

28 SEPTEMBER 2023

Tax & Exchange Control ALERT

IN THIS ISSUE

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In a [previous Tax Alert](#), we considered the judgment delivered by Judge Basson in *Commissioner for the South African Revenue Services v Angelo Agrizzi and Another* (45008/2021) [2023] ZAGPPHC 604 in relation to the repatriation application that was brought by the South African Revenue Service (SARS). In terms of the application, SARS was seeking an order to compel Angelo Agrizzi to repatriate his assets located in Italy to satisfy his outstanding tax debt.



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In a [previous Tax Alert](#), we considered the judgment delivered by Judge Basson in *Commissioner for the South African Revenue Services v Angelo Agrizzi and Another (45008/2021) [2023] ZAGPPHC 604* in relation to the repatriation application that was brought by the South African Revenue Service (SARS). In terms of the application, SARS was seeking an order to compel Angelo Agrizzi to repatriate his assets located in Italy to satisfy his outstanding tax debt.

As a counter to the repatriation application, Agrizzi sought an order reviewing SARS' decision to refuse his request for the suspension of the outstanding tax liability in terms of section 164 of the Tax Administration Act 28 of 2011 (TAA) (review application).

In this article, we discuss the court's judgment in relation to the review application. The background and facts will not be discussed again in this article, save to state that SARS had raised and issued additional assessments in relation to Agrizzi's income for the 2006 to 2019 tax years.

However, on 28 April 2021 (two days before the due date for payment of the assessed tax debt) Agrizzi delivered a request for the suspension of payment of debt as contemplated in section 164 of the TAA. SARS declined Agrizzi's request and directed that payment be made within 10 business days from the date of the refusal.

Agrizzi's counterapplication, therefore, sought to review SARS' decision to decline his request for the suspension of payment of his outstanding tax debt having regard to the provisions of section 164 of the TAA and, from what can be gathered from the judgment, Agrizzi's poor health.

Legal considerations: Section 164 of TAA

Generally, the obligation to pay tax is not automatically suspended by an objection or appeal, or pending a decision of a court of law pursuant to an appeal (section 164(1) of the TAA). This is the basis of the "*pay now, argue later*" principle.

However, section 164(2) of the TAA allows a senior SARS official to suspend payment of tax or a portion thereof after considering certain factors that are noted in section 164(3) of the TAA.



The fight continues: Agrizzi gets to keep his money to pay for his medical bills

CONTINUED

These factors include:

- whether the recovery of the disputed tax will be in jeopardy or whether there will be a risk of dissipation of assets;
- the taxpayer's compliance history;
- whether fraud is *prima facie* involved in the origin of the dispute;
- whether payment will result in irreparable hardship to the taxpayer not justified by the prejudice to SARS or the fiscus if the disputed tax is not paid or recovered; or
- whether the taxpayer has tendered adequate security for the payment of the disputed tax and accepting it is in the interest of SARS or the fiscus.

The list above is not exhaustive, and any relevant factor that prevents a taxpayer from paying its tax debt now may be raised as a reason to request the suspension of the payment of the assessed tax debt.

Section 164(5), in turn, empowers a senior SARS official to deny a request for suspension or revoke a decision to suspend payment with immediate effect. In this context, the senior SARS official must be satisfied that:

- the objection or appeal lodged by the taxpayer is frivolous or vexatious;
- the taxpayer is employing dilatory tactics in conducting the objection or appeal;
- the suspension should not have been granted on further consideration of the factors noted in section 164(3); or
- there is a material change in any of the factors referred to in section 164(3), upon which the decision to suspend payment was based.

Court's finding

In support of his application, Agrizzi submitted that the request for suspension of payment should have been granted having regard to,

amongst other things, (i) Agrizzi's inability to pay the disputed tax; (ii) Agrizzi being prohibited from selling his property in Italy to pay the disputed tax as he had already furnished the National Prosecuting Authority (NPA) with the title deed of the property; and (iii) the fact that not suspending the payment of the disputed tax would cause him "*irreparable hardship*", especially considering his ill health, which left him with substantial medical expenses.

Notwithstanding the reasons provided by Agrizzi, SARS denied the request on the following basis:

- although SARS acknowledged that there was no risk of dissipation of assets as a result of the security held by the NPA, SARS was still of the view that the recovery of the debt was in jeopardy;
- the assets held in Italy could either satisfy the full payment of the debt or at least a portion thereof. This reasoning was provided by SARS notwithstanding the

The fight continues: Agrizzi gets to keep his money to pay for his medical bills

CONTINUED

fact that it acknowledged that payment of the full debt would result in irreparable hardship for Agrizzi; and

- Agrizzi was not in a position to provide SARS with any security.

In considering the review application, the court confirmed that the decision being brought under review constituted administrative action capable of being reviewed in terms of the Promotion of Administrative Justice Act 3 of 2000. The court noted that the basis of a judicial review is where administrative action is not lawful, reasonable or procedurally fair. In this context, the court noted that a decision will be unlawful if, for example, the decision-maker considered irrelevant considerations or failed to take into account relevant considerations. In relation to reasonableness, it was held that a decision will be unreasonable if it "is one that a reasonable decision-maker could not reach" having regard to the process used to reach such a decision.

In relation to the suspension of payment, the court noted that a request for a suspension of payment will not be granted if there is "some pressing need for SARS to collect the disputed tax immediately instead of waiting for the objection procedure to run its course".

