7 SEPTEMBER 2018

TAX & EXCHANGE CONTROL ALERT

IN THIS **ISSUE**

MORE THAN ONE WAY TO SKIN A CAT? THE HIGH COURT CONSIDERS THE POWER OF SARS TO ISSUE REDUCED ASSESSMENTS

In terms of s93 of the Tax Administration Act, No 28 of 2011 (TAA), there are five circumstances under which SARS may issue a reduced assessment, so as to reduce a person's tax liability. While s93, therefore, makes it possible to "skin a cat", ie reduce a tax liability, in more ways than one, taxpayers should be mindful of the requirements that need to be met and the correct process to follow, in order to achieve the desired result.

CUSTOMS & EXCISE HIGHLIGHTS

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

CDH
CLIFFE DEKKER HOFMEYR

MORE THAN ONE WAY TO SKIN A CAT? THE HIGH COURT CONSIDERS THE POWER OF SARS TO ISSUE REDUCED ASSESSMENTS

The Taxpayers are members of a close corporation, which was audited in respect of its 2011 to 2013 years of assessment.

In terms of s93 of the Tax Administration Act, No 28 of 2011 (TAA), there are five circumstances under which SARS may issue a reduced assessment, so as to reduce a person's tax liability. While s93, therefore, makes it possible to "skin a cat", ie reduce a tax liability, in more ways than one, taxpayers should be mindful of the requirements that need to be met and the correct process to follow, in order to achieve the desired result.

After SARS disallowed some of the objections on 1 December 2015, the Taxpayers were told that they could appeal SARS's decision within 30 (business) days.

In *Rampersadh and Another v Commissioner of the South African Revenue Service and Others* (5493/2017) [2018] ZAKZPHC 36 (27 August 2018), the KwaZulu-Natal Division of the High Court had to consider the provisions of s93 of the TAA, where the applicant taxpayers (Taxpayers) lodged a review application. Specifically, the Taxpayers requested the High Court to review SARS's decision not to issue reduced assessments in terms of s93(1)(d) of the TAA.

We will focus mainly on the High Court's pronouncements regarding s93 and other provisions of the TAA but will also briefly discuss the High Court's findings regarding the application of the Promotion of Administrative Justice Act, No 3 of 2000 (PAJA) to the facts of the case.

Facts

The Taxpayers are members of a close corporation, which was audited in respect of its 2011 to 2013 years of assessment. The Taxpayers had loan accounts in the close corporation and pursuant to these loan accounts, the audit was extended to the Taxpayers. The Taxpayers made representations to SARS and provided it with revised loan accounts. SARS issued revised assessments on 23 March 2015, to which the Taxpayers objected on 15 May 2015 and after SARS then requested further information arising from the loan accounts, the Taxpayers produced further revised loan accounts, followed by another objection on 20 July 2015. In all, the Taxpayers submitted three different versions of the loan accounts. After SARS disallowed some of the objections on 1 December 2015, the Taxpayers were told that they could appeal SARS's decision within 30 (business) days.

The Taxpayers failed to appeal SARS's decision timeously and instead of lodging the appeal and requesting condonation for the late filing, the Taxpayers submitted three requests under s93(1)(d) of the TAA, that the revised assessments issued by SARS, be reduced. The requests were dated 13 July 2016, 19 October 2016

CDH
CLIFFE DEKKER HOFMEYR

MORE THAN ONE WAY TO SKIN A CAT? THE HIGH COURT CONSIDERS THE POWER OF SARS TO ISSUE REDUCED ASSESSMENTS

CONTINUED

Having regard to s7(2) of PAJA, SARS argued that the Taxpayers had not exhausted all the available internal remedies under the TAA.

and 17 January 2017. After SARS refused all three requests, the Taxpayers brought this review application, to review some of SARS's decisions, in terms of PAJA. Prior to the hearing, the Taxpayers had amended the relief sought and at the hearing, the Taxpayers indicated that the only relief sought was against SARS's decision to refuse the third request, which decision SARS handed down on 10 March 2017.

