

INTERPRETATION NOTE 54 (Issue 3)

DATE: 1 September 2026

ACT : INCOME TAX ACT 58 OF 1962
SECTION : SECTION 23(o)
SUBJECT : DEDUCTIONS NOT ALLOWED – CORRUPT ACTIVITIES, FINES AND PENALTIES, AND FRUITLESS AND WASTEFUL EXPENDITURE

Contents

Preamble.....	1
1. Purpose.....	2
2. Background	2
3. The law	3
4. Application of the law	3
4.1 Activities contemplated under Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004	4
4.2 Fines and penalties	9
4.2.1 Payments of fines and penalties as a result of an unlawful act	9
4.2.2 Penalties falling outside section 23(o)	12
4.2.3 Compensation and damages	13
4.3 Fruitless and wasteful expenditure	14
5. Burden of proof	15
6. Conclusion.....	15
Annexure A – The law.....	17
Annexure B – Categories of offences in Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004	19

Preamble

In this Note unless the context indicates otherwise –

- “**section**” means a section of the Act;
- “**PCCA Act**” means the Prevention and Combating of Corrupt Activities Act 12 of 2004;
- “**PFMA**” means the Public Finance Management Act 1 of 1999;
- “**TA Act**” means the Tax Administration Act 28 of 2011;
- “**the Act**” means the Income Tax Act 58 of 1962;

- **“the Constitution”** means the Constitution of the Republic of South Africa, 1996; and
- any other word or expression bears the meaning ascribed to it in the Act.

The guide and explanatory memorandum referred to in this Note are available on the SARS website at www.sars.gov.za. Unless indicated otherwise, the latest version of these documents should be consulted.

1. Purpose

This Note provides guidance on the meaning and scope of section 23(o), which prohibits the deduction of expenditure incurred –

- if the payment of that expenditure, or the agreement, or offer to make that payment constitutes an activity contemplated in Chapter 2 of the PCCA Act,
- which constitutes a fine charged or penalty imposed as a result of an unlawful activity carried out in South Africa or in any other country if that activity would be unlawful had it been carried out in South Africa; or
- which constitutes fruitless and wasteful expenditure as defined in section 1 of the PFMA and determined in accordance with that Act.

2. Background

The Constitution enshrines the rights of all people in South Africa and affirms the democratic values of equality, human dignity and freedom.¹ It requires the state to respect, protect, promote and fulfil these fundamental rights.² The Constitution also requires that the public administration must be governed by, amongst others, efficient, economic and effective use of resources.³ The Constitution further requires that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.⁴

Corruption affects the above constitutional values and requirements, limits the government's ability to fight poverty, negatively affects economic development, damages social and ethical values, prevents fair business practices, and undermines good governance and democracy. The PCCA Act was introduced in South Africa in 2004 in an effort to strengthen measures to prevent and combat corruption and corrupt activities. The PCCA Act applies to the private and public sectors, including the government, parliament, and the judiciary.

From a policy perspective the deduction for income tax purposes of bribes, fines and penalties relating to unlawful activities, and fruitless and wasteful expenditure cannot be justified. For example, the granting of a deduction for fines and penalties would reduce the burden of the fine or penalty and be contrary to the rationale of the law under which it is imposed.⁵

¹ Section 7(1) of the Constitution.

² Section 7(2) of the Constitution.

³ Section 195 of the Constitution.

⁴ Section 217(1) of the Constitution.

⁵ *Explanatory Memorandum on the Revenue Laws Amendment Bill, 2005.*

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.

Generally, in cases involving expenditure incurred in respect of corrupt activities, fines and penalties, and fruitless and wasteful expenditure, section 11(a) is the section that is applicable in determining whether the amount initially qualifies for a deduction. In context, one of the contentious requirements in this regard is often whether the expenditure has been incurred in the production of income. Section 23(o) is relevant and, if applicable, will serve to deny a deduction for an amount of expenditure which met the requirements for a deduction under section 11(a) or another section.

Section 23(o) was initially introduced into the Act⁶ to specifically prohibit the deduction of expenditure incurred on specified corrupt activities⁷ and a fine or penalty imposed as a result of an unlawful activity.⁸ In order to encourage accountability, sub-paragraph (iii)⁹ was added to section 23(o) to provide that any expenditure incurred by a person subject to the PFMA that constitutes fruitless and wasteful expenditure under the PFMA is not allowed as a deduction in the determination of that person's taxable income.

Section 23(o) is solely concerned with expenditure and is not concerned with whether income has been derived by a taxpayer through legal or illegal means.¹⁰

3. The law

The relevant sections of the Act and the PCCA Act are quoted in **Annexure A**.

