TAX

Are raising fees similar to interest? The Supreme Court of Appeal says yes

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In our article published in February 2025, which can be accessed at https://werksmans.com/are-raising-fees-similar-to-interest/, we discussed a judgment by the Tax Court sitting in Cape Town determining that raising fees constitute finance charges which are "similar to interest" and therefore tax deductible if they are incurred in the production of income, even if they are capital in nature. SARS appealed the Tax Court's finding directly to the Supreme Court of Appeal (SCA). On 7 September 2026, the SCA handed down judgment in *C:SARS v Cornucopia Trust* (469/2025) [2026] ZASCA 116, finding in favour of the taxpayer.

The issue

For many years, all finance charges "related" to interest were tax deductible on the same basis as interest, the relevance of which is that, unlike most other expenses, interest is tax deductible if incurred in the production of income even if the expense is capital in nature. The legislation was amended to limit the finance charges treated as "interest" for tax purposes to only those finance charges which are "similar" to interest.

It was generally accepted that raising fees were "related" to interest, but the question arose whether they are also "similar" to interest. For taxpayers incurring raising fees on funds borrowed to acquire capital assets used in their businesses, the legislative change raised the question of whether raising fees could remain tax deductible if they are capital in nature.

The taxpayer financed, and refinanced, the acquisition of two commercial properties with finance obtained from different Sanlam entities.

The original financing agreements as well as each of several subsequent refinancing agreements attracted a raising fee of two per cent of the loan capital, payable upfront by the taxpayer as a precondition for drawing down on the facility. In its 2019 and 2020 tax returns, the taxpayer claimed deductions for the raising fees, spread on a yield-to-maturity basis, as if the raising fees were to be treated as finance charges similar to interest.

SARS disallowed the deduction of the raising fees on the basis that they did not constitute finance charges which are "similar" to interest. The Tax Court conducted an interpretive exercise considering the text, context and purpose of the amendment and concluding that the raising fees bore a sufficiently relevant resemblance to interest to be regarded as "similar" and that this interpretation did not yield "*an unbusinesslike and unwieldy result*".

The SCA majority judgment (4 judges)

The SCA majority agreed with the Tax Court's findings. Due consideration was given to the dynamic nature of tax legislation and, in particular, the 2016 legislative amendment to the definition of "interest", in terms of which the word "related" was replaced by "similar". The amendment resulted from the SCA's decision in *C:SARS v South African Custodial Services* 2012 (1) SA 522 (SCA), where the term "related finance charges" was held to include a broad range of payments connected to a finance transaction, including legal fees and financial advisory fees, irrespective of whether they resembled interest. The SCA noted that it is accepted that the 2016 amendment was intended to narrow that interpretation, but also clarified that the purpose of amending the legislation was not to confine deductibility "*to the most obscure forms of finance charges*".

The majority accepted, correctly in our view, that finance charges which are similar to "interest" must be something other than interest, but with the necessary degree of similarity. On this basis it adopted a threefold approach by –

- firstly analysing the nature of "interest" in the context of a loan for consumption,
- secondly analysing the nature of "finance charges" and the "raising fees" paid by the taxpayer in this matter, and
- finally, comparing the two charges to determine whether the raising fees were similar to interest. The court explained its function in this regard as follows, "… *this Court must decide where on the scale the requisite similarity or relative relevance should raising fees be placed, having regard to the triad of language, context and purpose.*"

The majority identified the essential character of interest paid in respect of a loan for consumption as not merely compensation for the time value of money, but more broadly as the functional cost of credit, including compensation to the lender for the risks involved. The judgment considered in detail the true nature of interest on loans for consumption and cited several judgments to address the incorrect notion that interest is necessarily something paid for the use of the lender's funds. The following warrants mention (with our emphasis):

"*In Commissioner for Inland Revenue v Lever Bros (Lever Bros) Watermeyer CJ described interest as follows:*

… Although, colloquially, one speaks of a debt carrying interest, or interest on a debt, as though interest were a sort of growth sprouting from the debt, the language used means no more than that ***the borrower pays interest, if that is the agreement between the borrower and lender, as consideration for the benefits allowed to him by the lender***"."

The SCA also refers to the judgment in *Cactus Investment (Pty) Ltd v Commissioner for Inland Revenue*, and specifically that the SCA in that case issued a reminder that where one deals with a loan for consumption, "***the interest cannot be compensation to Cactus for the use of Cactus' money***."

