TAX & EXCHANGE CONTROL
ALERT

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INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

Section 9 of the Tax Administration Act as an 'internal remedy'

Section 9(1) of the Tax Administration Act 28 of 2011 (TAA) effectively provides for a taxpayer to request a South African Revenue Service (SARS) official to withdraw or amend either a decision made by a SARS official, or a notice issued to the taxpayer.

Excluded from this provision are decisions given effect to in an assessment or a notice of assessment that are subject to objection and appeal in terms of Chapter 9 of the TAA.

For example, where a taxpayer has unsuccessfully applied for a suspension of payment in terms of section 164 of the TAA, which decision is not subject to objection and appeal under Chapter 9, the taxpayer may request that SARS reconsider its negative decision.

PAJA AND EXHAUSTION OF INTERNAL REMEDIES

Generally, where a decision by SARS is not subject to objection and appeal, an aggrieved taxpayer would have to seek judicial review in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) on the basis that the decision constitutes administrative action.

Section 7 of PAJA specifically provides that a court may not review administrative action unless *"any internal remedy provided for in any other law has first been exhausted"* – this is why a decision that is subject to objection and appeal in terms of Chapter 9 of the TAA does not generally qualify for judicial review. The objection and appeal procedures are considered *"internal remedies"*.

The court in *Reed and Others v The Master of the High Court and Others* [2005] (2) All SA 429 (E) defined an *"internal remedy"* as an *"administrative appeal ... to an official or tribunal within the same administrative hierarchy as the initial decision-maker – or less common, an internal review"*. The Supreme Court of Appeal agreed with this definition in *DPP Valuers (Pty) Ltd v Madibeng Local Municipality* [2015] JDR 2093 (SCA).

The question that arises is whether section 9 provides for an *"internal remedy"* and, more specifically, whether it must first be exhausted before proceeding with a review application under PAJA.

SECTION 9 IN PRACTICE

Regardless of whether section 9 creates an *"internal remedy"*, it seems to be a common occurrence that taxpayers nevertheless exhaust section 9 prior to approaching the court for relief under PAJA. The taxpayers in the cases of *Medtronic International Trading SARL v CSARS* 83 SATC 281 and *ABSA Bank Ltd v CSARS* 2021 (3) SA 513 (GP) both sought review of the refusal by SARS to withdraw its decision or notice in terms of section 9.

In the *Medtronic* case, the taxpayer approached the court to review SARS' refusal to withdraw its decision in respect of the taxpayer's request for remission in terms of section 39(7)(a) of the Value-Added Tax Act 89 of 1991. Similarly, in the *ABSA Bank* case, the court grappled with the issue of refusal by SARS to withdraw a section 80J notice. The court in *ABSA Bank* went into more depth regarding section 9 in discussing how it relates to decisions not yet given effect to. As a matter

Section 9 of the Tax Administration Act as an 'internal remedy'

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of interest, the *Medtronic* case has been taken on appeal by SARS and is currently set down for hearing by the Supreme Court of Appeal (SCA) in August. It remains to be seen whether the SCA will touch upon the interpretation and application of section 9.

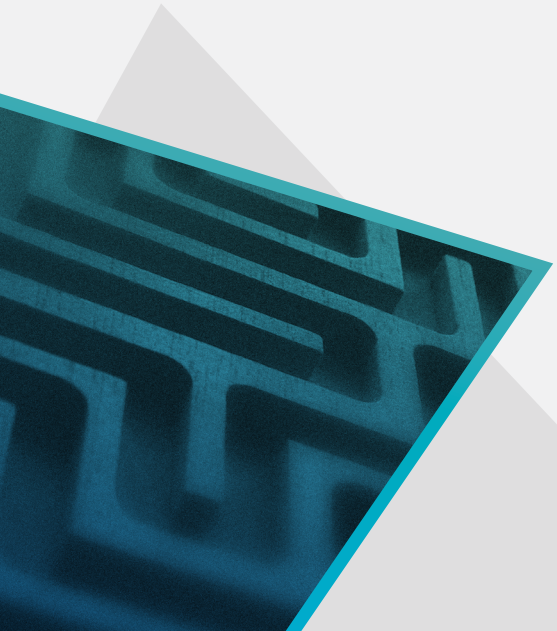
That being said, there appears to be no reported judgment where a court has refused to review administrative action by SARS under PAJA on the basis that the taxpayer did not first request a withdrawal or amendment in terms of section 9 of the TAA.

One should also keep in mind that, even if section 9 creates an explicit internal remedy, not exhausting this remedy does not absolutely exclude courts from reviewing the relevant administrative action. Section 7(2)(c) of PAJA provides for an exemption in exceptional circumstances where it is in the interests of justice.

SECTION 9 AS AN EMPOWERING PROVISION RATHER THAN AN INTERNAL REMEDY

As opposed to viewing section 9 as an "*internal remedy*", one should also consider the nature of section 9 as simply an empowering provision which allows SARS officials to revisit their decisions. The court in *ITC 1946* 83 SATC 504 considered the nature of section 9 and provided some valuable insight into the nature of this provision. The court noted that the provision explicitly provides that the withdrawal or amendment of a decision or notice can be done at the discretion of a SARS official and not only at the request of a relevant person. The court held that this implies that withdrawal or amendment need not particularly be to the benefit of the taxpayer and can be exercised adversely to the taxpayer. The section therefore not only provides a remedy to taxpayers, but is perhaps more fundamentally a provision empowering SARS officials to revisit their decisions (not leaving them *functus officio*).

HEINRICH LOUW



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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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