

# Tax & Exchange Control

## ALERT

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#### Jurisdiction in tax disputes: Many judgments, many opinions

*"Jurisdiction is not given for the sake of the judge, but for that of the litigant."* These words spoken by the famous French mathematician, Blaise Pascal, might resonate with many. For the average person, the question as to whether someone has "jurisdiction" to hear a matter is something highly technical that only lawyers need to concern themselves with. In the same vein, many people may also feel that the effect of jurisdiction is something that can often exclude a litigant's or aggrieved person's access to justice and a just outcome, as opposed to promoting it.



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## Jurisdiction in tax disputes: Many judgments, many opinions

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In the tax context, the question of jurisdiction has become a hotly debated one, as a number of cases have made their way through our courts culminating with the Supreme Court of Appeal (SCA) handing down three judgments relating to the question of jurisdiction. As things stand there, the judgment in *Absa Bank Limited and Another v Commissioner for the South African Revenue Service* (2019/21825) [2021] ZAGPPHC 127 (see our Tax and Exchange Control Alert of [18 March 2021](#)), was appealed to the SCA, where it was heard in March 2023. It is anticipated that this judgment will also deal with the question of jurisdiction. In this piece, we briefly touch on some of the judgments that have been handed down and the concomitant issues arising, with a view to dissecting the issue in one of our later alerts.

### The main hurdle: Section 105 of the TAA

Section 105 of the Tax Administration Act 28 of 2011 (TAA) states that a taxpayer may only dispute an assessment or “decision” as described in section 104 in proceedings under Chapter 9 of the TAA, unless a High Court directs otherwise. In *Commissioner for the South African Revenue Service v Rappa Resources (Pty) Ltd* (Case No 1205/2021) [2023] ZASCA 28 (discussed in our Tax and Exchange Control Alert of [30 March 2023](#)), the taxpayer launched an urgent review application in the High Court requesting the review and setting aside of additional value-added tax (VAT) assessments, instead of objecting to the assessments in the ordinary course in terms of section 104 of the TAA. Whereas the question of High Court jurisdiction was decided by the High Court in the taxpayer’s favour,



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the South African Revenue Service (SARS) appealed this decision. The SCA ultimately held that, in terms of this section, it is required that a taxpayer must first apply for the High Court to direct that it has jurisdiction to hear the application, before it can actually be heard.

In *United Manganese of Kalahari v Commissioner for the South African Revenue Service* (Case No 1231/2021) [2023] ZASCA 29, which was decided by the SCA on the same day, it reached the same conclusion, albeit that the dispute in that case related to transfer pricing and had slightly different facts. Both judgments were thus decided in SARS' favour.

### **Review and jurisdiction in the customs and excise context**

In *Commissioner for the South African Revenue Service and Another v Richards Bay Coal Terminal (Pty) Ltd* (Case no 1299/2021) [2023] ZASCA 39, heard by the SCA just a week later, the issue of jurisdiction also arose. In short, the issue here was whether the taxpayer could,

in terms of section 47(9)(e) of the Customs and Excise Act 91 of 1964 (CEA), appeal and review a tariff determination under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), alternatively the principle of legality.

In this case, the SCA stated, amongst other things, that “*nothing in the CEA expressly ousts the jurisdiction of the High Court to review a tariff determination decision*”. The SCA thus held that the High Court has the jurisdiction to hear a review application for a tariff determination, where the review is based on PAJA or the principle of legality.

### **Conflicting approaches? What's next?**

While on the face of it, it may seem strange that the same court held that a High Court has jurisdiction (automatically) to hear a review of a SARS decision in the customs and excise context, but not in the context of reviewing a VAT assessment, one should appreciate that section 105 of the TAA does

not apply in the customs and excise context. Whether any of the decisions we refer to are correct is not at issue, but rather, whether the SCA's approach is inconsistent. While the different outcomes are likely based on the different legislation underpinning the matters, it is possible that the parties will appeal the judgments to the Constitutional Court. It will also be interesting to see whether the SCA will, in *Absa Bank Limited*, also follow the same approach it did in *Rappa Resources and United Manganese of Kalahari*.

While the debate regarding jurisdiction in tax disputes might seem academic to some, it has great practical importance, as it implicates the constitutional right to fair administrative action. We hope to revisit this issue again, but once all is said and done, the hope is that it does not result in taxpayers being unfairly limited in the way they dispute tax assessments and in exercising their right to fair administrative action.

**Louis Botha**

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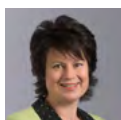
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