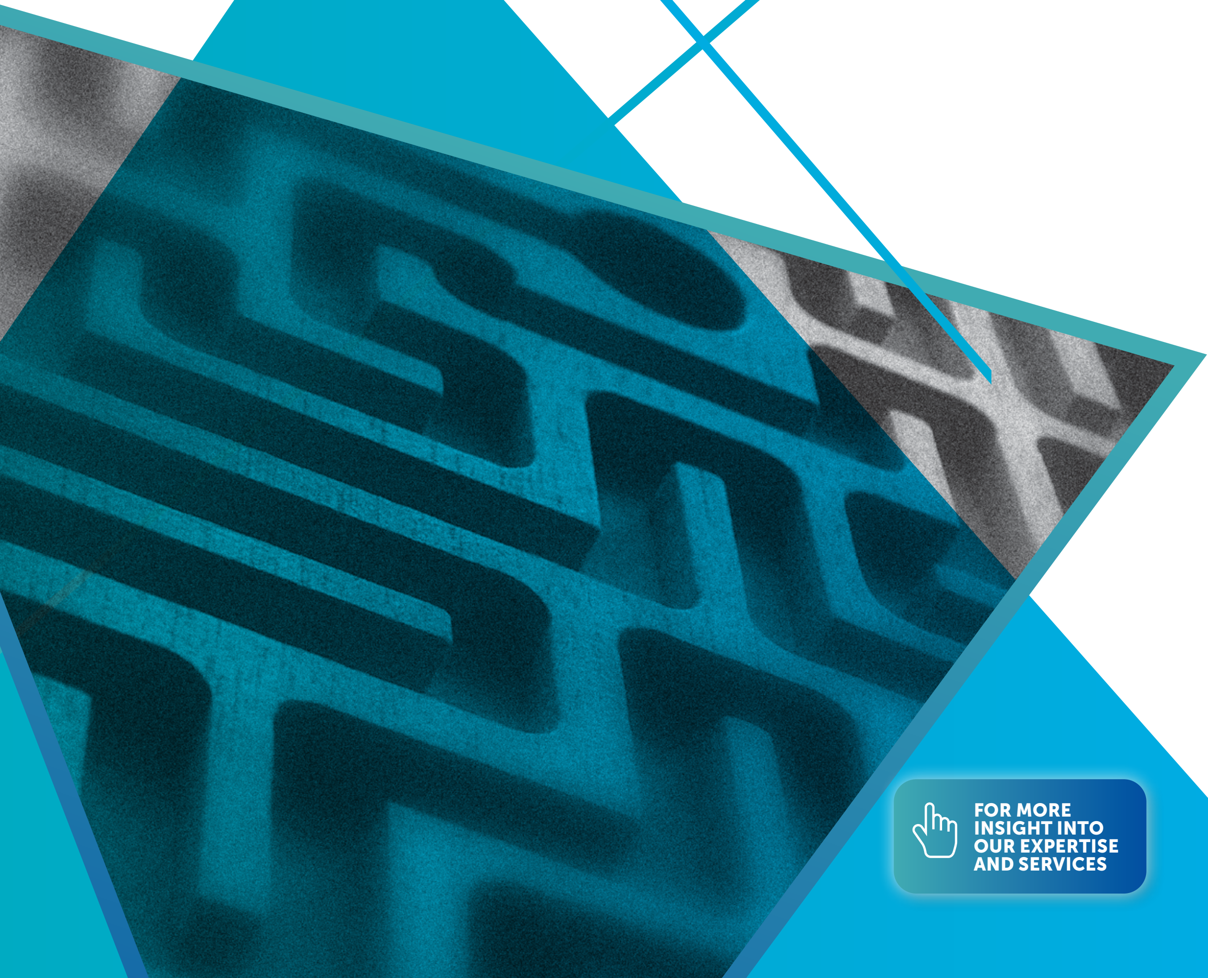
TAX & EXCHANGE CONTROL
ALERT

1 APRIL 2022



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An egregious delay and severe prejudice: SARS taken to task for failure to comply with dispute resolution timelines

The dispute resolution process contained in the Tax Administration Act 28 of 2011 (TAA), and the Rules of the Tax Court (Rules), is designed to allow SARS and taxpayers to engage on the subject of a dispute in a structured manner, aimed at ventilating the dispute between the parties. This maximises the potential for a reduction in the scope of disagreement, and potentially the resolution of the dispute.

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The recent case of *F Taxpayer v CSARS* (Case No: IT 45842, 25 February 2022) (F Taxpayer Case), determined whether delays by SARS in engaging with the dispute resolution process set out in the TAA, culminating in the late submission of its rule 31 statement of grounds of assessment and opposing appeal, was grounds for a final bar to SARS pursuing the dispute. It also highlighted whether the taxpayer ought to be granted a final decision on the appeal for relevant years of assessment, based on SARS' defaults.