4. Application of the law

For purposes of section 23(o) the meaning and scope of the following must be considered:

- Activities contemplated under Chapter 2 of the PCCA Act.¹¹
- A fine or penalty imposed as a result of an unlawful activity.¹²
- Expenditure constituting "fruitless and wasteful expenditure" as defined in section 1 of the PFMA.¹³

⁶ Introduced into the Act by section 28(1)(e) of the Revenue Laws Amendment Act 31 of 2005 with effect from 1 January 2006. Sub-paragraph (iii) was added by section 39(1) of Act 23 of 2018 with effect from 1 April 2019.

⁷ Section 23(o)(i).

⁸ Section 23(o)(ii).

⁹ Sub-paragraph (iii) was added by section 39(1) of the Taxation Laws Amendment Act 23 of 2018 with effect from 1 April 2019.

¹⁰ *MP Finance Group CC (in liquidation) v C:SARS 2007 (5) SA 521 (SCA)*; 69 SATC 141 held that an illegal contract is not without all legal consequences; it can, indeed, have fiscal consequences.

¹¹ Section 23(o)(i).

¹² Section 23(o)(ii).

¹³ Section 23(o)(iii).

4.1 Activities contemplated under Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004

Under section 23(o)(i) expenditure incurred will not be deductible for income tax purposes if the payment of such expenditure or the agreement or offer to make such payment constitutes an activity contemplated in Chapter 2 of the PCCA Act.¹⁴

This Note is not intended to and does not provide guidance on what facts will result in the payment of expenditure, or the agreement or offer to make such payment, constitute an activity contemplated in Chapter 2 of the PCCA Act. Each case must be determined on the facts of the specific case with reference to that Act. Taxpayers must, however, be aware that the ambit of potential payments, or agreements or offers to make payments, that fall within the activities contemplated in Chapter 2 of the PCCA Act is wide. Further, they need to take the impact of corrupt activities into account when determining whether any of the expenditure they incurred falls within its ambit such that they are not permitted to claim a deduction for that expenditure under section 23(o)(i).

Section 23(o)(i) does not require a conviction under the PCCA Act for the section to apply. Any expenditure incurred from a payment, or agreement or offer to make that payment, that constitutes an activity contemplated in Chapter 2 of the PCCA Act will be denied a deduction for income tax purposes.¹⁵

The wide ambit of Chapter 2 is evident in the following:

- The extensive list of offences in section 3 – 21 – see **Annexure B** for a list of the categories of offences (refer to the PCCA Act for further detail).
- The wide wording of those sections and the broad meaning of words and terms used in those sections.

By way of example see below the wide wording of section 3 of the PCCA Act and commentary on some of the other definitions and terms used.

3. General offence of corruption.—Any person who, *directly or indirectly*—

- (a) accepts or agrees or offers to accept any *gratification* from any other person, whether for the benefit of himself or herself or for the benefit of another person; or
- (b) gives or agrees or offers to give to any other person any *gratification*, whether for the benefit of that other person or for the benefit of another person, in order *to act*, personally or by influencing another person so to act, in a manner—
 - (i) that amounts to the —
 - (aa) illegal, dishonest, unauthorised, incomplete, or biased; or
 - (bb) misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

¹⁴ Section 23(o)(i).

¹⁵ See 'Burden of Proof' in **5**.

- (ii) that amounts to—
 - (aa) the abuse of a position of authority;
 - (bb) a breach of trust; or
 - (cc) the violation of a legal duty or a set of rules;
 - (iii) designed to achieve an unjustified result; or
 - (iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,
- is guilty of the offence of corruption.

The phrases “directly or indirectly”, “whether for the benefit of himself or herself or the benefit of another person”, and “whether for the benefit of that person or for the benefit of another person” are appropriately wide considering the nature and scope of the activities the PCCA Act is intended to include in its ambit. It caters for, for example, multiple parties being involved and complicated arrangements involving multiple activities.

The phrase “to act” could include doing something, for example, voting in a particular way, and not doing something, for example, abstaining from voting.

The term “gratification”, which is defined in section 1 of the PCCA Act, is key in the context of corruption in the PCCA Act. It is a broad concept and includes, amongst other things, money, any donation, a gift, a loan, a fee, a contract of employment or services, and the avoidance of punishment, or loss.

The wording of section 3 of the PCCA Act includes elements of moral and ethical considerations. Consider, for example –

- illegal, dishonest, unauthorised, incomplete, or biased;
- misuse;
- abuse;
- breach of trust;
- violation of a legal duty or a set of rules;
- an unjustified result; and
- any other unauthorised or improper inducement.