Judgment

SARS opposed the relief sought by the Taxpayers and we will discuss the various matters dealt with by the High Court under separate subheadings.

Exhaustion of available internal remedies

Having regard to s7(2) of PAJA, SARS argued that the Taxpayers had not exhausted all the available internal remedies under the TAA before they brought the current review application. For this reason, SARS argued that the review application had to be dismissed.

In response to this argument, the High Court indicated that the crisp issue to consider was whether the Taxpayers could object or appeal to SARS's decision to refuse the third request on 10 March 2017. The High Court held that to answer this question, one had to look at the provisions of the TAA. The High Court firstly explained that there are various types of assessments that SARS can raise in terms of the TAA and that only in the case of one type of assessment, a jeopardy assessment, does the TAA create an automatic right to take the decision on review.

The High Court then moved on to s93. In terms of s93 of the TAA, SARS may only issue a reduced assessment under the following five circumstances:

- Where the taxpayer successfully disputed the assessment under Chapter 9 of the TAA (s93(1)(a));
- Where it is necessary to give effect to a settlement under Part F of Chapter 9 of the TAA (s93(1)(b));
- Where it is necessary to give effect to a judgment pursuant to an appeal under Part E of Chapter 9 of the TAA and there is no right of further appeal (s93(1)(c));
- If SARS is satisfied that there is a readily apparent undisputed error in the assessment by SARS or the taxpayer in a return (s93(1)(d)); or
- A senior SARS official is satisfied that an assessment was based on the failure to submit a return or submission of an incorrect return by a third party under s26 or by an employer under a tax Act; or the assessment was based on a processing error by SARS; or an assessment was based on a return fraudulently submitted by a person not authorised by the taxpayer (s93(1)(e)).

Considering that the first three scenarios in s93 involve the issuing of reduced assessments pursuant to the dispute resolution mechanisms in Chapter 9 of the TAA being followed, it is clear that a request in terms of s93(1)(d) cannot be raised by way of objection or appeal. It appears that it is simply raised by way of a request.

MORE THAN ONE WAY TO SKIN A CAT? THE HIGH COURT CONSIDERS THE POWER OF SARS TO ISSUE REDUCED ASSESSMENTS

CONTINUED

The internal remedies in the TAA were not available to the Taxpayers and they can, therefore, bring the review application under PAJA.

The next question is whether the refusal of a request gives rise to the right of objection or appeal under the TAA. To answer this question, one must consider whether the refusal of the request falls within the ambit of s104(2)(c) of the TAA, where it states that a taxpayer may object to any decision that may be objected to or appealed against under a tax Act, other than the decisions not to extend the period for lodging an appeal or lodging an objection (see s104(2)(a) and s104(2)(b)).

There are at least three refusals where the TAA states that the dispute resolution procedure in Chapter 9 applies:

- where SARS is empowered, in terms of s220, to remit a penalty imposed under the TAA for administrative non-compliance, but decides not to remit the penalty, the taxpayer may object and appeal against such decision;
- where s224 of the TAA states that a taxpayer may object and appeal against SARS's decision to impose an understatement penalty in terms of s222 or its decision not to remit an understatement penalty in terms of s223; and
- where a senior SARS official, in terms of s231, decides to withdraw relief granted under the voluntary disclosure programme to a taxpayer, the taxpayer may object and appeal against such decision.

As the TAA does not specifically state that the refusal to issue a reduced assessment under s93 is subject to objection and appeal and as the High Court's jurisdiction is only ousted where a decision in s104 is being disputed, SARS's decision to refuse the third request was not subject to objection and appeal in terms of Chapter 9 of the TAA. Therefore, the internal remedies in the TAA were not available to the Taxpayers and they can, therefore, bring the review application under PAJA.

High Court's jurisdiction

The next argument raised by SARS was that the High Court did not have jurisdiction to hear the review application.

Section 105 of the TAA, states that a taxpayer may only dispute an assessment or 'decision' as described in s104 in proceedings under Chapter 9, unless a High Court otherwise directs. Section 105 does not oust the High Court's jurisdiction to hear the current review application as the decision to refuse the Taxpayer's request is not a decision, within the ambit of s104 of the TAA. As SARS's decision to refuse the request constitutes administrative action in terms of PAJA and as s6(1) of PAJA allows a person to institute proceedings for the review of administrative action, the High Court has jurisdiction to deal with this application.

