7 JULY 2017

TAX AND EXCHANGE CONTROL ALERT

IN THIS **ISSUE**

THE SHOE IS ON THE OTHER FOOT: THE HIGH COURT ORDERS SARS TO DISCOVER DOCUMENTS IN THE CONTEXT OF A REVIEW APPLICATION

It seldom happens that the South African Revenue Service (SARS) is compelled to provide documents to a taxpayer, while SARS is conducting an audit. In *Carte Blanche Marketing CC and Others v Commissioner for the South African Revenue Service* (26244/2015) [2017] ZAGPPHC 253 (26 May 2017), the Gauteng Division of the High Court, Pretoria had to decide whether SARS should be compelled to produce certain documents requested by the applicants (Taxpayers) in the context of a review application brought by the Taxpayers.

CUSTOMS HIGHLIGHTS

This week's selected highlights in the Customs and Excise environment since our last instalment.

CDH
CLIFFE DEKKER HOFMEYR

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The main proceedings in this matter is a review application which the Taxpayers brought against SARS seeking to set aside the "decision" of SARS to audit them in terms of s40 of the Tax Administration Act.

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Facts

In August 2014, SARS gave the Taxpayers a notice of its intention to audit them, in terms of s40 of the TAA, based on a risk assessment. This is one of the bases on which an audit can be instigated in terms of s40. In the same notice, SARS requested a range of documents in terms of s46 of the TAA. The Taxpayers refused to hand over the said documents but instead sought reasons for the audit. They alleged that the decision to audit was as a result of SARS's improper motives.

In its response, SARS said that it had noted discrepancies between the Taxpayers' turnovers as obtained from the bank statements and their declared gross income. SARS had obtained the bank statements in terms of s46(3) of the TAA. The Taxpayers, dissatisfied with the reasons, instituted the main review application in the High Court, to set aside SARS's decision to instigate the audit. SARS accordingly filed a record of proceedings in terms of Rule 53(1) of the Uniform Rules of Court (HC Rules), which it asserted it did for "pragmatic reasons". The Taxpayers were again not satisfied that the record contained all documents and sought access to further documents by bringing an interlocutory application to compel SARS to produce additional documents. SARS opposed the application.

The court had to decide whether the Taxpayers' interlocutory application to compel discovery should be granted.

Legal Framework

Section 40 of the TAA states that "SARS may select a person for inspection, verification or audit on the basis of any considerations relevant for the proper administration of a Tax Act, including on a random or risk assessment basis". Furthermore, s46 of the TAA states that "SARS may, for the purposes of the administration of a tax Act in relation to a taxpayer…require the taxpayer or another person to, within a reasonable period, submit relevant material (whether orally or in writing) that SARS requires".

On the other hand, Rule 53(1) of the HC Rules affords parties the right to review decisions of officers performing administrative functions. Conduct can be reviewed in terms of the Promotion of Administrative Justice Act, No 3 of 2000 (PAJA) or if it was exercised by a public power and had to be rational.

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The court held that the threshold to initiate an audit in terms of s40 of the TAA is extremely low and accepted that the instances where the court will interfere are rare.

Judgment

As stated above, the issue the High Court had to decide was whether the Taxpayers' application to compel discovery should be granted. However, the decision was complicated by the fact that the High Court had to consider whether the issues to be decided in the main review application, should also be taken into account to decide whether to grant the interlocutory application.

In its argument, SARS referred to reported cases where it was decided that a court in an interlocutory application could not avoid deciding a purely legal issue. The court held that such cases can only be decided on a case by case basis. It held that the court hearing the interlocutory application must be reasonably certain that a decision on the legal point will put an end to the case, or will dispose of a substantial part of the case. If there is a risk that the early decision of a legal point could complicate the further and full ventilation of the matter, the court should decline the invitation to decide such a legal issue.

The High Court stated that when one has to decide whether conduct is reviewable in principle, it is advisable to err on the side of caution, especially in the light of Constitutional Court decisions which have held that all public power is reviewable on some or other basis. The court held that the threshold to initiate an audit in terms of s40 of the TAA is extremely low and accepted that the instances where the court will interfere are rare. The High Court did, however, state that it would be unlawful for SARS to use the provisions of the TAA for an ulterior purpose. Any decision to audit must therefore be taken for purposes of administration of a tax Act.

