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TAX & EXCHANGE CONTROL ALERT

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To deem or not to deem: Tax Court judgment on section 13quin of the Income Tax Act

On 28 June 2019, the Tax Court (sitting in Johannesburg) handed down judgment in the matter of *XYZ CC v The Commissioner for the South African Revenue Service* Case No: IT14434/2019 (as yet unreported), in which it had to decide whether the appellant (Taxpayer) was entitled to claim a commercial building allowance in terms of s13quin of the Income Tax Act, No 58 of 1962 (Act). The Tax Court also had to decide whether certain interest imposed should be remitted.

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Facts

The Taxpayer bought commercial property in August 2001 from which it currently earns rental income and between 2007 and 2012, it made improvements to the property. The Taxpayer did not claim the commercial building allowance in terms of s13quin of the Act between the 2007 and 2012 years of assessment, but in the 2014 year of assessment, it claimed the s13quin allowance for all of these years of assessment. SARS disallowed the allowance claimed for the 2007 to 2012 years of assessment by issuing an additional assessment, against which the Taxpayer is appealing. It was not in dispute that, in principle, the Taxpayer was entitled to claim the s13quin allowance.

Relevant legal provision and issue in dispute

Section 13quin(3) of the Act states the following:

"Where any building or improvement in respect of which any deduction is claimed in terms of this section was during any previous financial year brought into use for the first time by the taxpayer for the purposes of any trade carried on by such taxpayer, the receipts and accruals of which were not included in the income of such taxpayer during such year, any deduction which could have been allowed in terms of this section during such year or any subsequent year in which such asset was used by the taxpayer shall for the purposes of this section be deemed to have been allowed during such previous year or years as if the receipts and accruals of such trade had been included in the income of such taxpayer."

Assuming a taxpayer meets all the requirements of s13quin of the Act, the provision allows a taxpayer to claim an allowance of 5% of the cost to the taxpayer of any new and unused building owned by the taxpayer or on any new

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To deem or not to deem: Tax Court judgment on section 13quin of the Income Tax Act...continued

The Tax Court had to decide whether, based on s13quin(3) of the Act, the Taxpayer could claim the allowance for the 2007 to 2012 years of assessment, in the 2014 year of assessment.

and unused improvement to a building owned by the taxpayer, in a particular year of assessment.

In the current matter, the Tax Court had to decide whether, based on s13quin(3) of the Act, the Taxpayer could claim the allowance for the 2007 to 2012 years of assessment, in the 2014 year of assessment.

Arguments raised by the parties

The Taxpayer's key arguments were the following:

- The Tax payer "did not claim the commercial building allowance provided for by section 13quin... between the periods 2007 and 2012 and was therefore entitled to claim same together with the 2013 [year of] assessment in the 2014 year of assessment".
- The Taxpayer did not claim the allowance in those years as it was not properly advised by its former accountant;
- SARS will not be prejudiced if it were to allow the Taxpayer to claim the allowance as argued for as it will recoup the allowances when the Taxpayer sells the property;
- The purpose of introducing s13quin was to put a taxpayer in the same position as other taxpayers who benefit from allowances granted for movable assets;
- Section 13quin(3) is ambiguous and therefore needs to be interpreted in favour of the Taxpayer; and

- On a proper interpretation of s13quin(3), a taxpayer is entitled to claim allowances for the previous years of assessment relating to the building or improvements as provided for in s13quin.

SARS' key arguments were the following:

- The Taxpayer failed to provide any evidence that s13quin(3) is ambiguous and therefore the Tax payer could not invoke the *contra fiscum* rule;
- When considering the provisions of s13quin, it is impermissible for the Taxpayer to claim a lump sum of the improvements for the 2008 to 2012 years of assessment and the building allowance for the 2013 year of assessment, in the 2014 year of assessment;
- It is clear from s13quin(3) that if the allowance could not be claimed because if the receipts and accruals of the taxpayer are not included in its income, the allowance is nonetheless deemed to have been claimed and allowed; and
- The deeming provision merely provides a taxpayer who qualifies to apply the allowances as and when it has to recoup it in terms of s8(4) of the Act, but does not grant an automatic right to a taxpayer to deduct the previous years' allowances in a subsequent year of assessment.

To deem or not to deem: Tax Court judgment on section 13quin of the Income Tax Act...continued

The judgment serves as a warning to taxpayers in the commercial property industry to ensure that they claim the s13quin allowance correctly.

Judgment

The Tax Court held that it is trite that s13quin of the Act was introduced to provide for capital allowances in respect of immovable property depending on the use of the property. It explained that the section provides for an allowance in respect of commercial buildings that are owned by a taxpayer and used solely for a taxpayer's trade.

The Tax Court held that it could not agree with the Taxpayer's contentions and that the provisions of s13quin(3) are clear and need not be interpreted further than the words in the provision itself. According to the Tax Court, *"...it is clear that if the receipts and accruals were not included in the income of the Taxpayer during the previous year of assessment, any deduction which would have been allowed in terms of s13quin during that year shall be deemed to have been allowed in that year."*

The Tax Court then referred to the Supreme Court of Appeal's judgment in *Novartis v Maphil* (20229/2014) [2015] ZASCA 111 where it deals with the principles of interpretation and held that the Taxpayer had failed to demonstrate that s13quin(3) is ambiguous. With reference to the definition of "year of assessment" in s1(1) and case law, it held that in light of the Taxpayer's failure to claim the building allowances in the 2007 to 2012 years of assessment, s13quin(3) deems the allowance as having been

claimed and allowed as a deduction for the past years of assessment. Furthermore, the Tax Court stated that it *"...does not make any business sense for the appellant [Taxpayer] to claim a lump sum after having incurred the expenses over a period of 5 years."* In its view, s13quin(3) was inserted to *"...prevent taxpayers from delaying in applying for these deductions and to avoid unnecessary cash flow problems."*

The Tax Court therefore disallowed the Taxpayer's appeal regarding s13quin. It also disallowed the Taxpayer's appeal against the imposition of interest.

Comment

The judgment serves as a warning to taxpayers in the commercial property industry to ensure that they claim the s13quin allowance correctly. However, it is slightly disappointing that the Tax Court did not analyse the deeming provision in a bit more detail before coming to its conclusion. It would also have been helpful if it discussed the principles of the *contra fiscum* rule in a bit more detail. Presumably it did not do so, as it found the provision was clear and easy to interpret.

It is also noteworthy that SARS Interpretation Note 107 (IN 107) only dedicates a few paragraphs to s13quin(3). We discussed IN 107 in our [Tax & Exchange Control Alert](#) of 14 June 2019.

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