CDH
CLIFFE DEKKER HOFMEYR

MORE THAN ONE WAY TO SKIN A CAT? THE HIGH COURT CONSIDERS THE POWER OF SARS TO ISSUE REDUCED ASSESSMENTS

CONTINUED

The judgment should serve as a reminder to taxpayers that they must always have documentary proof when trying to argue that SARS had made an error in an assessment.

Court's finding on the outcome of the review application

As this section is mainly focused on the application of PAJA, we will only briefly mention the key findings made by the High Court. These are the following:

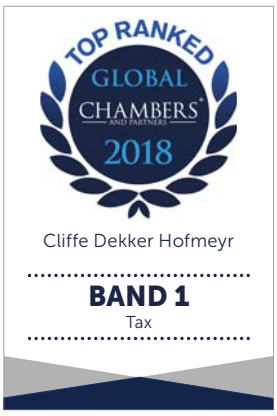
- In terms of s93(1)(d) of the TAA, the Taxpayers had to show that the claimed errors were, in fact, apparent and undisputed.
- The Taxpayers raised four points in arguing that SARS had made apparent and undisputed errors, but could not provide any documents to substantiate their claims.
- In light of the above, the High Court dismissed the Taxpayers' review application under PAJA and awarded costs in favour of SARS.

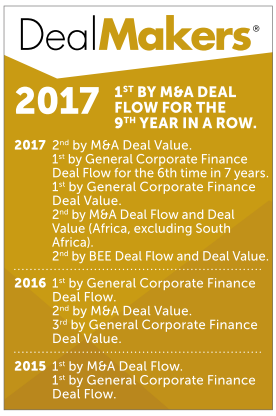
Comment

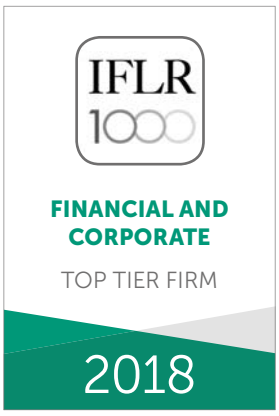
The judgment should serve as a reminder to taxpayers that they must always have documentary proof when trying to argue that SARS had made an error in an assessment. In the matter discussed, such documentary evidence would have in any event been necessary for the Taxpayers to succeed with an objection or appeal. In the current case, it is clear that the basis for the value of the loan accounts could not be proven and that this is probably why the Taxpayers were unsuccessful.

Furthermore, where faced with an audit or where SARS has raised an additional assessment, taxpayers should ensure that they obtain proper legal and professional advice, to avoid serious adverse consequences from ensuing.

Louis Botha







CDH
CLIFFE DEKKER HOFMEYR

CUSTOMS & 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.

Herewith below selected highlights in the Customs & Excise environment since our last instalment:

1. Draft amendments for implementation on 1 January 2019 (certain sections quoted from the SARS website):

    1.1 The phase–down of duties in terms of the Economic Partnership Agreement (EPA) between the European Union and the Southern African Development Community EPA States, which relates to the following:

        1.1.1 Fish classifiable in tariff subheadings 0302.13, 0302.14, 0303.14 and 0305.41, in Section A, Annex II, listed as staging category "B" shall be reduced to a preference margin of 33 per cent of the most favoured nation (MFN) rate of duty; and

        1.1.2 Fish in Chapters 3 and 16, in Section A, Annex II, listed as staging category "C" shall be reduced to a preference margin of 60 per cent of the MFN rate of duty.

