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TAX & EXCHANGE CONTROL **ALERT**

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Fora(ging) for tax relief – a judgment about reviewing a SARS assessment or decision

In terms of South African tax law, where a taxpayer wishes to object or appeal against an assessment issued by or decision made by the South African Revenue Service (SARS), it must do so in the manner prescribed in the Tax Administration Act, No 28 of 2011 (TAA). Where a dispute is not resolved pursuant to an objection lodged by a taxpayer, the taxpayer can appeal the decision to the Tax Court.

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Fora(ging) for tax relief – a judgment about reviewing a SARS assessment or decision

In this case, Gold Kid sought to review and set aside the decision of SARS to reverse the value-added tax assessments in terms of which refunds were due to Gold Kid in respect of the tax periods 2014/08 – 2015/03 and the interest on refunds for other tax periods.

In terms of South African tax law, where a taxpayer wishes to object or appeal against an assessment issued by or decision made by the South African Revenue Service (SARS), it must do so in the manner prescribed in the Tax Administration Act, No 28 of 2011 (TAA). Where a dispute is not resolved pursuant to an objection lodged by a taxpayer, the taxpayer can appeal the decision to the Tax Court.

But what happens if the taxpayer wants to review an assessment or decision before the High Court, where the objection and appeal process is still ongoing?

In *Gold Kid Trading CC v The Commissioner for the South African Revenue Services* (2016/31842) [2018] ZAGPJHC 679 (19 July 2018), the Gauteng High Court (HC) was asked to consider, among other things, the application of s98 of the TAA and the principles governing the administrative law principle to exhaust internal remedies, as provided for in s7(2) of the Promotion of Administration of Justice Act, No 3 of 2000 (PAJA).

In this case, Gold Kid sought to review and set aside the decision of SARS to reverse the value-added tax (VAT) assessments in terms of which refunds were due to Gold Kid in respect of the tax periods 2014/08 – 2015/03 (Disputed Period) and the interest on refunds for other tax periods.

Facts

Gold Kid is in the business of, among other things, exporting and selling gold offshore. As the supply of gold in terms of s11 of the Value-Added Tax Act, No 89 of 1991 (VAT Act) to foreign purchasers is subject to VAT at the zero rate where the requirements of s11 were met, the price paid by the foreign purchasers would then be the purchase price plus VAT at 0% (the judgment states that the foreign buyers were exempted from paying VAT).

Up until 2016, SARS had paid the refunds pursuant to the submission of VAT returns by Gold Kid. In 2016, this seemed to be no different and SARS raised an assessment concerning the December 2015 VAT period reflecting a refund due to Gold Kid of approximately R70 million.

Subsequent to the assessment however, SARS commenced with an audit and as a result delayed in paying the refund. Gold Kid pursued litigious avenues by way of an urgent application to compel SARS to pay in accordance with s190(1) of the TAA. The application was unopposed, and the court found in Gold Kid's favour. SARS then paid the amount as per the order.

In 2017, SARS withdrew the assessment by way of an additional assessment issued 17 March 2017 which resulted in an amount owing by Gold Kid to SARS. SARS opted to disallow the VAT refund claimed by Gold Kid in its VAT returns for the Disputed Period on the basis that it was not satisfied that the suppliers which Gold Kid had listed in its tax returns existed.

Gold Kid objected to the additional assessment and subsequently took the matter on appeal to the Tax Court. Concurrently, Gold Kid decided to take the matter on review to the HC, which is the matter discussed here.

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Gold Kid instituted the review for the setting aside of the additional assessment on the grounds that SARS's decision to raise the additional assessment was not rationally connected to the purpose for which the decision was taken and that such decision was unreasonable.

Relevant Legal Framework

In considering the matter, the HC had to consider, among other things, the following provisions:

Section 98 of the TAA which provides for the withdrawal of assessments by SARS. The section states that:

"(1) SARS may, despite the fact that no objection has been lodged or appeal noted, withdraw an assessment which –

(a) was issued to the incorrect taxpayer;

(b) was issued in respect of the incorrect tax period; or

(c) was issued as a result of an incorrect payment allocation.

(2) an assessment withdrawn under this section is regarded not to have been issued."

Section 117 of the TAA which provides for the jurisdiction of the Tax Court and states the following:

"(1) The Tax Court for purposes of this Chapter has jurisdiction over tax appeals lodged under section 107.

(2) The place where an appeal is heard is determined by the 'rules'.

(3) The court may hear and decide an interlocutory application or an application in a procedural matter relating to a dispute under this Chapter provided for in the 'rules'."

Sections 190(1) and (2) of the TAA which provides for refunds of excess payments. The section states:

"(1) SARS must pay a refund if a person is entitled to a refund, including interest thereon under section 188(3)(a), of –

(a) an amount properly refundable under a tax Act and if so reflected in an assessment; or

(b) the amount erroneously paid in respect of an assessment in excess of the amount payable in terms of the assessment.

(2) SARS need not authorise a refund as referred to in subsection (1) until such time that a verification, inspection of audit of the refund in accordance with Chapter 5 has been finalised."

The court also considered s7(2) of PAJA which provides that "...no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted."

Judgment

Grounds of Review

Gold Kid instituted the review for the setting aside of the additional assessment on the grounds that SARS's decision to raise the additional assessment was not rationally connected to the purpose for which the decision was taken and that such decision was unreasonable. Further

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The HC found that SARS's right to continue the audit would turn on the interpretation of the order obtained in 2016.

that, SARS had failed to consider the relevant information from the suppliers which SARS was not satisfied were in existence. Gold Kid also alleged that as a result of the order obtained pursuant to the urgent application SARS had lost its right to audit it for the periods in dispute.

The HC found that SARS's right to continue the audit would turn on the interpretation of the order obtained in 2016. The HC in this instance highlighted that the court in the urgent application merely dealt with s45 of the VAT Act as well as s190 (1)(a) of the TAA, which obliged SARS to pay Gold Kid in respect of the assessment issued by themselves as well as interest provided for by way of s45 of the VAT Act. SARS did not dispute this, but maintained that it did not restrain it from exercising its powers in terms of s98 of the TAA. The HC in this instance agreed with SARS's arguments.

Res judicata

Gold Kid raised the issue of *res judicata* in this instance, but the HC, although not delving into the principles already well established in our law, found that due to the fact that the urgent court had not dealt with the merits of the assessments and facts in the matter such argument of *res judicata* could not be sustained herein.

Exhaustion of internal remedies

The issue of jurisdiction was raised and s117 of the TAA as well as s7 of PAJA were considered. The HC held that when one considers s107 and s129(2) of the TAA, it appears that the Tax Court does not have the power to consider whether an assessment made by SARS is reviewable on the grounds of review listed in PAJA. The HC held that the powers afforded to the Tax Court do not oust the powers of

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It remained undisputed that SARS was entitled to withdraw the earlier assessment it had made in terms of s98 of the TAA on the basis that SARS was not satisfied that Gold Kid's suppliers, were in existence.

the High Court to hear review applications related to the exercise of power by SARS. With this said however the HC ultimately conceded that although it had the jurisdiction to hear the matter before it, Gold Kid had failed to exhaust the internal remedies afforded to it in terms of the TAA, as directed by s7 of PAJA.

HC's findings

It remained undisputed that SARS was entitled to withdraw the earlier assessment it had made in terms of s98 of the TAA on the basis that SARS was not satisfied that Gold Kid's suppliers, were in existence.

The HC, however, ultimately found that Gold Kid had failed to exhaust the internal remedies provided for in respect of the TAA and that no reason existed as to why Gold Kid should not have exhausted the internal remedies before considering a review.

The merits of the review application were therefore not considered, and Gold Kid was ordered to exhaust the internal remedies afforded to them in terms of the TAA first.

Comment

The judgment suggests that even though a Tax Court cannot consider whether an assessment should be set aside in terms of the grounds of review in PAJA, a taxpayer must first exhaust the dispute resolution process provided for in terms of the TAA. In stating that it is not necessary to consider the merits of the review application "at this stage", the HC's judgment seems to suggest that the merits of the review application, based on grounds of review in PAJA, can be heard once the dispute resolution process in terms of the TAA has been concluded.

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