Many of these considerations, especially those emphasised, depend on value judgements. Courts and prosecuting authorities are used to determining what does and does not accord with the legal convictions of the community. In addition, proof must be provided of the elements of the offence committed. In other words, the strictures of criminal law and the law of evidence, as well as the experience and vigilance of the courts, serve to protect the citizen against the potentially unlimited reach of the PCCA Act.

The Supreme Court of Appeal stated in *Scholtz and others v The State*¹⁶ that – ¹⁷

“corruption is all too often an issue which has to be determined by way of inference drawn from the proven facts. In this regard, like pieces in a jig-saw puzzle, a number of events need to be taken into account to determine the full factual matrix from which inferences may permissibly be drawn. For this reason it is necessary to consider in detail the evidence on record in order to determine whether the court a quo correctly convicted the appellants (of corruption)”.

The Court held that – ¹⁸

“agreement between a corruptor and corruptee on precisely what actions is required for any gratification to be given need not be reached, and a general common understanding suffices”.

The Court further held that –¹⁹

“where one party does a ‘favour’ amounting to the unlawful exercise of any duties on behalf of the other, on the understanding that a gratification of some sort as defined will be forthcoming in due course, it is neither necessary for the nature or amount of that gratification to be specifically agreed, nor for it to have been given, before the crime of corruption is committed”.

Not every form of promotional gift or free lunch constitutes an activity contemplated in Chapter 2 of the PCCA Act. Gifts of no significant, lasting or commercial value will normally not fall within its ambit, but factors such as the taxpayer’s intention, the size and regularity of the gift, and the position of the recipient, amongst others, will be objectively considered. In the course of doing so, the Commissioner will take account of the following dictum in *Gates v Gates*:²⁰

“It is true that in certain cases more especially in those in which charges of criminal or immoral conduct are made, it has repeatedly been said that such charges must be proved by the ‘clearest’ evidence or ‘clear and satisfactory’ evidence or ‘clear and convincing’ evidence, or some similar phrase. There is not, however, in truth any variation in the standard of proof required in such cases. The requirement is still proof sufficient to carry conviction to a reasonable mind, and the reasonable mind is not so easily convinced in such cases because there are moral and legal sanctions against immoral and criminal conduct and consequently probabilities against such conduct are stronger than they are against conduct which is not immoral or criminal.”

For completeness it is noted that even if section 23(o) denies the person incurring the expenditure a deduction, the amount may have fiscal consequences for the recipient. The only question as between the recipient and the *fiscus* is whether amounts received by or accruing to a taxpayer fall under the meaning of “gross income” as defined in section 1(1).²¹

¹⁶ [2018] 4 All SA 14 (SCA).

¹⁷ Paragraph 6.

¹⁸ Paragraph 130.

¹⁹ Paragraph 131.

²⁰ 1939 AD 150 at 155.

²¹ *MP Finance Group CC v C: SARS 2007 (5) SA 521 (SCA)*, 69 SATC 141.

Example 1 – General offence of corruption*Facts:*

Company A wishes to sponsor cricket team B in order to acquire exclusive marketing and advertising rights during its cricket matches. A director of Company A approaches the chairperson of the board of cricket team B and proposes the sponsorship for the amount of R500 000. On behalf of Company A, the director suggests that if the chairperson of the board uses his influence to secure the sponsorship for Company A to the exclusion of Company A's competition, Company A would donate cricket kits to the charity that the chairperson is known to support. A month later the chairperson of the board announces Company A as the official sponsor of cricket team B. Six months later Company A purchases the cricket kits at a cost of R50 000 and donates the cricket kits to the charity concerned.

Result:

Company A's offer to the chairperson of the board of cricket team B to provide cricket kits to the charity constitutes a general offence of corruption under section 3 of the PCCA Act, as the cricket kits are gratification given for the benefit of another person (the charity) in order for the chairperson to, amongst others, dishonestly carry out his duties and induce him to act in a particular way. If the expenditure of R50 000 meets the requirements for deduction under, for example, section 11(a), Company A will be denied a deduction under section 23(o)(i).

The sponsorship to cricket team B is not unlawful. The payment made by Company A in the amount of R 500 000 may potentially be claimed as a deduction under section 11(a) and will not be denied as a deduction under section 23(o)(i).

Example 2 – Offences in respect of corrupt activities relating to “specific persons”*Facts:*

Company C requires 500 tonnes of level 1 coal annually to run its business operations. Company D would like to secure the contract to supply Company C the coal but at a price that might be higher than that which others in the industry are currently charging.

E, a director and an authorised representative of Company D, is tasked by Company D to approach F, the chief financial officer of Company C, for assistance in ensuring Company D gets the contract. E is given a budget of R8 million to use as he sees fit in accomplishing this task. E approaches F and in return agrees to pay F an amount of R5 million. E is the sole director and shareholder of Company G.

