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TAX & EXCHANGE CONTROL **ALERT**

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Default judgment in the Tax Court – can the lockdown justify SARS' delay?

In the recent unreported judgment of *XYZ (Pty) Ltd v the Commissioner for the South African Revenue Service* (0035/2018) (20 October 2020), the Tax Court had to determine whether the taxpayer was entitled to default judgment against the South African Revenue Service (SARS).

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A first of sorts: Tax Court considers the GAAR in the context of interlocutory applications

On 12 November 2020, the Tax Court had to consider the application of some of the provisions of the GAAR in the matter of Mr X v The Commissioner for the South African Revenue Service (Case No IT24502) and Mr Y v The Commissioner for the South African Revenue Service (Case No IT24503) (as yet unreported).

In 2006, South Africa introduced Part IIA of the Income Tax Act 58 of 1962 (Act) dealing with impermissible avoidance arrangements, more commonly known as the new general anti-avoidance rules (GAAR). Since then, very few cases have come before our courts, which consider the application of these provisions.

On 12 November 2020, the Tax Court had to consider the application of some of the provisions of the GAAR in the matter of *Mr X v The Commissioner for the South African Revenue Service* (Case No IT24502) and *Mr Y v The Commissioner for the South African Revenue Service* (Case No IT24503) (as yet unreported). As indicated in the judgment, the matter involves the combined hearing of two separate tax appeals by Mr X and Mr Y. In short, the Tax Court had to consider the following three issues, which were applicable to both tax appeals:

- Whether certain allegations made by the Commissioner for the South African Revenue Service (SARS) in its Rule 31 statements filed in the tax appeals, should be struck out;
- Whether certain legal issues arising on the pleadings should be determined separately; and
- Whether SARS or the taxpayers had the duty to begin leading evidence at the appeal hearing(s) on the merits of the respective tax appeals.

The judgment is lengthy, mainly due to the complexity of the facts that form the subject matter of the tax appeals. The Tax Court's finding regarding the separation issue (second bullet above) was an ancillary issue to the first issue and is therefore not discussed in any detail. We do not provide a detailed exposition of the facts, but only set out those facts that are relevant to understand the Tax Court's decision on the three issues referred to above.

Facts

Mr X application

- On 26 October 2015, SARS dispatched to Mr X a notice of audit letter informing him that an audit would be conducted into his 2006 to 2012 years of assessment.

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A first of sorts: Tax Court considers the GAAR in the context of interlocutory applications*...continued*

Mr X argued that certain statements in the Rule 31 statement should be struck out.

- On 30 October 2015, SARS issued a letter incorporating both its audit findings and a section 80J notice, indicating its intentions to invoke the GAAR in raising the additional assessment (80J Notice).
- In the 80J Notice, SARS alleged that Mr X was, pursuant to preliminary audit findings, involved in certain arrangements which, despite them being reportable, were not disclosed.
- The transactions alleged to constitute impermissible avoidance arrangements involve agreements concluded between various South African companies, including A Investments and various companies in the Isle of Man. More specifically, these arrangements are said to consist of the following:
    - The transactions between A Investments, its subsidiaries and the Isle of Man companies;
    - The declaration of certain A Investments promissory notes to Mr X;
    - The 'settlement' of the promissory notes held by X via A Investments becoming obliged to pay those parties the net income from specific transactions involving specific A Investments subsidiaries; and
    - In each case following a sale by A Investments, the payment by A Investments of amounts to Mr X.
- SARS further alleged that each arrangement involving the steps listed above is a separate arrangement for purposes of the GAAR, consisting of a set of preconceived transactions which, together, constitute a "*scheme*".
- Mr X responded to the Section 80J Notice on 22 January 2016 by saying, amongst other things, that he was unable to submit reasons why SARS should not invoke the GAAR against him as the 80J Notice was too vague, generalised, and in some places, contradictory.
- Following further correspondence between the parties, SARS raised the additional assessments on 30 August 2016 in terms of the GAAR.
- Mr X objected against the assessments, which objection was disallowed, following which Mr X appealed against the assessments to the Tax Court.
- SARS filed its Rule 31 statement as required. Mr X brought a striking-out application in terms of which it argued that SARS sought to broaden its case in the Rule 31 statement by including significant averments that did not form part of the assessment. It was alleged that this was not permitted.
- Mr X also argued that the inclusion of these averments in the Rule 31 statement was an attempt to remedy certain shortcomings which were already identified by Mr X in his objection.
- On the basis that SARS had allegedly pleaded in its Rule 31 statement a basis for exercising its powers under the GAAR that differs from the basis set out in the 80J Notice and finalisation of audit letter, Mr X argued that certain paragraphs in the Rule 31 statement should be struck out.

A first of sorts: Tax Court considers the GAAR in the context of interlocutory applications*...continued*

The argument was that the broadening of SARS' case as suggested by the taxpayer, amounted to a novation of the whole of the factual basis of the disputed assessment, under Rule 31(3) of the rules (Tax Court Rules).

- Stated differently, the argument was that the broadening of SARS' case as suggested by the taxpayer, amounted to a novation of the whole of the factual basis of the disputed assessment, under rule 31(3) of the rules (Tax Court Rules). The Tax Court Rules were promulgated under section 103 of the Tax Administration Act 28 of 2011.

Mr Y application

- The facts involving Mr Y's application are similar to the facts in Mr X's application.
- On 26 October 2015, Mr Y received a notice of audit letter from SARS informing him that an audit would be conducted in his 2006 to 2012 years of assessment.
- On 30 October 2015, SARS issued a letter incorporating both its audit findings and the section 80J notice, indicating amongst other things that the Commissioner intended to invoke the GAAR to raise an additional assessment (Second 80J Notice).
- Similar to Mr X's application, Mr Y responded to the Second 80J Notice that he was unable to advance reasons why SARS should not invoke the GAAR as the Second 80J Notice was, amongst other things, too vague, generalised, in places contradictory and overall unclear to him.
- As was the case with Mr X, further correspondence was exchanged and SARS ultimately issued an additional assessment to Mr Y, which he objected and subsequently appealed against to the Tax Court.
- Similar to Mr X's application, the Second 80J notice identified three different structures affected by the transactions. These are "*the S structure*", "*the T structure*" and "*the 2012 structure*".
- The Second 80J Notice states, amongst other things, the following: "*For the purpose of this analysis, the arrangement or arrangements consist/s of the following:*
  - *The transactions between A Investments, its subsidiaries and the Isle of Man companies, giving rise to certain A Investments subsidiaries holding promissory notes issued by A Investments:*
  - *The declaration of certain A Investments promissory notes to J and X;*
  - *The "settlement" of the promissory notes held by J and X via A Investments becoming obliged to pay those parties the net income from specific transactions involving specific A Investments subsidiaries;*
  - *In each case following a sale by A Investments the payment by A Investments of amounts to J and X; and*
  - *In the specific case of the payments to J, the declaration of dividends by J to its shareholder trusts funded by those payments.*
- *Each arrangement involving the steps listed above is a separate arrangement for the purpose of the GAAR, consisting of a set of preconceived transactions, which, together, constitute a "scheme".*"

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A first of sorts: Tax Court considers the GAAR in the context of interlocutory applications...*continued*

Under the new GAAR contained in sections 80A to 80L of the Act, the requirement that SARS must be satisfied has been specifically excluded.

- Mr Y brought an application on a similar basis to Mr X's application and argued that certain paragraphs in the Rule 31 statement filed in Mr Y's case (Second Rule 31 Statement) should be struck out.

On the other hand, SARS brought an application in terms of rule 51(2) of the Tax Court Rules, against Mr X and Mr Y, seeking the Tax Court to declare that in each appeal, the taxpayers must first adduce evidence at the hearing of the appeals. This is disputed by both taxpayers.

Judgment on the striking-out applications

Interpretation of the new GAAR

The Tax Court held that to determine the merits of the striking-out applications, one had to consider SARS' powers under the GAAR and in this analysis, it was useful to compare the old GAAR provisions as contained in section 103(1) of the Act to the new GAAR provisions. The Tax Court held that when one considers the old GAAR, the basic jurisdictional requirement for the exercise of the powers under that section is that SARS must be *"satisfied"* of various requirements in section 103(1).

Under the new GAAR contained in sections 80A to 80L of the Act, the requirement that SARS must be satisfied has been specifically excluded. However, the Tax Court explained that the substantive trigger for the exercise of, or parts of the new GAAR, arises where SARS forms an opinion that there is an impermissible avoidance arrangement. For an impermissible avoidance arrangement to exist, the following four requirements must be met:

- First, there must be an *"arrangement"* as defined in section 80L of the Act;
- Second, the arrangement must result in a tax benefit. If the arrangement results in a tax benefit, then it constitutes an *"avoidance arrangement"*;
- Third, the *"avoidance arrangement"* must have characteristics of abnormality and/or lack commercial substance as set out in section 80C and 80D; and
- Fourth, the *"avoidance arrangement"* must have had as its *"sole"* or *"main purpose"* the obtaining of a *"tax benefit"*.

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A first of sorts: Tax Court considers the GAAR in the context of interlocutory applications*...continued*

In light of this interpretive approach, the Tax Court considered whether SARS is, under the new GAAR, permitted to amplify or change the basis of the determination without issuing a fresh assessment.

The Tax Court held that to interpret the GAAR, one must adopt the well-known approach set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) SA 593 SCA. Pursuant to this, the Tax Court noted that it is clear from the provisions of the new GAAR that the legislature intended a departure from the provisions of the old GAAR, and to this end, specifically excluded as a jurisdictional requirement that SARS must be *"satisfied"*. The Tax Court held that the judgments relied on by counsel for Mr X and Mr Y, regarding the interpretation of the old GAAR, are not applicable in the present circumstances. An interpretation of the new GAAR sections through the prism of the old GAAR may well have the effect of negating the very purpose of the new sections and the underlying mischief they were intended to address in the first place.

In light of this interpretive approach, the Tax Court considered whether SARS is, under the new GAAR, permitted to amplify or change the basis of the determination without issuing a fresh assessment. Specifically, this issue revolved around the interpretation of section 80J(4) of the Act. This section states that if at any stage after issuing a notice in terms of section 80J(1), additional information comes to SARS' knowledge, it may revise or modify its reasons for applying the GAAR or, if the notice has been withdrawn give notice in terms of section 80J(1). The Tax Court noted that section 80J(4), as relied on by counsel for Mr X and Mr Y, would only be applicable if there is a jurisdictional fact that is satisfied, namely that additional information must have come to SARS' knowledge.

Application of the law to the facts

The first issue to consider was whether the introduction of certain words in the Rule 31 statements fundamentally altered what was pleaded regarding the impugned *"arrangements"* or *"arrangement"* in Mr X's case (80J Notice and finalisation of audit letter) and in Mr Y's case (Second 80J Notice and finalisation of audit letter). The Tax Court held that the introduction of these words did not alter the basis of the assessment in each case.

The second issue to consider was the argument on behalf of Mr Y, that SARS did not allege the receipt of any tax benefit by Mr Y himself in the Second 80J Notice and finalisation of audit letter. On this issue, the Tax Court referred to the fact that, amongst other things, the Second 80J Notice stated that each arrangement factually resulted in a tax benefit for J's shareholder, whereas it is undisputed that the TT Trust is a shareholder of J and Mr Y is a trustee and beneficiary of the TT Trust. The Tax Court noted SARS' allegation in the Second 80J Notice that the TT Trust and J are *"connected persons"* and that the TT Trust and Mr Y are connected persons. It accepted that SARS treated the TT Trust, J and Mr Y as one and the same person, which is permissible in terms of section 80F of the Act. As such, the Tax Court held that there was no novation of SARS' case in the Second Rule 31 Statement regarding this issue.

Pursuant to the above discussion, the Tax Court rejected both striking-out applications and ordered that the taxpayers pay SARS' costs in respect of these applications.

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A first of sorts: Tax Court considers the GAAR in the context of interlocutory applications...*continued*

The Tax Court ultimately found that SARS bore the duty lead evidence first and ordered SARS to pay the taxpayers' costs in respect of those applications.

Judgment regarding the duty to begin

In answering this question, the Tax Court indicated that one must first consider Rule 44(1) of the Tax Court Rules, which states that at the hearing of a tax appeal, the proceedings are commenced by the appellant unless –

- the only issue in dispute is whether an estimate under section 95 of the TAA on which the disputed assessment is based, is reasonable or the facts on which an understatement penalty is imposed by SARS under section 221(1); or
- SARS takes a point *in limine*.

While the court held that the cases regarding the interpretation of the old GAAR were not relevant in interpreting the new GAAR provisions, in the context of interpreting the procedural aspect of onus, these cases could be considered.

The court then proceeded to consider rule 39 of the Uniform Rules of Court, which states that the duty to begin follows from the onus of proof.

The Tax Court held that the question regarding the duty to begin must be determined with reference to who bears the onus to prove the four requirements for an "*impermissible avoidance arrangement*" as alluded to above. In other words, if SARS relies on the existence of an "*avoidance arrangement*", it bears the onus of proving it. As the existence of an "*avoidance arrangement*" is in dispute, SARS must commence leading evidence.

The Tax Court ultimately found that SARS bore the duty lead evidence first and ordered SARS to pay the taxpayers' costs in respect of those applications.

Louis Botha

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Default judgment in the Tax Court – can the lockdown justify SARS' delay?

The facts and litigious history of this matter are complicated and, as was astutely described by the court, they are "*long, tortuous and extremely unfortunate*".

In the recent unreported judgment of *XYZ (Pty) Ltd v the Commissioner for the South African Revenue Service* (0035/2018) (20 October 2020), the Tax Court had to determine whether the taxpayer was entitled to default judgment against the South African Revenue Service (SARS). In terms of Rule 56 of the dispute resolution rules (Tax Court Rules) promulgated in terms of section 103 of the Tax Administration Act 28 of 2011 (TAA), default can be obtained in certain circumstances. Of particular importance in this case was the determination of whether a taxpayer has a viable remedy in the event that SARS fails to comply with an order of court that was previously handed down.

Facts

The facts and litigious history of this matter are complicated and, as was astutely described by the court, they are "*long, tortuous and extremely unfortunate*".

In August 2000, the applicant in this matter (Applicant) and the Minister of Correctional Services concluded a concession contract in terms of which the Applicant was contracted to design, construct and operate a correctional facility. The term of the agreement was 25 years, at the expiration of which the correctional facility was to be handed over to the state.

The first of many disputes between the Applicant and SARS arose in respect of the Applicant's tax return for the 2002 year of assessment, which dispute was ultimately decided by the Supreme Court of Appeal in 2011. The second dispute arose in relation to the assessments that were raised by SARS in 2015 in respect of the Applicant's 2005 to 2012 years of assessment. Whilst this dispute proceeded, SARS issued assessments in respect of the Applicant's 2013 and 2014 years of assessment, which assessments were raised on identical grounds as those in respect of the prior years of assessment.

The identical letters of objection lodged by the Applicant in respect of each year of assessment contended that the amounts "*added back*" by SARS constituted income of a capital nature rather than of a revenue nature, and as such should not be included in the taxable income of the Applicant. The Applicant also objected against SARS' disallowance and reversal of an exemption that was previously granted to the Applicant.

After the disallowance of its objections, the Applicant lodged an appeal in respect of the assessments for the 2005 to 2012 years of assessment on 31 January 2017. Notwithstanding various delays, it was agreed that SARS would file its opposing statement by 17 June 2017. After failing to meet this deadline, SARS was granted an extension for the filing of the opposing statement to 14 July 2017. This deadline was also not complied with by SARS.

In response, the Applicant gave notice that, unless SARS filed its opposing statement within 15 days, the Applicant would apply for a default order against SARS, in terms of which the original assessments issued by SARS would be revised and reduced in accordance with the terms of the Applicant's notice of appeal. SARS did not file its opposing statement until approximately a month after the 15 days' deadline and also did not file an answering

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Default judgment in the Tax Court – can the lockdown justify SARS' delay?*...continued*

The Rule 56 application was heard by the Tax Court, which concluded that SARS had *"made itself guilty of an egregious breach of the Tax Rules"*, as a result of which default judgment was granted in favour of the Applicant in respect of the 2005 to 2012 years of assessment.

affidavit in respect of the Applicant's application for a default order by the prescribed date. As such, the Applicant requested that a date for the hearing of the application by default be allocated.

The Rule 56 application was heard by the Tax Court, which concluded that SARS had *"made itself guilty of an egregious breach of the Tax Rules"*, as a result of which default judgment was granted in favour of the Applicant in respect of the 2005 to 2012 years of assessment.

The dispute between the Applicant and SARS in respect of the Applicant's 2013 and 2014 years of assessment then came before the Tax Court, which court dismissed the application on the grounds that the Applicant's objections were invalid. This decision of the Tax Court was appealed to the Full Bench of the High Court in January 2020, which court gave an order in the following terms:

(1) SARS would come to a decision regarding the allowance or disallowance of the Applicant's objections and would provide the Applicant with the basis of the said decision within 60 days of the court order; and

(2) In the event that SARS failed to make the decision and provide the grounds for that decision within 60 days, the Applicant would be entitled to make an application in terms of Rule 56(2)(b) of the Tax Court Rules for a final order that the Tax Court deems appropriate.

SARS failed to notify the Applicant of its decision to allow or disallow the Applicant's objection within 60 days of the court order. As such, the Applicant (on the strength of the order of the High Court) approached the Tax Court seeking to invoke Rule 56 of the Tax Court Rules in support of its application for default judgment.

Judgment

It was the Applicant's contention that SARS had failed to comply with the order of the High Court as it had communicated its decision, on whether or not the Applicant's objection would be allowed, more than two months out of time. As a result, the Applicant submitted that the Tax Court was empowered to grant default judgment in favour of the Applicant in terms of Rule 56 of the Tax Court Rules and section 129(2)(b) of the TAA.

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Default judgment in the Tax Court – can the lockdown justify SARS' delay?*...continued*

In support of its case, the Applicant addressed SARS' reasons for defaulting on the order of the High Court.

Rule 56 of the Tax Court Rules provides that if a party to a proceeding fails to comply with a prescribed time period or obligation, the other party may deliver a notice to the defaulting party informing them of their intention to apply for a final order in terms of section 129(2) of the TAA. The notice must state that the defaulting party has 15 days to remedy the default. To the extent that the default is not remedied within the 15-day period, the aggrieved party may apply to the Tax Court, which is empowered –

(i) in the absence of good cause shown by the defaulting party for the default in issue, to make an order in terms of section 129(2) of the TAA; or

(ii) to make an order compelling the defaulting party to comply with the obligation, failing which it can make an order in terms of section 129(2) without further notice to the defaulting party.

Section 129(2) of the TAA provides that, in the case of an assessment or 'decision' under appeal, or an application in a procedural matter referred to in section 117(3), the Tax Court may –

(a) confirm the assessment or 'decision';

(b) order the assessment or 'decision' to be altered; or

(c) refer the assessment back to SARS for further examination and assessment.

