Tax & Exchange Control

ALERT

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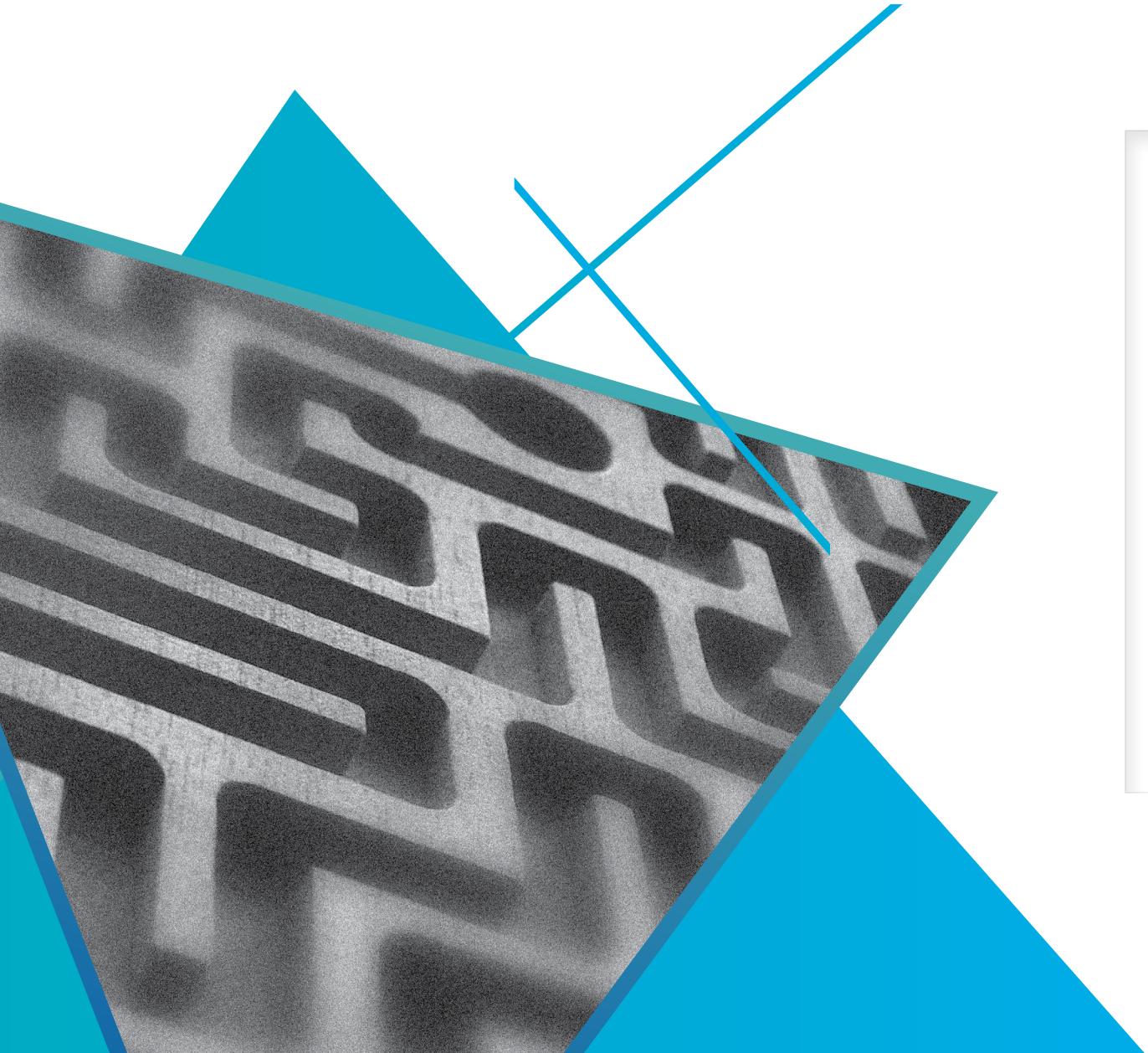

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Don't go banking on review

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FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

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The ability to review our revenue service's decisions in the High Court is a question that has plagued South Africa's legal system since the amendment of section 105 of the Tax Administration Act 28 of 2011 (TAA). Now the highly anticipated decision of the Supreme Court of Appeal (SCA) in *Commissioner, SARS v Absa Bank Ltd and Another* [2023] ZASCA 125 (29 September 2023) (*Absa*), dealing with just this issue, has been handed down. However, no ground-breaking decision, as hoped, was forthcoming, and taxpayers have returned to square one.

