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# TAX AND EXCHANGE CONTROL ALERT

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ISSUE

## CONDONATION FOR THE LATE FILING OF AN APPEAL

On 5 October 2017, the South African Revenue Service released a string of Tax Court decisions. Included in these is the case of *ABC (Pty) Ltd v The Commissioner for the South African Revenue Service* (Case number 0018/2016), which deals with the question of whether the taxpayer was entitled to condonation for the late filing of an appeal in terms of s107(2) of the Tax Administration Act, No 28 of 2011.

# CONDONATION FOR THE LATE FILING OF AN APPEAL

*An objection or appeal against assessments or decisions by SARS must be lodged in the manner, under the terms and within the periods prescribed in the rules promulgated under s103 of the TAA.*

*An objection against an assessment or decision must be lodged within 30 days of the date of assessment or decision.*

On 5 October 2017, the South African Revenue Service (SARS) released a string of Tax Court decisions. Included in these is the case of *ABC (Pty) Ltd v The Commissioner for the South African Revenue Service* (Case number 0018/2016) (ABC Case), which deals with the question of whether the taxpayer was entitled to condonation for the late filing of an appeal in terms of s107(2) of the Tax Administration Act, No 28 of 2011 (TAA).

By way of background, once a taxpayer has been issued with an assessment, the dispute resolution process can be summarised, in simple terms, as follows:

- to the extent that the grounds provided in the assessment do not sufficiently enable the taxpayer to understand the basis of the assessment, the taxpayer may request SARS to provide reasons for the assessment;
- the taxpayer may object against the assessment and SARS must consider the objection and either disallow or allow it in whole or in part;
- if the taxpayer is dissatisfied with SARS's decision following the objection, the taxpayer may lodge an appeal against such decision; and
- the dispute may be resolved either through alternative dispute resolution, the Tax Board or the Tax Court.

An objection or appeal against assessments or decisions by SARS must be lodged in the manner, under the terms and within the

periods prescribed in the rules promulgated under s103 of the TAA (Rules). An objection against an assessment or decision must be lodged within 30 days of the date of assessment or decision. Similarly, an appeal against the disallowance of an objection must be lodged within 30 business days of the date of the disallowance of the objection.

An objection or appeal that is not lodged within the prescribed time limits (as discussed above) is deemed to be invalid. A taxpayer may, however, request a senior SARS official to extend the period within which such an objection or appeal may be lodged. More specifically, s107(2) of the TAA states that a senior SARS official may extend the period for lodging an appeal for:

- 21 business days if satisfied that reasonable grounds exist for the delay; or
- up to 45 business days, if exceptional circumstances exist that justify an extension beyond 21 business days.

## Who's Who Legal

Emil Brincker has been named a leading lawyer by Who's Who Legal: Corporate Tax – Advisory and Who's Who Legal: Corporate Tax – Controversy for 2017.

Mark Linington has been named a leading lawyer by Who's Who Legal: Corporate Tax – Advisory for 2017.

# CONDONATION FOR THE LATE FILING OF AN APPEAL

CONTINUED

*The TAA does not prescribe the manner in which the discretion to extend the period for lodging an appeal must be exercised. As a result, regard must be had to SARS Interpretation Note 15.*



The TAA does not prescribe the manner in which the discretion to extend the period for lodging an appeal must be exercised. As a result, regard must be had to SARS Interpretation Note 15 (issue 4) (IN 15) which deals with the exercise of a discretion in the case of a late objection or an appeal. IN 15 provides, at page four, that the senior SARS official's decision "must comply with the requirements for administrative justice which are contained in s33 of the Constitution of the Republic of South Africa, 1996 read with the Promotion of Administrative Justice Act" and must be reasonable. In order for a decision to be reasonable, the senior SARS official is required to consider all relevant matters, which, among others, include:

- the reasons for the delay;
- the length of the delay;
- the prospects of success on the merits; and
- any other relevant factor.

With the abovementioned background in mind, we discuss the ABC Case in more detail below.

#### Facts

On 9 December 2013, ABC Pty Ltd (Applicant) timeously lodged an appeal (First Appeal) against SARS's partial disallowance of an objection for the 2012 year of

assessment. The First Appeal was uploaded on eFiling by the Applicant's accountant (Mr X), who made the following note on a hard copy of the First Appeal: "ADSL ... repaired faulty line 6.12.2013". Mr X submitted that at the time of uploading the First Appeal, the ADSL lines in the neighbourhood where he conducts business had been disrupted.

On 30 June 2014, Mr X was advised that (i) SARS had no record of the notice of appeal and (ii) a further appeal should be filed in which Mr X requests condonation for the late submission of the appeal. Two days after Mr X became aware that the First Appeal had not been filed, Mr X did as advised and submitted a further appeal (Second Appeal) where he cited the disruption of the ADSL lines as a basis for the condonation.

SARS refused to grant the condonation on the basis that the Second Appeal was submitted out of time. Following the submission of a further appeal (Third Appeal) and the further refusal by SARS to grant the condonation, the Applicant approached the Tax Court by way of an interlocutory application.

#### Arguments by the parties to the application

SARS provided that the main reason for its inability to grant the condonation is that s107 of the TAA "curtails its powers to come to

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Gerhard Badenhorst ranked by CHAMBERS GLOBAL 2014 - 2017 in Band 1: Tax: Indirect Tax.

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Ludwig Smith ranked by CHAMBERS GLOBAL 2017 in Band 3: Tax.



# CONDONATION FOR THE LATE FILING OF AN APPEAL

CONTINUED

*The Tax Court granted the condonation, with leave to the Applicant to file its notice of appeal.*



the assistance of the Applicant" on the basis that SARS may only extend the time period granted under the Rules (that is, 30 days):

- by a further 21 days, thus 51 days in all where there are reasonable grounds; and
- a further period of 45 days, that is 75 days if exceptional circumstances exist.

On the other hand, the Applicant contended that s107(2) should be interpreted to mean that the time period referred to therein must be calculated from the date of the request. The Applicant's argument was that following SARS's interpretation of s107 would render the discretion given to SARS by the legislation meaningless, especially in circumstances where the taxpayer only became aware of the fact that the appeal had not in fact been submitted, in the prescribed manner after the expiration of 75 business days.

## **Tax Court's findings**

The court referred to the Constitutional Court judgment of *Ferris v First Rand Bank Limited* 2014 (3) SA 39 (CC) which found that in condonation applications, a delay cannot be a determining factor. In addition, the Tax Court noted that when dealing with a request for condonation, there are other important considerations to take into account, namely:

- **Whether or not the omission or failure was due to the fault of the Applicant**  
The court found that the late filing of the notice of appeal was not an omission nor a failure on the Applicant's part, as the First Appeal was lodged within the prescribed 30-day period.
- **The extent of the delay and steps taken by the Applicant as soon as it became aware there was non-compliance with the Rules**

The court held that the First Appeal was not recorded on the eFiling platform due to a technological problem and that the Second Appeal was lodged within two days of Mr X becoming aware of the fact that the First Appeal had not been lodged.

- **Whether or not the condonation would prejudice SARS**

The court found that the granting of the condonation would not prejudice SARS on the basis that the notices of appeal and supporting documents had been available on the Applicant's eFiling profile since December 2014. In addition, the court found that there would be a great prejudice to the Applicant if the request for condonation was not granted.

- **There must be reasonable prospects of success on appeal**

The court found that at the time of the disallowance of the objection, SARS had not provided reasons for the disallowance. The court stated that the fact that SARS had failed to tender any explanation was a strong indication that there were good prospects of success on appeal.

On the basis of the above, the Tax Court granted the condonation, with leave to the Applicant to file its notice of appeal.

## **Conclusion**

It is clear that taxpayers will welcome this Tax Court judgement. However, taxpayers who wish to dispute an assessment issued by SARS must lodge the objection or appeal within the prescribed time. To the extent that a taxpayer does not comply with the relevant periods, such taxpayer must ensure that they have adequate reasons which will support their request for condonation.

*Gigi Nyanin*

## OUR TEAM

For more information about our Tax and Exchange Control practice and services, please contact:



**Emil Brincker**  
National Practice Head  
Director  
T +27 (0)11 562 1063  
E [emil.brincker@cdhlegal.com](mailto:emil.brincker@cdhlegal.com)



**Mark Linington**  
Private Equity Sector Head  
Director  
T +27 (0)11 562 1667  
E [mark.linington@cdhlegal.com](mailto:mark.linington@cdhlegal.com)



**Candice Gibson**  
Senior Associate  
T +27 (0)11 562 1602  
E [candice.gibson@cdhlegal.com](mailto:candice.gibson@cdhlegal.com)



**Gerhard Badenhorst**  
Director  
T +27 (0)11 562 1870  
E [gerhard.badenhorst@cdhlegal.com](mailto:gerhard.badenhorst@cdhlegal.com)



**Heinrich Louw**  
Senior Associate  
T +27 (0)11 562 1187  
E [heinrich.louw@cdhlegal.com](mailto:heinrich.louw@cdhlegal.com)



**Petr Erasmus**  
Director  
T +27 (0)11 562 1450  
E [petr.erasmus@cdhlegal.com](mailto:petr.erasmus@cdhlegal.com)



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



**Dries Hoek**  
Director  
T +27 (0)11 562 1425  
E [dries.hoek@cdhlegal.com](mailto:dries.hoek@cdhlegal.com)



**Louis Botha**  
Associate  
T +27 (0)11 562 1408  
E [louis.botha@cdhlegal.com](mailto:louis.botha@cdhlegal.com)



**Ben Strauss**  
Director  
T +27 (0)21 405 6063  
E [ben.strauss@cdhlegal.com](mailto:ben.strauss@cdhlegal.com)



**Jerome Brink**  
Associate  
T +27 (0)11 562 1484  
E [jerome.brink@cdhlegal.com](mailto:jerome.brink@cdhlegal.com)



**Mareli Treurnicht**  
Director  
T +27 (0)11 562 1103  
E [mareli.treurnicht@cdhlegal.com](mailto:mareli.treurnicht@cdhlegal.com)



**Gigi Nyanin**  
Associate  
T +27 (0)11 562 1120  
E [gigi.nyanin@cdhlegal.com](mailto:gigi.nyanin@cdhlegal.com)



**Nandipha Mzizi**  
Candidate Attorney  
T +27 (0)11 562 1741  
E [nandipha.mzizi@cdhlegal.com](mailto:nandipha.mzizi@cdhlegal.com)

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### 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](mailto: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](mailto:ctn@cdhlegal.com)

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