

TAX & EXCHANGE CONTROL ALERT

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CLIFFE DEKKER HOFMEYR

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Angelo Agrizzi may have won the battle, but has he won the war? A novel judgment on the repatriation of foreign assets to settle SA tax debt

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Angelo Agrizzi recently obtained a favourable judgment from the High Court in Pretoria in a unique tax dispute with the South African Revenue Service (SARS).

Following Agrizzi's evidence before the Zondo Commission, SARS launched a tax inquiry into the whistle-blower's tax affairs following suspicions of fraud, money laundering, racketeering and tax evasion. Agrizzi was subsequently slapped with a tax bill of about R230 million, which SARS wanted to collect.

The court in *Commissioner for the South African Revenue Services v Angelo Agrizzi and Another* (45008/2021) [2023] ZAGPPHC 604 had to decide on two applications that were brought before it.

The first was an application brought by SARS for the compulsory repatriation of foreign assets held by Agrizzi in Italy as contemplated in section 186(2) of the Tax Administration Act 28 of 2011 (TAA) (repatriation application). In terms of the repatriation application, the Commissioner sought an order compelling the respondent to repatriate all his assets located outside of South Africa, specifically in Italy, in order to satisfy his outstanding tax debts.

The second application was a counter-application to the repatriation application. The application was brought by Agrizzi in terms of which he sought an order reviewing SARS' decision to refuse his request for the suspension of his assessed outstanding tax liability in terms of section 164 of the TAA (review application).

Given that this is potentially the first reported judgment dealing with the application of section 186 of the TAA (repatriation applications), we have limited our discussion here to the court's interpretation and application of this provision.

Background and facts

Following the Zondo Commission, SARS launched a tax inquiry into the finances of the African Global Group of Companies (previously known as BOSASA) and various related individuals and companies. As a result of evidence that was led before the Zondo Commission, SARS was made aware of a large scheme of fraud,



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money laundering, racketeering and tax evasion involving BOSASA at a time when Agrizzi was the group's chief operating officer.

In terms of the tax inquiry held by SARS, SARS formed the view that Agrizzi had received "gross income" as defined in section 1 of the Income Tax Act 58 of 1962, which he had failed to declare in his annual income tax return.

As such, on 7 December 2020 SARS issued a letter of audit findings to Agrizzi and on 11 March 2011 SARS raised additional income tax assessments for the tax years 2006 to 2019. In terms of the assessments, it was determined that Agrizzi had underdeclared an amount of around R196 million in his taxable income and was liable to tax for an amount of about R230 million, which included normal income tax, understatement penalties (USP), provisional tax penalties and interest.

The due date for the payment of the full amount assessed, in terms of the notice of assessment issued, was 18 March 2021. Notwithstanding this, the parties agreed that the assessed amount could be paid in two instalments, with the first due date for payment being 1 April 2021 and the second 30 April 2021.

On 28 April 2021, Agrizzi delivered a request for extension for the delivery of his objection to the assessment. On the same day, Agrizzi also submitted a request for the suspension of payment of the debt as contemplated in section 164 of the TAA (two days prior to the second due date for payment).

The request for an extension was granted by SARS, including a subsequent request for extension that was made by Agrizzi.

However, SARS declined the request for the suspension of payment of the assessed amount and directed that payment be made within 10 business days from the date of the refusal.

Notwithstanding the refusal, on 13 August 2021, Agrizzi submitted his objection against the assessments. The objection was partially allowed by SARS on 9 February 2022, reducing the assessed amount from R230 million to R174 million.

In the midst of Agrizzi's tax woes, on 14 October 2020 he was arrested and charged with fraud and corruption. He applied for bail, which was granted on 30 October 2020. His bail was set to an amount equal to the value of his fixed property situated in Italy. As part of the bail conditions, Agrizzi was required to hand over the original title deed of the relevant property to the National Prosecuting Authority (NPA). Further, Agrizzi had to provide the NPA with a signed guarantee secured by the relevant property in terms of which Agrizzi would cede to the state all of his rights, title and interest in the property to be held as security pending the discharge of his obligations in terms of the bail conditions.