The sale agreement between Company C and Company D is concluded. Company C pays Company D R52,5 million for the year's coal supplies. E, on behalf of Company D, pays R8 million to Company G. Company G pays F R5 million and declares a dividend to E of R3 million.

Result:

E and F fall within the definition of an “agent” as defined in section 1 of the PCCA Act. The R8 million used to pay F R5 million and E R3 million is “money” and falls within the ambit of paragraph (a) of the definition of “gratification” in section 1 of the PCCA Act. E and F agree to and accept gratification to abuse their position and act dishonestly in performing their duties and are guilty of committing a corrupt activity relating to agents under section 6 of the PCCA Act.

Company D and Company G are participants in the corrupt activity and are guilty of the general offence of corruption under section 3 of the PCCA Act.

Company D

Company D must include R52,5 million in its gross income on the earlier of receipt or accrual. The payment of R8 million by Company D to Company G constitutes expenditure incurred in respect of a corrupt activity under Chapter 2 of the PCCA Act. Accordingly, even if the expenditure meets the requirements for deduction under a section of the Act, the expenditure incurred by Company D of R8 million is prohibited as a deduction under section 23(o)(i).

Company G

The total amount of R8 million received by Company G must be included in its gross income on the earlier of receipt or accrual. The payment of R5 million by Company G to F constitutes expenditure incurred in respect of a corrupt activity. Accordingly, even if the expenditure incurred by Company G of R5 million meets the requirements for deduction under a section of the Act, Company G will be prohibited from claiming it as a deduction under section 23(o)(i). No deductions are available for Company G in respect of the dividend of R3 million declared and paid to E, so there is no deduction for section 23(o) to prohibit. Company G has declared a dividend to its shareholder and must withhold and pay over dividends tax to SARS.²²

E

The dividend of R3 million from Company G must be included in E’s gross income. It will, however, be exempt under section 10(1)(k). If Company G fails to withhold dividends tax from the dividend, E must pay the applicable dividends tax to SARS under section 64K(1)(a).²³

F

The amount of R5 million from Company G must be included in F’s gross income and is subject to income tax.

Company C

The payment of the expenditure incurred by Company C for the purchase of coal does not constitute an unlawful activity as envisaged under section 23(o). Therefore, the payment for the coal may potentially be claimed as a deduction under section 11(a) and will not be denied as a deduction under section 23(o)(i).

²² See the *Comprehensive Guide to Dividends Tax* for detail.

²³ See the *Comprehensive Guide to Dividends Tax* for detail.

Example 3 – Offences in respect of corrupt activities relating to the procuring and withdrawal of tenders

Facts:

Company H submits a tender to state-owned Company I for the construction of public infrastructure. Their projected price for the tender project amounts to R50 million. Director J, a representative of Company H, agrees to pay an amount of R200 000 towards Company I's year-end function after a suggestion by the chairperson of the tender committee that this would be a good gesture and would assist during tender deliberations. Company K, which also specialises in the construction and installation of public infrastructure, submits a tender at a lower price. After influence by the chairperson of the tender committee of Company I, the tender is awarded to Company H even though the preferred applicant is Company K. Company H pays R200 000 towards Company I's year-end function and claims the expenditure as a deduction in respect of entertainment costs.

Result:

Company H, through its representative Director J, has committed a corrupt activity under section 13 of the PCCA Act by offering gratification to Company I, in the form of a contribution towards its year-end function, as an inducement and reward for the chairperson of the tender committee to use his influence in the awarding of the tender. Even if the payment of R200 000 meets the requirements for deduction under a section of the Act, Company H will be prohibited from claiming a deduction under section 23(o)(i) as the expenditure relates to a corrupt activity.

4.2 Fines and penalties

4.2.1 Payments of fines and penalties as a result of an unlawful act

Section 23(o)(ii) prohibits the deduction of expenditure incurred that constitutes a fine charged or penalty imposed as a result of an unlawful activity carried out –

- in South Africa; or
- in any other country if that activity would be unlawful had it been carried out in South Africa.

Claassen²⁴ describes a “fine” and “penalty”, respectively as follows:

“[a] financial penalty imposed for a crime committed”.

“[a] fine or punishment.”

In *Rex v Laughton*,²⁵ Matthews J described “penalty” as follows:

“‘Penalty’, when used in a statute – though it may not always import a punishment for a criminal offence – does at least imply some form of sanction declared or operating by order of a court of law.”

²⁴ Claassen, R. D (2023). *Claassen's Dictionary of Legal Words and Phrases*. My LexisNexis [online].

²⁵ 1930 NPD 47 at 53.

