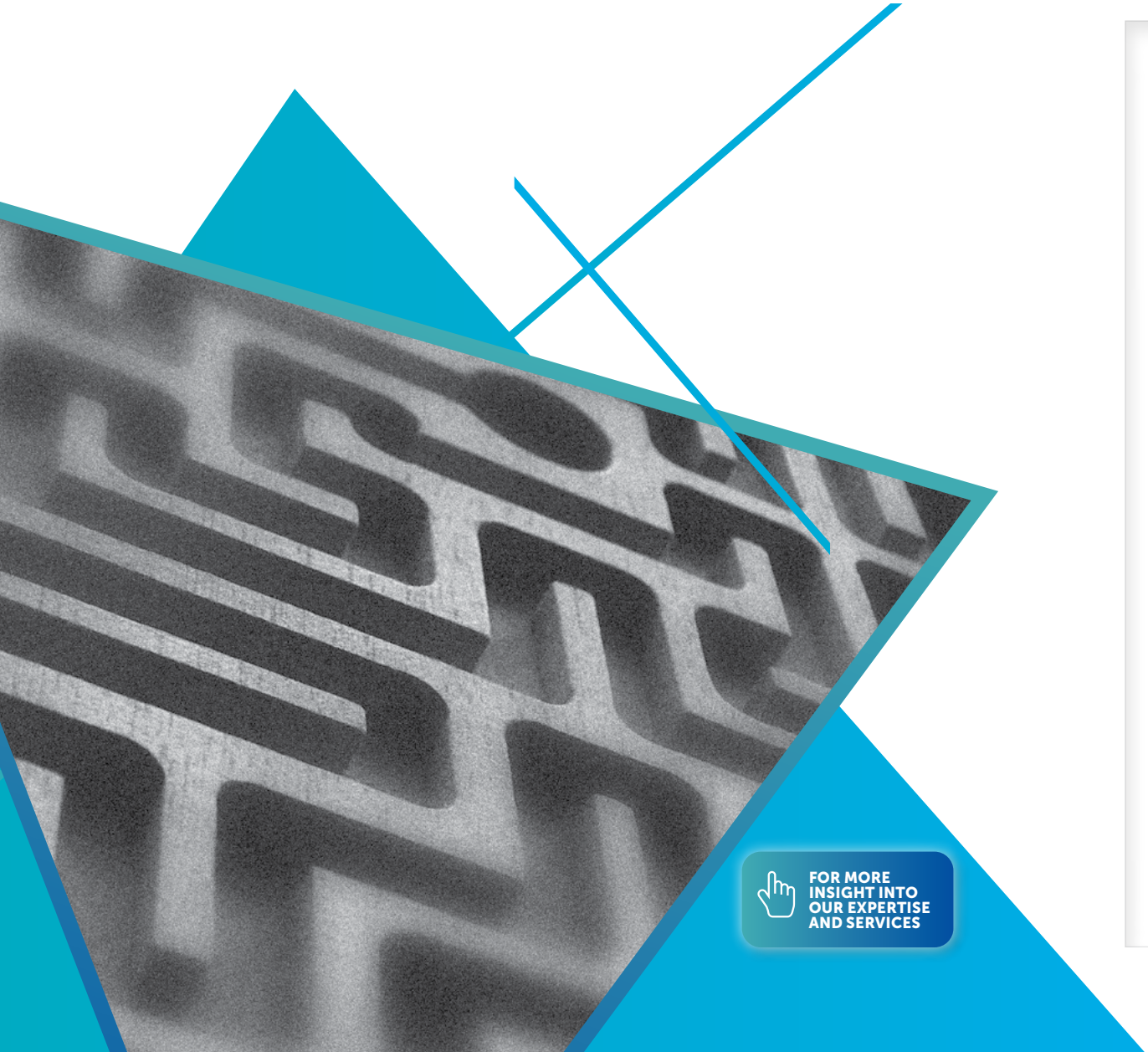
Tax & Exchange Control

ALERT

30 MARCH 2023

CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA



FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

IN THIS ISSUE

KENYA

Take advantage of the import duty waivers to reduce high food prices

The current food crisis in Kenya has seen food prices skyrocket, leading to public calls for the Government to lower food prices. Consequently, in gazette notices issued on 17 March 2023 the Government exempted import duty imposed under the East African Community Customs Management Act of 2004 for specific products imported into the country.

