

## TAXPAYER BOUND BY GROUNDS OF OBJECTION

Whether or not a taxpayer is bound by its grounds of objection against a disputed assessment has been the subject of two recent judgments.

The case of *HR Computek (Pty) Ltd v The Commissioner for the South African Revenue Service [2012] ZASCA 178* was delivered by the Supreme Court of Appeal (SCA) on 29 November 2012 (SCA judgment) and the case of *AB CC v The Commissioner for the South African Revenue Service (VAT case number 759, unreported)* was delivered by the Tax Court on 3 May 2013 (Tax Court judgment). These cases appear to be related as they seemingly concern the same taxpayer in respect of the same matter.

The facts are briefly as follows. During 2003 the South African Revenue Service (SARS) conducted an audit on the taxpayer. In 2004, and as a result of the audit, SARS raised an assessment against the taxpayer in respect of the under-declaration of Value-added Tax (VAT). The assessment also made provision for additional tax, penalties and interest. In response, the sole member of the taxpayer filed a notice of objection (form ADR1) on behalf of the taxpayer. Various boxes were ticked on the notice of objection in respect of the grounds on which the taxpayer objected, and in an addendum the taxpayer listed certain grievances pertaining to the matter. A letter was also attached to the notice of objection in which the taxpayer raised various points of dissatisfaction. Most notably the letter referred to an "[un]contested VAT Assessment value of R1,246,177.69 ... ."

SARS subsequently disallowed the taxpayer's objection and recorded that the taxpayer did not object to the capital amount of the VAT in respect of the assessment. During 2004 there was further correspondence from the taxpayer indicating that it agreed with SARS's 'turnover figures'. In 2007, after the disallowance of the objection, the taxpayer filed a notice of appeal (form ADR2), in which the grounds of appeal were indicated as being the unfair imposition of additional tax, penalties and interest, as well as

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unfair procedural matters. In 2011 SARS delivered its grounds of assessment (rule 10 statement) in which it formally recorded that the taxpayer had never disputed liability for the capital amount due under the assessment.

However, when the taxpayer delivered its grounds of appeal (rule 11 statement), it was raised for the first time that the capital amount under the assessment was in dispute. Specifically, the taxpayer indicated that the 'turnover figures' of a related but distinct entity had been included in those of the taxpayer.

Before the matter proceeded to the Tax Court, the parties held a pre-trial conference. The parties agreed that the Tax Court should first decide on the preliminary issue as to whether the taxpayer had properly objected to the capital amount under the assessment, before the trial on the merits would commence.

The preliminary issue was subsequently argued in the Tax Court. However, the judge found that the objection lodged by the taxpayer did not cover the issue that it sought to raise before the Tax Court, being that the taxpayer disputed the correctness of the capital amount under the assessment.

Before the matter proceeded before the Tax Court on the remaining issues, the taxpayer appealed the Tax Court's finding on the preliminary issue to the SCA. The SCA agreed with the finding of the Tax Court. The SCA judgment makes it clear that, on the facts, the taxpayer had not objected to the correctness of

the capital amount under the assessment. The SCA also held that the effect of such a finding is that the taxpayer is precluded from raising such new ground of objection at the appeal stage before the Tax Court.

The SCA judgment explains that raising a ground of objection for the first time in a statement of grounds of appeal is tantamount to allowing the taxpayer to lodge a 'new objection' contrary to the prescribed manner for objecting to an assessment.

The SCA judgment further explains that, because the taxpayer had not properly objected to the capital amount, the assessment as to that capital amount became 'final and conclusive' in 2007. As three years had elapsed, the taxpayer could not force SARS to adjust the assessment, even if the calculation of the amount was patently wrong, such as in this case, where the turnover of another entity was combined with that of the taxpayer.

Even though the taxpayer lost its case in respect of the preliminary issue of whether it had objected to the capital amount, the remaining issues still had to be heard by the Tax Court. Accordingly, the trial before the Tax Court commenced in 2013.

Surprisingly, however, the taxpayer made it clear at the trial that it would not pursue any argument as to the imposition of additional tax, penalties or interest, but that it would only argue the validity of the assessment.

Despite the SCA judgment, the taxpayer continued to argue the issue of the capital amount under the assessment and attacked the validity of the assessment. This was so in light of the fact that it was common cause, and admitted by SARS, that the turnover of a related entity had been included in the turnover of the taxpayer.

The sole member of the taxpayer testified in the Tax Court that the taxpayer initially agreed to the capital amount only 'so that SARS would unlock the bank accounts of the taxpayer'.

The Tax Court judgment made it clear that the SCA had already decided on the issue. The assessment as to the capital amount had become final, and the taxpayer could no longer dispute it. The Tax Court did not have the power to revisit the assessment of the capital amount in light of the SCA judgment, and neither could it refer the matter back to the Commissioner so that the correct turnover figures be used to calculate the taxpayer's liability. Since the Tax Court is a creature of statute, it could not declare an assessment invalid where the validity of that assessment had not been contested in the taxpayer's objection. The Tax Court accordingly dismissed the appeal with costs.

The outcome of the SCA judgment and the Tax Court judgment proved to be quite costly for the taxpayer. This was largely so not because of the substantive merits concerning any under-declaration of VAT, but because of the poor administrative handling of the objection on the part of the taxpayer.

Had the taxpayer ticked the box on the notice of objection (form ADR1) that reads 'miscalculation on the assessment in that an amount was taken into account/not taken into account to determine the liability for tax', the taxpayer's tax bill and legal costs might have been substantially less.

In addition, the decision to abandon the issues of additional tax, penalties and interest in the Tax Court and placing all hopes on the Tax Court deciding that the assessment was invalid, contrary to the findings of the SCA, can also be criticised as a poor decision in respect of the litigation strategy employed.

This case illustrates the importance of setting out one's grounds of objection against an assessment in detail, paying particular attention to whether one objects against the actual validity of the assessment, the capital amount, the additional tax, penalties and/or interest.

What is also noteworthy about this case is that a relatively uncomplicated matter took nearly a decade to be finalised.

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