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TAX & EXCHANGE CONTROL ALERT

IN THIS **ISSUE**

A WIN AGAINST SARS: LATE DELIVERY OF SARS'S RULE 31 STATEMENT

On 17 October 2017 the Tax Court (Western Cape Division: Cape Town) delivered judgment in the matter between *S Company v The Commissioner for the South African Revenue Service* under case number IT0122/2017. The judgment was handed down by Judge Cloete. This judgment is of great interest to any taxpayers currently involved in prolonged disputes with SARS, in particular where there are delays on the part of SARS.

DEDUCTIBILITY OF LEGAL EXPENSES

For purposes of determining the taxable income derived by any person from carrying on a trade, s11(c) of the Income Tax Act, No. 58 of 1962 (Act) provides for the deduction of legal expenses which arise in the course of or by reason of a taxpayer's ordinary trading operations. More specifically, any legal expenses actually incurred by a taxpayer in respect of "any claim, dispute or action at law arising in the course of or by reason of the ordinary operations undertaken by the [taxpayer] in the carrying on of [its] trade" will be deductible.

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The SARS official to whom the appeal had been allocated informed Kotze that he had only recently been appointed in SARS's litigation division and would need time to acclimatise himself with SARS's processes and the facts of the appeal.

The case involved two applications relevant for purposes of this article and discussed herein, namely:

- an application by the taxpayer for default judgment in terms of rule 56 of the Tax Court rules (Rules); and
- an application by SARS for condonation for the late filing of its answering affidavit opposing the default judgment application.

Background to the case

SARS assessed the taxpayer on 2 November 2015 for the tax periods 2005 to 2010 and on 3 November 2015 for the tax periods 2011 and 2012.

On 31 January 2017 the taxpayer filed its notice of appeal in terms of s107(1) of the Tax Administration Act, 2011 (TAA) read with rule 10 of the Rules. In terms of rule 31, SARS was required to deliver its statement of grounds of assessment and opposing the appeal (Rule 31 Statement) within 45 days thereafter. This period expired on 5 April 2017 and SARS failed to deliver the Rule 31 Statement timeously. There was no agreement between the parties pertaining to late delivery nor had SARS requested an extension in terms of rule 4(2).

The SARS official to whom the appeal had been allocated (Masola) invited the taxpayer's tax consultant (Kotze) to a meeting held on 10 April 2017. According to Masola the purpose of the meeting was to introduce himself to Kotze as the SARS official dealing with the appeal. He informed Kotze that he had only recently been appointed in SARS's litigation division (two months earlier, on 7 February 2017) and would need time to acclimatise himself with SARS's processes and the facts of the appeal. Masola requested an extension for delivery of the Rule 31 Statement and the taxpayer reluctantly agreed to an extension until 13 June 2017 (a further 45 days calculated from the initial deadline of 5 April 2017).

On 26 May 2017 the taxpayer made a "without prejudice" settlement proposal to SARS. The proposal did not state that the taxpayer relieved SARS of its obligation to deliver the Rule 31 Statement by the agreed extended deadline of 13 June 2017.

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SARS also did not seek condonation for the late filing of the Rule 31 Statement, it simply served and filed it, which did not remedy its non-compliance.

On 31 May 2017 Masola informed Kotze that the Rule 31 Statement would not be forthcoming by 13 June 2017. On 1 June 2017 Kotze wrote to Masola informing him that SARS already had 90 days to prepare and file the Rule 31 Statement. Even though his client was unhappy about the extension, the taxpayer wanted SARS to consider the settlement proposal whilst preparing the Rule 31 Statement, and therefore agreed to a further extension to 14 July 2017 (an additional month). Kotze advised SARS that his advice to the taxpayer would be not to grant SARS any further extensions to file its Rule 31 Statement.

Masola explained in his affidavit that he received the settlement proposal whilst "busy dealing" with the matter. On receipt thereof he turned his attention to the settlement proposal as its acceptance would conclude the matter and render further processes and action (including the Rule 31 Statement) unnecessary. Masola did not disclose the stage he had reached in drafting the Rule 31 Statement or whether he had in fact started with the drafting at all.