    1.2 Technical amendment to the Schedules of the Customs & Excise Act, No 91 of 1964 (Act):

        1.2.1 Amendments of Schedule 1 Part 1:

            1.2.1.1 Requests from the South African Sugar Association for the creation of separate tariff subheadings to provide for liquid sugars (tariff subheading 1702.90);

            1.2.1.2 Requests from the Department of Environmental Affairs for the creation of separate tariff subheadings for substances that contribute to the depletion of the ozone layer that result in global warming (tariff subheading 3824.7);

            1.2.1.3 Request from Propet S.A (Pty) Ltd for the creation of new tariff subheadings for Polyethylene Terephthalate Strapping classifiable in tariff subheading 3920.62.10;

            1.2.1.4 Request from Propet S.A (Pty) Ltd for the creation of new tariff subheadings for Polyethylene Terephthalate Monofilament classifiable in tariff subheading 5404.19;

            1.2.1.5 Request from Hanes Inc. for the creation of separate tariff subheadings for brassieres classifiable in tariff subheading 6212.12;

CDH
CLIFFE DEKKER HOFMEYR

CUSTOMS & EXCISE HIGHLIGHTS

CONTINUED

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

1.2.1.6 Request from the South African Footwear and Leather Industries Association for the creation of separate tariff subheadings for safety footwear classifiable in Chapter 64;

1.2.1.7 Request from the Southern African Metal Cladding and Roofing Association for the creation of new tariff subheadings in Chapter 72 (tariff subheadings 7210.41, 7210.49, 7210.61, 7210.70, 7210.90 and 7225.92);

1.2.1.8 Request for the creation of new tariff subheadings for copper coated wire that is used in the welding industry, classified in tariff subheadings 7217.30 and 7229.90;

1.2.1.9 Request from Harvey Roofing Products (Pty) Ltd for the creation of new tariff subheadings for steel roofing tiles, classifiable in tariff subheading 7308.90.90;

1.2.1.10 Request from Defy for the creation of 8-digit tariff subheadings on washing machines (tariff subheading 8450.20);

1.2.1.11 Request from the Non-Ferrous Metals Industry Association for the creation of 8-digit tariff subheadings on scrap lead acid batteries as well as on lead acid, of a kind used for starting piston engines (tariff subheading 8548.10);

1.2.2 Amendments of Schedule 1 Part 2A:

1.2.2.1 Deletions as a consequence to the above amendments to Schedule 1 Part 1;

1.2.3 Amendment of Schedule 3:

1.2.3.1 Rebate item 315.05/7308.90.90/01.01 is being deleted as a consequence to a deletion of Schedule 1 Part 1 and rebate item 315.05/7308.90.99/01.01 is inserted;

1.2.4 Amendment of Schedule 4:

1.2.4.1 Rebate item 460.02/12.06/01.04 provides for sunflower seed, in such quantities as the Director-General: Department of Agriculture, Forestry and Fisheries, may allow by specific permit issued on or before 10 May 2002. The rebate provision is deleted as it was created for goods entered for home consumption on or before 10 May 2002.

CDH
CLIFFE DEKKER HOFMEYR

CUSTOMS & EXCISE HIGHLIGHTS

CONTINUED

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

1.2.4.2 Rebate item 460.07/39.19/01.04 provides for plates, sheets, film, foil and strip, of polyethylene terephthalates, self-adhesive, with removable protective substances, entered on or before 12 April 1997, in such quantities and subject to such conditions as the International Trade Administration Commission, may allow by specific permit issued on or before 12 April 1996. The rebate provision is deleted as it was created for goods entered for home consumption on or before 12 April 1997.

1.2.5 Amendment of Schedule 5:

1.2.5.1 Deletion of Note 1 to rebate item 537.00 applicable to MIDP and Note 2 is renumbered as Note 1, to remove the reference to rebate item 317.04 applicable to MIDP;

1.2.5.2 Deletion of refund items 537.01, 537.01/8701.20/01.06, 537.01/87.02/01.04, 537.01/87.03/01.04, 537.01/87.04/01.04 and 537.01/87.06/01.04, as they were applicable to MIDP; and

1.2.5.3 Deletion of refund item 538.00/00.00/02.00 applicable to MIDP.

Comments can be submitted to: MMaphosa@sars.gov.za and AMpanza@sars.gov.za by 1 October 2018.

2. Amendments to the Schedules to the Act:

2.1 Schedule 1 Part 1:

2.1.1 The substitution of tariff subheadings 1001.91 and 1001.99 as well as 1101.00.10 and 1101.00.90 to increase the rate of customs duty on wheat and wheaten flour from 28,17c/kg and 42,26c/kg to 64,06c/kg and 96,09c/kg respectively;

2.2 Schedule 2:

2.2.1 The substitution of safeguard items 260.03/72.08/01.04 and 260.03/7225.40/01.06 to exclude rebate items 460.15/7208.51/01.06 and 460.15/7225.40/19.06 in order to exclude certain hot-rolled carbon steel plates from being subject to safeguard duty (with effect from 31 August 2018 up to and including 10 August 2019);

2.2.2 The substitution of safeguard items 260.03/72.08/01.04 and 260.03/7225.40/01.06 to exclude rebate items 460.15/7208.51/01.06 and 460.15/7225.40/19.06 in order to exclude certain hot-rolled carbon steel plates from being subject to safeguard duty (with effect from 11 August 2019 up to and including 10 August 2020);

CDH
CLIFFE DEKKER HOFMEYR

CUSTOMS & EXCISE HIGHLIGHTS

CONTINUED

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

2.3 Schedule 4:

2.3.1 The insertion of rebate item 460.16/8523.52.10/01.08 in order to create a temporary rebate facility on digital smart cards (excluding proximity cards and tags) classifiable in tariff subheading 8523.52.10; and

2.3.2 The insertion of rebate item 460.15/7208.51/01.06 and 460.15/7225.40/19.06 in order to create a rebate facility on certain hot-rolled carbon steel plates classifiable in tariff subheading 720851 and 7225.40 – ITAC Report 585 (31 August 2018).

3. Draft amendments relating to spirits/fortified wine/unfortified wine received and used under rebate of duty in terms of item 620.25/104.15:

3.1 The insertion of Note 7 as well as rebate items 620.25/104.15, 620.25/104.15.21/01.01 and 620.25/104.15.23/02.01 to provide for the rebate provision on unfortified wine used in the manufacture of other foodstuffs; and

3.2 Draft Rule inserting form DA 133 – Return in respect of spirits/fortified wine/unfortified wine received and used under rebate of duty.

Due date for comments is 18 September 2018 as follows:

- For the draft amendment to Schedule No. 6: mmaphosa@sars.gov.za; and
- For the draft rule inserting form DA 133: C&E_legislativecomments@sars.gov.za.

4. The International Trade Administration Commission has (certain sections quoted from the notice) issued a notice of termination of an investigation into the alleged dumping of detonating fuses and delay detonators (commonly known as shock tubes), originating in or imported from the People's Republic of China. Enquiries may be directed to Ms Carina van Vuuren at telephone (012) 394 3594.

5. A notice in terms of s38(1) of the Legal Metrology Act, No 9 of 2014 was published in the Government Gazette on 24 August 2018 by the Department of Trade and Industry. It relates to prescribed measuring equipment and provides (inter alia) as follows:

"Any manufacturer, importer or person who offer[s] for sale or supply any prescribed measuring instrument, product, or provides a service, falling within the ambit of the Act prior to the date of these regulations coming into effect, must apply for registration with the National Regulator within three years from the date of these regulations coming into effect".

6. Please advise if additional information is required.

Petr Erasmus

CDH
CLIFFE DEKKER HOFMEYR

OUR TEAM

For more information about our Tax & 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

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

Petr Erasmus
Director
T +27 (0)11 562 1450
E petr.erasmus@cdhlegal.com

Dries Hoek
Director
T +27 (0)11 562 1425
E dries.hoek@cdhlegal.com

Heinrich Louw
Director
T +27 (0)11 562 1187
E heinrich.louw@cdhlegal.com

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

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

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

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

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

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

Jessica Carr
Associate
T +27 (0)11 562 1602
E jessica.carr@cdhlegal.com

BBBEE STATUS: LEVEL TWO CONTRIBUTOR
Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 2 BBBEE verification under the new BBBEE Codes of Good Practice. 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.

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