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TAX & EXCHANGE CONTROL **ALERT**

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Sometimes, knowledge is an entitlement – an important judgment regarding a taxpayer's rights in the course of an audit

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CLIFFE DEKKER HOFMEYR

Sometimes, knowledge is an entitlement – an important judgment regarding a taxpayer's rights in the course of an audit

Recently, the unreported judgment of *Brits and Others v The Commissioner for the South African Revenue Service* (Case No 2017/44380) was published by SARS on its website, which judgment also deals with the important issue of administrative fairness in the context of a tax audit.

In Commissioner for *South African Revenue Service v Pretoria East Motors (Pty) Ltd* [2014] 3 All SA 266 (SCA), it was held, amongst other things, that in conducting an audit, which process precedes the raising of an assessment, the South African Revenue Service (SARS) must "*engage the taxpayer in an administratively fair manner, as it is obliged to do*."

Recently, the unreported judgment of *Brits and Others v The Commissioner for the South African Revenue Service* (Case No 2017/44380) was published by SARS on its website, which judgment also deals with the important issue of administrative fairness in the context of a tax audit. The application was heard by the High Court, specifically the Gauteng Local Division, Johannesburg. We discuss the judgment in this article.

Facts

- The four applicants (Applicants) launched an urgent application for the following two orders:
    1. Firstly, compelling SARS to provide certain documentation on which SARS' audit findings are based; and
    2. Secondly interdicting SARS from issuing any additional, estimated or other assessments pursuant to its letters of audit findings relating to each Applicant until 30 days after SARS has provided the aforementioned documentation to each Applicant.
- The Applicants are VAT vendors who buy jewellery containing gold from the general public and sell it to entities such as micro refineries.
- Two of the entities which rendered administrative services to the Applicants (Service Providers), were in possession of all of the documents relating to their tax affairs, such as bank statements, proof of payments and other documents under the Value-Added Tax Act 89 of 1991.
- During November 2015, the offices of the Service Providers were raided by SARS, pursuant to which SARS seized any and all documents found at the premises, including the VAT related documents of the Applicants, which related to the 2012 - 2015 tax years.
- SARS subsequently audited the Applicants for the 2012 – 2017 tax years and during the auditing process required further documents from the Applicants, which they provided, but meant that the Applicants ended up with no documents of their own.
- During October 2017, SARS had completed its VAT audits of the Applicants and issued "letters of audit finding" (sic) which concluded that all the transactions were fictitious and that all input VAT claimed by the Applicants over 2012 – 2017 period, should be written back.
- As this had far-reaching implications for the Applicants, they applied to SARS to be furnished with documents or copies of the documents on which the audits were based.

Sometimes, knowledge is an entitlement – an important judgment regarding a taxpayer's rights in the course of an audit...*continued*

The application was based on section 42 of the Tax Administration Act 28 of 2011 (TAA), which the High Court had to consider.

Judgment

The application was based on section 42 of the Tax Administration Act 28 of 2011 (TAA), which the High Court had to consider. It stated the following at the time:

(1) *A SARS official involved in or responsible for an audit under this Chapter must, in the form and in the manner as may be prescribed by the Commissioner by public notice, provide the taxpayer with a report indicating the stage of completion of the audit.*

(2) *Upon conclusion of the audit or criminal investigation, and where –*

  (a) *the audit or investigation was inconclusive, SARS must inform the taxpayer accordingly within 21 business days; or*

  (b) *the audit identified potential adjustments of a material nature, SARS must within 21 business days, or the further period that may be required based on the complexities of the audit, provide the taxpayer with a document containing the outcome of the audit, including the grounds for the proposed assessment or decision referred to in section 104(2).*

(3) *Upon receipt of the document described in subsection (2)(b), the taxpayer must within 21 business days of delivery of the document, or the further period requested by the taxpayer that may be allowed by SARS based on the complexities of the audit, respond in writing to the facts and conclusions set out in the document.*