SARS failed to comply with the final deadline. Accordingly, the taxpayer delivered its notice in terms of rule 56(1) on 17 July 2017 (Rule 56 Notice). The Rule 56 Notice pointed out that, despite the extensions granted and having had 113 days to deliver the Rule 31 Statement, SARS had failed to deliver same. The taxpayer formally indicated that it would apply to the Tax Court for a final order in terms of s129(2) of the TAA in the event of SARS failing to remedy its non-compliance within 15 days, ie by 7 August 2017. SARS failed to comply with this deadline and, on 8 August 2017, the taxpayer delivered an application for default judgment. SARS delivered the Rule 31 Statement on 9 September 2017, one month after delivery of the application for default judgment. In the application the taxpayer sought as its main relief a final order in terms of s129(2)(b) of the TAA upholding its appeal in its notice of appeal dated 31 January 2017. In the alternative the taxpayer sought an order directing SARS to deliver its Rule 31 Statement within five days thereof in the event that the court found good cause for SARS's default.

SARS timeously filed its notice of intention to oppose but failed to deliver its answering affidavit timeously, which was required by 12 September 2017. The Rule 31 Statement was delivered 107 days after the initial deadline expired on 5 April 2017. SARS failed to secure another extension for its delivery after 7 August 2017 and did not request one. SARS also did not seek condonation for the late filing of the Rule 31 Statement, it simply served and filed it, which did not remedy its non-compliance.

On 13 September 2017 the taxpayer requested the registrar to allocate a hearing date for the default judgment application. The notice of set down was provided to the parties on 20 September 2017. SARS only brought its application for condonation for late filing of its answering affidavit on 29 September 2017 (five days before the hearing on 9 October 2017). In his affidavit, Masola complained that the default judgment application was set down despite delivery of the Rule 31 Statement. He complained that his subsequent requests for the default judgment application to be withdrawn were refused. In his view there was no prejudice to the taxpayer since it had been in possession of the Rule 31 Statement since 9 September 2017. On this basis he sought condonation for the late filing of the answering affidavit. Masola attached the Rule 31 Statement to his affidavit without attempting to summarise it for the court.

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Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case.

In response the taxpayer pointed out that Masola had not explained why he believed that SARS's non-compliance could simply be remedied by delivering the Rule 31 Statement before the deadline for delivery of its answering affidavit. The taxpayer's prejudice arising from SARS's repeated failure to comply with the Rules was manifest. The taxpayer explained that it had over the past 10 years tried to regularise its tax affairs and during this period locked horns with SARS in court on four occasions. Consequently it had difficulty in performing income tax calculations, filing income tax returns and attending to provisional tax. It had nonetheless never defaulted on payment of sums due to SARS. Despite SARS's averments about its consideration of the settlement offer (submitted over four months earlier), it had yet to provide a response.

Discussion by the court

The court, in considering SARS's application for condonation, referred to the case of *Van Wyk v Unitas Hospital* 2008 (2) SA 472 (CC) where the Constitutional Court stated that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case.

Relevant factors include the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal, and the prospects of success. An applicant for condonation must give a full explanation for the delay which must cover the entire period of the delay. The explanation must also be reasonable.

The court referred to the case of *SARS v Muller Marais Yekiso Inc* (Tax Case No. 12013/2012) in which both the taxpayer and SARS failed to comply with the Rules or follow up on matters. The Court stated that the:

> Timetable in the rules is a generous one; far longer periods are permitted for the filing of pleadings, by which I mean the statements in terms of Rule 10 [now 31] and 11 [now 32], than applies in High Court proceedings under the Uniform Rules of Court…Despite these generous time periods, one sees time and time again that neither SARS nor the taxpayers comply with them; they simply seem to go along in their own way. This is strongly discouraged. SARS, in particular,

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The court stated that the explanation provided by SARS for its delay of five months beyond the time limit of 45 days stipulated in rule 31 was grossly inadequate.

should take the lead and should display efficiency in the conduct of litigation. It should comply with time periods, and where it does not, it should promptly raise that matter in correspondence, providing reasons and seeking written agreements to extensions.

Having said that SARS should take the lead, taxpayers themselves should not allow matters to drift. If SARS does not comply with a requirement imposed by the rules, a taxpayer is entitled, in terms of Rule 26 [now 56], to bring an application to compel compliance with the Commissioner's obligations. That is the way in which a taxpayer prevents prejudice which can otherwise arise from lengthy delays in the finalisation of tax disputes.

The Court referred to the *Van Wyk* case where the Constitutional Court stated that:

There is now a growing trend for litigants in this Court [ie the Constitutional Court] to disregard time limits without seeking condonation...In some cases litigants either did not apply for condonation at all or if they did, they put up flimsy explanations... This practice must be stopped in its tracks.