The first exemption from import duty is in respect of raw material for animal feeds to arrive in the country on or before 6 August 2023. Eligible raw materials include yellow maize, soya bean meal, assorted protein concentrates, feed additives, enzymes and premix ingredients. The thresholds of the importation waiver are indicated in the table below:

RAW MATERIAL	QUANTITY (METRIC TONS)	IMPORT DUTY RATE WITHOUT WAIVER (%)	NEW RATE WITH WAIVER
Yellow Maize	500,000	50	0
Soya Bean Meal	250,000	25	0
Soya Bean	150,000	10	0
Assorted protein concentrates	1,600	10	0
Feed additives	30,000	10	0
Enzymes	7,500	0	0
Premix Ingredients	37,500	0	0

KENYA

Take advantage of the import duty waivers to reduce high food prices

CONTINUED

Further, the imported yellow maize should have a moisture content not exceeding 14,5%; have aflatoxin levels not exceeding 10 parts per billion (ppb); be accompanied by a certificate of conformity issued by the Kenya Bureau of Standards (KEBS); and be used for the manufacturing of animal feeds only. Similarly, the imported soya bean meal should be accompanied by a certificate of conformity issued by KEBS; be used for the manufacturing of animal feeds only; and be imported before 6 August 2023.

Importation of maize shall also be duty free for registered millers and traders to import a total of 500,000 metric tons of white maize grain from March 2023 to 6 August 2023. The import duty rate without a waiver is 50%. To qualify for this waiver, the imported maize grain should have a moisture content not exceeding 13,5%; have aflatoxin levels not exceeding 10 parts per billion; be accompanied by a certificate of conformity issued by KEBS; and be imported before 6 August 2023.

Another import duty waiver has also been granted for traders to import a total of 500,000 metric tons of white grade 1 milled rice. The import duty rate for rice without the waiver is 75% or $345/MT, whichever is higher.

The waiver will apply to grade 1 rice imported into the country on or before 6 August 2023 by traders. The imported white milled rice grade 1 should be in accordance with international and national food/rice standards and Kenyan standards implemented by KEBS. It also ought to be accompanied by a certificate of conformity issued by KEBS and be imported on or before 6 August 2023.

Farmers, traders, manufacturers, and millers should consult their tax and legal advisers on how to access and take advantage of the waivers. It is expected that the waivers will result to a drop in food prices and in return contribute towards lowering the cost of living.

Alex Kanyi and Joseph Macharia

SOUTH AFRICA

Reviewing a SARS assessment in the High Court: Only if the High Court says so

In the recent Supreme Court of Appeal (SCA) judgment in *Commissioner for the South African Revenue Service v Rappa Resources (Pty) Ltd* (Case no 1205/2021) [2023] ZASCA 28, the South African Revenue Service (SARS) raised assessments against Rappa Resources (Pty) Ltd (Rappa) for the payment of value-added tax, interest and penalties.

As is standard with an assessment, Rappa was informed that if it wished to object to the assessments raised, it would need to do so in accordance with section 104 of the Tax Administration Act 28 of 2011 (TAA).

Instead of filing an objection in the ordinary course, Rappa launched an urgent application to the High Court seeking, *inter alia*, the following relief:

*"1. **Reviewing** and setting aside the decision of the Commissioner to issue the Assessments ("the decision");*

*2. **Reviewing** and setting aside the Assessments;*

*3. **Declaring** the decision of the Commissioner to issue the Assessments to be in conflict with the constitutional principle of legality and accordingly unconstitutional, unlawful and invalid."*

Under the review in terms of Rule 53(1)(b) of the Uniform Rules of Court (Rules), Rappa further requested that the High Court order that SARS be obliged to make available the record of its decision under review. When SARS was not forthcoming with the record, Rappa instituted an interlocutory application to compel SARS to make the record available.

SARS' argument

In its answering papers, SARS indicated that it would not produce the record, as Rappa's application for review (and the incidental application to compel) was not competent, due to it not following the usual procedure in terms of section 104 of the TAA. In addition, SARS argued that the High Court had not made an order in terms of section 105 of the TAA, which provides as follows:

> *"A taxpayer may only dispute an assessment or "decision" as described in section 104 in proceedings under this Chapter, **unless a High Court otherwise directs**."*
> (our emphasis)

SOUTH AFRICA

Reviewing a SARS assessment in the High Court: Only if the High Court says so

CONTINUED

On this basis, SARS contested Rappa's application for review, as well as its application to compel, as Rappa did not apply for the High Court's direction in terms of section 105 of the TAA. SARS stated that Rappa should have followed the procedure to dispute the assessment in accordance with section 104 of the TAA, or alternatively, made an application in terms of section 105 of the TAA requesting that the High Court direct that the review could be heard by a High Court, as opposed to making an objection in the ordinary course, in accordance with section 104.