SARS further argued that the Taxpayers' litigation was vexatious and constituted an abuse of process and that if litigants were allowed to take decisions made in terms of s40 of the TAA under review, it would bring the entire tax administration system to a halt. The court rejected this argument and held that the issue was whether the parties used the existing court rules sensibly and efficiently. The court also commented that SARS could not select at what stage it wanted to object to litigation.

In the current matter, SARS argued that as the audit did not have any direct external legal effect, which is a requirement for conduct to constitute administrative action in terms of PAJA, the decision to audit was not reviewable. The court took the view that the main application constituted a review in terms of PAJA and also raised general grounds of rationality review, as the powers under s40 and s46 of the TAA constituted exercises of public power. The court accepted that there are strong arguments to be made against an assertion that the audit constituted administrative action, as the audit is merely provisional and only once the additional assessment is raised then it constitutes administrative action. The court, however, noted that the decisions and processes in tax administration are related to a decision that will ultimately constitute administrative action and as such should not be shielded from judicial scrutiny at the earliest stage possible. Court interference at this stage is very rare and occurs in exceptional cases, it said.

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The court concluded that these matters are too complex to be adjudicated in an interlocutory matter and therefore declined to decide the legal issues in the main review application.

On whether the actions had the necessary "direct legal effect", the court referred to how the word "audit" is not defined in the TAA, but that an audit can be unobstructive or invasive, depending on the nature thereof. Therefore, the court suggested that an audit will not always constitute administrative action. The court should also be careful in deciding matters before they are ripe for review especially since the notice sent by SARS is the beginning stage of its statutory powers. On the other hand, malice by SARS must be dealt with. It noted that High Court review proceedings could also seriously affect the efficacy of SARS's work and that some taxpayers have, on occasion, seriously abused court processes.

Interestingly, the court opined that the real complications arising from this matter were due to the issue of jurisdiction of tax courts. The TAA deals with dispute resolution in tax administration extensively and it is therefore unclear why the High Court retains some residual review jurisdiction, but agreed that the legislature appears to have expressly retained High Court jurisdiction over tax cases in limited instances. It considered the provisions of s105 of the TAA and the amendments thereto in 2015, which suggest that the High Court retains residual review jurisdiction. However, it went on to state that in its opinion, there is no reason why an ordinary Tax Court should not be competent to grant urgent interim relief as other courts with similar status to that of a High Court do so, such as labour courts and the land claims courts.

The court concluded that these matters are too complex to be adjudicated in an interlocutory matter and therefore declined to decide the legal issues in the main review application. It ordered SARS to discover the documents requested by the Taxpayers in its discovery notice, in terms of Rule 35(3) of the HC Rules. It also ordered SARS to pay the Taxpayers' costs of the application to compel.

Comment

Although the comments by the court regarding the reviewability of SARS's decisions in terms of s40 and s46 of the TAA are not binding and merely constituted *obiter dictum*, its comments do suggest that an audit could constitute administrative action under certain circumstances. It will therefore be interesting to see what the High Court decides in the main application. At the same time, the judgment serves as an indication that where taxpayers feel that SARS is overstepping the bounds of its powers, taxpayers would be well entitled to approach the courts to review such conduct and to enforce their procedural rights, including the right to request discovery.

The High Court's statements regarding the jurisdiction of the High Court and the Tax Court are also interesting to note. It remains to be seen, however, whether its suggestion that the Tax Court can consider review applications regarding tax matters in terms of s105 of the TAA, is correct.

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The case concerned a taxpayer wanting to appeal the Tax Court's decision in an interlocutory application.

In *Wingate-Pearse v Commissioner of the South African Revenue Service* 2017 (1) SA 542 (SCA), the Supreme Court of Appeal (SCA) considered what kind of matters could be heard by the Tax Court. The case concerned a taxpayer wanting to appeal the Tax Court's decision in an interlocutory application. We discussed this case in our Tax and Exchange Control Alert of 7 October 2016.