The court stated that the explanation provided by SARS for its delay of five months beyond the time limit of 45 days stipulated in rule 31 was grossly inadequate. It was not a full explanation and did not cover the entire period of the delay. Moreover, it was not reasonable. During the period 5 April 2017 to 13 June 2017 (the first agreed extended deadline) the only steps Masola took were to meet Kotze on 10 April 2017, essentially to ask for an extension, and to consider the settlement offer. Apart from that, the court was left with the "bald averment that he was 'busy dealing' with the matter." The court further stated that it was not possible to discern the actual steps taken by Masola between 14 June 2017 and 14 July 2017 (the second and final agreed extended deadline). All that is known is that by 17 July 2017 he was engaged in drafting the Rule 31 Statement.

The court noted that the Rule 31 Statement was still not finalised by 7 August 2017 and must have been nowhere near completion even when SARS filed its notice of intention to oppose the default judgment application on 22 August 2017, given that the statement was only served and filed on 9 September 2017. However, the court found that SARS's fundamental difficulty was that there was no application for condonation for late filing of the Rule 31 Statement before the court. The only application before the court was for

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In the court's view Masola may have been a recent appointee in SARS's litigation division when the appeal was allocated to him on 27 February 2017.

condonation for late filing of its answering affidavit. Even if the latter were to be granted it would not cure that fundamental difficulty. The Rule 31 Statement was not properly before the court - it was delivered months out of time and at the very least more than a month after the deadline of 7 August 2017 stipulated in the Rule 56 Notice.

In the court's view Masola may have been a recent appointee in SARS's litigation division when the appeal was allocated to him on 27 February 2017, however, there was no suggestion that he lacked the necessary skills and experience. He may have required a reasonable period of time to familiarise himself with SARS's internal processes and the appeal. However, he had been employed in SARS's litigation division for over four months by the date when the first agreed deadline expired. In such circumstances he could surely have had the opportunity to familiarise himself with the Rules. In addition, by 10 April 2017 he must have been aware of the 45 day time limit contained in rule 31 as he knew that he required an agreed extension. The same applies to the further extension requested and to which the taxpayer agreed.

In the court's view it was difficult to accept that, by 7 August 2017, he was wholly unaware of the provisions of rule 4 relating to the extension of time periods and that he laboured under the misapprehension that delivery of the Rule 31 Statement would automatically remedy the non-compliance. Even if he genuinely believed this to be the case, it was not the end of the matter. Masola was employed by SARS itself. The court referred to the case of *Saloojee and Another v Minister of Community Development* 1965 (2) SA 135 (AD) where that court considered delays caused by the neglect of the applicants' attorneys. The court stated that there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. Since the attorney is the representative that the litigant chose himself and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are. The court in the *Saloojee* case stated that a litigant who knows that the prescribed period has elapsed and that an application for condonation is necessary

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The court concluded that the taxpayer had complied with the procedural provisions of rule 56 whereas SARS failed to show good cause for condonation for its default.

is not entitled to hand over the matter to his attorney and wash his hands of it. He cannot sit passively by without any reminder or enquiry to his attorney and expect to be exonerated of all blame. If he relies upon the ineptitude or remissness of his attorney, he should at least explain that none of it is to be imputed to himself.

Referring to the case at hand, the court stated that, although Masola took responsibility for his belief that simply delivering the Rule 31 Statement, albeit grossly out of time, would automatically remedy SARS's non-compliance, SARS was otherwise silent. The court accepted that the amount involved was substantial, however, insofar as the delay was concerned, SARS's conduct was "inexcusable". It paid little, if any, regard to the proper administration of justice and the effect of its delay on the taxpayer and the fiscus. The onus rested upon SARS to persuade the court that it had good prospects of success in the context of whether it had shown good cause for condonation. SARS failed to deal with all the findings by which it was bound and merely incorporated the content of its Rule 31 Statement by reference in its affidavit, coupled with the averment that the statement showed that it had a *bona fide* case. This approach did not enable the court to determine that it enjoyed good prospects of success and, accordingly, the application for condonation failed.

