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# TAX AND EXCHANGE CONTROL ALERT

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A certain question has been the subject of a number of recent court cases: Is an interim order or a decision which does not dispose finally of a case appealable?

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This week's selected highlight in the Customs and Excise environment.

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CLIFFE DEKKER HOFMEYR

# ALAS, SOMETIMES YOU CAN'T APPEAL

*A taxpayer wanted to appeal the Tax Court's decision regarding the onus of proof and the duty to commence leading evidence.*

*The issue was whether the point in limine, being an interlocutory application, was a decision in terms of s129 of the TAA.*

**A certain question has been the subject of a number of recent court cases: Is an interim order or a decision which does not dispose finally of a case appealable?**

The Constitutional Court recently had to answer this question in two separate cases – one involving the changing of street names in Tshwane and the other involving the provisions of the National Credit Act, No 34 of 2005. The issue has now also reared its head within a tax context in the Supreme Court of Appeal (SCA). In *Wingate-Pearse v CSARS* (830/2015) [2016] ZASCA 109 (1 September 2016), a taxpayer wanted to appeal, among other things, the Tax Court's decision regarding the onus of proof and the duty to commence leading evidence.

## Facts

Wingate-Pearse, the taxpayer, disputed the assessments that had been issued by SARS for the 1998 to 2005 years of assessment. He lodged an appeal with the Tax Court on 1 August 2007, which was only set down for hearing almost eight years later on 9 February 2015. In terms of s270(2)(d) of the Tax Administration Act, No 28 of 2011 (TAA), the case had to be decided in terms of the provisions of the TAA. When the hearing before the Tax Court commenced the taxpayer's counsel raised a point *in limine* and argued that the onus of proof and duty to commence leading evidence was on SARS and not the taxpayer. The Tax Court ruled that the initial burden of proof lies with the taxpayer to show that SARS's decision, against which he was appealing, was wrong and that he had the duty to commence leading evidence. The taxpayer appealed this ruling to the SCA.

## Judgment

At the outset, the SCA stated that the Tax Court is a creature of statute, constituted in terms of the TAA. Therefore, one has to consider its provisions to determine whether the Tax Court's ruling on the onus of proof and the duty to begin to lead evidence was appealable or not. Section 133(1) of the TAA allows a taxpayer or SARS the right to appeal "against a decision of the Tax Court under sections 129 and 130". In this case, the issue was thus whether the point *in limine*, being an interlocutory application, was a decision in terms of s129 of the TAA.

Section 117 of the TAA sets out the jurisdiction of the Tax Court. In terms of s117(3), the Tax Court's jurisdiction includes hearing any interlocutory application or any application in a procedural matter relating to a dispute under Chapter 9 of the TAA, which is the chapter dealing with disputes and appeals. In terms of s129(2) the Tax Court may do one of three things in the case of an assessment or "decision" under appeal or an application in a procedural matter referred to in s117, which are as follows:

- Confirm the assessment or "decision";
- Order the assessment or "decision" to be altered; or
- Refer the assessment back to SARS for further examination and assessment.

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CLIFFE DEKKER HOFMEYR

# ALAS, SOMETIMES YOU CAN'T APPEAL

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*The SCA also stated that even based on the conventional principles applicable to determine whether a decision is appealable.*

The taxpayer raised two arguments in support of the contention that the Tax Court's decision was appealable.

Firstly, it argued that because s117(3) of the TAA provides that the Tax Court has the jurisdiction to deal with an interlocutory application and s129(2) contemplates a decision by the Tax Court in terms of s117(3), the Tax Court's decision on the question of onus and duty to begin was appealable. The SCA rejected this argument and held that only if the onus and duty to begin was a decision in terms of s129 of the TAA would it be appealable. That the decision was not appealable appeared from the fact that s129(1) is concerned with a decision that finally resolves the point in issue and is not concerned with interlocutory matters. Furthermore, the question of onus and duty to begin and any provision dealing with the Tax Court's powers in respect of interlocutory matters under s117(3) was "conspicuously absent" from s129(2).

Secondly, the taxpayer argued that a decision on an interlocutory matter and a decision on an application in a procedural matter referred to in s117(3) should be treated the same. The SCA rejected this argument as s129(2) expressly includes a procedural matter referred to in s117(3), but excludes interlocutory matters. To support this finding the SCA referred to the history of s129(2) and s117(3) – both sections were slightly amended by the Tax Administration Laws Amendment Act, No 39 of 2013, most probably to clarify that decisions made by the Tax Court in resolving disputes under the rules of the Tax Court are appealable. As the amendment did not alter the position in respect of interlocutory applications, it meant that decisions in such cases were not appealable.

Interestingly, the SCA rejected the argument raised by SARS in its supplementary written argument, that in appropriate circumstances a decision in an interlocutory application will be appealable. As an aside, the SCA also stated that even based on the conventional principles applicable to determine whether a decision is appealable, as set out in the judgment of *Zweni v Minister of Law and Order 1993* (1) SA 523 (SCA), the decision would not have been appealable as it lacks the necessary requirement of finality and cannot dispose of any issue in the case.

