

TAX AND EXCHANGE CONTROL ALERT

IN THIS ISSUE

SARS SAYS "PAY UP", BUT THE COURT SAYS "NO": AN IMPORTANT CASE ON TAXPAYERS' RIGHTS

In *Nondabula v Commissioner: SARS and Another* (4062/2016) [2017] ZAECMHC 21 (27 June 2017), heard by the Mthatha High Court, Nondabula (Taxpayer), brought an application to interdict the South African Revenue Service (SARS) from invoking the provisions of s179 of the Tax Administration Act, No 28 of 2011 (TAA) pending the final determination of the Taxpayer's objection to an additional assessment of his income tax. Furthermore, the Taxpayer sought an order that SARS withdraw its third party notice, in terms of which SARS instructed Absa to withhold and pay over monies held in the Taxpayer's bank account.

CUSTOMS AND EXCISE HIGHLIGHTS

This week's selected highlights in the Customs and Excise environment since our last instalment.

SARS SAYS "PAY UP", BUT THE COURT SAYS "NO": AN IMPORTANT CASE ON TAXPAYERS' RIGHTS

The matter at hand arose after SARS issued an additional assessment in terms of which the Taxpayer was ordered to pay an amount of R1,422,637.83 within 10 days.

The court considered the provisions of s92, s95, s96 and s179 of the TAA and the interaction between those provisions.

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Facts

The Taxpayer is a businessman and sole proprietor of a fuel service station called Umzimkhulu Shell Garage and it is in respect of this business that he is liable to pay taxes to SARS in these proceedings. The matter at hand arose after SARS issued an additional assessment in terms of which the Taxpayer was ordered to pay an amount of R1,422,637.83 within 10 days, in a letter dated 29 September 2016. The letter was preceded by a statement of account issued by SARS which reflected a balance brought forward in the sum of R1,404,517.97. Apart from the information in the statement of account, SARS did not explain how it arrived at these figures. The Taxpayer objected to the additional assessment on 4 April 2016, but SARS rejected the objection on 5 May 2016. The Taxpayer then wrote another letter to SARS on 3 June 2016 in which the Taxpayer requested that SARS reconsider

the objection. The Taxpayer also submitted further documentation with this letter and submitted a further objection, but SARS did not respond to the letter or the objection. It simply raised technical objections against the Taxpayer's objections.

Legal framework

The court considered the provisions of s92, s95, s96 and s179 of the TAA and the interaction between those provisions. These provisions deal with, among other things, the rules pertaining to the issuing of additional assessments based on estimates and the issuing of a third party notice in terms of which an institution is ordered to pay monies that would have been due to a person, to SARS, to satisfy a person's tax debt.

Judgment

The court explained that in terms of s92 of the TAA, SARS must issue an additional assessment if at any time it is satisfied that an assessment does not reflect the correct

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Importantly, the court also found that s96 is a peremptory provision, meaning that SARS does not have a discretion, within the context of this section.

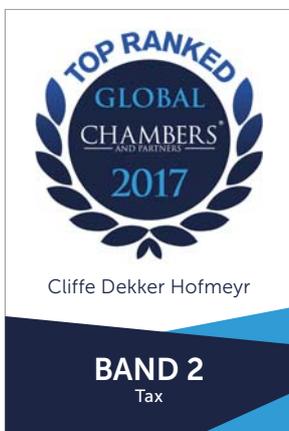


application of a tax Act to the prejudice of SARS or the fiscus, so as to correct the prejudice. However, before SARS can act in terms of s92, it must comply with the provisions of s95, which provides, among other things, that SARS may raise an additional assessment based on an estimate, based on information readily available to it. The court found that SARS had complied with s95, as SARS explained in its answering affidavit that the additional assessment was raised due to the Taxpayer declaring interest income of R0, which did not match the interest income amount of R32,734 for the Taxpayer's account held at Absa.

The court continued, stating that once SARS had decided to act in terms of s92 and had complied with s95, it was then required to comply with s96 of the TAA. Section 96 contains the formal requirements regarding the information that must be contained in a notice of assessment, but importantly it also states that in addition to these formal requirements "SARS must give the person assessed in the case of an assessment described in section 95 of an assessment

that is not fully based on a return by the taxpayer, a statement of the grounds for the assessment". In other words, SARS had to explain the grounds on which the additional assessment was raised, by providing a statement of the grounds of the assessment. SARS failed to do this under the circumstances as the statement of account issued to the Taxpayer did not provide such grounds.

The court explained that although SARS was correct in arguing that the application of s92 and s95 does not require SARS to interact with the Taxpayer, "once the stage provided for in section 92 is reached the first respondent is required to comply with... section 96 by issuing a notice of assessment with all the information required and provided for in section 96". Importantly, the court also found that s96 is a peremptory provision, meaning that SARS does not have a discretion to apply the provision or not. Having failed to comply with s96, SARS then jumped to the provisions of s179 of the TAA and issued the impugned third party notice, which effectively would have had the effect



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The court held that SARS dealt with the Taxpayer in an arbitrary manner contrary to the TAA and to the values enshrined in the Constitution.



of closing down the Taxpayer's business. The court viewed SARS's conduct in a very negative light and held that SARS's conduct "was not only unlawful but a complete disregard of the doctrine of legality which is a requirement of the rule of law in a constitutional democracy".

