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To 'tax debt' or not to 'tax debt': SARS' debt recovery options keep getting better

In terms of section 169(1) of the Tax Administration Act 28 of 2011 (TAA), any amount of tax due or payable under a tax act is a debt due to the South African Revenue Service (SARS).

The court in *The Commissioner for SARS v Dr Christoffel Hendrik Wiese and Others* [2022] JOL 55368 (WCC) held that in circumstances where the purpose and aim of the TAA are to hold a third party liable, a section 80J(1) notice is sufficient to give rise to a tax debt recoverable by SARS as contemplated in section 183 of the TAA.

Has the court in *Wiese* extended the scope of what constitutes a *"tax debt"*? Or is the judgment a warning to taxpayers and advisors alike that the courts have little sympathy for tax advisors who provide *"aggressive"* tax advice that frustrates SARS' ability to collect taxes?

THE FACTS

Energy Africa Proprietary Limited, the taxpayer in the matter, sold its shares and claims in Energy Africa Holdings Pty Ltd (EAH) to Tullow Overseas Holdings BV on 25 January 2007, pursuant to a restructure that was undertaken by the Tullow Group during January of 2007 (the transaction).

On 16 November 2012, SARS issued a notice in terms of section 80J(1) of the Income Tax Act 58 of 1962 (ITA) to the taxpayer notifying it of SARS' intention to apply the general anti-avoidance rules (GAAR) and adjust its 2007 assessment. This was pursuant to an audit that was conducted into the taxpayer's tax affairs.

According to SARS, the taxpayer was liable for capital gains tax (CGT) and secondary tax on companies (STC) of R453 million and R487 million respectively, on the basis that the transaction amounted to, amongst other things, an impermissible tax avoidance arrangement as defined in section 80L of the ITA.

On 15 April 2013, the taxpayer addressed a letter to SARS, disputing any tax liability under the *"substance over form"* doctrine, alternatively under the GAAR provisions contained in the ITA.

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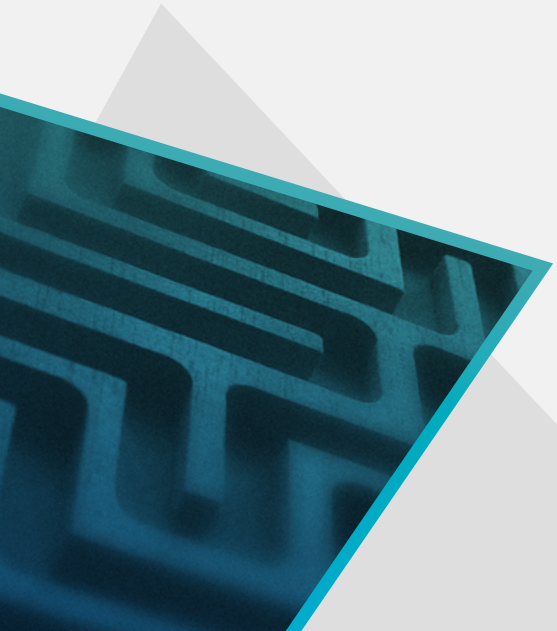

According to the taxpayer, the main purpose of the transaction was not to obtain a "*tax benefit*", as contemplated in section 80A of the ITA. As such, the taxpayer was of the view that the Commissioner was not entitled to invoke the provisions of section 80B of the ITA.

Notwithstanding this, on 21 August 2013, SARS addressed a finalisation of audit letter to the taxpayer in terms of which the taxpayer's additional income tax liability for the 2007 year of assessment was fully described (finalisation letter).

In terms of the finalisation letter, an additional assessment was raised by SARS for CGT of R453,126,518 on the disposal of the EAH shares, and an understatement penalty of R679,689,777 was imposed.

The only asset that the taxpayer had during all relevant times was a loan claim against Titan Share Dealers Proprietary Limited for R216,6 million (loan claim).

On 19 April 2013, prior to the issuing of the finalisation letter, the taxpayer disposed of its only asset by making a distribution to its sole shareholder, Elandspad Investments Proprietary Limited (Elandspad). Elandspad, in turn, immediately distributed the asset to Titan Premier Investments (Pty) Ltd (TPI), its holding company. It was SARS' view that this was done by the individual defendants cited and that they also arranged for the sale of the shares in the taxpayer to Friedshelf 1395 (Pty) Ltd.

In September 2013, the taxpayer replied to the finalisation letter and advised SARS, *inter alia*, that it did not have any cash or assets and could not pay the disputed tax.

On 24 October 2014, SARS was informed that the taxpayer was dormant and in April 2016 the taxpayer was finally wound-up by an order of the High Court.

