but also for individuals. Tank containers are often bought by investors in rand and let, mostly, to international clients for a US dollar return.

A taxpayer may acquire tank containers for letting purposes through direct acquisition or by hire, typically from a financial institution.

In a typical tank container leasing arrangement the investor purchases a tank container and appoints a South African investment management company as the investor's agent for a period of 10 years. The investment management company in turn has agreements with various offshore lease managers who manage the container on a day-to-day basis and conclude lease agreements with lessees on behalf of the investment management company and hence the investor. The tank is generally placed in a pool and the investor derives a share of the net pool rental income which is determined after deducting various operating costs such as insurance and the fees paid to the leasing agents and investment manager.

This Note discusses how the rental income from the letting of tank containers as well as related deductions and assessed losses will be treated.

3. The law

For ease of reference, the relevant sections of the Act are quoted in the Annexure.

4. Application of the law

4.1 Gross income

From years of assessment commencing on or after 1 January 2001, South Africa switched from a largely source-based system to a residence-based system of taxation.

Under the residence-based system, a "resident", as defined in section 1(1), is assessed on taxable income derived from world-wide receipts or accruals. The following Interpretation Notes can be consulted for a discussion of the requirements for a person to be classified as a "resident":

- No. 3 "Resident: Definition in Relation to a Natural Person – Ordinarily Resident" (4 February 2002);
- No. 4 (Issue 3) "Resident: Definition in Relation to a Natural Person – Physical Presence Test" (8 February 2006); and
- No. 6 "Resident: Place of Effective Management (Persons other than Natural Persons)" (26 March 2002).

A resident's[1] "gross income" as defined in section 1(1) includes –

> "the total amount, in cash or otherwise, received by or accrued to or in favour of"

that resident during the year or period of assessment, excluding receipts or accruals of a capital nature but including a number of specified amounts, whether or not of a capital nature.

In *Geldenhuys v CIR* Steyn J stated that the words "received by" as used in the gross income definition –[2]

> "must mean 'received by the taxpayer on his own behalf for his own benefit' ".

The term "accrued to" was held by Watermeyer J (as he then was) in *WH Lategan v CIR* to mean –[3]

> "to which he has become entitled".

Rental income received by or accrued to a resident will, therefore, be included in the resident's gross income irrespective of whether it is derived from inside or outside South Africa or whether it is paid directly to the resident or collected by an agent on behalf of the resident.

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1 It is unlikely that a person who is not a South African tax resident will have South African-sourced rental income from tank containers and accordingly this occurrence has not been dealt with in further detail in this Note.

2 1947 (3) SA 256 (C),14 SATC 419 at 430.

3 1926 CPD 203, 2 SATC 16 at 20. The correctness of the interpretation of "accrued to" in *Lategan's* case was subsequently confirmed by Hefer JA in *CIR v People's Stores (Walvis Bay) (Pty) Ltd* 1990 (2) SA 353 (A), 52 SATC 9 at 24.

As a general rule rental income derived in a foreign currency must be translated to rand by applying the spot rate on the date of receipt or accrual [section 25D(1)].[4] However, individuals and non-trading trusts may elect to use the average exchange rate for the relevant year of assessment for all receipts or accruals during that year [section 25D(3)]. For more on section 25D see Interpretation Note No. 63 “Rules for the Translation of Amounts Measured in Foreign Currencies” (19 September 2011).

Double taxation will arise when two or more countries impose taxation on the same amount of rental income. In such event, the provisions of any applicable tax treaty and the unilateral relief granted under section 6*quat* by way of rebate or deduction must be considered.

4.2 Deductions from gross income

4.2.1 General deductions – the trade requirement

Section 11 deals with general deductions allowable in the determination of taxable income. Section 23 deals with deductions not allowable in the determination of taxable income. These two sections must be read together in determining a taxpayer’s entitlement to a deduction.

