

12 NOVEMBER 2020

TAX & EXCHANGE CONTROL ALERT

IN THIS
ISSUE

The failure by a taxpayer to object to the imposition of interest may prove fatal

In the judgment of *CSARS v The Executor of the Estate Late Lot Maduke Ndlovu* (A395/2016) [2020] ZAGPPHC (12 October 2020), the High Court of South Africa had to determine whether the Tax Court had erred in its findings that, amongst others, the taxpayer should be entitled to raise a new ground of objection during the appeal when such ground had not been raised by the taxpayer in his objection.

The failure by a taxpayer to object to the imposition of interest may prove fatal

Of critical importance in this case was that the taxpayer did not object to the imposition of interest in terms of section 89(2) in his objection to the additional assessment raised by SARS.

In the judgment of CSARS v The Executor of the Estate Late Lot Maduke Ndlovu (A395/2016) [2020] ZAGPPHC (12 October 2020), the High Court of South Africa had to determine whether the Tax Court had erred in its findings that, amongst others, the taxpayer should be entitled to raise a new ground of objection during the appeal when such ground had not been raised by the taxpayer in his objection.

Facts

The late taxpayer, the executor of whose estate was the respondent in this matter, was granted options to acquire shares in his employer, which options were exercised by him during his tenure of employment. These shares were subsequently sold by the taxpayer in three tranches, as a result of which a gain of R7,121,744.43 was realised by the taxpayer. Despite the sale of the shares being dealt with by the administrator of the trust established by the taxpayer's employer, the administrator did not deduct and withhold any tax in respect of the gain that was realised. The three IT3(a) returns given to the taxpayer by the administrator indicated that no tax was deducted by reason of the fact that the gain constituted "*non-taxable earnings*". The taxpayer queried this, to which the administrator replied that the "*earnings arising from the options exercised were non-taxable*". As a result, the taxpayer did not declare the gain in his 2007 tax return.

Following an audit by SARS, an additional assessment was raised, which included the gains realised from the disposal of the shares in the taxpayer's taxable income. This additional assessment imposed additional tax in terms of the then

section 76(1)(b) of the Income Tax Act 58 of 1962 (ITA), which section has since been repealed with effect from 1 October 2012. The assessment also imposed interest in terms of section 89(2) of the Act. In light of the fact that section 76 of the ITA has since been repealed, this article deals primarily with the issues before the High Court that pertain to the section 89(2) interest that was imposed by SARS.

In the objection to the additional assessment, the taxpayer opposed the imposition of additional tax in terms of section 76(1)(b) and submitted that the gain of R7,121,744.43 could not be taxed as a capital gain in terms of the Eighth Schedule to the ITA, nor could it be taxed as income in terms of sections 8A and 8C of the ITA. Of critical importance in this case was that the taxpayer did not object to the imposition of interest in terms of section 89(2) in his objection to the additional assessment raised by SARS.

This objection was disallowed on 8 February 2012, and in a letter dated 10 February 2012, SARS informed the taxpayer that certain adjustments had been made in the calculations of his taxable income for, amongst others, the 2007 year of assessment.

The taxpayer noted an appeal against the disallowance of his objection on 7 March 2012 on the same grounds as those set out in his objection, and the Tax Court unanimously upheld the appeal in favour of the taxpayer. To this end, and in respect of the appeal against the interest imposed by SARS, the Tax Court found that the letter dated 10 February 2012 created a legitimate expectation that SARS would issue a further assessment and that the taxpayer would have objected to such

The failure by a taxpayer to object to the imposition of interest may prove fatal...continued

SARS took the decision by the Tax Court on appeal to the High Court to determine, amongst others, whether the Tax Court's finding that the taxpayer could challenge the raising of section 89(2) interest for the first time on appeal was correct.

assessment. On this basis, it was held that SARS would suffer no prejudice if a new ground of appeal pertaining to the interest (which was not part of the original objection) was introduced.

SARS took the decision by the Tax Court on appeal to the High Court to determine, amongst others, whether the Tax Court's finding that the taxpayer could challenge the raising of section 89(2) interest for the first time on appeal was correct.

Judgment

Section 89(2) makes provision for the imposition of interest on underpayments and overpayments of provisional tax. In respect of the underpayment of provisional tax by a taxpayer, section 89(2) provides that if the taxable income of any provisional taxpayer exceeds R20,000 (in the case of a company) or R50,000 (in the case of any person other than a company), and the normal tax payable by that taxpayer in respect of such taxable income exceeds the credit amount in relation to that year, interest shall be payable by the taxpayer. This interest is calculated at the prescribed rate on the amount by which the normal tax payable by the taxpayer exceeds the credit amount.