In support of its case, the Applicant addressed SARS' reasons for defaulting on the order of the High Court. It was submitted that the said reasons were entirely unsatisfactory, as a result of which the Tax Court would be justified in granting an order in terms of section 129(2) on the basis that SARS was unable to show good cause for its default.

In its opposition of the application, SARS raised the issue of the administrative nature of an assessment issued by it and argued that until such time as the assessment has been set aside, it is a valid and binding decision. The Tax Court inferred that SARS was relying on the principles laid out in the Supreme Court of Appeal (SCA) judgment of *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 SCA (Oudekraal Estates case), which were summarised by the Tax Court as follows:

(1) administrative action that is invalid can give rise to consequences that must be regarded as lawful until such time as the validity of that administrative action has been tested in appropriate legal proceedings before a court; and

(2) allegedly unlawful administrative action can only be challenged in properly constituted proceedings before a court and until that happens, in order to adhere to the principle of the rule of law, the decision must stand.

The Tax Court ruled that the application brought by the Applicant (although unconventional) constituted the type of appropriate legal proceedings before a court that was envisaged by the SCA in the Oudekraal Estates case when determining the necessary forum for the challenge of unlawful administrative action. As such, it was held that the proceedings before the Tax Court were capable of setting aside an invalid administrative act taken by SARS, which would include the decision by SARS to disallow the Applicant's objection.

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Default judgment in the Tax Court – can the lockdown justify SARS' delay?*...continued*

Rule 56 of the Tax Court Rules makes provision for a default order to be granted against either SARS or a taxpayer in the event that the time periods and obligations imposed by the TAA are not adhered to.

In this case, the legal basis in terms of which SARS' decision was to be set aside was Rule 56 of the Tax Court Rules, which provides the Tax Court with a discretion in determining whether an order in terms of section 129(2) of the TAA should be granted. However, in coming to its decision, the Tax Court found that it could not exercise its discretion in favour of the Applicant for two reasons.

Firstly, SARS had contended that one of the reasons for its delay in complying with the High Court's order was the negative impact that the national lockdown, caused by the COVID-19 pandemic, had on SARS' administration and operations. The Tax Court conceded that this explanation given by SARS for its default constituted *"good cause"* for the delays that it had caused.

Second, neither of the parties before the Tax Court presented arguments pertaining to the merits of the case, as a result of which the Court was unable to make a pronouncement on the success or failure of the Applicant's objection to SARS' assessments for the 2013 and 2014 years of assessment.

In the result, the Court dismissed the application for the default order that was sought by the Applicant. However, in taking cognisance of SARS' *"dilatory and utterly disrespectful"* approach to the dispute proceedings between it and the Applicant, the court granted a punitive cost order against SARS.

Comment

Rule 56 of the Tax Court Rules makes provision for a default order to be granted against either SARS or a taxpayer in the event that the time periods and obligations imposed by the TAA are not adhered to. This type of relief may prove very beneficial to a taxpayer, provided that they can prove that the failure by SARS to comply with its obligations cannot be justified. In this case, it is likely that the Applicant would have been granted the default order had the COVID-19 pandemic not had such a significant impact on the proper functioning of the South African economy as a whole.

However, it is worth noting that when a default order is denied, a taxpayer is not without further remedies as the taxpayer is still entitled to approach the Tax Court to have the merits of its case properly ventilated. To the extent that the taxpayer's arguments have merit, it may be successful in the Tax Court and, as pointed out by the court in this case, the taxpayer may be entitled to a punitive cost order.

Interestingly, this case appears to be one of the first Tax Court cases to expressly deal with the collateral challenge issue. A collateral challenge may be used to test the validity of an administrative act and *"will generally arise where the subject is sought to be coerced by a public authority into compliance with an unlawful administrative act"* (para 32 of the Oudekraal Estates case).

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