Dictionary.com defines “fine” and “penalty”, respectively as follows:

- “1. a sum of money imposed as a penalty for an offense or dereliction: a parking fine ...4. Archaic. a penalty of any kind.”²⁶
- “1. a punishment imposed or incurred for a violation of law or rule. ... 2.a loss, forfeiture, suffering, or the like, to which one subjects oneself by nonfulfillment of some obligation.”²⁷

*Black’s Law Dictionary*²⁸ defines “unlawful act” as –

“conduct that is not authorized by law; a violation of a civil or criminal law”.

Dictionary.com defines “unlawful” as –²⁹

- “1. not lawful; contrary to law; illegal”.

An activity carried out in South Africa may be unlawful under a statute or under common law.

Statutory offences

Most statutes create offences and corresponding penalties in order to enforce compliance with their provisions. Some examples are included below.

The Act contains various penalty provisions, such as –

- paragraph 5(5) of the Fourth Schedule to the Act, which applies to an employer that fails to deduct or withhold the correct amount of employees’ tax; and
- section 35A(9), which prescribes that any purchaser that fails to pay the required withholding tax to SARS from payments to non-resident sellers of immovable property within the prescribed period will be liable for, amongst others, a penalty of 10% in addition to any other penalties or charges the purchaser may be liable for under the Act.

Chapters 15 and 16 of the TA Act provide for non-compliance and understatement penalties. The main purpose of such additional charges is to ensure the accuracy of returns upon which the whole income tax system is based and to thus avoid the loss of revenue to the *fiscus*.

Section 23(d) prohibits the deduction of such fiscal penalties by denying a deduction for –

“any tax or interest imposed under this Act or any interest or penalty imposed under any other Act administered by the Commissioner;”³⁰

Fines imposed by the courts for tax offences³¹ will be denied as a deduction under section 23(o)(ii).

²⁶ www.dictionary.com/browse/fine [Accessed 1 September 2026].

²⁷ www.dictionary.com/browse/penalty [Accessed 1 September 2026].

²⁸ 8 ed 2004.

²⁹ www.dictionary.com/browse/unlawful [Accessed 1 September 2026].

³⁰ A tax, as defined in section 1(1), will generally not meet the requirements for deduction under section 11(a). However, assuming the requirements were met, the deduction would be denied under section 23(d).

³¹ Chapter 17 of the TA Act lists criminal offences for which the courts could impose fines or imprisonment.

The ambit of section 23(o)(ii) is wider than tax-related fines and penalties, and includes any fine charged or penalty imposed for any unlawful activity carried out in South Africa or outside South Africa (if it would have been an unlawful activity had it been carried out in South Africa).

Other examples of an unlawful act may include the following:

- Practices prohibited by the Competition Act 89 of 1998

Under sections 4 to 9 of this Act certain restrictive practices, as well as the abuse of a dominant position, are prohibited. Restrictive practices include –

- agreements between parties in a horizontal or vertical relationship that substantially prevent or lessen competition;
- agreements, practices or decisions between parties in a horizontal relationship if it involves restrictive horizontal practices such as price-fixing, market division between firms and collusive tendering; and
- minimum resale price maintenance.

- Unfair marketing

The Consumer Protection Act 68 of 2008 protects a number of fundamental consumer rights, including the right to fair and responsible marketing and the right to restrict unwanted direct marketing. A consumer's rights under that Act may be enforced through referral of a matter to the National Consumer Tribunal, an ombudsman with jurisdiction, or a court with competent jurisdiction. Contravention of the Consumer Protection Act may result in civil or criminal liability as well as the possible imposition of an administrative penalty.

- Unfair discrimination, harassment, hate speech

These are dealt with by the equality courts. Equality courts are courts designed to deal with matters covered by the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, also known as the Equality Act.

- Violation of traffic laws.
- Contravention of municipal by-laws.
- Offences under the National Road Traffic Act 93 of 1996.

Example 4 – Payment of a fine owing to an unlawful act

Facts:

Company L provides pharmaceutical goods for consideration to the public. Owing to an unexpected increase in the demand for certain pharmaceutical goods, Company L increased the price of those goods by 100%.

The Competition Tribunal, under the specific sections of the Competition Act 89 of 1998, found Company L guilty of excessive pricing and unfair practices and levied a penalty of R 1 million.

Result:

The fine imposed on Company L is in respect of an unlawful activity under the Competition Act. Accordingly, if the expenditure meets the requirements for deduction under a section of the Act, the expenditure of R1 million incurred by Company L will be prohibited as a deduction under section 23(o)(ii).

Common law

A common law offence is unlawful by historical legal precedent developed by the courts of law in South Africa. There is no statute to regard such an offence as unlawful. Some examples of common law offences are murder, robbery, rape, and culpable homicide.