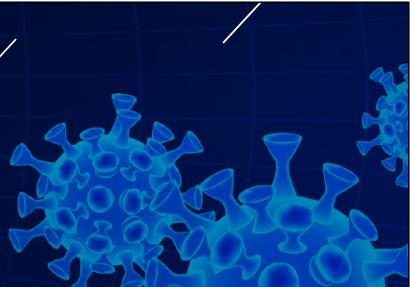
In its determination of the correctness of the Tax Court's decision to allow a new ground of appeal, the High Court considered the Rules of the Tax Court, issued in terms of section 103 of the Tax Administration Act 28 of 2011 (Rules). Rule 7 provides that a taxpayer who lodges an objection to an assessment must:

- (a) Complete the prescribed form in full; and
- (b) Specify the grounds of objection in detail including:
 - i. The part or specific amount of the disputed assessment objected to;
 - ii. Which of the grounds of assessment are disputed; and
 - iii. The documents required to substantiate the grounds of objection that the taxpayer has not previously delivered to SARS.

In terms of Rule 10, a taxpayer's notice of appeal must specify on which grounds of the objection the taxpayer is appealing. This rule also states that a taxpayer may not appeal on any ground that constitutes a new objection against a part or amount of the disputed assessment that was not objected to in terms of the objection under Rule 7.

CDH'S COVID-19 RESOURCE HUB

[Click here for more information](#) 



The failure by a taxpayer to object to the imposition of interest may prove fatal...continued

The High Court found that the Tax Court had erred in deciding that the taxpayer was entitled to raise the issue pertaining to the interest only at the appeal stage and therefore the ruling by the Tax Court that the interest be waived was also incorrect.

The High Court acknowledged that a court should not be unduly rigid in its approach when deciding whether to allow a new ground of objection only at the appeal stage and stated that the circumstances of each case should be taken into consideration in order to come to a decision in this regard. However, it was also reiterated that it is in the public interest that disputes should come to an end as soon as practicable and that consistently allowing either party to change the basis upon which their case is made would be contrary to the public interest.

The High Court then contemplated the Tax Court's reasoning for its finding that the new ground of appeal pertaining to the imposition of interest could be raised, which finding was based on a legitimate expectation that was created by the letter sent to the taxpayer dated 10 February 2012. However, the High Court found that no evidence to this effect had been presented in the Tax Court such that the finding by that court could be substantiated. In addition, no reasons were advanced regarding why the taxpayer had failed to object to the imposition of interest in terms of section 89(2).

Ultimately, on the specific facts of this case, the High Court found that the Tax Court had erred in deciding that the taxpayer was entitled to raise the issue pertaining to the interest only at the appeal stage. As such, it was held that the ruling by the Tax Court that the interest be waived was also incorrect.

Comment

It is apparent from the judgment that a court has a discretion whether or not a new ground of appeal may be raised only at the appeal stage of the dispute proceedings between SARS and a taxpayer. However, taxpayers should always be careful to introduce new grounds of appeal that were not raised during the objection stage of the proceedings.

The interest that is imposed in terms of section 89(2) will constitute part of an assessment that is issued by SARS. If such interest is not objected to by a taxpayer in their objection, they may be precluded from challenging the imposition of the interest on appeal as such a challenge constitutes a "new objection against a part or amount of the disputed assessment not objected to under Rule 7". This is in direct contravention of Rule 10(3) of the Rules.

As such, it is best for taxpayers to object to the imposition of all interest in an objection, even if the assessment issued by SARS does not clearly indicate that interest has been or will be imposed.

Louise Kotze

OUR TEAM

For more information about our Tax & 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



Stephan Spamer
Director
T +27 (0)11 562 1294
E stephan.spamer@cdhlegal.com



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



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



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



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



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



Keshen Govindsamy
Senior Associate
T +27 (0)11 562 1389
E keshen.govindsamy@cdhlegal.com



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



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



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



Louise Kotze
Associate
T +27 (0)11 562 1077
E louise.Kotze@cdhlegal.com



Howmera Parak
Director
T +27 (0)11 562 1467
E howmera.parak@cdhlegal.com

BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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 ctr@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

©2020 9556/NOV