The majority judgment pulls this neatly together in summarising the position in relation to interest on a loan for consumption as follows: "*Thus, while interest reflects the time value of money plus the quid pro quo for the lender's forbearance in awaiting repayment at a later date, these are not the only characteristics of interest. Interest is the functional cost of credit – what it costs the lender to provide the credit, together with a margin.* ***Interest is not only the time value of the loan but also compensation for the risk involved.*** *This is borne out by higher interest rates for higher risk loans. In this scenario interest is the agreed consideration to the lender for the extension of credit*."

The next discussion involved an analysis of the raising fees paid by the taxpayer in the matter under consideration, where the raising fee was a precondition for credit and was calculated with reference to the amount of credit to be obtained and the lender's level of risk. In this context, the fee, together with interest, constituted the consideration the borrower paid to obtain credit. The raising fees were directly proportional to the loan capital, linked to the period of the facility (although payable upfront and non-refundable), and compensated the lender for the risk and cost of being deprived of its money. In these circumstances, the raising fees were not merely consideration for the administrative effort of arranging the loan; they were an indivisible part of the cost of obtaining credit and shared the same functional characteristics as interest.

The majority summarised the legal position as follows:

- Raising fees that are inextricably linked to the procurement of the loan have the same functional characteristics as interest (i.e. to compensate the lender for providing credit); and
- They are distinguishable from ancillary charges, such as legal fees, financial advisory fees, and other fees, which are not strictly speaking necessary but incidental to the loan and are compensation for the labour associated with producing the services charged for.

The majority also addressed the significance of the raising fees being a once-off, lump-sum payment. The majority judgment pointed to the definition of "interest", which expressly contemplates interest "*payable or receivable as a lump sum or in unequal instalments during the term of the financial arrangement*". The fact that a charge is paid upfront does not, of itself, disqualify it from being "similar" to interest, as interest itself can be paid as a lump sum.

A final point to note is that the majority considered the nature of the raising fees from the perspective of the borrower, to whom it did not matter whether the fees are payable to the same entity which extended the loan finance or another entity identified by the lender (being in the same group) – from the borrower's perspective, it was a cost it had to pay to obtain the finance.

The takeaway from the majority's reasoning is that (raising) fees that are strictly linked to the procurement of the loan, both in amount and objective, and that compensate the lender for the risk and cost of being deprived of its money, fall within the ambit of section 24J. By contrast, fees charged for the efforts associated with obtaining the loan – such as legal fees and financial advisory fees – remain outside.

The minority judgment (1 judge)

The minority accepted that "similar" does not mean "identical", but regarded the raising fees as a once-off service fee which is not similar to "interest", mainly because it constituted a once off charge which was, according to the dissenting judge, unrelated to the loan term and paid to the facility agent, which was another entity in the group of the lender. The minority judge regarded the raising fee as the cost of obtaining the capital, which he regarded as being different to the price of retaining the capital over time.

The minority judge drew support from –

- The wording in paragraph 20(2)(a) of the Eighth Schedule to the Income Tax Act, which lists interest and raising fees separately. For the minority judge, this indicated that the legislature treats them as distinct species of borrowing costs. The majority of the SCA countered this view by stating that the separate listing of interest and raising fees to exclude both from the base cost of assets, underscores their similarity, not their difference.
- Section 8FA of the Income Tax Act, which defines "hybrid interest" to include interest not determined with reference to a specified rate or the time value of money. The minority reasoned that it would be incongruous to admit as "similar to interest" a fee unconnected to the time value of money, when the legislature excludes amounts called "interest" on precisely that basis. The majority of the SCA dismissed this view, noting that hybrid interest concerns equity instruments disguised as debt and that the raising fees in this instance were indeed linked to the period of the facility and were negotiated with reference to the time value of money.

Concluding remarks

Contrary to the view expressed by SARS in Interpretation Note 142, issued on 12 December 2025, the SCA's majority decision, being the first SCA authority on the meaning of "similar finance charges" following the 2016 legislative amendment, endorsed a functional, business-like approach, rather than a formalistic approach, in determining whether finance charges, other than interest, are sufficiently similar to interest to be tax deductible if they are incurred in the production of interest, even if they may be capital in nature.

Important characteristics to achieve the required level of similarity include a calculation of the raising fees as a percentage of the loan capital, and with regard to the risk undertaken by the lender, which is impacted by the term of the loan.

Characteristics which are not determinative are whether raising fees are paid once-off as a lump sum, and whether they are paid to the lender directly or to another entity as part of the arrangement with the lender.

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