Common law offences are not necessarily limited to particular types of “persons” such as natural persons. Companies are capable of being prosecuted and sentenced for common law crimes committed such as culpable homicide. A person receiving a fine on conviction will not be allowed a tax deduction for the fine under section 23(o)(ii).

In the Rhodesian case of *S v Joseph Mtshumayeli (Pvt) Ltd*,³² a charge arose from the negligent driving of a bus in the course of the company’s business. The appellant, a limited liability company operating an omnibus company, was convicted in a magistrate’s court of culpable homicide and sentenced to a fine of \$200. On appeal the conviction was upheld but the fine was altered to a caution and discharge. Under equivalent circumstances in South Africa today, if a company was found guilty and incurred a fine, the company would not be allowed a tax deduction for the fine under section 23(o)(ii).

Fine or penalty imposed outside South Africa

A fine or penalty imposed by a foreign country will also be denied as a deduction under section 23(o)(ii) if that activity would be unlawful had it been carried out in South Africa.

Expenditure incurred on a fine or penalty imposed by a foreign country for an offence carried on outside South Africa that would not be unlawful if it had been carried out in South Africa, will not be denied as a deduction under section 23(o)(ii). Whether such fine or penalty is deductible will depend on whether it meets the requirements for deduction under appropriate sections in the Act, generally section 11(a) read with section 23(g).

4.2.2 Penalties falling outside section 23(o)

Not all penalties payable result from an “unlawful activity” and will thus not be denied as a deduction under section 23(o)(ii). However, such penalties will need to meet the requirements of an applicable section, often section 11(a), read with section 23(g), in order to qualify for a deduction.

Typical examples are the commercial penalties found in the building industry. In concluding building contracts, the owner and the contractor would normally agree on the completion of work on or before a certain date. A penalty clause is often included in the contract under which the contractor must pay the owner a certain sum of money for each day the operations continue after the agreed date of completion. If the contractor breaches the contract by failing to complete the work in time and incurs the penalty, it will likely meet the requirements for deductibility under section 11(a).

³² 1971 (1) SA 33 (RA).

It is beyond the scope of this Note to examine the requirements of section 11(a) in detail. It suffices to say that the facts and circumstances of each case will have to be considered in deciding whether a particular penalty is deductible under section 11(a), read with section 23(g). If the penalty qualifies for a deduction, the deduction will not be denied under section 23(o)(ii) as it was not imposed as a result of an unlawful activity.

4.2.3 Compensation and damages

Fines and penalties (see 4.2.1) must be distinguished from amounts payable as compensation or damages.

Dictionary.com defines “compensation” as —³³

“1. the act or state of compensating, as by rewarding someone for service or by making up for someone's loss, damage, or injury by giving the injured party an appropriate benefit.”

Dictionary.com defines “damage” as —³⁴

“2. Law. damages, the estimated money equivalent for detriment or injury sustained.”

Compensation or damages may be awarded for non-patrimonial loss³⁵ or patrimonial loss.³⁶ The above dictionary definitions are broad and do not highlight that “compensation” or “damages” may be used to refer to either non-patrimonial loss or patrimonial loss, depending on context. In *SA Airways v Jansen van Vuuren*³⁷ the court held as follows:

“... this Court in *Johnson & Johnson v CWIU*³⁸ held that the term ‘compensation’ in section 193 of the LRA [Labour Relations Act] included and referred to both patrimonial losses and non-patrimonial losses, such as solatium, ... In section 193, the LRA does not distinguish between ‘damages’ and ‘compensation’ as the EEA [Employment Equity Act] ... The EEA draws a distinction between ‘compensation’ and ‘damages’ and does not regard them as the same. ... The intention must have been that they connote different kinds of award. In my view, ... ‘damages’ connotes a monetary award for ...patrimonial loss and ‘compensation’ connotes a monetary award for non-award patrimonial loss (including a ‘solatium’). ... The purpose of an award of damages for patrimonial loss by means of a monetary award, is to place the claimant in the financial position he or she would have been in had he, or she, not been unfairly discriminated against. This is the common purpose of an award of damages for patrimonial loss in terms of the South African law in both the fields of delict and contract. In the case of compensation for non-patrimonial loss, the purpose is not to place the person in a position he or she would have otherwise been in, but for the unfair discrimination, since that is impossible, but to assuage by means of monetary compensation, as far as money can do so, the insult, humiliation and dignity or hurt that was suffered by the claimant as a result of the unfair discrimination.”

Amounts payable as compensation or damages may qualify for a deduction under section 11(a) and will not be denied as a deduction under section 23(o). The principles laid down in *Port Elizabeth Electric Tramway Co. Ltd v CIR*³⁹ will apply to the payment of compensation or damages. It is beyond the scope of this Note to provide a comprehensive analysis of these principles.