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Legal considerations: Section 186 of the TAA

Section 186 of the TAA deals with the recovery of tax, more specifically, Part F, which deals with remedies in regard to foreign assets, and sets out the jurisdictional ambit within which an order for the repatriation of foreign assets may be sought.

In this context, section 186(2) of the TAA allows a senior SARS official to apply to the High Court for an order compelling the taxpayer to repatriate assets located outside of South Africa in order to satisfy a tax debt owing to SARS.

The jurisdictional requirements that must be met before a senior SARS official may bring such an application are contained in subsection (1) of section 186, which states that -

- the taxpayer concerned must not have sufficient assets located in South Africa to satisfy the tax debt in full;

- the senior SARS official must believe that the taxpayer has assets outside of South Africa or has transferred assets outside of South Africa for no consideration or for a consideration less than the fair market value; and
- that the assets outside South Africa may fully or partly satisfy the tax debt.

Court's finding

In relation to the repatriation application, it was SARS' submission that it had met the jurisdictional requirements for an order to be granted as contemplated in section 186(2) of the TAA. SARS noted that it was aware of assets situated in Italy which belonged to Agrizzi and which could be used to settle the outstanding tax debt or a portion thereof. Alternatively, SARS submitted that Agrizzi transferred assets outside of South Africa for no consideration or for a consideration less than market value.

In response to SARS' submissions Agrizzi raised three objections, namely:

1. There is no "tax debt" as defined. It was submitted on behalf of Agrizzi that a "tax debt" is "an amount of tax due or payable in terms of a tax Act" as contemplated in section 169(1) of the TAA. It was further submitted that an assessment is not "due and payable" until it is final. In this regard, it was noted that an assessment becomes "final" only if, among other things, no objection has been made.

Agrizzi submitted that an objection to the assessments had been submitted, which was partially upheld by SARS. Agrizzi had also made his intention clear to appeal those parts of the objection that were not upheld. As such, Agrizzi was of the view that because he had

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not yet exhausted his internal right to appeal, the assessments could not be considered final and therefore no outstanding tax debt can be said to exist.

2. The application was not brought by a senior SARS official. The authority of the SARS official who deposed to the founding affidavit in the repatriation application was challenged by Agrizzi. It was submitted that SARS did not place sufficient evidence before the court of the relevant official's authority or seniority as required by the TAA.
3. The order sought in the repatriation application was legally impermissible as it would be contrary to Agrizzi's bail conditions. One of the assets specifically noted in SARS' notice of motion in the repatriation application was the property in Italy, which had already been ceded to the NPA as part of the bail conditions in the criminal proceedings.

The court did not agree with the first two objections raised by Agrizzi. In respect of the first ground of objection the court noted that as a point of departure, section 186(1) must be considered in the context of Chapter 11 which deals with the recovery of tax. The court also cautioned against ignoring the express wording used in section 186(1) of the TAA. In this regard, the court noted that section 186(1) expressly refers to an "*outstanding tax debt*" and not a "*tax debt*" as defined in section 169(1) of the TAA. The court, therefore, held that Agrizzi's reliance on the definition of a "*tax debt*" as contemplated in section 169(1) was misplaced in the circumstances.

The court held that the adjusted amount assessed was an outstanding tax debt required to be paid by the date noted in the notice of assessment (IT34) issued to Agrizzi (being 18 March 2021 before the partial allowance of the objection).

Notwithstanding the aforementioned, the court did agree that having regard to the bail conditions set in the criminal matter, the order sought by SARS was legally impermissible. The court highlighted SARS' failure to join the NPA and the South African Reserve Bank to the proceedings as an impediment to granting the order sought by SARS. In this context, the court noted that granting the compulsory repatriation order would significantly interfere with the terms set for Agrizzi's bail. SARS' response in this regard was that Agrizzi should renegotiate his bail conditions with the NPA to allow for the order to be granted.

The court found this submission to be untenable and noted that the NPA's non-joinder to the proceedings had left the court to speculate as to what the attitude of the NPA might be to a request from Agrizzi to renegotiate his bail conditions should the repatriation order be granted.

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The court therefore held that having regard to the fact that Agrizzi's bail conditions precluded him from selling his property in Italy, the relief sought by SARS in the repatriation application was legally impossible. It was noted that not only would the order result in a variation of a material bail condition, it would also result in the arrest and incarceration of Agrizzi.

