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TAX & EXCHANGE CONTROL **ALERT**

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Judicial review of decisions taken by SARS: The High Court considers another case

In our Tax & Exchange Control Alert published on 8 October 2020, the reviewability of the South African Revenue Service's (SARS) decision to audit a taxpayer was considered by the High Court in the matter of *Cart Blanche Marketing CC and others v CSARS* (26244/15) [2020] ZAGPJHC (31 August 2020).

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CLIFFE DEKKER HOFMEYR

Judicial review of decisions taken by SARS: The High Court considers another case

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In our Tax & Exchange Control Alert published on 8 October 2020, the reviewability of the South African Revenue Service's (SARS) decision to audit a taxpayer was considered by the High Court in the matter of *Cart Blanche Marketing CC and others v CSARS* (26244/15) [2020] ZAGPJHC (31 August 2020).

The entitlement of a taxpayer to review a decision by SARS in the High Court (rather than to pursue the dispute resolution procedures provided for in chapter 9 of the Tax Administration Act 28 of 2011 (TAA)), was once again considered by the High Court in the recent judgment of *ABSA Bank Limited and another v CSARS* (2019/21825 [P]) [2021] ZAGPPHC (11 March 2021). In this case, the court had to determine whether the decision taken by SARS not to withdraw notices issued by it in terms of section 80J of the Income Tax Act 58 of 1962 (ITA), and additionally the decision to issue letters of assessment pursuant to such notices, was capable of being reviewed under South African administrative law.

Facts

The applicants in this case were ABSA Bank Limited (ABSA) and United Towers Proprietary Limited (United), and the origin of the dispute before the High Court was whether the applicants had participated in a so-called impermissible tax avoidance arrangement.

The transactions constituting the purported impermissible tax avoidance arrangement can be summarised as follows:

1. ABSA acquired tranches of preference shares in a South African company (PSIC 3), the acquisition of which shares entitled ABSA to dividends when declared.
2. PSIC 3 then bought preference shares in another South African company (PSIC 4).

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ABSA brought a review application to the High Court to review SARS' refusal to withdraw the section 80J notices and to review the issuance of the correlating letters of assessment.

3. As part of a capital outlay investment, PSIC 4 invested in an offshore trust (DI Trust), which trust then lent money to a South African company (MSSA) by means of subscribing for floating rate notes. MSSA was a subsidiary of a group of companies domiciled in Australia.
4. DI Trust also made investments by way of the purchase of Brazilian government bonds, in respect of which DI Trust received interest income.

The culmination of these transactions was such that PSIC 4 received interest on its capital investment in DI Trust, as a result of which PSIC 4 could declare a dividend to PSIC 3 and PSIC 3 could declare a dividend to ABSA. By reason of the fact that a dividend was declared between two South African resident companies, the dividend received by ABSA was tax-free.

SARS' belief that ABSA was party to an impermissible tax avoidance arrangement stemmed from the Brazilian investment made by DI Trust and the purported impermissible tax benefit received by ABSA in the form of a tax-free dividend. It was contended by SARS that the lawful result of these transactions ought not to have been the receipt of tax-free dividends by ABSA, but rather the receipt of interest income, which interest would attract tax.

ABSA, however, argued that its purchase of the preference shares in PSIC 3 was premised on the understanding that PSIC 3 and MSSA had a back-to-back relationship and that the funds would flow directly to MSSA in order to settle a debt with its parent company. ABSA was unaware of the intermediary role fulfilled by PSIC 4 and DI Trust, and more specifically it was unaware of the Brazilian investment made by DI Trust. To this end, ABSA stated that it could not, in a state of ignorance, have participated in an impermissible tax avoidance arrangement, nor did it have a tax avoidance motive when it acquired the preference shares in PSIC 3.

Pursuant to its belief that ABSA had participated in an impermissible tax avoidance arrangement, SARS issued notices in terms of section 80J of the ITA informing ABSA of the reasons on which this belief was based. ABSA submitted reasons to SARS why the provisions of Part IIA of the ITA (comprising of sections 80A to 80L which deal with impermissible tax avoidance arrangements and the general anti-avoidance rules) should not apply and requested that SARS withdraw its section 80J notices. While SARS considered this request by ABSA (and prior to its ultimate refusal to withdraw the notices) SARS issued letters of assessment in respect of a tax liability imposed in terms of section 80B of the ITA.