The court concluded that the taxpayer had complied with the procedural provisions of rule 56 whereas SARS failed to show good cause for condonation for its default. The taxpayer sought a final order under s129(2)(b) of the TAA to alter SARS's assessment in the manner contemplated in its notice of appeal. The court was persuaded that the taxpayer was entitled to such order and that costs should follow the result. Accordingly:

- SARS's application for condonation for the late filing of its answering affidavit was dismissed;
- a final order was granted under s129(2)(b) of the TAA altering the assessments issued by SARS on 2 November 2015 in respect of the 2005 to 2010 tax periods and on 3 November 2015 in respect of the 2011 and 2012 tax periods, in the manner contemplated in the taxpayer's notice of appeal dated 31 January 2017; and
- SARS was ordered to pay the taxpayer's costs in respect of both applications, including the costs of two counsel where employed.

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DEDUCTIBILITY OF LEGAL EXPENSES

Any legal expenses actually incurred by a taxpayer in respect of "any claim, dispute or action at law arising in the course of or by reason of the ordinary operations undertaken by the [taxpayer] in the carrying on of [its] trade" will be deductible.

For purposes of determining the taxable income derived by any person from carrying on a trade, s11(c) of the Income Tax Act, No. 58 of 1962 (Act) provides for the deduction of legal expenses which arise in the course of or by reason of a taxpayer's ordinary trading operations. More specifically, any legal expenses actually incurred by a taxpayer in respect of "any claim, dispute or action at law arising in the course of or by reason of the ordinary operations undertaken by the [taxpayer] in the carrying on of [its] trade" will be deductible.

For purposes of s11(c), it is not a requirement that the legal expenses should have been incurred in the production of income.

In order for a taxpayer to be able to deduct legal expenses (which include the services of legal practitioners, expenses incurred in procuring evidence or expert advice, court expenses, witness expenses, taxing expenses, expenses of sheriffs or messengers of the court and other expenses of litigation which are of an essentially similar nature to any of the said expenses), such expenses must:

i. be in relation to any claim, dispute or action at law;

ii. arise in the course of or by reason of the ordinary operations undertaken by the taxpayer in the carrying on of its trade; and

iii. not be of a capital nature.

These requirements are discussed in more detail below.

Claim, dispute or action at law

The phrase "claim, dispute or action at law" is not defined in the Act. However, the meaning of this phrase was considered in *ITC 1419 (1986) 49 SATC 45*, where the taxpayer incurred expenditure on securing legal representation before a commission of enquiry appointed under s417 of the Companies Act, No. 61 of 1973. The Commissioner for the South African Revenue Service (SARS) argued that the word "dispute" referred to a defined and readily identifiable dispute between the parties. The court did not find it necessary to decide the issue as commissions appointed under the said s417 are appointed by a court of law. However, the view was expressed that the word "dispute" covers "any disagreement as a result of which parties require legal assistance".

Arise in the course of or by reason of the ordinary operations of a taxpayer in carrying on a trade

For purposes of s11(c), it is not a requirement that the legal expenses should have been incurred in the production of income. It is submitted that all that is required is that the legal expenditure must arise in the course of or by reason of the taxpayer's ordinary trading operations.

The term "trade" is given a very wide meaning in s1 of the Act and includes "every profession, trade, business, employment, calling, occupation or venture, including the letting of any property and the use of or the grant of permission to use any patent as defined in the Patents Act, or any design as defined in the Designs Act, or any trade mark as defined in the Trade Marks Act, or any copyright as defined in the Copyright Act, or any other property which is of a similar nature".

The phrase "arising in the course of or by reason of ordinary operations undertaken by him in the carrying on of his trade" has been considered by our courts and has been interpreted to mean that the deductibility of legal expenses in terms of s11(c) does not depend on the purpose of the expenditure, but rather the causal connection of the relevant events with the taxpayer's trade.

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The question of whether or not expenditure is of a capital nature, depends on the facts of each case.

For example, in the case of *ITC 1710 (1999) 63 SATC 403*, an employee of the taxpayer who was the owner of a farm producing grapes, had, while working in the vineyards, negligently set a neighbour's farm alight causing severe damage thereto. In an action for damages brought against the taxpayer, the court had found that the employee in question had acted within the course and scope of his employment and the taxpayer was accordingly liable for the damages caused by the employee as a result of the fire. The taxpayer, in order to defend the legal action, had incurred legal expenses and the issue to be decided by the court was whether such expenses were deductible in terms of s11(c) of the Act. It was found that the expenses in issue were connected with work performed by the employee on the farm, as part of the taxpayer's business and that there was a sufficient causal connection with the taxpayer's farming operations. Accordingly, it was held that the legal expenses incurred by the taxpayer were deductible in terms of s11(c) of the Act.

