CONDONATION FOR THE LATE FILING OF AN APPEAL

On 5 October 2017, the South African Revenue Service released a string of Tax Court decisions. Included in these is the case of ABC (Pty) Ltd v The Commissioner for the South African Revenue Service (Case number 0018/2016), which deals with the question of whether the taxpayer was entitled to condonation for the late filing of an appeal in terms of s107(2) of the Tax Administration Act, No 28 of 2011.
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By way of background, once a taxpayer has been issued with an assessment, the dispute resolution process can be summarised, in simple terms, as follows:

- to the extent that the grounds provided in the assessment do not sufficiently enable the taxpayer to understand the basis of the assessment, the taxpayer may request SARS to provide reasons for the assessment;
- the taxpayer may object against the assessment and SARS must consider the objection and either disallow or allow it in whole or in part;
- if the taxpayer is dissatisfied with SARS’s decision following the objection, the taxpayer may lodge an appeal against such decision; and
- the dispute may be resolved either through alternative dispute resolution, the Tax Board or the Tax Court.

An objection or appeal against assessments or decisions by SARS must be lodged in the manner, under the terms and within the periods prescribed in the rules promulgated under s103 of the TAA (Rules). An objection against an assessment or decision must be lodged within 30 days of the date of assessment or decision. Similarly, an appeal against the disallowance of an objection must be lodged within 30 business days of the date of the disallowance of the objection.

An objection or appeal that is not lodged within the prescribed time limits (as discussed above) is deemed to be invalid. A taxpayer may, however, request a senior SARS official to extend the period within which such an objection or appeal may be lodged. More specifically, s107(2) of the TAA states that a senior SARS official may extend the period for lodging an appeal for:

- 21 business days if satisfied that reasonable grounds exist for the delay; or
- up to 45 business days, if exceptional circumstances exist that justify an extension beyond 21 business days.

Who’s Who Legal

Emil Brincker has been named a leading lawyer by Who’s Who Legal: Corporate Tax – Advisory and Who’s Who Legal: Corporate Tax – Controversy for 2017.

Mark Linington has been named a leading lawyer by Who’s Who Legal: Corporate Tax – Advisory for 2017.
The TAA does not prescribe the manner in which the discretion to extend the period for lodging an appeal must be exercised. As a result, regard must be had to SARS Interpretation Note 15. IN 15 provides, at page four, that the senior SARS official’s decision “must comply with the requirements for administrative justice which are contained in s33 of the Constitution of the Republic of South Africa, 1996 read with the Promotion of Administrative Justice Act” and must be reasonable. In order for a decision to be reasonable, the senior SARS official is required to consider all relevant matters, which, among others, include:

- the reasons for the delay;
- the length of the delay;
- the prospects of success on the merits; and
- any other relevant factor.

With the abovementioned background in mind, we discuss the ABC Case in more detail below.

Facts

On 9 December 2013, ABC Pty Ltd (Applicant) timeously lodged an appeal (First Appeal) against SARS’s partial disallowance of an objection for the 2012 year of assessment. The First Appeal was uploaded on eFiling by the Applicant’s accountant (Mr X), who made the following note on a hard copy of the First Appeal: “ADSL ... repaired faulty line 6.12.2013”. Mr X submitted that at the time of uploading the First Appeal, the ADSL lines in the neighbourhood where he conducts business had been disrupted.

On 30 June 2014, Mr X was advised that (i) SARS had no record of the notice of appeal and (ii) a further appeal should be filed in which Mr X requests condonation for the late submission of the appeal. Two days after Mr X became aware that the First Appeal had not been filed, Mr X did as advised and submitted a further appeal (Second Appeal) where he cited the disruption of the ADSL lines as a basis for the condonation.

SARS refused to grant the condonation on the basis that the Second Appeal was submitted out of time. Following the submission of a further appeal (Third Appeal) and the further refusal by SARS to grant the condonation, the Applicant approached the Tax Court by way of an interlocutory application.

Arguments by the parties to the application

SARS provided that the main reason for its inability to grant the condonation is that s107 of the TAA “curtails its powers to come to
The Tax Court granted the condonation, with leave to the Applicant to file its notice of appeal.

The court held that the First Appeal was not recorded on the eFiling platform due to a technological problem and that the Second Appeal was lodged within two days of Mr X becoming aware of the fact that the First Appeal had not been lodged.

On the other hand, the Applicant contended that s107(2) should be interpreted to mean that the time period referred to therein must be calculated from the date of the request. The Applicant’s argument was that following SARS’s interpretation of s107 would render the discretion given to SARS by the legislation meaningless, especially in circumstances where the taxpayer only became aware of the fact that the appeal had not in fact been submitted, in the prescribed manner after the expiration of 75 business days.

The court held that the First Appeal was not recorded on the eFiling platform due to a technological problem and that the Second Appeal was lodged within two days of Mr X becoming aware of the fact that the First Appeal had not been lodged.

**Tax Court’s findings**

The court referred to the Constitutional Court judgment of Ferris v First Rand Bank Limited 2014 (3) SA 39 (CC) which found that in condonation applications, a delay cannot be a determining factor. In addition, the Tax Court noted that when dealing with a request for condonation, there are other important considerations to take into account, namely:

- Whether or not the omission or failure was due to the fault of the Applicant

  The court found that the late filing of the notice of appeal was not an omission nor a failure on the Applicant’s part, as the First Appeal was lodged within the prescribed 30-day period.

- The extent of the delay and steps taken by the Applicant as soon as it became aware there was non-compliance with the Rules

  The court found that there would be a great prejudice to the Applicant if the request for condonation was not granted.

- There must be reasonable prospects of success on appeal

  The court found that the granting of the condonation would not prejudice SARS on the basis that the notices of appeal and supporting documents had been available on the Applicant’s eFiling profile since December 2014. In addition, the court found that there would be a great prejudice to the Applicant if the request for condonation was not granted.

**Conclusion**

It is clear that taxpayers will welcome this Tax Court judgement. However, taxpayers who wish to dispute an assessment issued by SARS must lodge the objection or appeal within the prescribed time. To the extent that a taxpayer does not comply with the relevant periods, such taxpayer must ensure that they have adequate reasons which will support their request for condonation.

Gigi Nyanin
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 1163  
E emil.brincker@cdhlegal.com

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

Gerhard Badenhorst  
Director  
T +27 (0)11 562 1870  
E gerhard.badenhorst@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

Mareli Treurnicht  
Director  
T +27 (0)11 562 1203  
E mareli.treurnicht@cdhlegal.com

Candice Gibson  
Senior Associate  
T +27 (0)21 481 6392  
E candice.gibson@cdhlegal.com

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

Varusha Moodaley  
Senior Associate  
T +27 (0)21 481 6392  
E varusha.moodaley@cdhlegal.com

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

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

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

Nandipha Mzizi  
Candidate Attorney  
T +27 (0)11 562 1741  
E nandipha.mzizi@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  
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  
E ctn@cdhlegal.com

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