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## Section 24C: The ‘contractual sameness’ requirement

Taxpayers may deduct an allowance for expenditure not yet incurred in terms of section 24C. In *Clicks Retailers (Pty) Limited v Commissioner for the South African Revenue Service* the Constitutional Court considered this provision’s requirement that the income and obligations for future expenditure must arise from the same contract. The judgment contains valuable guidance on the interpretation of the ‘contractual sameness’ requirement to be satisfied to qualify for the allowance.

Taxpayers may deduct an allowance for expenditure not yet incurred in the circumstances set out in section 24C of the Income Tax Act. This provision has been the subject of two disputes that proceeded to the Constitutional Court (‘CC’), which in itself is quite unusual for tax matters. The most recent of these cases is *Clicks Retailers (Pty) Limited v Commissioner for the South African Revenue Service* [2021] ZACC 11. This article considers the key takeaway points from this judgment.

### Overview of the facts

The taxpayer, Clicks Retailers (Pty) Ltd (‘Clicks’), sells merchandise to customers. It operates a customer loyalty scheme, the Clicks ClubCard programme. Clicks and participating customers conclude a ClubCard contract. A customer receives loyalty points when shopping at Clicks. These points can be converted into vouchers, which can be set-off against future purchases.

Members of the ClubCard programme may also earn loyalty points when shopping with affinity partners with whom Clicks concluded agreements.

### Dispute

Clicks claimed an allowance for future expenditure under section 24C for the cost of merchandise to be provided to customers on redemption of their vouchers. SARS disallowed the deduction on the basis that the expenditure will be incurred in terms of the ClubCard Contract, a different contract from the sale.

The Tax Court ruled in Clicks’ favour on the basis that it was artificial to regard the future expenditure from the redemption of a voucher as arising under a different contract from the sale. The Supreme Court of Appeal (‘SCA’) however concluded that the income and obligation did not arise same contract, even if the loyalty programme could not function without the sale. Dlodlo JA specifically noted that the SCA rejected the notion that section 24C applies to inextricably linked contracts in *Commissioner, South African Revenue Service v Big G Restaurants (Pty) Ltd* [2018] ZASCA 179. The CC since accepted that two or

more contracts may possibly be so inextricably linked that they may constitute the same contract for purposes of section 24C in *Big G Restaurants (Pty) Ltd v Commissioner, South African Revenue Service* [2020] ZACC 16.

### Judgment

After concluding that leave to appeal to the CC should be granted, Theron J distilled the essence of the requirements of section 24C to:

“There must be (a) income earned by a taxpayer in terms of a contract (the income-producing contract); (b) an obligation on the taxpayer under a contract that requires future expenditure, which will be financed by this income (the obligation-imposing contract); and (c) contractual sameness.”

Following the CC’s judgment in the Big G case, she indicated that the contractual sameness requirement can be met:

“either on a same- contract basis (the income-producing contract and obligation-imposing contract are literally the same contract) or on a sameness basis (the income and obligation to finance expenditure are sourced in two or more contracts that are so inextricably linked that they meet the requirement of sameness)”

The issue in this case was whether the sameness requirement was met. The mere fact that two contracts are inextricably linked did not necessarily conclude the matter. The determinative question was rather whether they were so inextricably linked that they satisfy the requirement of sameness. In paragraph 46 of the judgment Theron J indicated that, at a minimum, the concept of sameness required that the income earning and obligation to finance future expenditure must depend on the existence of both contracts. If either contract can be entered into and exist without the other, this sameness is not achieved.

The CC concluded that although there were factual and legal links between the sale contract and ClubCard contract, these contracts were simply too independent of each other to meet the sameness requirement. These links were therefore not sufficient to render the contracts the same for purposes of section 24C.

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