The TAA and review

Where the South African Revenue Service (SARS) assesses a taxpayer, section 104 of the TAA provides for the remedy of objection and then appeal to the Tax Court (in the event that SARS disallows the taxpayer's objection). Section 104 also provides for the objection and appeal process to be used for certain other decisions taken by SARS that affect a taxpayer. In practice, this means that SARS decisions are not open to review – they must be dealt with in terms of the objection and appeal process. While not expressly stated in case law, the view seems to be consistent with section 7 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), which provides that internal remedies must be exhausted before PAJA is applied.

However, section 105 of the TAA provides the exception to the rule. This section states that assessments issued and decisions taken by SARS can be disputed outside of the objection and appeal process at the discretion of the High Court. Arguably, section 105 of the TAA therefore treads the line between the High Court's inherent jurisdiction, and the legislatively prescribed process for resolving tax disputes.

Section 105 of the TAA therefore set the stage for the dispute in *Absa*. Here, the question concerned when it is appropriate for the High Court to exercise its discretion in section 105 and thus allow a taxpayer to deviate from the prescribed process of objection and appeal set out in the TAA.

The road well-travelled

We have already covered the road to the *Absa* decision extensively. Not just the original High Court decision (discussed here), but also the decisions of courts in other matters concerning the question of review.

In *Commissioner, SARS v Rappa Resources (Pty) Ltd* [2023] ZASCA 28 (*Rappa*) (discussed here), and *United Manganese of Kalahari (Pty) Ltd v Commissioner, SARS* [2023] ZASCA 29 (discussed here), the SCA found that the High Court would only

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be permitted to exercise its discretion under section 105 of the TAA in exceptional circumstances. There, the SCA decided that exceptional circumstances would be where the dispute turned solely on a question of law (as opposed to fact).

These previous decisions culminated in the question of review being brought before the court again in *Absa*.

The *Absa* decision

In *Absa*, the question of reviewability arose in the context of an assessment issued by SARS to the taxpayers following the application of the general anti-avoidance rules (GAAR) by SARS. In short, the taxpayers had entered into a transaction which, in SARS' view, was an impermissible avoidance arrangement as defined in section 80L, and described in section 80A, of the Income Tax Act 58 of 1962 (ITA). Therefore, SARS issued the taxpayers with notices in terms of section 80J of the ITA, inviting the taxpayers to make submissions as to why the GAAR should not be applied.

The taxpayers submitted a request to SARS that it withdraw the section 80J notices. They also requested that SARS grant an extension to the deadline by which they had to submit their responses to these notices.

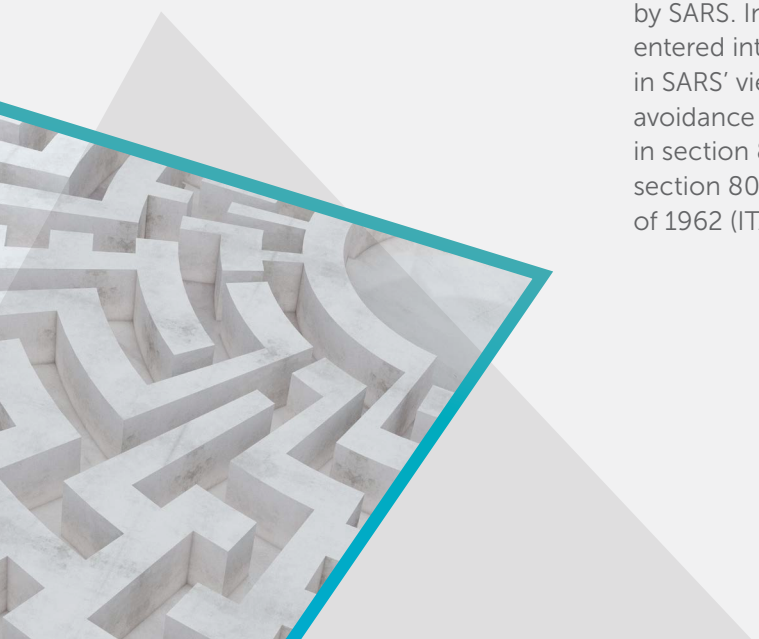
SARS granted the extension, but denied the taxpayers' request for the section 80J notices to be withdrawn. As a result, the taxpayers launched an application in the High Court in order to review SARS' decision not to withdraw the notices. Simultaneously, the taxpayers submitted their responses to the section 80J notices to SARS.

While waiting for their High Court review application to be heard, the taxpayers received SARS' letters of assessment which arose from the initial section 80J notices.

The taxpayers therefore extended their review application to include a review of these assessments as well as SARS' original decision not to withdraw the section 80J notices.