Section 11 only permits a deduction if a taxpayer is carrying on a trade. The word “trade” is defined in section 1(1) as follows:

> **“[T]rade”** includes every profession, trade, business, employment, calling, occupation or venture, including the letting of any property and the use of or the grant of permission to use any patent as defined in the Patents Act, 1978 (Act No. 57 of 1978), or any design as defined in the Designs Act, 1993 (Act No. 195 of 1993), or any trade mark as defined in the Trade Marks Act, 1993 (Act No. 194 of 1993), or any copyright as defined in the Copyright Act, 1978 (Act No. 98 of 1978), or any other property which is of a similar nature;

In *Burgess v CIR* E M Grosskopf JA stated the following on the meaning of the term “trade”:[5]

> “It is well-established that the definition of trade, which I have quoted above, should be given a wide interpretation. In ITC 770 (1953) 19 SATC 216 at p 217 Dowling J said, dealing with the similar definition of ‘trade’ in Act 31 of 1941, that it was ‘obviously intended to embrace every profitable activity and … I think should be given the widest possible interpretation.’ ”

Having regard to the definition of the term “trade”, which specifically includes the letting of property,[6] and the case law referred to above, it is clear that an investor deriving rental income from the letting of tank containers is carrying on a trade.

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[4] Exchange differences, which may arise if there is a delay between the transaction date and the date the amount owing to the taxpayer is settled, are dealt with in section 24I.

[5] 1993 (4) SA 161 (A), 55 SATC 185 at 196.

[6] The word “property” refers to rights having pecuniary or economic value and includes rights of ownership in movable property such as a tank container (see *CIR v Estate C P Crewe & another* 1943 AD 656, 12 SATC 344 at 352).

4.2.2 General deductions [section 11(*a*)]

The requirements for a general deduction under section 11(*a*) read with section 23(*g*) are that expenditure and losses must be –

- actually incurred;
- in the production of income;
- not be of a capital nature; and
- be laid out or expended for the purposes of trade.[7]

In addition, the expenditure must be claimed in the year of assessment in which it is actually incurred.[8]

All of the above requirements must be met in order for a deduction to be allowed under section 11(*a*) read with section 23(*g*). Expenditure that is likely to qualify as a deduction under section 11(*a*) includes interest,[9] agent or management fees, repairs and maintenance, re-certification fees and insurance.

4.2.3 Wear-and-tear or depreciation allowance [section 11(*e*)]

A wear-and-tear or depreciation allowance under section 11(*e*) will generally be allowable as a deduction to a taxpayer if –

- any machinery, plant, implements, utensils and articles;
- owned by the taxpayer or acquired by the taxpayer as a purchaser under an instalment credit agreement;
- are used for the purpose of his or her trade; and
- have diminished in value by reason of wear-and-tear or depreciation during the year of assessment.

SARS allows a wear-and-tear or depreciation allowance on large, metal-type tank containers used for transporting freight over a straight-line period of 10 years – see Annexure A to Interpretation Note No. 47 (Issue 3) "Wear-and-tear or depreciation allowances" (2 November 2012).[10] Interpretation Note No. 47 also deals with, amongst other things, the circumstances in which an allowance will not be allowed and how it must be calculated. A container which is let under a lease agreement covering a period exceeding 10 years must be written off over the period of the lease.[11]

Any wear-and-tear or depreciation allowance recouped as a result of the disposal of a tank container will be dealt with under section 8(4). To the extent that the proceeds on disposal of the tank container exceed its original cost, a capital gain will arise

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7 To the extent that expenditure is not laid out for the purposes of trade it will not be allowed as a deduction [section 23(*g*)].

8 Although section 11(*a*) is silent on this issue, it is clear from the structure of the Act that income tax is an annual event and that the claiming of expenditure cannot be postponed. See, for example, *Concentra (Pty) Ltd v CIR* 1942 CPD 509, 12 SATC 95 at 98.

9 If the container is financed through a loan which is denominated in a foreign currency then sections 25D and 24I will be relevant in determining the rand amount of the interest expense and the *quantum* of exchange differences.

