

TAX & EXCHANGE CONTROL ALERT

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Tax Court finds that SARS was in default: The importance of timeous requests for extension

In the context of Tax Court litigation, an order for default judgment against SARS, or the taxpayer will generally only be granted if, in terms of rule 56(1) of the rules (Rules) promulgated under section 103 of the Tax Administration Act, 28 of 2011 (TAA), the defaulting party fails to remedy its default within 15 days of receiving a notice to apply for a final order under section 129(2) of the TAA.



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In Commissioner for the *South African Revenue Service v SAV South Africa (Pty) Ltd* (Case No IT25117) (as yet unreported), the Tax Court was requested to grant a rule 56 application in the taxpayer's favour, while SARS requested the court to find that the application was irregular.

FACTS

- The taxpayer filed its appeal on 22 May 2019.
- On 2 September 2019, more than a year after SARS was required to file its rule 31 statement of grounds of assessment (Rule 31 Statement), the taxpayer addressed a letter to SARS wherein it indicated that SARS had not made a request for extension of the 45-day period in which the Rule 31 Statement should have been filed. The letter also noted that SARS had not indicated its intention to formally apply to the Tax Court for condonation of the non-compliance with the Rules.
- SARS did not respond to the letter and after the taxpayer filed a notice on 13 October 2020 indicating its intention to apply for default judgment if SARS failed to remedy the default within 15 business days of the notice, SARS filed its Rule 31 Statement on 20 October 2020.
- Under the circumstances, SARS had filed its Rule 31 Statement 310 business days after expiry of the 45-day period.
- On 30 November 2020, the taxpayer applied for default judgment under rule 56 of the Rules as SARS did not apply for condonation when filing its Rule 31 Statement and did not request an extension before filing the Rule 31 Statement.
- On 14 December 2020, SARS served a notice to oppose the default judgment application and served a notice in terms of rule 30 of the Uniform Rules of Court, on the basis that the rule 56 application was an irregular step as SARS had filed its Rule 31 Statement within 15 business days of receiving the applicant's rule 56 notice.

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RULE 56

Rule 56(1) provides as follows:

"If a party has failed to comply with a period or obligation prescribed under these rules or an order by the tax court under this Part, the other party may -

(a) deliver a notice to the defaulting party informing the party of the intention to apply to the tax court for a final order under section 129(2) of the Act in the event that the defaulting party fails to remedy the default within 15 days of delivery of the notice; and

(b) if the defaulting party fails to remedy the default within the prescribed period, apply, on notice to the defaulting party, to the tax court for a final order under section 129(2)"

Rule 56(2) states that the "tax court may, on hearing the application -

(a) in the absence of good cause shown by the defaulting party for the default in issue make an order under section 129(2); or

(b) make an order compelling the defaulting party to comply with the relevant requirement within such time as the court considers appropriate and, if the defaulting party fails to abide by

the court's order by the due date, make an order under section 129(2) without further notice to the defaulting party."

JUDGMENT

The court noted that it was common cause that SARS had complied with the 15-day period in rule 56(2). However, it was asked to consider the taxpayer's argument that SARS was not in full compliance as it did not invoke rule 4(2) of the Rules, which requires that a party request extension of a prescribed time period before expiry of the time period, unless the parties agree that the delivery of a document may take place after expiry of the time period.

The court considered the provisions dealing with Tax Court procedures, including Supreme Court of Appeal and Constitutional Court judgments regarding the interpretation of legislation and held that the Rules provide for clear time periods that all parties must adhere to. It noted that rule 4 was equally applicable to

all the parties and that rule 56 must not be read in isolation unless SARS was exempt from compliance with rule 4(2). The court held that SARS' compliance with the rule 56 notice did not result in a waiver of rule 4(2) as rule 4(2) would then serve no purpose and the court did not interpret the law to state that certain rules are less important than others.

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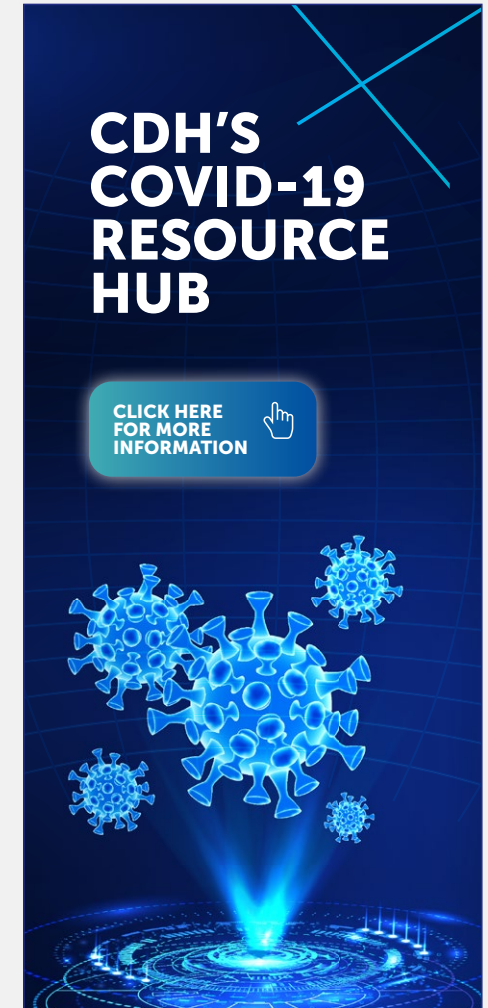
SARS was aware of its non-compliance with rule 4(2) as indicated by its failure to respond to the taxpayer's letter. In the court's view, "SARS went [in]to this trap with eyes open." The court noted SARS' argument that it would suffer prejudice if the rule 56 application were granted as the issues would not have been properly ventilated. However, it found that the prejudice suffered was due to SARS' delay in filing the Rule 31 Statement, which delay in the court's view suggested that the matter may not have had significance for SARS.

The court concluded that the Rule 31 Statement filed was not valid and that SARS remained in default. It dismissed SARS' application and granted the taxpayer's rule 56 application.

COMMENT

The judgment appears to be the first instance where the Tax Court has granted a rule 56 application despite the default being remedied within the 15-business day period provided for in rule 56. The judgment illustrates the importance of rule 4(2) and should serve as a reminder to both taxpayers and SARS to comply with the latter rule and request extension of a time period for delivery of a document, before the time period expires. In the current instance, it appears that SARS' extreme lateness in filing the Rule 31 Statement (more than 310 business days late) without any request for extension addressed to the taxpayer, that influenced the court's decision.

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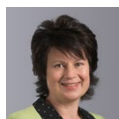
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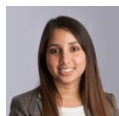
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