Accordingly, SARS sought an order from the court declaring the defendants liable, jointly and severally, to pay to SARS the amount of R216,6 million in terms of sections 183 and 184 of the TAA. This was on the basis that the defendants knowingly caused, or assisted in causing, the taxpayer to dissipate the loan claim by declaring and transferring it as a dividend *in specie* to its holding company Elandspad, which in turn declared and transferred the loan claim as a dividend *in specie* to its own holding company, TPI.

QUESTION OF LAW

The question before the court was the meaning of the term "*tax debt*", as contemplated in sections 183 and 169 of the TAA, specifically whether SARS is required to issue an assessment to create a tax debt before invoking section 183. This issue (along with another) were considered as separate points of law and the question was thus not whether the defendants were liable in terms of section 183.

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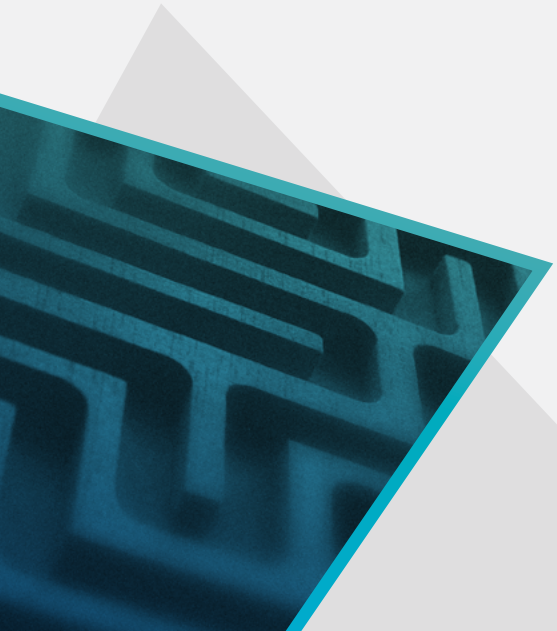

KEY ARGUMENTS RAISED BY SARS AND THE DEFENDANTS

SARS argued that section 183 of the TAA finds application in circumstances where an assessment is anticipated, and adopting a contrary interpretation would negate or seriously undermine the purpose of the section and could lead to *"absurd consequences"*.

The defendants, on the other hand, argued that a *"tax debt"*, properly construed, requires SARS to issue an assessment to the taxpayer before it can invoke the provisions of section 183 of the TAA.

The defendants submitted that a distinction needs to be drawn between when a debt is owing, due, or payable (in the context of the phrase *"due and payable"*) and enforceable by SARS. It was contended that a contingent liability is not a debt and as such a contingent tax liability cannot qualify as a *"tax debt"* under section 183 of the TAA.

JUDGMENT

In determining this question, the court noted that the point of departure must be the language of the provision itself, read as a whole, and its context and purpose.

In terms of section 183 of the TAA:

> *"If a person knowingly assists in dissipating a taxpayer's assets in order to obstruct the collection of a tax debt of the taxpayer, the person is jointly and severally liable with the taxpayer for the tax debt to the extent that the person's assistance reduces the assets available to pay the taxpayer's tax debt."*

The court noted that the object of section 183 was to hold person(s) jointly and severally liable if they knowingly assisted in dissipating a taxpayer's assets in order to obstruct the collection of a tax debt. The provision, therefore, applies to parties other than the taxpayer.

Section 183 falls under Chapter 11 of the TAA which covers Part A to F under the main heading *"Recovery of Tax"*.

The court held that on a purposive reading, section 169(1) of the TAA informs the meaning of the phrase *"tax debt"* within the provisions of Chapter 11. Accordingly, the term *"tax debt"* in section 183 of the TAA must be read through the prism of section 169 of the TAA. The phrase, *"debt due to SARS"* is defined in the heading of section 169 (1) and refers to an amount that is *"due or payable"*.

The court further held that it would be *"unbusinesslike but will also emasculate the very purpose of the TAA as a whole"* to require an assessment to first be issued before there is a *"tax debt"* for purposes of section 183 of the TAA. This would mean that a third party could knowingly assist a taxpayer to dissipate their assets until the day before an assessment is issued by SARS.