Therefore, the taxpayers sought two reviews: one review of SARS' decision not to withdraw the section 80J notices, and another review of the assessments issued by SARS. The first review was based on the principle of legality, the taxpayers claiming that SARS had issued the section 80J notices based on an error of law. The second review was based on PAJA, or the principle of legality in the alternative.

Both of these reviews were substantially based on the assertion by the taxpayers that they were not aware of the impermissible avoidance arrangement in which SARS alleged they were participants. Both reviews were also submitted to the High Court under section 105 of the TAA, the taxpayers requesting the High Court exercise its discretion under this section in their favour.



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Therefore, the question became whether the taxpayers were entitled to use the review process and approach the High Court directly, or whether they should have challenged SARS' decision in terms of the objection and appeal process.

Firstly, the High Court decided that a decision by SARS to issue a notice to a taxpayer (such as the section 80J notices) was not final, and was therefore not administrative action (not being subject to review). However, the High Court held that a decision by SARS not to withdraw a notice, even if not final, had sufficiently adverse consequences to be subject to review.

Following from this, the High Court affirmed that it would only be permitted to consider the reviews if they concerned a question of law, as was decided in *Rappa*. On this point, the High Court agreed with the taxpayers that SARS could not apply the GAAR to them if they were not participants in (had no knowledge of) the impermissible avoidance arrangement in which SARS alleged they were participants. This, in the High Court's view, was a question of legal application of the GAAR, and thus empowered it to exercise its discretion under section 105 of the TAA.

Before the SCA

On appeal, the SCA disagreed with the High Court. Firstly, the SCA stated that if a decision by SARS to issue a notice (such as the section 80J notices) is not final, and thus not subject to review, then the decision not to withdraw that notice (therefore leaving the notice in force) cannot then be seen to be final enough for it to be subject to review. Therefore, the SCA dismissed the first of the taxpayers' reviews.

Regarding the taxpayers' second review, the SCA confirmed the principle from *Rappa* (and applied by the High Court) that the discretion afforded to the High Court in section 105 of the TAA can only be exercised in exceptional circumstances, this being where there is a pure question of law. However, the SCA disagreed with the High Court on the application of the principle to the taxpayers in *Absa*.

Here, the nub of the taxpayers' argument was that they were not aware of the impermissible avoidance arrangement in which SARS alleged they were participants. Therefore, they argued that the GAAR could not be applied to them, and its application was an error of law, irrational and thus offended the principle of legality.

Unlike the High Court, however, the SCA found that the taxpayers' argument hinged on a factual dispute – whether or not the taxpayers were aware of the impermissible avoidance arrangement. SARS had not accepted in its section 80J notices, or the subsequent assessments,

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that the taxpayers did not have this knowledge. Therefore, the only undisputed fact was that the taxpayers had participated in steps that SARS alleged formed part of an impermissible avoidance arrangement, not that the taxpayers were unaware of this arrangement.

On this basis, the SCA found that the High Court was incorrect in its exercise of its discretion under section 105 of the TAA. Therefore, the SCA found that the taxpayers would have to dispute the assessments issued by SARS using the objection and appeal process.

What we're left with

Following the SCA's decision in *Absa*, we are left with little more than confirmation of the position that existed before it. The promise of potential change regarding the reviewability of SARS' decisions that came with the High Court decision has evaporated (for now), and the principle set out in *Rappa* (that section 105 of the TAA only applies where there is a question of pure law) is confirmed.

On the one hand, it appears that section 105 of the TAA does not limit the High Court's discretion to exceptional circumstances, let alone these circumstances being a purely legal question. Arguably, the interpretation of this section adopted in *Rappa*, and confirmed in *Absa*, therefore limits a taxpayer's ability to review SARS' decisions.

On the other hand, however, there is arguably sound legal reasoning for this approach. The process of objection and appeal fulfils a function that is two-fold.

Firstly, it provides for engagement with SARS, and thus allows for the issues at the heart of a dispute between the taxpayer and SARS to be fully ventilated before the dispute reaches the courts. In general terms, this appears to be the principle which informs the requirement for exhaustion of internal remedies found in section 7 of PAJA.

Secondly, however, proceedings in the Tax Court include the examination and cross examination of witnesses. These proceedings are therefore tailored to disputes which are factual in nature, and not purely legal. Therefore, where a dispute involves a factual question, it is arguably appropriate for the High Court not to exercise its discretion in section 105 of the TAA.

Therefore, we are back to square one where review is concerned. As such, *Absa* may not have delivered the groundbreaking decision which many taxpayers (and tax practitioners) were eagerly awaiting. It did, however, affirm the principles applicable to a dispute with SARS, and in the process banked the question of review for now until the Constitutional Court potentially rules on this issue.

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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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