10 Reproduced in Binding General Ruling No. 7 issued on 2 November 2012.

11 Interpretation Note No. 47 (Issue 3) in 4.3.3(a).

which must be dealt with under the capital gains tax provisions of the Eighth Schedule.

The extent to which a lessor can claim a wear-and-tear or depreciation allowance is limited by section 23A (see **4.3.1**).

4.3 Limitation of deductions

4.3.1 Allowances granted to the lessor

Section 23A limits specified allowances claimed by a lessor of an "affected asset" as defined in section 23A(1).[12] A detailed discussion of section 23A can be found in Interpretation Note No. 53 "Limitation of Allowances Granted to Lessors of Affected Assets" (12 February 2010).

A tank container, which is let, is likely to be an "affected asset" with the result that section 23A(2) will apply. Under the latter provision, any wear-and-tear or depreciation allowances are limited to the taxable income derived from the letting of affected assets, determined before deducting any such allowances.

Example 1 – Impact of section 23A on allowances granted to an investor in tank containers

Facts:

X, an individual, has, besides a plumbing business, investments in tank containers and residential properties. X lets the tank containers through an agent to international lessees. The taxable income from X's different ventures for the 2013 year of assessment was as follows:

	R
Plumbing business	1 000 000
Rental:	
Tank containers (before allowing any wear-and-tear allowance)	140 000
Residential properties	60 000

X claimed a wear-and-tear allowance of R200 000 under section 11(*e*) on the tank containers.

Result:

Under section 23A(2) X's deduction for the wear-and-tear allowance on the tank containers for the 2013 year of assessment is limited to R140 000, being an amount equal to the taxable income from letting of those tank containers (as determined before deducting the wear-and-tear allowance). The balance of R60 000 (being the difference between R200 000 and R140 000) must be carried forward to the 2014 year of assessment under section 23A(4).

Further examples to illustrate the practical application of section 23A are contained in Interpretation Note No. 53.

Section 23A is applied before applying paragraph (*b*) of the proviso to section 20(1) pertaining to assessed losses.

[12] See the definitions of an "affected asset" and "operating lease" in section 23A(1).

4.3.2 Assessed loss

An "assessed loss" is defined in section 20(2) as –

> "any amount by which the deductions admissible under section 11 exceeded the income in respect of which they are so admissible".

Section 20(1)(*a*) provides that for the purpose of determining the taxable income derived by any person from carrying on any trade, there will, subject to the ring-fencing provisions contained in section 20A, be set off against the income so derived by that person any balance of assessed loss incurred by that person in any previous year which has been carried forward from the preceding year of assessment.

Section 20(1)(*b*) stipulates that any assessed loss incurred during the same year of assessment in carrying on any *other* trade either alone or in partnership with others, otherwise than as a member of a company the capital whereof is divided into shares, may be set off against income derived from carrying on any trade.

However, paragraph (*b*) of the proviso to section 20(1) prohibits the set-off of any assessed loss incurred during the year or any balance of assessed loss incurred in any previous year of assessment in carrying on a trade outside South Africa against the amount derived by a person from the carrying on of a trade within South Africa.

It is therefore important to determine whether a trade is carried on inside or outside South Africa – see **5**.

5. Determination whether a trade is carried on inside or outside South Africa

There is limited precedent in South African case law for determining where trade is carried on.[13] Although it does not necessarily follow that the place where trade is carried on will be the same as the place where a particular source of income is located, the courts have provided useful guidelines to determine the source of income which may be helpful in determining where trade is carried on.[14]

In *CIR v Black*[15] the taxpayer, a Johannesburg-based stockbroker, carried on a business of buying and selling shares through a London broker. The broker was entitled to deal in shares without consulting the taxpayer. The court held that the source of the profits was in London because that was where a distinct business of buying and selling shares was being carried on.