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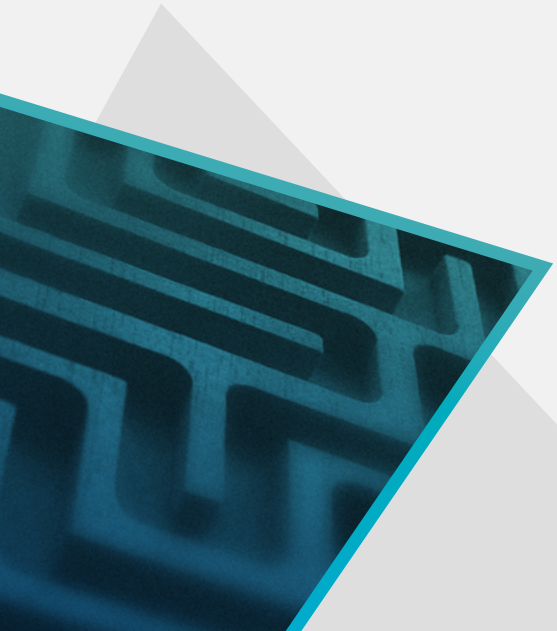

The court also confirmed that, reading section 183 with section 169 of the TAA, that a tax debt that is "*due and payable*", will not lead to two irreconcilable constructions. In this regard, the court relied on the judgment handed down in *Singh v Commissioner, South African Revenue Service* 65 SATC 203, in order to conclude that the assessing of a taxpayer to tax is to retrospectively render the tax due and payable when it ought to have been paid i.e. a tax debt exists irrespective of whether the taxpayer or SARS has made an assessment.

The court quoted a passage from the Singh judgment to elucidate this point:

> *"... an amount is due when the correctness of the amount has been ascertained either because it is reflected as due in the taxpayer's return or because the circumstances set out in section 32(5) had been applicable (in both of which cases it is both due and payable) or if there is a dispute after the procedures relating to objection and appeal have been exhausted (in which case the amount so ascertained was due and payable with the return)."*

The court, therefore, held that the amounts for CGT and STC that were subsequently assessed by SARS were already owing by the taxpayer at the time of the dissipation. SARS did not have to issue an assessment to establish the tax debt. The court noted that the debt existed irrespective of whether the taxpayer or SARS made an assessment.

COMMENT

It is no secret that the *Wiese* case has a unique set of facts. The court's interpretation of what constitutes a "*tax debt*" seems to widen the net for liability to ensure that SARS' efforts at recovering tax that is "*due and payable*" are not frustrated by clever timing, so to speak. It clearly seeks to ensure that a person who knowingly assists a taxpayer to dissipate assets before an additional assessment is raised is treated the same as a person who does so after the assessment is raised. However, how far in the future will tax advisors have to look when restructuring the tax affairs of their clients to ensure that there is no reduction of assets that could have been used for the settlement of a potential liability in the future, somewhere?

In *Top Watch (Pty) Ltd v Commissioner for SARS* 80 SATC 448, the court also relied on *Singh* and found that tax is due or payable when it has been assessed, in the context where SARS wanted to set-off VAT refunds against an alleged outstanding tax debt. What is interesting is how contradicting these judgments appear to be, notwithstanding the fact that both cases relied on *Singh* to come to their conclusions.

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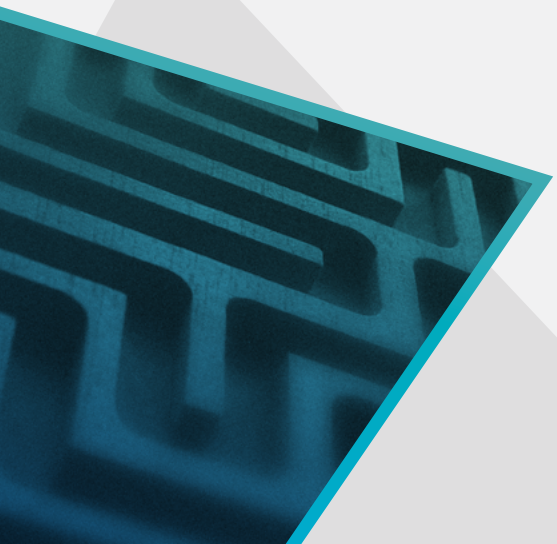
It will be interesting to see how in the main hearing, the court will dissect the remaining requirements contained in section 183 of the TAA. In this regard, for a person to be held liable, jointly and severally with the taxpayer for its tax debt, that person must:

- **knowingly assist**;
- in the **dissipation** of the taxpayer's assets;
- in order to **obstruct** the collection;
- of the **tax debt**; and
- the person's assistance must **reduce the assets available** to pay the taxpayer's tax debt.

Although the court's interpretation of what constitutes a "*tax debt*" in section 183 of the TAA may cause some whiplash, taxpayers should not lose too much sleep, as the remaining requirements are a question of fact and are likely more difficult for SARS to prove. Seeing as SARS is the *dominus litis* in the matter, it might have an uphill battle trying to prove liability on the part of the defendants. The matter, therefore, merely may assist SARS in using section 183, but still requires them to prove a number of things before the section can be applied.