In *ITC 1837 71 SACT 177*, the taxpayer, a premier of a province, had made remarks at a press conference that resulted in him being successfully sued and ordered to pay damages for defamation. It was held that the claim for damages arose in the course and scope of his employment as premier and was sufficiently closely related to his ordinary trading operations to establish the requisite causal connection between such expenditure and those trading operations. The legal expenses incurred in defending the claim were accordingly deductible in terms of s11(c) of the Act.

Not of a capital nature

The question of whether or not expenditure is of a capital nature, depends on the facts of each case. For example, what may be capital expenditure in the case of one taxpayer may be revenue expenditure in the case of another. A useful test, which has been applied and endorsed in a number of South African judgments (such as *New State Areas Ltd v Commissioner for Inland Revenue 1946 AD 610* and *Commissioner for Inland Revenue v George Forest Timber Co Ltd 1924 AD 516*) is to ascertain whether the expenditure has been incurred to create, acquire or improve an income-producing asset, in which case the expenditure will be of a capital nature. As with most capital/revenue matters, there is seldom tax certainty and one has to form a view based on a myriad of tax cases with contrasting principles and decisions. Some of these cases are summarised below.

In *ITC 1241 (1975) 37 SATC 300*, a company that was a scrap-metal merchant had erected a crushing machine on hired land zoned by the local municipality for general residential purposes. The municipality then gave notice calling for the removal of the machine but the company took no action. The municipality consequently instituted proceedings in the Supreme Court for an order directing the company to remove the machine. In an attempt to gain time and continue the profitable use of the machine for as long as possible, the company decided to use all legitimate means of resisting the granting of an order for the removal of the machine. At the same time, the company attempted to find a suitable alternative site for the machine.

The court, having regard to the fact that the purpose and effect of the expenditure was to delay as long as possible the granting of an order compelling the removal of the machine, held that (at 306):

> The legal expenses incurred did not create or enhance any asset, they did not bring about any advantage for the enduring benefit of trade, and they were more closely related to the appellant's income-earning

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Based on this reasoning in Cadac, the court in ITC 1677 held that the taxpayer's litigation was instituted to preserve an asset and protect the taxpayer's market.

> operations than to its income-earning structure. [T]he appellant took a calculated risk, and the expenditure was in truth no more than part of the cost incidental to the performance of the income-producing operations.

The court accordingly concluded that the legal expenses incurred were not of a capital nature and were deductible under s11(c) of the Act.

In *ITC 1677 (1999) 62 SATC 288*, a certain D had applied for an interdict against the taxpayer, a publishing company, on the basis that the taxpayer had published two textbooks which constituted an infringement of D's copyright. The court had to decide whether legal expenses incurred by the taxpayer were of a capital nature.

The court rejected the taxpayer's argument that the expenditure did not give rise to any asset or to any advantage of an enduring nature on the basis of the decision in *Secretary for Inland Revenue v Cadac Engineering Works (Pty) Ltd* 1965 (2) SA 511 (A). In that case, Cadac was manufacturing cookers under licence from the patent holder and asked the patent holder to institute legal proceedings against another firm, Homegas, which had started to market cookers in competition with Cadac. Cadac undertook to indemnify the patent holders for its legal expenses. The court held that the legal expenses were of a capital nature as they were directed at preserving and perhaps expanding the field in which the taxpayer's business operated. This was further the case, as the expenditure had been incurred by Cadac to eliminate the competition of Homegas. It was therefore not deductible.

Based on this reasoning in Cadac, the court in *ITC 1677* held that the taxpayer's litigation was instituted to preserve an asset and protect the taxpayer's market. The legal expenses were therefore capital in nature and not deductible.

Conclusion

In light of the above, to the extent that the requirements of s11(c) are met, legal expenses should be deductible. However, it is important for taxpayers to bear in mind that such deduction is limited to so much thereof as:

a) is not of a capital nature;

b) is not incurred in respect of any claim made against the taxpayer for the payment of damages or compensation if by reason of the nature of the claim or the circumstances any payment which is or might be made in satisfaction or settlement of the claim does not or would not rank for deduction under s11(a) of the Act;

c) is not incurred in respect of any claim made by the taxpayer for the payment to him of any amount which does not or would not constitute income of the taxpayer; and

d) is not incurred in respect of any dispute or action at law relating to any such claim as is referred to in b) or b) above - in other words, where legal expenses are incurred on a claim, the claim must be either for the taxpayer to pay damages or compensation deductible in terms of s11(a) of the Act or for the taxpayer to derive an amount that will be included in its income.

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