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[13] In *Khanyile v Club Dry Cleaners (Pty), Ltd & others* 1965 (1) SA 563 (D) the court held that a company carrying on a laundry business was not trading outside its licensed area by sending its trucks to collect and deliver laundry outside that area. In ITC 1779 (2004) 66 SATC 353 (C) the court held that even though certain elements of the trade occurred outside the Republic, the exercise of the taxpayer's wits and labour were the essential elements and those elements were conducted within the Republic. Accordingly, the trade was held to be carried on within the Republic.

[14] *Millin v CIR* 1928 AD 207, 3 SATC 170; *CIR v Lever Brothers & Unilever Ltd* 1946 AD 441, 14 SATC 1; *CIR v Epstein* 1954 (3) SA 689 (A), 19 SATC 221; *CIR v Black* 1957 (3) SA 536 (A), 21 SATC 226; *COT v British United Shoe Machinery SA (Pty) Ltd* 1964 (3) SA 193 (FC), 26 SATC 163; *Transvaal Associated Hide and Skin Merchants v Collector of Income Tax Botswana* 1967 (BCA), 29 SATC 97; *Essential Sterolin Products (Pty) Ltd v CIR* 1993 (4) SA 859 (A), 55 SATC 357 and *First National Bank of Southern Africa Ltd v C: SARS* 2002 (3) SA 375 (SCA), 64 SATC 245. The majority of income tax cases dealing with this subject precede 1 January 2001 when South Africa changed from a source-based to a residence-based system. These cases dealt with the concept of income "from any source within South Africa" which was applicable before 1 January 2001.

[15] 1957 (3) SA 536 (A), 21 SATC 226.

In *COT v British United Shoe Machinery (SA) (Pty) Ltd*[16] the taxpayer concluded lease agreements in Port Elizabeth for the use of its' machinery in Rhodesia for between 5 and 10 years. The court held that the source of the rental income was to be found where the machines were used and hence it was in Rhodesia. The court also noted that the source of rentals from the letting of smaller items for a more limited period (for example, motor cars) would be the lessor's business and not the property leased.

Consistent with the source cases it is necessary to look at all of the activities which include not only the activities (or lack thereof) of the taxpayer but the activities of the investment management company and the lease managers (including the scope of their authority) and the locations where the tank container is used. It is submitted that the place where trade is carried on will be where the main business activities occur on a continuing basis. In the context of tank containers this will be the place where the international leasing managers carry on their business activities, for example, where they take orders, enter into leases, collect the rent and generally deal with the administration of the container pool on behalf of the taxpayer and the place where the tank containers are actually used by lessees. The taxpayer's activities in South Africa (for example, the provision of the funds to acquire the tank containers, the signing of an agency agreement in South Africa and the investment management company's activities conducted on the taxpayer's behalf) are unlikely to be of sufficient scale to result in a conclusion that the trade is conducted in South Africa.

Thus, in the typical tank-container leasing arrangement described in **2** the trade will be carried on outside South Africa with the result that paragraph (*b*) of the proviso to section 20(1) will apply and any rental loss from the letting of containers may not be set off against local trade income. Any such foreign assessed loss will be available for set-off against other foreign trade income derived during the same year of assessment and any remaining balance of the foreign assessed loss must be carried forward to the succeeding year of assessment in which it will be available for set-off against foreign trade income.

Ultimately, however, the determination of where trade is carried on will depend on the facts and circumstances of the particular case.

6. Conclusion

In summary –

- South Africa applies a residence-based tax system under which residents are assessed on their taxable income derived from their world-wide receipts and accruals, which include income derived from the letting of tank containers;
- rental income derived in a foreign currency must generally be translated to rand by applying the spot rate on the date of receipt or accrual under section 25D;
- expenses incurred by a taxpayer will be allowed as a deduction in the determination of the taxpayer's taxable income if the deduction complies with the requirements of section 11(*a*) read with section 23(*g*);

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[16] 1964 (3) SA 193 (FC), 26 SATC 163.

- a lessor will generally be allowed a deduction for wear-and-tear or depreciation on tank containers that is calculated over a straight-line period of 10 years;
- a lessor's deduction of a wear-and-tear or depreciation allowance on affected assets is limited under section 23A to the taxable income derived from the letting of those assets before deducting that allowance; and
- under paragraph (*b*) of the proviso to section 20(1) an assessed loss or balance of assessed loss incurred from carrying on a trade outside South Africa may not be set off against income derived from carrying on a trade in South Africa.