ABSA brought a review application to the High Court to review SARS' refusal to withdraw the section 80J notices and to review the issuance of the correlating letters of assessment.

Judgment

The first point of contention that had to be addressed was whether the decisions taken by SARS in this matter were open to review by the High Court.

In an argument premised on the findings of the High Court in the Cart Blanche case, SARS contended that the dispute resolution provisions contained in South Africa's tax legislation are extensive

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The right question to ask is not whether the tax regime offers two routes but whether the court's jurisdiction is plainly excluded. In the face of clear precedents, the court has dealt with tax disputes on points of law and have not compelled aggrieved taxpayers to exhaust internal remedies.

and that they provide adequate channels for taxpayers to resolve their grievances and disputes with SARS. As such, it was argued that it would be inappropriate for a taxpayer to circumvent the extensive process of objections and appeals provided for in the fiscal legislation by directly approaching a court of law at the inception of a disputed tax liability.

SARS' approach was refuted by ABSA on the basis that:

1. the scope of the dispute was a pure point of law, as a result of which the court would be entitled to depart from the usual procedures applied in the resolution of a tax dispute; and
2. the guarantee in section 34 of the Constitution (pertaining to access to the courts to resolve a dispute) has not been impeded by the provision in fiscal legislation of a system of internal remedies.

To this end, it was argued that in so far as a court has a discretion to deal with a tax dispute, that court would regard a pure point-of-law-dispute as an appropriate rationale to deal with the matter rather than condemn the parties to the potentially protracted dispute resolution process provided for in the TAA.

In coming to its decision, the court considered sections 9, 104 and 105 of the TAA.

Section 9 provides that a decision or notice issued by SARS, excluding a decision given effect to in an assessment or a notice of assessment that is subject to objection and appeal, may at the request of the person affected by that decision, be withdrawn by a SARS official. On this basis, if such decision is not withdrawn, it may be subject to review by a court.

While it was SARS' view that section 9 of the TAA does not apply to the section 80J notices and section 80B assessments (on the grounds that they are subject to the TAA's objection and appeal processes), the court held that the exclusion contemplated in section 9 refers to assessments that have already been given effect to, and not to assessments that have not yet been given effect to. In the present matter, the court agreed that this exclusion did not apply as the section 80J notices (on the basis of which the section 80B assessments were issued) did not constitute a decision that had been given effect to in an assessment (or notice of assessment). Furthermore, it was contended by ABSA, and accepted by the court, that –

> *"the right question to ask is not whether the tax regime offers two routes but whether the court's jurisdiction is plainly excluded. In the face of clear precedents, the court has dealt with tax disputes on points of law and have not compelled aggrieved taxpayers to exhaust internal remedies."*

On this basis, the court held that the decisions in question were not excluded from the application of section 9 of the TAA.

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The court agreed with ABSA's submission that in the event that there is a pure point-of-law-dispute, a party to the dispute would be entitled to approach the court directly, without following the dispute resolution proceedings provided for in the TAA.

The court then considered section 105 of the TAA which provides that *"[a] taxpayer may only dispute an assessment or 'decision' as described in section 104 in proceedings under this Chapter, unless a High Court otherwise directs." Section 104 prescribes that a taxpayer may object to and appeal against "any other decision that may be objected to or appealed against under a tax Act."*

It was held that the inclusion of the words *"unless a High Court otherwise directs"* in section 105 plainly denotes an environment for dispute resolution in which there is more than one process, and that a court has a discretion to approve a deviation from the prescribed procedures in the TAA. To this end, it was found that, in appropriate circumstances, a taxpayer may seek approval for such deviation simultaneously in the proceedings seeking a review. However, in order for the deviation to be granted, it was acknowledged that a court would require a justification to depart from the usual procedure, which justification should constitute *"exceptional circumstances"*. To this end, it was held that –

> *"...the quality of exceptionality need not be exotic or rare or bizarre; rather it needs simply be, properly construed, circumstances which sensibly justify an alternative route. When a dispute is entirely a dispute about a point of law, that attribute, in my view, would satisfy exceptionably."*

As such, the court agreed with ABSA's submission that in the event that there is a pure point-of-law-dispute, a party to the dispute would be entitled to approach the court directly, without following the dispute resolution proceedings provided for in the TAA.

After concluding that SARS' decision could constitute the subject matter of a review, it had to be decided on what basis the decisions might be reviewed. In particular, the court considered whether the decisions constituted *"administrative action"* that stood to be reviewed in accordance with the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), alternatively whether the decisions merely were an exercise of public power and were therefore reviewable under the principle of legality. It was found that the decision to issue the notices in terms of section 80J was not *"fully-final"* because they placed no immediate adverse burden on ABSA and therefore had no *"external or legal effect"*. As such, this decision was not administrative action as contemplated in PAJA. On the other hand, the letters of assessment and the refusal by SARS to withdraw the section 80J notices did have an external or legal effect, as a result of which it was concluded that these decisions did constitute administrative action.

Judicial review of decisions taken by SARS: The High Court considers another case*...continued*

The court found that SARS' refusal to withdraw the notices undoubtedly had an effect, even if that effect was not necessarily final.

However, ABSA did not invoke PAJA for purposes of reviewing SARS' decisions but relied on the principle of legality. The court did not deem it necessary to decide whether or not the use of PAJA may have been more appropriate in this case as –

> *"the attributes of [SARS'] decision to refuse lies in the borderlands of which review-regime should prevail, ie, PAJA or Legality"*.

The court found that SARS' refusal to withdraw the notices undoubtedly had an effect, even if that effect was not necessarily final. Of critical importance, so it was held, was that the decision to refuse was a decision by an organ of state exercising its statutory powers and that the non-final effect thereof did not preclude the decision from being reviewed, precisely because that decision nevertheless had an impact. As such, the court was satisfied that SARS' decisions could be reviewed under the principle of legality.

Since it had been established that a pure point-of-law-dispute may be subject to review under the principle of legality, the court was required to ascertain whether the dispute between the parties in this case could be classified as a pure point-of-law-dispute.

ABSA relied on multiple passages contained in the section 80J notices (which identical passages were included in the notices of assessment) to demonstrate that SARS had accepted that ABSA was ignorant of the intricate workings of the series of transactions that constitute the alleged impermissible tax avoidance arrangement, and therefore accepted that ABSA had no knowledge of the Brazilian investment made by DI Trust. Upon consideration of these passages, it was found that SARS had failed to make any statement alleging that ABSA was indeed aware of the Brazilian investment, or that any of the facts advanced by ABSA regarding its involvement in the series of transactions were false. In its answering affidavit, SARS again failed to rebut ABSA's factual contentions that ABSA was ignorant of the transactions.

SARS argued that the relevant passages in the section 80J notices did not indicate SARS' acceptance of the facts forwarded by ABSA, and that the process of objection and appeal (where employees of ABSA may be subject to cross-examination and discovery of documents may be demanded) would be appropriate in order to test the veracity of ABSA's claim of ignorance.

This view was rejected by the court on the basis that the notices of assessment were issued on the factual premise set out in the section 80J notices. In essence, the court emphasized that if SARS intends to assess tax on the basis that it is due despite ABSA being ignorant, then SARS would not be entitled to claim that it deserved a *"chance to go behind the premise of the assessment levied, so [it] can afterwards attempt to prove Absa did have knowledge."*

Judicial review of decisions taken by SARS: The High Court considers another case*...continued*

In respect of ABSA's first substantive ground of review, the court held that the definition of *"party"* in section 80L requires a taxpayer to *"participate or take part"* in an arrangement.

As SARS was unable to distance itself from the premise (as set out in the section 80J notices) it chose to rely on to issue the assessments, the court held that there was no room for a plausible dispute of fact. On this basis, the dispute before the court was found to be a pure point-of-law-dispute which constituted the exceptional circumstances required to justify the court's approval for deviation from the normal despite resolution proceedings as contained in the TAA.