In this context, the court held that there was no rational basis for SARS refusing to grant the suspension of payment of the disputed tax having regard to the fact that:

"... there are no realisable assets to execute against; that the payment will result in irreparable hardship; that there is no risk of asset dissipation, that the respondent is fully tax compliant (except for the current dispute); that no fraud is involved in the origin of the dispute; that the objection is not frivolous or vexatious (although it was found that the respondent was employing dilatory tactics in

conducting the objection or appeal); and the fact that the respondent is unable to provide any security as he has offered security to the NPA in terms of his bail conditions."

The court also found it contradictory for SARS to state that Agrizzi had no assets to execute against on the one hand, but also find that the recovery of the tax debt was in jeopardy. In the court's mind the two arguments were mutually exclusive.

The court also rejected SARS' reasoning that it would make no difference whether or not the suspension was granted as Agrizzi did not possess any assets against which SARS could execute. The court held that it would equally make no difference to SARS if the payments were suspended as Agrizzi lacked the means to pay the disputed tax.

It was further held that it was not rational to reject the suspension of payment based on the perceived subjective view held by the

The fight continues: Agrizzi gets to keep his money to pay for his medical bills

CONTINUED

decision-maker that the irreparable harm that would be suffered by Agrizzi was self-inflicted based on the assets dissipated and repatriated to Italy. The court further noted that SARS seems to have ignored the fact that Agrizzi would suffer irreparable harm if he were forced to make payment of the disputed tax. The court was of the view that SARS seemed to only focus on Agrizzi's inability to pay the disputed tax and the perceived reasons for not being able to do so.

In this context, the court held that irrelevant factors were considered by SARS while relevant factors (such as Agrizzi's medical condition) were ignored.

The court concluded by saying that the decision by SARS to refuse the suspension lacked a rational connection to the underlying purpose of section 162 of the TAA, which is to ensure prompt payment of the assessed tax without first having to consider any objections raised against the assessments. The court found

that there was no pressing need for SARS to collect the disputed tax, especially considering that Agrizzi would suffer irreparable hardship as he lacked the necessary funds to pay the disputed tax, and there was no risk of dissipation of assets. The court therefore set aside SARS' decision and remitted the matter back to SARS for a reconsideration of the suspension application.

"Pay now, argue later"

As the phrase notes, the *"pay now, argue later"* principle requires taxpayers to settle their assessed tax debts as soon as they arise, notwithstanding the fact that they intend to dispute the assessment raised by SARS that gave rise to the tax debt.

Depending on the value of the tax debt, this principle has the potential to create real hardship for a taxpayer who may not have the necessary funds to settle the tax debt immediately. Especially if the taxpayer is of the view that they have good

prospects of success on objection or appeal. Therefore, the relief contained in section 164 of the TAA is critical for alleviating any hardship that may be caused by strictly implementing the principle.

From a review of the court's judgment, it is clear that the decision to (or not to) suspend payment involves a balancing of the considerations relevant to a specific set of facts. It is important to note that the considerations contained in section 164(3) are not exhaustive. Put differently, a taxpayer can rely on almost any relevant and reasonable factor to support an application for the suspension of payment, including ill health.

The court in this case highlighted the fact that not enough weight was afforded by SARS to Agrizzi's medical state and too much weight was placed on their subjective views of why Agrizzi was unable to pay the disputed tax debt. Although ill health is not specifically noted in

The fight continues: Agrizzi gets to keep his money to pay for his medical bills

CONTINUED

section 164(3) of the TAA, this factor was used by Agrizzi to demonstrate the irreparable hardship that could be caused to him if he were required to immediately settle the tax debt as opposed to waiting until the appeal is decided.

It is therefore clear that the decision to grant a request for the suspension of payment is highly dependent on the particular facts of the matter, and for any taxpayer that is disputing an assessment raised by SARS, the suspension of payment application is generally the first "fight" it will engage in with SARS, aside from the objection.

The potential benefit of not having to immediately pay the disputed tax, arises upon submission of the application. This is because in terms of section 164(6)(a) of the TAA, SARS cannot take any recovery

steps against the taxpayer from the date that SARS receives a request for the suspension of payment until 10 business days after they issue a decision on the application.

One should appreciate that even if an application to suspend payment of tax is granted, late payment interest will generally still be imposed, to the extent that the dispute is resolved in SARS' favour. Such late payment interest is generally calculated from the date that the tax in dispute initially became due to the date of payment. Any decision to apply for suspension of payment, should therefore also take this into account. Depending on the outcome of a dispute, it is possible that the amount payable pursuant to finalisation of the dispute (including interest) is higher when the dispute is resolved compared to when the dispute arose.

[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**.

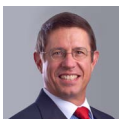
Gerhard Badenhorst was awarded
an individual spotlight table ranking in
Chambers Global 2022 - 2023 for
Tax: Indirect Tax.

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**.

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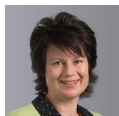
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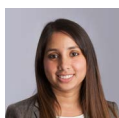
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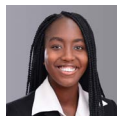
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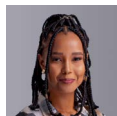
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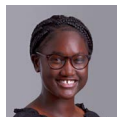
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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

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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