The High Court subsequently decided the application to compel in favour of Rappa and ordered SARS to provide Rappa with the record. SARS applied for leave to appeal this decision to the SCA, which was granted on the basis of SARS' main argument: that the High Court lacked jurisdiction in the review due to the provision in section 105 of the TAA, and therefore also could not make a decision on matters incidental thereto (in other words, the application to compel).

Rappa's defence

Rappa raised the defence that section 105 of the TAA was not applicable in its review to the High Court, as the review was based on grounds relating to the legality of the assessments, as opposed to the merit thereof. In response to this defence, the SCA referred to the decision in *Africa Cash & Carry (Pty) Ltd v The Commissioner for the South African Revenue Service* (783/18) [2019] ZASCA 148 where it was held that:

> *"The point of departure should always be that a tax court is a court of revision and, "not a court of appeal in the ordinary sense". The legislature "intended that there could be a* ***re-hearing of the whole matter by the Special Court and that the Court could substitute its own decision for that of the Commissioner****", if justified on the evidence before it."* (our emphasis)

The SCA thereby refuted the defence raised by Rappa, stating that the, *"wide power of revision of the tax court includes the power to determine the legality of an assessment on grounds of review"*. Therefore, even where the merits are not contested by the taxpayer, the process in section 104 of the TAA should still be the default route, and in the alternative, the taxpayer can apply for direction from the High Court in terms of section 105 of the TAA.

Significantly, the SCA also confirmed, with reference to *Metcash Trading v Commissioner, SARS* [2001] (1) SA 1109 (CC), that the High Court is not barred from determining tax disputes, and may do so, subject to section 105 of the TAA. Section 105 allows for necessary judicial intervention in relation to a decision by the Commissioner, in certain circumstances, one of which includes the determination of the High Court's jurisdiction to determine tax cases.

SOUTH AFRICA

Reviewing a SARS assessment in the High Court: Only if the High Court says so

CONTINUED

The decision

The SCA had to decide whether a High Court has jurisdiction in an application for review of an assessment made by a taxpayer who did not seek the High Court's prior endorsement in accordance with section 105 of the TAA.

The SCA discussed the case of *Competition Commission of South Africa v Standard Bank of South Africa* [2020] ZACC 2 (*CCSA v Standard Bank*), specifically in relation to the ability of the High Court to make a decision in respect of production of a record, as well as the appealability of an interlocutory application to compel.

According to the decision in *CCSA v Standard Bank*, a High Court cannot make an order for the production of a record in a review, where it has not first established whether it has jurisdiction in the main review.

Furthermore, the court in *CCSA v Standard Bank* held that a decision made by a High Court in respect of an application to compel the delivery of a record, was indeed appealable.

The SCA held that overall, the purpose of section 105 of the TAA, "*is clearly to ensure that, in the ordinary course, tax disputes are taken to the tax court*". Therefore, by not making an order in terms of section 105 of the TAA, the High Court did not have the necessary jurisdiction to hear the review application, nor issue the application to compel production of the record.

SARS' appeal was thus upheld with costs, and the order of the High Court was set aside and replaced with an order dismissing the application with costs, including those of two counsel.

Conclusion

It is important to note that the wording of section 105 of the TAA is in fact peremptory as the SCA held that, "*an order under section 105 … is not simply to be had for the asking*". Furthermore, the SCA notably quoted *CCSA v Standard Bank*, where it was held that, "*we 'should not pre-empt the [high court's] decision on its jurisdiction*". Therefore, a taxpayer must first apply for the High Court's direction, prior to applying to a High Court for review.

Taxpayers must therefore always endeavour to follow the procedure provided for in the TAA, such as in section 105, which has been created by the legislature to ensure that specialised matters are mainly dealt with by specialised courts created for that purpose. Taxpayers cannot merely choose to follow the route of civil procedure instead of the specialised tax procedure. Therefore, regardless of the route chosen by a taxpayer seeking a review, the starting point must always be the TAA.

Sasha Schermers and Howmera Parak

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

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

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
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 cdhstellenbosch@cdhlegal.com

CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA