

TAX & EXCHANGE CONTROL

ALERT

27 JANUARY 2022



INCORPORATING
KIETI LAW LLP, KENYA

CLICK HERE FOR
MORE INSIGHT
INTO OUR
EXPERTISE AND
SERVICES



IN THIS ISSUE

Same issue, different outcome – another Tax Court judgment regarding Rule 56

It is not often that the Tax Court hands down judgment in two separate matters on consecutive days, especially where those two matters deal with the same legal question - yet this is exactly what happened recently.

WEBINAR
INVITATION

VIRTUAL 2022 BUDGET SPEECH OVERVIEW

Join us for an insightful
and practical overview of
the 2022 Budget Speech.



Wednesday,
23 February 2022



17h00 to 18h30
(CAT)

Same issue, different outcome – another Tax Court judgment regarding Rule 56

It is not often that the Tax Court hands down judgment in two separate matters on consecutive days, especially where those two matters deal with the same legal question - yet this is exactly what happened recently.

On 18 November 2021, the Tax Court handed down judgment in Commissioner for the *South African Revenue Service v SAV South Africa (Pty) Ltd* (Case No IT25117) (as yet unreported), where the court granted a taxpayer's application for default judgment in terms of rule 56 of the rules (Rules) promulgated under Section 103 of the Tax Administration Act, 28 of 2011 (TAA). CDH discussed this judgment in a recent [Tax and Exchange Control Alert](#) on 13 January 2022.

On 19 November 2021, the Tax Court handed down judgment in *CDC (Pty) Ltd v Commissioner for the South African Revenue Service* (Case No IT2020/95) (as yet unreported), which also dealt with an application for default judgment in terms of rule 56. While the subject matter of both judgments are identical, our discussion of the second judgment here will reveal that the outcome was not the same in both instances.

FACTS

The taxpayer (CDC) brought a rule 56 application pursuant to the following:

- SARS disallowed a substantial assessed loss (approximately R38.5 million) claimed by the taxpayer in its 2011 year of assessment.
- CDC objected against the disallowance of the assessed loss by objecting against SARS' assessment, but SARS disallowed the objection.
- On 22 July 2016, CDC attempted to appeal against SARS' disallowance of the objection by submitting certain supporting documents to SARS via eFiling, including a special power of attorney. It was disputed whether a typed undated document headed "Memorandum" which contains CDC's grounds of appeal, was submitted by eFiling. The applicant contended in the Tax Court that

this "Memorandum" was filed then and constituted its notice of appeal (NOA). The "Memorandum" was included as an annexure to the founding affidavit of the rule 56 application.

On 19 November 2021, the Tax Court handed down judgment in *CDC (Pty) Ltd v Commissioner for the South African Revenue Service* (Case No IT2020/95) (as yet unreported), which also dealt with an application for default judgment in terms of Rule 56. While the subject matter of both judgments are identical, our discussion of the second judgment here will reveal that the outcome was not the same in both instances.

Same issue, different outcome – another Tax Court judgment regarding Rule 56

continued

- Following the submission of these documents, there was email correspondence between SARS and CDC on the same day, as to when CDC would submit its NOA, with CDC indicating that it would submit the NOA not later than 12 August 2016.
- After not receiving CDC's notice of appeal, SARS asked CDC on 12 September 2016 when it would file the NOA, with CDC responding that it was already filed on 22 August 2016.
- In July 2019, CDC delivered its rule 56 application, withdrew it, and then filed a new rule 56 application approximately two years later, which is the subject matter of this judgment.
- In opposing the application, SARS also filed a supplementary affidavit to prove that CDC did not deliver its grounds of appeal as contemplated under rule 10(2) of the Rules.

