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TAX

‘Kickbacks and bribes are not tax deductible’

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CAN a business claim a tax deduction for money it pays as a bribe or kickback? Under section 23(o) of the Income Tax Act, the answer is no.

The provision was introduced in 2005 to support South Africa’s anti-corruption efforts, and it denies a tax deduction for any payment that amounts to corrupt activity under our main anti-corruption statute, the Prevention and Combating of Corrupt Activities Act 12 of 2004 (the PCCAA).

For more than a decade, section 23(o) was rarely used. The recent Tax Court judgment of Taxpayer LE (Pty) Ltd v Commissioner for the South African Revenue Service, delivered on 10 April 2026, has now brought it firmly into the open.

The case in brief

At the heart of the appeal was a familiar pattern dressed in new clothing. A South African company, part of a foreign rail-equipment group, won contracts worth more than R25 billion to supply locomotives to a state-owned enterprise.

Roughly 20% of each contract’s value was paid away, through a chain of related foreign companies, to consultancy firms that did no real work; payments dressed up as “Business Development Services”.

Sars refused to allow those payments as tax deductions, relying on the usual rules in sections 11(a) and 23(g) of the Income Tax Act and, in addition, on section 23(o). The Tax Court agreed on all three grounds.

What the judgment confirms

Two points stand out from the Court’s reasoning.

First, the taxpayer does not need to have been convicted, or even charged, with any crime before section 23(o) can apply. As SARS confirmed in its own Interpretation Note 54, the section operates on the civil standard, and SARS need only show, on a balance of probabilities, that the payment was corrupt. It does not need to wait for a prosecutor to act.

Second, having made its section 23(o) finding, the Court referred the matter to the National Director of Public Prosecutions for possible criminal investigation. A tax disallowance is therefore not the end of the matter for the taxpayer – it can be the start of a criminal one.

Why section 23(o) was enacted

Both of these consequences fit the reason section 23(o) was enacted in the first place. Before it was introduced, South African tax law did not specifically deal with whether bribes, fines or penalties could be claimed as deductions. The Budget at the time made clear that this had to change, “as a matter of good governance and to reinforce South Africa’s anti-corruption drive”.

The reasoning was that if a company could claim a tax deduction for the cost of unlawful conduct, the State would effectively be sharing the cost of that conduct. That outcome cannot be defended.

Section 23(o) was the answer; it bars any deduction where the payment itself amounts to corruption under the PCCAA, or where the payment is a fine or penalty for unlawful conduct. The provision is a policy statement: the fiscus will not subsidise corruption.

A warning to taxpayers

The judgment also shows how far Sars’ investigative capability has come. Its Illicit Economy Unit used formal information requests under the Tax Administration Act, an exchange-of-information request to Hong Kong, forensic cash-flow tracing, and independent expert evidence to build a detailed record of the payment flows. The 20% pattern was not advanced as a theory; it was proven, transaction by transaction, against bank records, invoices, and contemporaneous correspondence.

Against that backdrop, section 23(o) is a precise tool in Sars’ anti-corruption toolkit. It protects the tax base by making sure that corrupt expenditure receives no support from the fiscus. It also sends a clear message that taxpayers structuring “advisory”, “facilitation” or “business development” fees in connection with public procurement should expect to have those arrangements tested rigorously, both against the ordinary rule that an expense must be incurred to produce income, and against the corruption ground in section 23(o).

The provision has come alive. Sars has shown both the will and the skill to use it. This judgment is also a reminder that cross-border arrangements face pressure from two sides at once: Sars on the tax side, and the South African Reserve Bank on the exchange-control side. The two regulators increasingly share information with each other, and structures that look fine at a glance can unravel under closer scrutiny.

It is essential that taxpayers obtain proper professional advice on both the tax and exchange-control treatment of cross-border transactions, including related-party payments, transfer pricing, advisory and facilitation fee arrangements, and whether the deductions claimed will hold up under examination.

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