### Comment

The judgment is quite technical, but holds an important caution to taxpayers to carefully consider the applicable legislation and whether an appeal is worthwhile, especially considering the legal costs involved. The SCA struck the case from the roll after hearing the appeal, ordering the taxpayer to pay SARS's costs, including the costs of two counsel, and only gave the reasons for its decision later. The SCA did not deal with the merits of the appeal and as such the Tax Court's decision stood. In terms of the Tax Court's decision the taxpayer had the initial burden of proof and had to discharge the onus in terms of s102(1) of the TAA, to prove that SARS's decision against which he is appealing was wrong and has to also adduce evidence first.

*Louis Botha*



CDH
CLIFFE DEKKER HOFMEYR

# CUSTOMS AND EXCISE HIGHLIGHTS

*Please note that this is not intended to be a comprehensive study or list of the amendments, changes and the like in the Customs and Excise environment, but merely selected highlights which may be of interest.*

*In the event that specific advice is required, kindly contact our Customs and Excise specialist, Director, Petr Erasmus.*

This week's selected highlight in the Customs and Excise environment: Judgment was handed down by the Supreme Court of Appeal (SCA) in the matter of *CSARS v Van der Merwe* NO (598/2015) [2016] ZASCA 138 on 29 September 2016.

A brief background of the case is as follows: a party (AA) imported certain goods into a bonded warehouse and as such deferred payment of duty and value-added tax (VAT) until clearance for home consumption. Subsequently, AA was to be wound up, and the liquidators demanded that the goods in the bonded warehouse be delivered to them without payment of duty and VAT in order for the liquidation process to continue (ie sale of the goods, share of the proceeds between the creditors, and so on). The South African Revenue Service (SARS) was of the view that the duty and VAT first had to be paid before delivery of the goods to the liquidators.

The SCA found that s20(4), s38, s39 and s114 of the Customs and Excise Act, No 91 of 1964 do not create an embargo in favour of SARS, preventing the liquidator from taking possession of property in terms of the Insolvency Act, No 24 of 1936 until duty and VAT is paid.

Interestingly, the SCA concluded as follows:

> One final reason for rejecting the Commissioner's claims is that the Insolvency Act makes specific provision for the preference that the claims in issue in this case are to enjoy in the event of insolvency. The relevant sections are ss99(1)(cA) and (cD) of the Insolvency Act. The effect of the argument on behalf of the Commissioner would be to nullify these provisions in relation to these claims by giving the Commissioner a right to payment in preference to all other creditors. The statutory priority given to funeral and death bed expenses; the costs of sequestration and administration of the estate; the costs of execution; salaries and wages; payments of amounts due for workmen's compensation; income tax and payments under the Pneumoconiosis Compensation Act, No 64 of 1962; would all have to give way to claims under the Customs Act and the VAT Act. That would be so even though the Insolvency Act specifically confers on such claims a priority over the claims here in issue. That is not a sensible or realistic interpretation of the relevant statutory provisions.

*Petr Erasmus*



CDH
CLIFFE DEKKER HOFMEYR

## OUR TEAM

For more information about our Tax and Exchange Control practice and services, please contact:

**Emil Brincker**
National Practice Head
Director
T +27 (0)11 562 1063
E emil.brincker@cdhlegal.com

**Mark Linington**
Private Equity Sector Head
Director
T +27 (0)11 562 1667
E mark.linington@cdhlegal.com

**Petr Erasmus**
Director
T +27 (0)11 562 1450
E petr.erasmus@cdhlegal.com

**Dries Hoek**
Director
T +27 (0)11 562 1425
E dries.hoek@cdhlegal.com

**Ben Strauss**
Director
T +27 (0)21 405 6063
E ben.strauss@cdhlegal.com

**Lisa Brunton**
Senior Associate
T +27 (0)21 481 6390
E lisa.brunton@cdhlegal.com

**Heinrich Louw**
Senior Associate
T +27 (0)11 562 1187
E heinrich.louw@cdhlegal.com

**Mareli Treurnicht**
Senior Associate
T +27 (0)11 562 1103
E mareli.treurnicht@cdhlegal.com

**Jerome Brink**
Associate
T +27 (0)11 562 1484
E jerome.brink@cdhlega.com

**Gigi Nyanin**
Associate
T +27 (0)11 562 1120
E gigi.nyanin@cdhlegal.com

**Louis Botha**
Candidate Attorney
T +27 (0)11 562 1408
E louis.botha@cdhlegal.com

**Mark Morgan**
Candidate Attorney
T +27 (0)11 562 1374
E mark.morgan@cdhlegal.com


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**JOHANNESBURG**

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

**CAPE TOWN**

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com



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CLIFFE DEKKER HOFMEYR