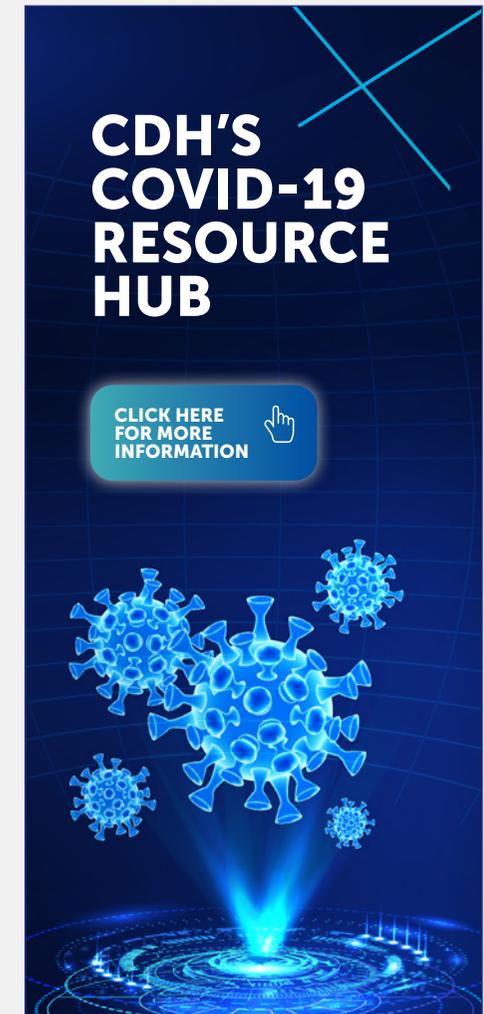
The basis for CDC's rule 56 application is that SARS had allegedly failed to file its Statement of Grounds of Assessment in terms of rule 31 of the Rules (Rule 31 Statement) timeously.

RELEVANT LEGAL PROVISIONS

The Tax Court considered rules 10(2) and 56 in its judgment. Rule 10(2) states the following:

A notice of appeal must:

- be made in the prescribed form;
- if a SARS electronic filing service is used, specify an address at which the appellant will accept delivery of documents when SARS electronic filing service is no longer available for the further progress of the appeal;
- specify in detail the following:
 - in respect of which grounds of the objection referred to in rule 7 the taxpayer is appealing;



Same issue, different outcome – another Tax Court judgment regarding Rule 56

continued

- the grounds for disputing the basis of the decision to disallow the objection referred to in section 106(5) of the TAA; and
- any new ground on which the taxpayer is appealing;
- be signed by the taxpayer or the taxpayer duly authorized representative; and
- indicate whether or not the taxpayer wishes to make use of the alternative dispute resolution procedures referred to in Part C of the Rules, should the procedures under section 107(5) of the TAA be available.

Rule 56(1) states that if a party has failed to comply with a period or obligation prescribed under the rules or an order by the Tax Court under the rules, the other party may –

- 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 TAA in the event that the defaulting party fails to remedy the default within 15 days of delivery of the notice; and

- 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).

However, rule 56(2) states that the Tax Court may, on hearing the application, decline granting the application if good cause is shown by the defaulting party for the default.

JUDGMENT

Firstly, the Tax Court granted SARS' application to file the supplementary affidavit as it could not be shown that it would prejudice CDC.

On the issue of the rule 56 application, the Tax Court held that one had to determine whether a valid notice of appeal had been filed by CDC. In this regard, it considered whether CDC had complied with rule 10(2) of the Rules. The court held that the "*Memorandum*" allegedly filed by CDC on 22 August 2016 (containing grounds of appeal) did not comply with rule 10(2) as it was not the prescribed notice of appeal

form. The Tax Court accepted SARS' assertion that the documents filed on 22 July 2016 did not include a NOA compliant with rule 10(2), as SARS would then not have asked on the same date by email when the NOA would be filed. SARS relied on a letter dated 4 August 2016 stating that an extension for late filing of the NOA will be granted until 25 August 2016. The court found that CDC's response thereto, that it managed to file the NOA on 16 July 2016, is inconsistent with the other undisputed evidence presented.

The Tax Court concluded that SARS correctly believed at all material times that CDC failed to deliver a valid notice of appeal in terms of rule 10(2) of the Rules and that the documents uploaded on 22 July 2016 does not specify in detail the grounds of appeal.