PULENG MOTHABENG



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The unconstitutionality of minimum tax: An analysis of the Court of Appeal's judgment on the Kenya Revenue Authority's move to impose minimum tax

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Agreeing with the findings of the High Court, The Court of Appeal reiterated that the provisions of Finance Act 2020, which introduced minimum tax, was unconstitutional, as it was a contradiction to the spirit of Article 201 of the Constitution.

ARGUMENTS OF THE KRA

The KRA (Appellant) argued that the rationale behind the introduction of the minimum tax was to ensure equity in taxation by expanding the tax base to involve as many people as possible in sharing the tax burden. The Appellant further reiterated that the need to share the tax burden necessitated the inclusion of loss-making companies through payment of the minimum tax at the rate of one percent of their gross turnover.

The Appellant also argued that the ultimate purpose of imposing the minimum tax was to net tax evaders, by placing all loss-making entities under the Appellant's bracket (as they nonetheless benefitted from infrastructure maintained by the government) and prevent tax evaders from escaping their fair share of tax liability.

ARGUMENTS OF THE TAXPAYERS AND ASSOCIATIONS

The Taxpayers and Associations (the Respondents) argued that the imposing of a minimum tax violated the principle of fair sharing of the burden of tax as set under Article 201 of the Constitution. The minimum tax would have unfairly targeted entities in loss-making positions, to pay taxes from their capital while thriving business paid taxes from their profits, maintaining their capital base. The Respondents also argued that the legal provisions that introduced minimum tax were contrary to other provisions in the Income Tax that allowed businesses to reduce their tax liability by taking allowable deductions such as expenses.

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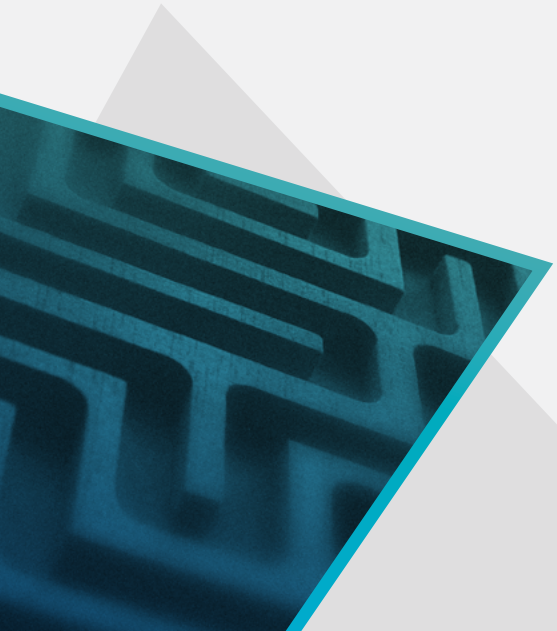

Besides, the Respondents submitted that the KRA's argument on the introduction of the minimum tax to net tax evaders, violated taxpayer's right to dignity as it assumed that honest businesses in loss-making position were intentionally avoiding paying tax. The Respondents stated that the KRA failed to adduce any evidence showing audited accounts of any establishments that purported to have made losses to avoid payment of taxes.

According to the Respondents, KRA did not justify the imposition of a broad tax regime that stands to punish genuinely complaint entities that deserve legal protection.

THE COURT OF APPEAL'S FINDINGS

In dismissing KRA's appeal, the Court of Appeal found that the levying of minimum tax on gross turnover, as opposed to gains or profit would lead to a situation where a loss-making taxpayer, would bear a heavier burden than other taxpayers contrary to the spirit of Article 201 of the Constitution.

Additionally, the Court of Appeal appreciated the stack difference between tax evaders and businesses that are unable to pay taxes due to genuine losses. It further stated that tax evasion implied devious criminal conduct while the other is a victim of odd cluster inhibitions, not out of wilful design. Consequently, the Court of Appeal held that the imputation of criminal conduct for a business that is grappling with a difficult economic environment, constituted grave humiliation and a violation of their right to dignity.

CONCLUSION

This decision by the Court of Appeal cements the place of a taxpayer's right in the realm of tax imposition and tax legislation. We note from the judgment that both the trial court and the Court of Appeal understood and accepted that the rationale on sharing the tax burden was in consonance with Article 201(b) of the Constitution.

From the foregoing, courts have appreciated that parliament has the mandate of realising the provisions of the Constitution such as ensuring that the tax burden is fairly shared, however, the same must be within confines of the law and in line with the spirit of the Constitution.

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