

TAX & EXCHANGE CONTROL ALERT

IN THIS ISSUE

IT'S COMPLETE: THE DAVIS TAX COMMITTEE RELEASES ITS FINAL REPORTS

On 12 April 2018, the Davis Tax Committee (DTC), issued a media statement (Media Statement) in which it announced the publication of four additional final reports and the conclusion of its work based on its Terms of Reference (ToR).

RAISING JURISDICTIONAL ISSUES

Where a taxpayer is dissatisfied with the decision taken by the South African Revenue Services (SARS) regarding an objection made by the taxpayer to an assessment, the taxpayer is entitled to appeal against such decision to the Tax Court. The Rules of the Tax Court, promulgated under s103 of the Tax Administration Act, No 28 of 2011 (TAA), prescribe the procedure to be followed when proceedings are instituted in the Tax Court.

IT'S COMPLETE: THE DAVIS TAX COMMITTEE RELEASES ITS FINAL REPORTS

The DTC held its last meeting on 27 March 2018 and also published the "Closing report on the work done by the Davis Tax Committee", which is essentially a summary of the work done by the DTC since its establishment (Closing Report).

Using the ToR as its point of departure, the Committee established 12 sub-committees, with members and various ad hoc members, during its existence to fulfil its mandate.



On 12 April 2018, the Davis Tax Committee (DTC), issued a media statement (Media Statement) in which it announced the publication of four additional final reports and the conclusion of its work based on its Terms of Reference (ToR).

The four reports that were released on the same day are:

- The "Final report on VAT for the Minister of Finance";
- the "Report on the efficiency of South Africa's corporate income tax system for the Minister of Finance", along with a separate note on territorial taxation;
- the "Report on the public benefit organisation and the tax system for the Minister of Finance"; and
- the "Report on the feasibility of a wealth tax in South Africa for the Minister of Finance".

According to the Media Statement, the reports are based on the mandate of the DTC as per its ToR and the publication of these reports concludes the work of the DTC, which started on 17 July 2013 when the DTC was appointed by the Minister of Finance. According to the Media Statement, the DTC held its last meeting on 27 March 2018 and also published the "Closing report on the work done by the Davis Tax Committee", which is essentially a summary of the work done by the DTC since its establishment (Closing Report).

The Closing Report

The Closing Report notes that the operating costs (excluding premises and Secretariat costs borne by SARS) of the DTC was R12,380,000, for the five-year period that it was in existence. In terms of the Closing Report, the DTC submitted 25 reports to the Minister of Finance, which have all been published on the

DTC's website with the approval of the Minister of Finance. Using the ToR as its point of departure, the DTC established 12 sub-committees, with members and various ad hoc members, during its existence to fulfil its mandate. The Closing Report sets out the progress made by each of the various sub-committees.

Progress made by DTC sub-committees and implementation of certain recommendations

The Closing Report also sets out, among other things, the extent to which the recommendations made by various sub-committees had already been implemented. For example, the sub-committee on base erosion and profit shifting's recommendations for s6quin of the Income Tax Act, No 58 of 1962 (Act) to be repealed and for s10(1)(o)(ii) of the Act to be reviewed, were implemented by National Treasury and SARS accordingly. Taxpayers should note for example that the amendment regarding s10(1)(o)(ii), will only come into effect on 1 March 2020. It is also interesting to note that pursuant to the work of the sub-committee on estate duty and CGT implications, the Minister of Finance accepted one of the DTC's recommendations in the 2018 Budget Speech by announcing an increased estate duty rate of 25% that will apply to an amount in excess of a dutiable amount of R30 million in an estate. This amendment will apply from 1 March 2018, although the legislation giving effect to this amendment, still needs to be passed by Parliament.

IT'S COMPLETE: THE DAVIS TAX COMMITTEE RELEASES ITS FINAL REPORTS

CONTINUED

The Closing Report also makes mention of some of the challenges faced by the DTC.



Themes emerging from consultations

The Closing Report states that the twelve sub-committees consulted widely and that a number of themes emerged from the DTC's consultations with various stakeholders. Some of the most interesting themes that emerged include the following:

- The role of the tax system in South Africa must be considered in a holistic context ie its main mandate is to collect revenue for the state and it cannot be used to address all impediments to economic growth and job creation – this requires a coordinated "whole of government approach" in consultation with business and labour;
- tax legislation has become far too onerous and complicated and the associated tax compliance and reporting requirements are becoming too burdensome and expensive to comply with – there is a need for simplicity and certainty to encourage local and foreign direct investment;
- to what extent can the tax system contribute to behavioural changes that contribute to economic growth, employment creation, development and fiscal sustainability?; and

- taxpayers need assurance and indications that their taxes are being spent prudently and invested in the best interests of the country.

Challenges faced and concluding remarks

The Closing Report also makes mention of some of the challenges faced by the DTC, including the political uncertainty that arose due to six different Ministers of Finance being appointed, while the DTC was in existence.

In its conclusion, the Closing Report notes that the DTC and its sub-committees held 205 meetings and received 433 submissions in an effort to consult widely. It issued 23 media statements and held seven workshops to further engage with the public. The DTC also presented progress reports on two occasions to the Standing Committee on Finance in Parliament.

Importantly, the Closing Report notes that, as mentioned in the ToR, "the Committee is advisory in nature, and will make recommendations to the Minister of Finance." Therefore, it remains to be seen whether the proposals of the DTC will be implemented in future. This, only time will tell.

.....
Louis Botha



Best Lawyers 2018 South Africa Edition

Included 53 of CDH's Directors across Cape Town and Johannesburg.

Recognised Chris Charter as Lawyer of the Year for Competition Law (Johannesburg).

Recognised Faan Coetzee as Lawyer of the Year for Employment Law (Johannesburg).

Recognised Peter Hesseling as Lawyer of the Year for M&A Law (Cape Town).

Recognised Terry Winstanley as Lawyer of the Year for Environmental Law (Cape Town).

Named Cliffe Dekker Hofmeyr Litigation Law Firm of the Year.

Named Cliffe Dekker Hofmeyr Real Estate Law Firm of the Year.

RAISING JURISDICTIONAL ISSUES

The focus of this case was not on the merits of the dispute between the parties, but rather the correctness of the procedure followed by the Taxpayer in its appeal to the Tax Court.

In the SCA, SARS argued that the decision by the Tax Court was not appealable.

Where a taxpayer is dissatisfied with the decision taken by the South African Revenue Services (SARS) regarding an objection made by the taxpayer to an assessment, the taxpayer is entitled to appeal against such decision to the Tax Court. The Rules of the Tax Court, promulgated under s103 of the Tax Administration Act, No 28 of 2011 (TAA), prescribe the procedure to be followed when proceedings are instituted in the Tax Court.

In *Lion Match Company (PTY) LTD v Commissioner for the South African Revenue Services* (2018) ZASCA 36 (27 March 2018), the Taxpayer noted an appeal against the disallowance of an objection raised in response to an additional assessment issued by SARS. The additional assessment arose after the Taxpayer disposed of its entire shareholding in the Kimberly Clark Group in the 2008 year of assessment. In determining the taxable capital gain, the base cost of the shares was taken as the market value of the shares as at 1 October 2001. It was this value that SARS later adjusted, which caused an increase in the taxable capital gain of the Taxpayer.

The focus of this case was not on the merits of the dispute between the parties, but rather the correctness of the procedure followed by the Taxpayer in its appeal to the Tax Court.

After the Taxpayer had noted its appeal, SARS delivered its statement of grounds of assessment to the Taxpayer in accordance with Rule 31 of the Tax Court Rules. This rule contains a provision prohibiting SARS from including in its statement any ground that constitutes a novation of the whole of the factual or legal basis of the disputed assessment. Instead of submitting its response in terms of Rule 32, the Taxpayer then brought an application to the Tax Court in which it asserted that SARS had included in its statement a ground that constitutes a novation and asked the Tax Court to set aside the statement.

The Tax Court dismissed the application but granted leave to the Taxpayer to appeal to the Supreme Court of Appeal (SCA). The Taxpayer then appealed to the SCA.

In the SCA, SARS argued that the decision by the Tax Court was not appealable.



CHAMBERS GLOBAL 2018 ranked our Tax & Exchange Control practice in Band 1: Tax.

Gerhard Badenhorst ranked by CHAMBERS GLOBAL 2014 - 2018 in Band 1: Tax: Indirect Tax.

Emil Brincker ranked by CHAMBERS GLOBAL 2003 - 2018 in Band 1: Tax.

Mark Lington ranked by CHAMBERS GLOBAL 2017- 2018 in Band 1: Tax: Consultants.

Ludwig Smith ranked by CHAMBERS GLOBAL 2017 - 2018 in Band 3: Tax.

RAISING JURISDICTIONAL ISSUES

CONTINUED

The Closing Report also makes mention of some of the challenges faced by the DTC.



Judgment

The SCA took a relatively simple approach. Being a creature of statute, the Tax Court obtains all of its powers and functions from the TAA. Section 117 provides that the Tax Court has jurisdiction to hear appeals lodged under s107 of the TAA, which in turn states that taxpayers may appeal against an assessment or a decision. Section 104(2) refers to three types of decisions, namely:

- (a) A decision not to extend the period for lodging an objection;
- (b) A decision not to extend the period for lodging an appeal; and
- (c) Any other decision that may be objected to or appealed against under a tax Act.

Furthermore, s129 sets out the ambit of decisions that the Tax Court may make in response to an appeal lodged under s107.

In turn, s133 of the TAA provides for appeals against decisions of the Tax Court under s129.

The SCA held that to determine whether the decision of the Tax Court was appealable, it had to be determined whether the decision was one contemplated in s104(2) of the TAA.

The SCA found that the decision did not fall within s104(2) of the TAA, and that the decision of the Tax Court was accordingly not subject to appeal.

Heinrich Louw and Louise Kotze



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



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



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



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



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



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



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



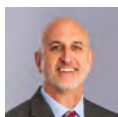
Varusha Moodaley
Senior Associate
T +27 (0)21 481 6392
E varusha.moodaley@cdhlegal.com



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



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

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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

©2018 2312/APR