FACTS

Following an audit, SARS raised additional assessments for the taxpayer's 2016 – 2018 Years of Assessment (YoAs). The Taxpayer instituted the dispute resolution process through a request for reasons. SARS failed to respond within the required 45 days as per rule 6(5). SARS, 16 days after the initial 45-day period, unilaterally imposed an extension of a further 45 days. Under rule 6(6), SARS is empowered to require such an extension if it is satisfied that exceptional circumstances, the complexity of the matter or the principle or the amount involved warrant more time. However, this is subject to notice of such an extension being delivered in accordance with rule 6(7).

Prior to the expiry of the initial period, the taxpayer lodged a request with SARS in terms of section 164(2) of the TAA for suspension of payment of the amounts now owed under the additional assessments. Section 164(6) prescribes that no actions toward collection may be instituted, from the time SARS receives the request, until 10 days after SARS' decision on the request has been provided to the taxpayer. Unless SARS holds a reasonable belief that there is a risk of dissipation of assets by the taxpayer. There was no indication that any SARS official held such a belief and yet SARS proceeded to issue a final demand for payment. The taxpayer indicated to SARS that it was in contravention of section 164(6) TAA, and following this SARS formally approved the payment suspension request.

Despite this SARS refused to indicate that the taxpayer was tax compliant until the suspended amounts were paid to SARS. Only after the taxpayer threatened court action, did SARS correct the taxpayer's compliance status. SARS on two further occasions reverted the taxpayer's compliance status to non-compliant. The second instance persisting until the Tax Court hearing.

The taxpayer upon receipt of the reasons for the additional assessments lodged an objection to the additional assessments. SARS in terms of rule 9(1)(a) was meant to deliver a decision on the objection with 60 days but failed to do so. Only following the delivery of a rule 56(1)(a) notice of default did SARS provide the required decision on objection.

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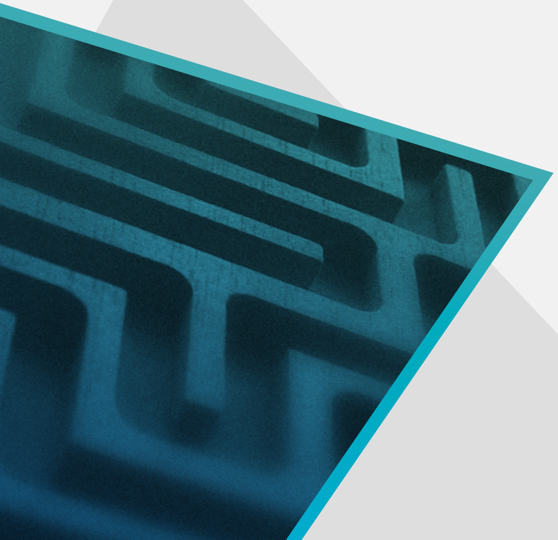

The taxpayer was required to deliver their notices of appeal within 30 days under rule 10(1)(a). This was duly complied with, triggering the requirement for SARS to deliver its rule 31 statement within 45 days as prescribed by rule 31(1)(d).

SARS' rule 31 statement was not delivered within the prescribed time and one day after expiry of the time period SARS notified the taxpayer that the matter had been referred to SARS' Tax Court Litigation Unit. No explanation was provided for the delay in filing the rule 31 statement, and no request for condonation was made in this correspondence from SARS.

Given the failure by SARS to deliver its rule 31 statement, the taxpayer served another rule 56(1)(a) notice, requiring that SARS' default be remedied within 15 days, failing which the taxpayer would apply for a final order under section 129(2) of the TAA.

SARS then engaged the taxpayer on the reasons for failure to deliver its rule 31 statement timeously and the taxpayer granted an extension of 30 days. On the day this extension was to expire, SARS indicated to the taxpayer that the matter had been reallocated to a different SARS official and requested a further extension of 21 business days.

The taxpayer rejected the request for a further extension and indicated that SARS would be required to bring an application for condonation under rule 52(6). The Taxpayer thereafter launched proceedings for a final order and SARS was put on terms to launch its condonation application.

SARS eventually provided the rule 31 statement 36 days after the agreed extended deadline and 15 days after the expiration of the deadline which it itself had requested.

THE JUDGMENT

The judgment dealt with the requirements for the granting of a condonation for non-compliance with the time periods set out in the TAA and Rules. Should the grounds for a condonation not be met, it would then consider whether the basis for a final decision under section 129(2) of the TAA had been laid by the taxpayer.

Section 195 of the Constitution sets out the standards governing the public administration. Section 33 of the Constitution requires that all administrative action be lawful, reasonable and procedurally fair. The TAA is legislation giving effect to these overarching values in the context of tax administration.