The court held that SARS dealt with the Taxpayer in an arbitrary manner contrary to the TAA and to the values enshrined in the Constitution. It added that the Applicant is a businessman who employs quite a number of people in our country where our unemployment rate is extremely high and SARS's conduct had the potential to close down the Taxpayer's business. This would have had catastrophic consequences for the Taxpayer, his family and all his employees. The court held that at the very least, SARS should comply with its own legislation and must promote the values in the Constitution in the exercise of its public power, which

it failed to do in the circumstances by not complying with its obligations under s96 of the TAA.

The court found in favour of the Taxpayer and ordered SARS to pay the Taxpayer's costs.

Comment

This case reiterates the fact that inasmuch as taxpayers have a duty to pay tax, SARS has duties that it has to comply with in order to be entitled to collect such tax. A taxpayer that is faced with a situation where an assessment is raised by SARS, which does not meet the formal requirements of s96 of the TAA and which does not provide the grounds for raising the assessment, should be aware that SARS is not entitled to enforce payment based on such an assessment as such an assessment is unlawful.

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Louis Botha

Tax Indaba 2017

SAIT, along with other recognised professional bodies in South Africa, have come together to host the largest annual gathering bringing together the entire tax community.

The 2017 Tax Indaba takes place at the Sandton Convention Centre from 11 – 15 September.

The event benefits professionals in the financial field who are seeking to refresh their knowledge and to learn about new tax-related developments. This includes tax practitioners and professionals, in-house tax staff members, government tax officials and tax academics.

CDH's Emil Brincker will be there to discuss the core elements of financing, including issues relating to the new hybrid share and hybrid debt anti-avoidance rules.

Mark Linington will discuss share buy-backs, while **Gerhard Badenhorst** will be providing input on the VAT implications of remuneration paid to executive and non-executive directors. **Johann Jacobs** will be tackling the trials and tribulations of dismantling trusts.

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 highlights in the Customs and Excise environment since our last instalment.

1. Amendments of Schedules to the Customs & Excise Act, No 91 of 1964 (Act). Certain of the below sections are quoted from the SARS website:
 - 1.1 Schedule 1:
 - 1.1.1 substitution (with retrospective effect from 1 April 2016) of General Note M to amend the TRQ allocation of the Preferential Trade Agreement between the common market of the south (MERCOSUR) and Southern African Customs Union;
 - 1.1.2 substitution of tariff subheadings 3301.90.20 and 3301.90.30 as well as the insertion of tariff subheading 0405.20.10 and 0405.20.90 to give effect to technical corrections to the SACU tariff duty structure as well as adjusting the duty structure to the WTO bound rate;
 - 1.1.3 substitution of tariff heading 7321.11 and insertion of item 7321.11.10 and 7321.11.90 to increase the rate of customs duty on certain stoves for gas fuel from 15% to 30%;
 - 1.1.4 substitution of tariff subheading 7326.20.10 to increase the rate of customs duty on gabions of wire netting from free to 30%;
 - 1.1.5 substitution of tariff subheading 8704.21.75 in order to amend the description to engine capacity to not exceed 1000cm³;
 - 1.1.6 substitution of tariff subheading 8708.94.20 to reduce the rate of customs duty on rack and pinion steering assemblies from 20% to free of duty;
 - 1.1.7 substitution of tariff subheading 9801.00.40 to make provision for dumpers for off-highway use of less than 50 tons under the APDP programme;
 - 1.2 Schedule 1 Part 1:
 - 1.2.1 substitution of tariff subheadings 7315.82.01, 7315.82.03, 7315.82.05, 7315.82.07, 7315.82.90 and 7326.11 to increase the general rate of duty from free to 15%;
 - 1.2.2 substitution of tariff subheadings 7315.82.01, 7315.82.03, 7315.82.05, 7315.82.07, 7315.82.90 and 7326.11 to increase the general rate of duty from free to 15%;
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1.3 Schedule 1 Part 2B:

- 1.3.1 substitution of item 126.04.02/8704.21.75 as a consequence to the amendment of the description of tariff subheading 8704.21.75 in Schedule 1 Part 1;

1.4 Schedule 1 Part 3E:

- 1.4.1 substitution of item 153.04.15/8704.21.75 as a consequence to the amendment of the description of tariff subheading 8704.21.75 in Schedule 1 Part 1;

1.5 Schedule 3:

- 1.5.1 substitution and deletion of various notes and rebate items in order to make provision for dumpers for off-highway use of less than 50 tons under the APDP programme (relating to items 317.03 and 317.07);
- 1.5.2 insertion of rebate items 320.01/3926.90.90/01.08, 320.01/4409.29.90/01.08, 320.01/8301.30/01.06, 320.01/8202.10/01.06 and 320.01/8302.42.90/01/08 in order to create a rebate provision for certain goods used in the manufacture of furniture.

Petr Erasmus

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