Section 117 of the TAA defines the jurisdiction of the Tax Court, and s117(3) states that the Tax Court's jurisdiction includes hearing any interlocutory application or any application in a procedural matter relating to a dispute under Chapter 9 of the TAA, which is the chapter dealing with disputes and appeals. Without going into the details of that judgment, the court suggested in *Wingate-Pearse* that as the Tax Court is a creature of statute, its jurisdiction is limited to what is provided by the TAA and the Tax Court Rules. The SCA did not consider whether s105 of the TAA conferred jurisdiction on the Tax Court to consider review applications, as suggested by the High Court in the *Carte Blanche* case discussed in this article. Therefore this issue remains undecided.

Louis Botha and Nandipha Mzizi

CUSTOMS AND EXCISE HIGHLIGHTS

Please note that this is not intended to be a comprehensive study or list of the amendments, changes and the like in the Customs and Excise environment, but merely selected highlights which may be of interest.

In the event that specific advice is required, kindly contact our Customs and Excise specialist, Director, Petr Erasmus.

This week's selected highlights in the Customs and Excise environment since our last instalment:

1 SARS issued a communication relating to an update on the new Customs legislation (being the Customs Duty Act, No 30 of 2014 and the Customs Control Act, No 31 of 2014). The communication states, among other things, as follows:

> We have now reconsidered our initial approach of introducing Registration, Licensing and Accreditation (RLA) first and will rather be focusing on Reporting of Conveyancing and Goods (RCG) ... All impacted clients for RCG will be engaged through the stakeholder engagement sessions as well as directly, closer to implementation which is only likely to take place in the first half of next year.
>
> .....
>
> We are also about to embark on roadshows to discuss the New Customs Acts with both SARS staff and clients. These will begin in July and end in August and every major centre in each region will be covered.
>
> The purpose of the roadshows is to give a high-level overview of the impact of the new Acts on stakeholders, as well as progress on the legislation and the implementation thereof.
>
> SARS will continue to engage with public and private stakeholders throughout the process.

Parties who wish to attend the roadshows can book their place by clicking here.

2 ITAC has received the below applications concerning the Customs Tariff. Any objection to or comments on these representations should be submitted to the Chief Commissioner, ITAC, Private Bag X753, Pretoria, 0001.

2.1 Reduction in the rate of duty on Digital Smart cards classifiable under tariff subheading 8523.52.10, from 5% *ad valorem* to free.

2.2 Amendment of rebate items 405.04/01.00 and 405.04/02.00, as follows:

2.2.1 By the deletion of "physical or mental defects" and the insertion of "disabilities";

2.2.2 By the deletion of "handicapped" and the insertion of "with disabilities"; and

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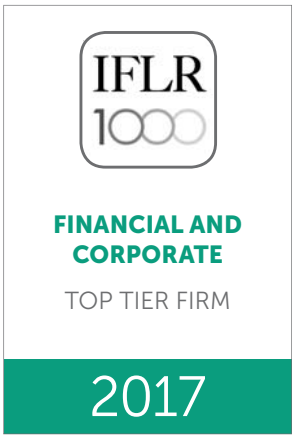
In the event that specific advice is required, kindly contact our Customs and Excise specialist, Director, Petr Erasmus.

2.2.3 By the insertion of "or a certificate from a registered medical practitioner".

2.3 Amendments to rebate item 460.17/87.00/04.02, 460.17/87.03/02.04, 630.20 and 630.22 of the Customs & Excise Act, No 91 of 1964 to reduce the period within which a vehicle may not be offered, advertised, lent, hired, leased, pledged, given away, exchanged, sold or otherwise disposed of from five years to three years.

Petr Erasmus



CDH
CLIFFE DEKKER HOFMEYR

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

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

Lisa Brunton
Senior Associate
T +27 (0)21 481 6390
E lisa.brunton@cdhlegal.com

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

Heinrich Louw
Senior Associate
T +27 (0)11 562 1187
E heinrich.louw@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

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

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

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

Mareli Treurnicht
Director
T +27 (0)11 562 1103
E mareli.treurnicht@cdhlegal.com

Gigi Nyanin
Associate
T +27 (0)11 562 1120
E gigi.nyanin@cdhlegal.com

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