Legal and Policy Division
SOUTH AFRICAN REVENUE SERVICE

Annexure – The law

Section 11(*a)* and (*e*)

11. General deductions allowed in determination of taxable income.—For the purpose of determining the taxable income derived by any person from carrying on any trade, there shall be allowed as deductions from the income of such person so derived—

(*a*) expenditure and losses actually incurred in the production of the income, provided such expenditure and losses are not of a capital nature;

(*b*) – (*d*) [. . .]

(*e*) save as provided in paragraph 12(2) of the First Schedule, such sum as the Commissioner may think just and reasonable as representing the amount by which the value of any machinery, plant, implements, utensils and articles (other than machinery, plant, implements, utensils and articles in respect of which a deduction may be granted under section 12B, 12C, 12DA, 12E(1) or 37B) owned by the taxpayer or acquired by the taxpayer as purchaser in terms of an agreement contemplated in paragraph (*a*) of the definition of "instalment credit agreement" in section 1 of the Value-Added Tax Act, 1991 (Act No. 89 of 1991), and used by the taxpayer for the purpose of his or her trade has been diminished by reason of wear and tear or depreciation during the year of assessment: Provided that—

(i) . . .

(iA) no allowance may be made in respect of any machinery, plant, implement, utensil or article the ownership of which is retained by the taxpayer as a seller in terms of an agreement contemplated in paragraph (*a*) of an "instalment credit agreement" as defined in section 1 of the Value-Added Tax Act, 1991;

(ii) in no case shall any allowance be made for the depreciation of buildings or other structures or works of a permanent nature;

(iiA) where any machinery, implement, utensil or article qualifying for an allowance under this paragraph is mounted on or affixed to any concrete or other foundation or supporting structure and—

(*aa*) the foundation or supporting structure is designed for such machinery, implement, utensil or article and constructed in such manner that it is or should be regarded as being integrated with the machinery, implement, utensil or article; and

(*bb*) the useful life of the foundation or supporting structure is or will be limited to the useful life of the machinery, implement, utensil or article mounted thereon or affixed thereto,

the said foundation or supporting structure shall for the purposes of this paragraph not be deemed to be a structure or work of a permanent nature but shall for the purposes of this Act be deemed to be a part of the machinery, implement, utensil or article mounted thereon or affixed thereto; (iii) no allowance shall be made under this paragraph in respect of any ship to which the provisions of section 14(1)(*a*) or (*b*) apply or in respect of any aircraft to which the provisions of section 14*bis*(1)(*a*), (*b*) or (*c*) apply;

(iiiA) no allowance shall be made under this paragraph in respect of any machinery, implement, utensil or article of which the cost has been allowed as a deduction from the taxpayer's income under the provisions of section 24D;

(iv) . . .

(v) the value of any machinery, implements, utensils or articles used by the taxpayer for the purposes of his trade shall be increased by the amount of any expenditure (other than expenditure referred to in paragraph (*a*)) which is proved to the satisfaction of the Commissioner to have been incurred by the taxpayer in moving such machinery, implements, utensils or articles from one location to another;

(vi) . . .

(vii) where the value of any such machinery, implements, utensils and articles acquired by the taxpayer on or after 15 March 1984 is for the purposes of this paragraph to be determined having regard to the cost of such machinery, implements, utensils and articles, such cost shall be deemed to be the cost which, in the opinion of the Commissioner, a person would, if he had acquired such machinery, implements, utensils and articles under a cash transaction concluded at arm's length on the date on which the transaction for the acquisition of such machinery, implements, utensils and articles was in fact concluded, have incurred in respect of the direct cost of the acquisition of such machinery, implements, utensils and articles, including the direct cost of the installation or erection thereof; and

(viii) . . .