³³ www.dictionary.com/browse/compensation [Accessed 1 September 2026].

³⁴ www.dictionary.com/browse/damage [Accessed 1 September 2026].

³⁵ Compensation for, for example, pain and suffering.

³⁶ Loss in financial position.

³⁷ 2014 ILJ 2774 (LAC).

³⁸ [1998] 12 BLLR 1209 (LAC).

³⁹ 1936 CPD 241, 8 SATC 13.

4.3 Fruitless and wasteful expenditure

Section 23(o)(iii) was introduced to contribute to the government's efforts to limit corruption and to ensure proper governance and accountability by persons subject to the PFMA. Section 3 of the PFMA provides that the PFMA applies to "departments" (as defined in the PFMA), public entities (as listed in Schedule 2 or 3 of the PFMA) and "constitutional entities" (as defined in the PFMA). Under section 23(o)(iii) any expenditure incurred by such person that constitutes and is determined to be fruitless and wasteful expenditure under the PFMA, will not be allowed as a deduction from such person's income, if applicable, in the determination of such person's taxable income.⁴⁰

The term "fruitless and wasteful expenditure" is defined in section 1 of the PFMA as –

"...expenditure which was made in vain and would have been avoided had reasonable care been exercised".

National Treasury issued a Fruitless and Wasteful Expenditure Framework⁴¹ for the purpose of providing procedures to be followed by accounting officers and accounting authorities of government departments, constitutional institutions as listed in Schedule 1 to the PFMA and public entities as listed in Schedule 2 and 3 to the PFMA. The terms "vain" and "reasonable care", as contained in the definition of "fruitless and wasteful expenditure", are defined in the Framework as follows:⁴²

"**[V]ain**" means an expenditure which was undertaken without value or substance and which did not yield any desired results or objectives."

"**[R]easonable care**" means applying due diligence and exercising control (careful application, attentiveness, caution) to ensure that the probability of a transaction, event or condition not being achieved as planned is being managed."

Broadly, persons subject to the PFMA are required to prepare annual financial statements which statements are required to include particulars of fruitless and wasteful expenditure.⁴³ The annual financial statements must be audited. Amounts disclosed as fruitless and wasteful expenditure in the audited annual financial statements will generally be accepted as such and, if they meet the requirements for deduction under one of the sections of the Act, be denied as a deduction under section 23(o)(iii). In addition, other amounts of expenditure that constitute and are determined to be fruitless and wasteful expenditure under the PFMA but, for whatever reason, are not so disclosed will, if they meet the requirements for deduction under one of the sections of the Act, also be denied as a deduction under section 23(o)(iii).

⁴⁰ Section 23(o)(iii) was introduced by section 39(1) of the Taxation Laws Amendment Act 23 of 2018 with effect from 1 April 2019, and is applicable from the year of assessment commencing on or after the specified date.

⁴¹ www.treasury.gov.za/legislation/pfma/treasuryinstruction/AccountGeneral.aspx [Accessed 1 September 2026] – see "Treasury Instruction No. 3 of 2019/2020 on Fruitless & Wasteful Exp Framework" and "Annexure A - Fruitless and Wasteful Framework".

⁴² www.treasury.gov.za/legislation/pfma/treasuryinstruction/AccountGeneral.aspx [Accessed 1 September 2026] – see "Treasury Instructions issued in 2019/2020, Annexure A - Fruitless and Wasteful Framework.pdf".

⁴³ Section 40(3)(b)(i) and section 55(2)(b)(i) of the PFMA.

Section 10(1)(zL) exempts from normal tax fruitless and wasteful money that is recovered in a subsequent year of assessment and reads as follows:

“[A]ny amount received or accrued previously prohibited as a deduction during any year of assessment under section 23(o)(iii) that is recovered in any subsequent year of assessment;”

The introduction of section 10(1)(zL) ensures a neutral tax position. If an amount, that constituted fruitless and wasteful expenditure in respect of which a deduction was previously denied under section 23(o)(iii), is recovered by the relevant taxpayer, the amount recovered will be exempt from normal tax during the year of assessment in which it is received or accrued.

5. Burden of proof

Section 102(1)(b) of the TA Act reads as follows:

“(1) A taxpayer bears the burden of proving—
 (a) ...
 (b) that an amount or item is deductible or may be set off; ...
 (c)-(f) ...”

The burden of proof under section 102 of the TA Act generally lies with a taxpayer in view of the fact that the assessment is essentially based on facts within the particular knowledge of the taxpayer.

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.

Under section 102(b) of the TA Act, the taxpayer bears the onus to prove that the expenditure claimed as deduction is eligible for deduction under section 11(a) and is not prohibited under section 23(o).