In Buffalo City Metropolitan *Municipality v Asla Construction (Pty) Ltd* 2019 (6) BCLR 661 (CC) the Constitutional Court, held that if the delay is unreasonable and no satisfactory explanation has been provided, it is necessary to

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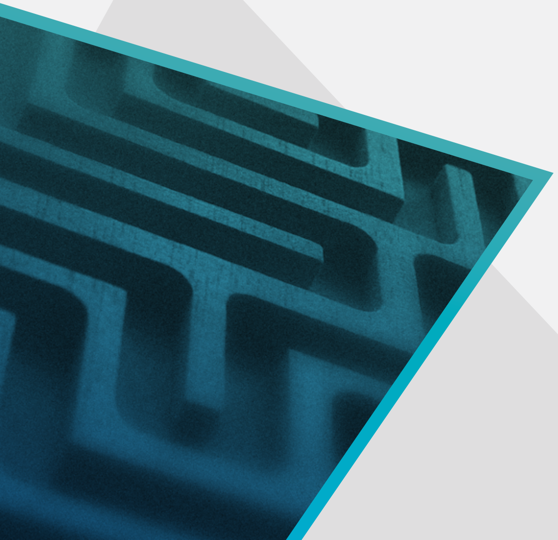
consider whether the delay should be overlooked, which is a flexible approach. One of the factors to be taken into account is the conduct of the applicant concerned, particularly for State litigants (which would be SARS in the present case) because they are often best placed to explain the delay and are subject to a higher duty to respect the law.

Cloete J held that it was therefore necessary to consider SARS' default in its totality, rather than blinkeredly focussing on the rule 31 default, which was the basis of the condonation application. Therefore, it was held that SARS' failure to seek the extension it required to provide reasons to the taxpayer before the period for furnishing reasons expired; its failure to request an extension to file its rule 31 statement before the prescribed time limit expired; its failure to provide any explanation whatsoever to the taxpayer for these delays, evidenced *"a persistent disregard for the time limits prescribed in the rules."*



Turning to the question of prejudice to the taxpayer which arises as a result of the right to just administrative action under section 33 of the Constitution, the Tax Court held that the taxpayer had suffered great prejudice. Mainly, in having its tax compliance status unilaterally altered by SARS following the partial disallowance of the objections raised.

The basis of the prejudice suffered regarding the tax compliance status was that the taxpayer:

- was registered with certain regulatory bodies which required consistent compliance with tax obligations;
- had loans with certain banks, a condition of which was consistent compliance with tax obligations; and
- had received funding from the Department of Trade and Industry which also required consistent tax compliance.

Further prejudice was suffered by the taxpayer, beyond the risks to its business, in the sunk expenses of the cost and time expended in ensuring that SARS complied with its statutory obligations.

Based on the factual background and SARS' failure to adequately put forward an argument against prejudice being suffered by the taxpayer, Cloete J held that SARS' *"delay was egregious; there has been no reasonable explanation for the delay; and the consequent prejudice to the taxpayer (which prejudice SARS admits, since it sought to ameliorate it) is severe."*

On prospects of success on the merits of the additional assessments, Cloete J after an examination of the International Financial Reporting Standards (IFRS) guidance on the treatment of short-term insurance products held that SARS' own version was internally contradictory, as it relied on the wrong part of IFRS to base the additional assessments.

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Overall, SARS could not demonstrate reasonable grounds for its delay, the delay caused severe prejudice to the taxpayer and SARS had low prospects of success in the central dispute. Therefore, Cloete J held that the taxpayer ought to be granted its final order based on SARS' defaults.

On costs, Cloete J held that while granting of costs in a tax matter is an exception, the facts of the present case warranted a granting of costs against SARS.

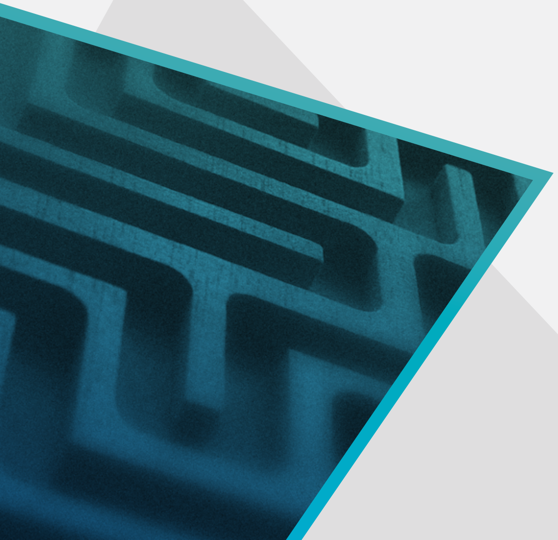
COMMENT

The F Taxpayer Case provides a good illustration of the importance of consistent compliance with the statutory timelines, as failure to do so may undermine the case. The present instance however serves as a warning to SARS to be mindful of its obligations under the statutory framework in which it operates.

It is a clear reemphasis that SARS is bound by the prescripts of the statutory framework. Specifically, that where jurisdictional facts must be present as a basis for a particular decision this must be observed. For example, the court noted that there was no basis for SARS to proceed with collection steps following the receipt of the request for suspension of payment, as there was no evidence of an anticipated dissipation of funds by the taxpayer.

Taxpayers can therefore take comfort in the fact that should SARS engage in behaviour which is contrary to its obligations under the TAA and Rules, to the detriment of the taxpayer, then the courts will act to protect taxpayers who have engaged in the dispute resolution process.

TSANGA MUKUMBA



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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

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.

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