TAX & EXCHANGE CONTROL

ALERT

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IN THIS ISSUE

No forum shopping in tax disputes? A discussion on *Forge Packaging v The Commissioner for the South African Revenue Service*

There are various rules and procedures in place to ensure a streamlined approach to disputing assessments issued by the South African Revenue Service (SARS). One such rule can be found in section 105 of the Tax Administration Act 28 of 2011 (TAA), which provides that where a person intends to dispute an assessment, the assessment may not be disputed in any court or other proceedings except in terms of Chapter 9 of the TAA and the Tax Court Rules (promulgated under section 103 of the TAA), unless the High Court otherwise directs. Practically, this means that an appeal against an assessment must be heard by the Tax Court, if it is not resolved at the objection phase or in terms of the ADR process provided for in the Tax Court Rules.

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However, the section does not prohibit a taxpayer from reviewing in the High Court a decision made by SARS or an assessment issued by SARS. The interpretation of this section is important as the simultaneous consideration of the dispute in the Tax Court and the High Court could potentially give rise to unwanted delays or the unnecessary fragmentation of a matter.

This was a focal issue in the matter of *Forge Packaging Proprietary Limited v The Commissioner for the South African Revenue Service* ZAWCHC 119 (13 June 2022). In this case, the High Court had to determine, amongst other things, whether it was appropriate for Forge Packaging Limited (applicant) to seek a review in the High Court without relying on the provisions of section 105 of the TAA.

BACKGROUND

On 31 June 2018, SARS issued the applicant with a letter indicating that its return of income for the 2016 tax year had been selected for verification. The verification procedure involved requesting that the applicant verify the information provided in the return against the information the applicant already had to ensure that the return was an accurate reflection of the applicant's tax position.

Following the applicant's confirmation of the information provided, SARS issued an additional assessment for the 2016 tax year, which led to an additional revision of the assessments for the 2014 and 2015 tax years. Ultimately, SARS' adjustments to these assessments led to the imposition of hefty understatement penalties.

The applicant disputed the additional assessments on the grounds that no adequate reasoning was provided for issuing them. A notice of appeal was submitted by the applicant, after which SARS furnished its statement of grounds of assessment and opposing appeal in terms of Rule 31 of the Tax Court Rules.

The applicant failed to submit its statement of grounds of appeal, in terms of Rule 32, and instead brought an application in the Tax Court for the judicial review and setting aside of the additional assessments. SARS in response made an application in terms of rule 42 of the Tax Court Rules to strike out the review application as an irregular step.

Cloete J presided over the matter in the Tax Court and found in favour of SARS, that the review application was an irregular step. In addition, Cloete J granted an order to stay the appeal pending the determination of equivalent review proceedings to be instituted by the applicant in the High Court within 30 calendar days of the date on which the stay was granted. The High Court explained that the applicant accordingly was prosecuting the current application in the High Court parallel to the appeal in the Tax Court with the same aim to set aside the additional assessments.

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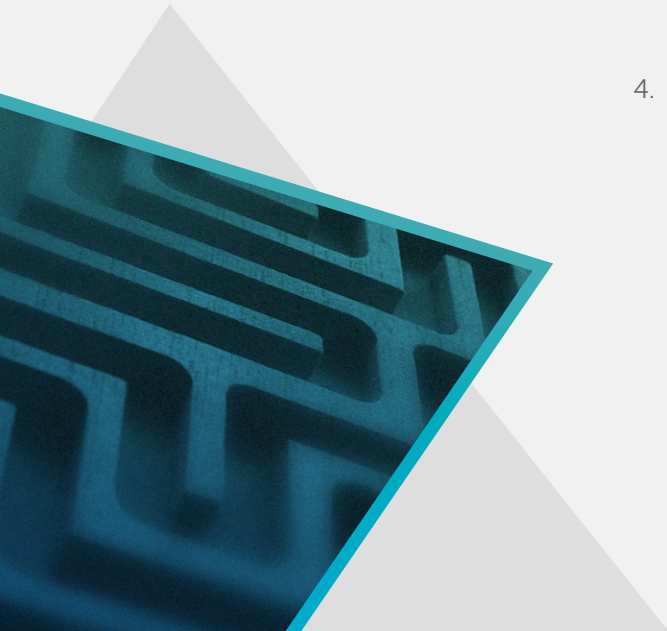

SARS opposed the applicant's review application on the following grounds:

1. It was instituted outside the timeframe provided in terms of the order by Cloete J in the Tax Court.
2. There was an unreasonable delay in the institution of the review proceedings as the proceedings were brought outside the 180-day limit provided for in section 7 of the Promotion of Administration of Justice Act 3 of 2000.
3. The review was based on the misguided premise that the applicant was subject to an audit in terms of section 42 of the TAA when SARS alleged that it conducted an income tax verification as opposed to an audit.
4. The applicant had failed to obtain the necessary direction from this court in terms of section 105 of the TAA permitting it to bring this application.