(4) *The taxpayer may waive the right to receive the document.*

(5) *Subsections (1) and (2)(b) do not apply if a senior SARS official has a reasonable belief that compliance with those subsections would impede or prejudice the purpose, progress or outcome of the audit.*

(6) *SARS may under the circumstances described in subsection (5) issue the assessment or make the decision referred to in section 104(2) resulting from the audit and the grounds of the assessment or decision must be provided to the taxpayer within 21 business days of the assessment or the decision, or the further period that may be required based on the complexities of the audit or the decision'.*

Sometimes, knowledge is an entitlement – an important judgment regarding a taxpayer's rights in the course of an audit...*continued*

The *Brits* judgment shows how a taxpayer who is faced with a SARS audit process that is not conducted in a manner consistent with the TAA, can enforce its rights.

With reference to the *Pretoria East Motors* judgment, the High Court indicated that a taxpayer is afforded an opportunity to respond to a tax audit in terms of section 42(3) of the TAA, so as to enable the taxpayer to persuade SARS that it was incorrect in its audit, which could avoid an assessment being raised.

It further stated that in order for the Applicants to respond meaningfully to SARS' letters of audit findings, the Applicants must have sight of the documents on which the audits are based. However, in the current matter, SARS was in possession of all the documents which it had seized in a search and seizure operation. As a result, the Applicants had no choice but to request SARS to furnish them with the requisite documents, which they did on 31 October 2017, but which request SARS refused.

This meant that after the expiry of the 21-day period in section 42(3) of the TAA, SARS would become entitled to issue an assessment, which would result in the Applicants becoming liable to SARS for substantial amounts of additional tax, without having had an opportunity to make representations to SARS.

Therefore, the High Court granted the application and held that the Applicants had a legal right to the documents, if one considers the provisions of section 42 of the TAA. The High Court also concluded that the application was indeed urgent on the basis that if they are entitled to the documents, they must receive them as soon as possible as it would serve no purpose for them to receive the documents after the assessments are issued.

In finding in favour of the Applicants, the High Court rejected SARS' arguments that the application should not be granted. Essentially, SARS argued that the application should not be granted as it had invited the Applicants to a meeting to discuss the audit findings and as there are alternative remedies available to the Applicants, such as their right to object to the assessments once issued. These arguments were rejected as, once the assessments had been raised, SARS could insist on payment of the assessed amount(s).

Comment

The *Brits* judgment shows how a taxpayer who is faced with a SARS audit process that is not conducted in a manner consistent with the TAA, can enforce its rights under the TAA. Taxpayers should note that after the *Brits* judgment was handed down, section 42(1) of the TAA was amended by the Tax Administration Laws Amendment Act 22 of 2018 (TALA) to state that SARS must *"...provide the taxpayer with a notice of commencement of an audit and, thereafter, a report indicating the stage of completion of the audit"* (underlined words inserted by the TALA).

Sometimes, knowledge is an entitlement – an important judgment regarding a taxpayer's rights in the course of an audit...*continued*

Taxpayers should note that where SARS issues an assessment pursuant to a flawed audit process, it would be possible to successfully dispute such assessment on the basis that the issue of the assessment was preceded by a flawed audit process, that was conducted in a manner inconsistent with section 42 of the TAA.

What is particularly encouraging is the High Court's rejection of SARS' arguments that the invitation to a meeting to discuss the audit findings and the availability of the dispute resolution process in the TAA, do not justify the application being rejected.

However, taxpayers should also note that where SARS issues an assessment pursuant to a flawed audit process, it would be possible to successfully dispute such assessment on the basis that the issue of the assessment was preceded by a flawed audit process, that was conducted in a manner inconsistent with section 42 of the TAA. This was the result in the matter of *Mr A v The Commissioner for the South African Revenue Service* (Case No IT13726), which is discussed in our Tax & Exchange Control Alert of 4 May 2018.

Louis Botha

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 BBBEE verification under the new BBBEE Codes of Good Practice. 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.

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