The court held that its finding in this regard was dispositive of the repatriation application and ultimately dismissed the application with costs.

Concluding remarks

The court's judgment seems to draw a sharp distinction between what constitutes a "tax debt" and what constitutes an "outstanding tax debt", notwithstanding that the definition of an "outstanding tax debt" in section 1 of the TAA makes reference to a tax debt.

It is also interesting to note that even though the court found that SARS had met the jurisdictional requirements contained in section 186(2) of the TAA, the repatriation application was still refused on the basis that it would be legally impossible to repatriate one of the assets listed in SARS' notice of motion, namely the property situated in Italy. Other assets that were identified by SARS for repatriation included (i) a vehicle to the estimated value of R1,767,660; (ii) funds held in a bank account in Italy with a value of R398,018.11; (iii) cryptocurrency; and (iv) funds held in Agrizzi's wife's bank account (who was joined as a second respondent) to the value of R10,968,696,30.

[Puleng Mothabeng](#)



Cliffe Dekker Hofmeyr

2023 RESULTS

Chambers Global 2018 - 2023
ranked our Tax & Exchange Control
practice in **Band 1: Tax**.

Emil Brincker ranked by
Chambers Global 2003 - 2023
in **Band 1: Tax**.

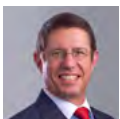
Gerhard Badenhorst was awarded
an individual spotlight table ranking in
Chambers Global 2022 - 2023 for
Tax: Indirect Tax.

Mark Linington ranked by
Chambers Global 2017 - 2023
in **Band 1: Tax: Consultants**.

Stephan Spamer ranked by
Chambers Global 2019-2023
in **Band 3: Tax**.

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:
Tax & Exchange Control
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



Mark Linington

Director:
Tax & Exchange Control
T +27 (0)11 562 1667
E mark.linington@cdhlegal.com



Gerhard Badenhorst

Director:
Tax & Exchange Control
T +27 (0)11 562 1870
E gerhard.badenhorst@cdhlegal.com



Jerome Brink

Director:
Tax & Exchange Control
T +27 (0)11 562 1484
E jerome.brink@cdhlegal.com



Petr Erasmus

Director:
Tax & Exchange Control
T +27 (0)11 562 1450
E petr.erasmus@cdhlegal.com



Dries Hoek

Director:
Tax & Exchange Control
T +27 (0)11 562 1425
E dries.hoek@cdhlegal.com



Alex Kanyi

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E alex.kanyi@cdhlegal.com



Heinrich Louw

Director:
Tax & Exchange Control
T +27 (0)11 562 1187
E heinrich.louw@cdhlegal.com



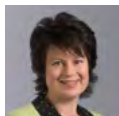
Howmera Parak

Director:
Tax & Exchange Control
T +27 (0)11 562 1467
E howmera.parak@cdhlegal.com



Stephan Spamer

Director:
Tax & Exchange Control
T +27 (0)11 562 1294
E stephan.spamer@cdhlegal.com



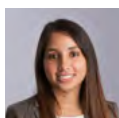
Tersia van Schalkwyk

Tax Consultant:
Tax & Exchange Control
T +27 (0)21 481 6404
E tersia.vanschalkwyk@cdhlegal.com



Louis Botha

Senior Associate:
Tax & Exchange Control
T +27 (0)11 562 1408
E louis.botha@cdhlegal.com



Varusha Moodaley

Senior Associate:
Tax & Exchange Control
T +27 (0)21 481 6392
E varusha.moodaley@cdhlegal.com



Abednego Mutie

Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E abednego.mutie@cdhlegal.com



Nicholas Carroll

Associate:
Tax & Exchange Control
T +27 (0)21 481 6433
E nicholas.carroll@cdhlegal.com



Joan Kamau

Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E joan.kamau@cdhlegal.com



Puleng Mothabeng

Associate:
Tax & Exchange Control
T +27 (0)11 562 1355
E puleng.mothabeng@cdhlegal.com



Esther Ooko

Associate Designate:
Tax & Exchange Control
T +27 (0) 11 562 1778
E esther.ooko@cdhlegal.com

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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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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

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. 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

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INCORPORATING
KIETI LAW LLP, KENYA