In finding that there was no valid notice of appeal filed, the court held that SARS had shown good cause (as required by rule 56) that it had never defaulted by not filing the Rule 31 Statement

Same issue, different outcome – another Tax Court judgment regarding Rule 56

continued

COMMENT

The most important take-away from this case is that a taxpayer should always ensure that when it lodges an appeal against SARS' decision to disallow an objection, it files the appeal in accordance with the Rules, so as to avoid a situation where SARS argues that the appeal is invalid. A taxpayer bringing a rule 56 application will be unsuccessful if it did not file a valid appeal.

As this matter illustrates, where there is no valid notice of appeal before SARS, there is no requirement that SARS must do anything further, including filing a Rule 31 Statement.

This differs from the provisions pertaining to objections, where SARS will notify a taxpayer if an objection is invalid and allow the taxpayer 20 business days to file a valid objection.

Where a taxpayer is uncertain whether it has filed a valid notice of appeal, it should (where possible), follow up with the auditor or SARS official involved in the matter on email, and request confirmation that the appeal has been received and is being considered. This is especially so when taxpayers encounter challenges with submitting the appeal via eFiling.

LOUIS BOTHA

As this matter illustrates, where there is no valid notice of appeal before SARS, there is no requirement that SARS must do anything further, including filing a Rule 31 Statement. This differs from the provisions pertaining to objections, where SARS will notify a taxpayer if an objection is invalid and allow the taxpayer 20 business days to file a valid objection.

OUR TEAM

For more information about our Tax & Exchange Control practice and services in South Africa and Kenya, please contact:



Emil Brincker
Practice Head
Director
T +27 (0)11 562 1063
E emil.brincker@cdhlegal.com



Sammy Ndolo
Managing Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sammy.ndolo@cdhlegal.com



Lance Collop
Director
T +27 (0)21 481 6343
E lance.collop@cdhlegal.com



Mark Linington
Director
T +27 (0)11 562 1667
E mark.linington@cdhlegal.com



Gerhard Badenhorst
Director
T +27 (0)11 562 1870
E gerhard.badenhorst@cdhlegal.com



Jerome Brink
Director
T +27 (0)11 562 1484
E jerome.brink@cdhlegal.com



Petr Erasmus
Director
T +27 (0)11 562 1450
E petr.erasmus@cdhlegal.com



Dries Hoek
Director
T +27 (0)11 562 1425
E dries.hoek@cdhlegal.com



Heinrich Louw
Director
T +27 (0)11 562 1187
E heinrich.louw@cdhlegal.com



Howmera Parak
Director
T +27 (0)11 562 1467
E howmera.parak@cdhlegal.com



Stephan Spamer
Director
T +27 (0)11 562 1294
E stephan.spamer@cdhlegal.com



Tersia van Schalkwyk
Tax Consultant
T +27 (0)21 481 6404
E tersia.vanschalkwyk@cdhlegal.com



Louis Botha
Senior Associate
T +27 (0)11 562 1408
E louis.botha@cdhlegal.com



Keshen Govindsamy
Senior Associate
T +27 (0)11 562 1389
E keshen.govindsamy@cdhlegal.com



Varusha Moodaley
Senior Associate
T +27 (0)21 481 6392
E varusha.moodaley@cdhlegal.com



Louise Kotze
Associate
T +27 (0)11 562 1077
E louise.kotze@cdhlegal.com



Tsanga Mukumba
Associate
T +27 (0)11 562 1136
E tsanga.mukumba@cdhlegal.com



Ursula Diale-Ali
Associate
T +27 (0)11 562 1614
E ursula.diale-ali@cdhlegal.com

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.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196.
Private Bag X40, Benmore, 2010, South Africa.
Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111
E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001.
PO Box 695, Cape Town, 8000, South Africa.
Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388
E ctn@cdhlegal.com

NAIROBI

CVS Plaza, Lenana Road, Nairobi, Kenya.
PO Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 |
+254 710 560 114
E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central,
Stellenbosch, 7600.
T +27 (0)21 481 6400
E cdh Stellenbosch@cdhlegal.com