6. Conclusion

Corruption limits the government's ability to fight poverty, negatively affects economic development, damages social and ethical values, prevents fair business practices, and undermines good governance and democracy. To contribute to the government's anti-corruption drive and to ensure proper governance, section 23(o) was introduced. The section prohibits the deduction of expenditure incurred in respect of activities contemplated in Chapter 2 of the PCCA Act, fines or penalties imposed owing to unlawful activity or any expenditure constituting “fruitless and wasteful expenditure”, as defined in section 1 of the PFMA.

The deductibility of *bona fide* commercial penalties remains unaffected by the provision. Such commercial penalties are subject to the normal tests for deductibility under section 11(a) taking into account section 23(g) and would not be denied as a deduction under section 23(o) if the requirements of those sections were met.

Leveraged Legal Products
SOUTH AFRICAN REVENUE SERVICE

Annexure A – The law

Section 23(o)

23. Deductions not allowed in determination of taxable income.—No deductions shall in any case be made in respect of the following matters, namely—

(a)– (n)

(o) any expenditure incurred—

- (i) where the payment of that expenditure or the agreement or offer to make that payment constitutes an activity contemplated in Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No.12 of 2004);
- (ii) which constitutes a fine charged or penalty imposed as a result of an unlawful activity carried out in the Republic or in any other country if that activity would be unlawful had it been carried out in the Republic; or
- (iii) which constitutes fruitless and wasteful expenditure as defined in section 1 of the Public Finance Management Act and determined in accordance with that Act.

Section 3 of the PCCA Act

3. General offence of corruption.—Any person who, directly or indirectly—

- (a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or
- (b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person,
in order to act, personally or by influencing another person so to act, in a manner—
 - (i) that amounts to the —
 - (aa) illegal, dishonest, unauthorised, incomplete, or biased; or
 - (bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;
 - (ii) that amounts to—
 - (aa) the abuse of a position of authority;
 - (bb) a breach of trust; or
 - (cc) the violation of a legal duty or a set of rules;
 - (iii) designed to achieve an unjustified result; or
 - (iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,
is guilty of the offence of corruption.

Definition of “gratification” in section 1 of the PCCA Act

“**[G]ratification**”, includes—

- (a) money, whether in cash or otherwise;
- (b) any donation, gift, loan, fee, reward, valuable security, property or interest in property of any description, whether movable or immovable, or any other similar advantage;
- (c) the avoidance of a loss, liability, penalty, forfeiture, punishment or other disadvantage;
- (d) any office, status, honour, employment, contract of employment or services, any agreement to give employment or render services in any capacity and residential or holiday accommodation;
- (e) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;
- (f) any forbearance to demand any money or money's worth or valuable thing;
- (g) any other service or favour or advantage of any description, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and includes the exercise or the forbearance from the exercise of any right or any official power or duty;
- (h) any right or privilege;
- (i) any real or pretended aid, vote, consent, influence or abstention from voting; or
- (j) any valuable consideration or benefit of any kind, including any discount, commission, rebate, bonus, deduction or percentage;

Annexure B – Categories of offences in Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004

CHAPTER 2 OFFENCES IN RESPECT OF CORRUPT ACTIVITIES

Part 1: General offence of corruption

3. General offence of corruption

Part 2: Offences in respect of corrupt activities relating to specific persons

4. Offences in respect of corrupt activities relating to public officers
5. Offences in respect of corrupt activities relating to foreign public officials
6. Offences in respect of corrupt activities relating to agents
7. Offences in respect of corrupt activities relating to members of legislative authority
8. Offences in respect of corrupt activities relating to judicial officers
9. Offences in respect of corrupt activities relating to members of prosecuting authority

Part 3: Offences in respect of corrupt activities relating to receiving or offering of unauthorised gratification

10. Offences of receiving or offering of unauthorised gratification by or to party to an employment relationship

Part 4: Offences in respect of corrupt activities relating to specific matters

11. Offences in respect of corrupt activities relating to witnesses and evidential material during certain proceedings
12. Offences in respect of corrupt activities relating to contracts
13. Offences in respect of corrupt activities relating to procuring and withdrawal of tenders
14. Offences in respect of corrupt activities relating to auctions
15. Offences in respect of corrupt activities relating to sporting events
16. Offences in respect of corrupt activities relating to gambling games or games of chance

Part 5: Miscellaneous offences relating to possible conflict of interest and other unacceptable conduct

17. Offence relating to acquisition of private interest in contract, agreement or investment of public body
18. Offences of unacceptable conduct relating to witnesses
19. Intentional interference with, hindering or obstruction of investigation of offence

Part 6: Other offences relating to corrupt activities

20. Accessory to or after offence
21. Attempt, conspiracy and inducing another person to commit offence