After concluding that the course of action taken by ABSA to institute review proceedings was appropriate, the last enquiry that the court was required to make was whether the decisions by SARS correctly stood to be reviewed. ABSA contended that SARS had made two substantive errors of law in its analysis of whether ABSA was involved in an impermissible tax avoidance arrangement. In particular, ABSA first argued that it was an error to suppose that ABSA could be a *"party"* to an impermissible tax avoidance arrangement as defined in section 80L of the ITA, and secondly that the transaction to which ABSA was a party did not result in it escaping from any tax liability.

In respect of ABSA's first substantive ground of review, the court held that the definition of *"party"* in section 80L requires a taxpayer to *"participate or take part"* in an arrangement. This, it was said, requires volition on the part of the taxpayer such that the taxpayer is not merely present in the arrangement but is participating therein. To this end, the court held that the fact that a taxpayer may be the unwitting recipient of a benefit derived from an impermissible tax avoidance arrangement cannot be construed as that taxpayer *"taking part"* in the arrangement.

Regarding the arrangement contended for by SARS, the court held that such arrangement must –

> *"encompass all the transactions described. An arrangement which is alleged to comprise several distinct transactions must therefore be a scheme. It is plain that the scheme requires a unity to tie the several transactions into a deliberate chain. A mere series of subsequential events does not constitute a chain"*.

As SARS had failed to demonstrate a factual basis for its allegation that ABSA was anything more than an investor, it could not be found that a scheme (in which ABSA was involved) had been established. In addition, the court held that there was no basis to support an inference that ABSA's investment in PSIC 3 was motivated by an intention to obtain relief from an anticipated tax liability (a necessary attribute of an *"arrangement"*).

In respect of ABSA's second substantive ground of review, the court stated that whether a tax liability is evaded by a taxpayer must be determined by applying the *"but for"* test to a future anticipated tax liability. To this end, it had

Judicial review of decisions taken by SARS: The High Court considers another case*...continued*

It is readily apparent that not all decisions taken by SARS will be capable of review in the High Court and careful consideration should be given to the merits of a matter before such proceedings are instituted.

to be determined, but for the purchase of preference shares in PSIC 3, how might an anticipated tax liability have been evaded by ABSA? The court concluded that SARS had set out no foundation to demonstrate how an anticipated tax liability was to be evaded by ABSA in these circumstances, with the result that SARS' conclusion that ABSA had escaped an anticipated tax liability was irrational.

Ultimately, the court found in favour of ABSA and concluded that SARS' refusal to withdraw the section 80J notices, and its decision to issue the notices of assessment, constituted decisions that stood to be reviewed and set aside. The court also granted a cost order in favour of ABSA.

Comment

It appears that the frequency with which taxpayers are instituting review applications in respect of decisions made by SARS is increasing. When contemplating the intricacies of the reviewability of SARS' decisions, however, it is evident that the particular facts and provisions of law that are applicable to a dispute will dictate whether a decision by SARS is subject to review by a court.

To this end, taxpayers should bear in mind that if they intend to review a decision by SARS, they will, at the very least, likely have to show that:

1. the decision forming the basis of the dispute stands to be reviewed rather than resolved by means of the dispute resolution procedures contemplated in the TAA; and
2. substantive grounds for review exist, such that a court may determine that the decision taken by SARS rightly ought to be reviewed.

It is readily apparent that not all decisions taken by SARS will be capable of review in the High Court and careful consideration should be given to the merits of a matter before such proceedings are instituted.

Of significance for taxpayers is the principle highlighted by the court in this case that when a pure point-of-law-dispute arises from a decision taken by SARS, a taxpayer may directly approach an appropriate court for relief (by means of the review of the decision) rather than be subjected to the arduous and time-consuming processes that are prescribed in the TAA.

Louise Kotze

CLIFFE DEKKER HOFMEYR

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

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

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

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

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

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

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

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

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

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

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

Ursula Diale-Ali
Associate Designate
T +27 (0)11 562 1614
E ursula.diale-ali@cdhlegal.com

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

Tsanga Mukumba
Associate Designate
T +27 (0)11 562 1136
E tsanga.mukumba@cdhlegal.com

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

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 ctn@cdhlegal.com

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