(ix) where any such machinery, plant, implement, utensil or article was used by the taxpayer during any previous year of assessment or years of assessment for the purposes of any trade carried on by such taxpayer, the receipts and accruals of which were not included in the income of such taxpayer during such year or years, the Commissioner shall take into account the period of use of such asset during such previous year or years in determining the amount by which the value of such machinery, plant, implement, utensil or article has been diminished;

Section 20(1)

20. Set-off of assessed losses.—(1) For the purpose of determining the taxable income derived by any person from carrying on any trade, there shall, subject to section 20A, be set off against the income so derived by such person—

(*a*) any balance of assessed loss incurred by the taxpayer in any previous year which has been carried forward from the preceding year of assessment;

(*b*) any assessed loss incurred by the taxpayer during the same year of assessment in carrying on any other trade either alone or in partnership with others, otherwise than as a member of a company the capital whereof is divided into shares:

Provided that there shall not be set off against any amount—

(*a*) . . .

(*b*) derived by any person from the carrying on within the Republic of any trade, any—

(i) assessed loss incurred by such person during such year; or

(ii) any balance of assessed loss incurred in any previous year of assessment,

in carrying on any trade outside the Republic; or

Section 23A

23A. Limitation of allowances granted to lessors of certain assets.—(1) For the purposes of this section—

"affected asset" means—

(*a*) any machinery, plant or aircraft which has been let and in respect of which the lessor is or was entitled to an allowance under section 12 or 14*bis*, whether in the current or a previous year of assessment, other than any such machinery, plant or aircraft let by him under an agreement of lease formally and finally signed by every party to the agreement before 15 March 1984; or

(*b*) any machinery, plant, implement, utensil, article, aircraft or ship which has been let and in respect of which the lessor is or was entitled to an allowance under section 11(*e*), 12B, 12C, 12DA or 37B(2)(*a*), whether in the current or a previous year of assessment, other than any such machinery, plant, implement, utensil, article, aircraft or ship let by him under an agreement of lease formally and finally signed by every party to the agreement before 19 November 1988, but excluding any such asset let by the lessor under an operating lease or any such asset which was during the year of assessment mainly used by him in the course of any trade carried on by him, other than the letting of any such asset;

"operating lease" means a lease of movable property concluded by a lessor in the ordinary course of a business (not being a banking, financial services or insurance business) of letting such property, if—

(*a*) such property may be hired by members of the general public directly from that lessor in terms of such a lease, for a period of less than one month;

(*b*) the cost of maintaining such property and of carrying out repairs thereto required in consequence of normal wear and tear, is borne by the lessor; and

(*c*) subject to any claim that the lessor may have against the lessee by reason of the lessee's failure to take proper care of the property, the risk of destruction or loss of or other disadvantage to such property is not assumed by the lessee;

"rental income" means income derived by way of rent from the letting of any affected asset in respect of which an allowance has been granted to the lessor under section 11 (*e*), 12B, 12C, 12DA or 37B(2)(*a*), whether in the current or any previous year of assessment, and includes any amount—

(*a*) which is included in the income of that person in terms of section 8(4) in respect of an amount deducted in any year of assessment in respect of any affected asset; and

(*b*) derived from the disposal of any affected asset.

(2) Notwithstanding the provisions of sections 11(*e*) and (*o*), 12B, 12C, 12DA, 14*bis* and 37B(2)(*a*), the sum of the deductions which may be allowed to any taxpayer in any year of assessment under those provisions in respect of any affected assets let by him shall not exceed the taxable income (as determined before making the said deductions) derived by him during such year from rental income.

(3) For the purposes of subsection (2), where the taxpayer is entitled to any deduction which relates to rental income and other income derived by him, an appropriate portion of such deduction shall be taken into account in the determination of the taxable income derived by him from rental income.

(4) Any deduction which is disallowed under the provisions of subsection (2) shall be carried forward to the succeeding year of assessment and shall, subject to the provisions of this section as applicable in relation to that year, be deemed to be a deduction to which the taxpayer is entitled in that year.