SECTION 105 TAA

The High Court interpreted section 105 as requiring the applicant to first pursue the ordinary course, that being the proceedings available under Chapter 9 of the TAA and the Tax Court Rules, unless this default route would be less appropriate. The High Court noted that one of the well-recognised situations in which it would exercise its jurisdiction in tax matters is where the question before the court relies wholly on a point of law. In this regard, the High Court relied on the judgment in *Absa Bank Ltd and Another v Commissioner, SARS* [2021] (3) SA 513 (we discuss this judgment in our Tax & Exchange Control Alert of 18 March 2021 .

In trying to decipher whether a question of law was before this court, the applicant alleged that SARS' non-compliance with section 42 of the TAA was a matter of law. This concerned whether the information-gathering exercise SARS conducted was a verification, as SARS alleged, or an audit. The High Court disagreed as SARS' alleged non-compliance with section 42 of the TAA was only one of the issues in the applicant's appeal pending before the Tax Court. Though SARS alleged it to be a verification, while making the necessary exchanges of statements in preparation for the appeal in the Tax Court, in its statement of grounds of assessment and opposing appeal, the terminology used by SARS was that of *"audit"*. Evidence in this case would be required to determine which specific exercise SARS was engaging in. The High Court held that even if the issues for determination were solely issues of law, hearing the review application would lead to an unnecessary fragmentation of this matter. It explained that should it rule unfavourably for the applicant on a point that is also subject to a pending appeal in the Tax Court, uncertainty would arise on whether the Tax Court should follow suit with the High Court's finding or proceed to make its own finding, which would lead to further uncertainty amongst the parties.

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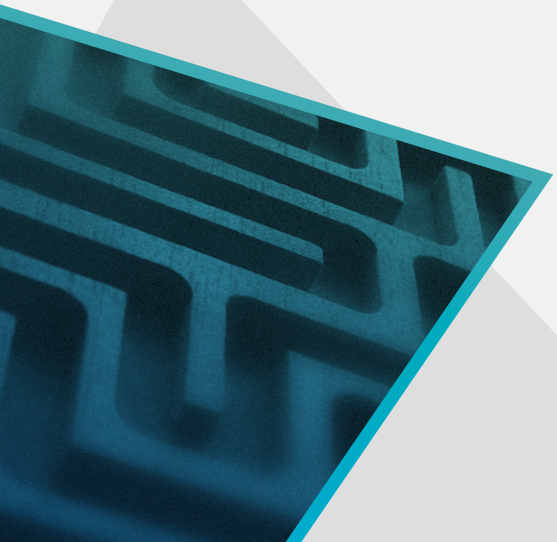
Importantly, the High Court found that the applicant would be entitled to rely on SARS' alleged non-compliance with section 42 of the TAA in its Tax Court appeal, provided it's able to provide proof of this non-compliance, by way of a defensive or collateral challenge to the legality of SARS' decision. In making this finding, it relied on the well-known *Oudekraal Estates* decision and the High Court's finding in *South Atlantic Jazz Festival (Pty) Ltd v CSARS* [2015] (6) SA 78 (WCC) where it was held that the Tax Court is competent to decide such a collateral challenge as an incident of the appeal.

COMMENTS

In understanding the Legislature's intention behind section 105, one should keep in mind the decision in *Rossi v CSARS 74 SATC 387*, where the court considered the predecessor provisions to section 105 of the TAA and held that it was never the intention for the Legislature to create competing and concurrent forums for a resolution of tax disputes. Rather, it is to have various forums that operate in tandem with one another to ensure the efficiency of the judicial system and service delivery. As noted by the High Court in the case at hand, instituting a review application in the High Court while a parallel proceeding is underway at the Tax Court, both of which aim to set aside the same additional assessments, would not only undermine court procedure but create unreasonable delay to the resolution of tax disputes for the parties involved.

The High Court's judgment is also helpful in providing further assistance regarding the practical application of section 105 of the TAA and making it clear that taxpayers can rely on section 42 of the TAA to challenge the validity of an assessment before the Tax Court.

ESTHER OOKO AND LOUIS BOTHA



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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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