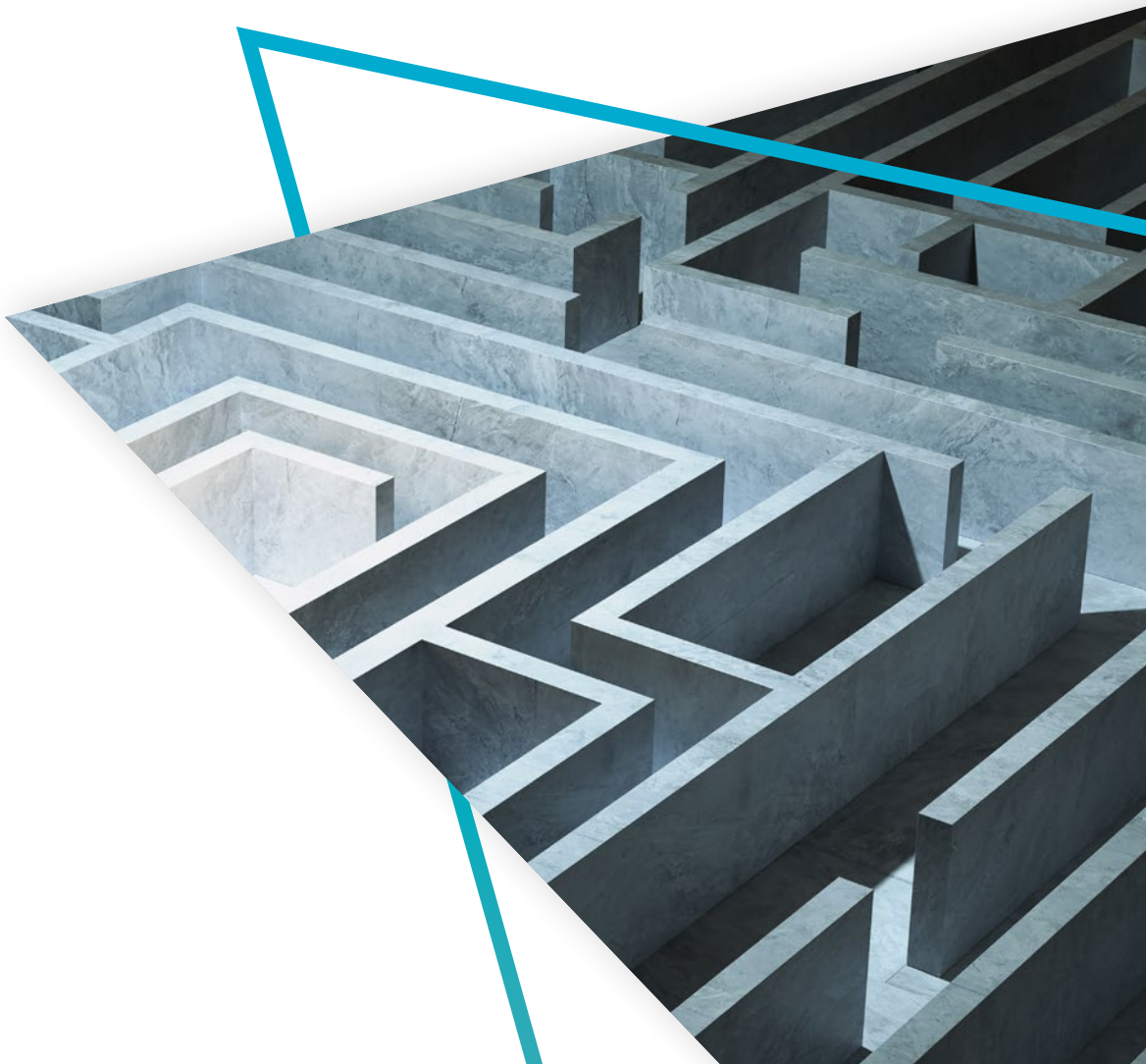
Tax & Exchange Control

ALERT | 21 August 2025

In this issue

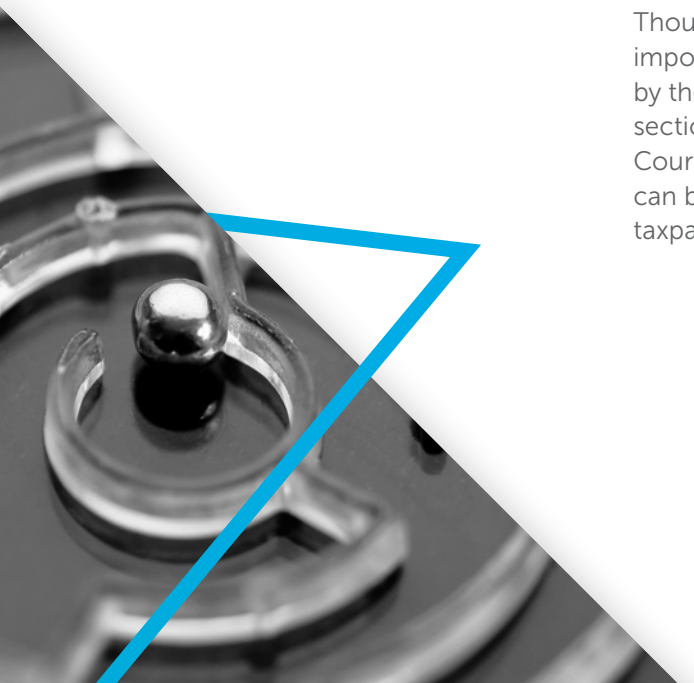
SOUTH AFRICA



For more insight into our expertise and services

TAX & EXCHANGE CONTROL ALERT

Absent but not off the hook: Tax Court's jurisdiction to alter assessments confirmed



The Supreme Court of Appeal (SCA) clarified a simple yet crucial principle of Tax Court procedure in the case of *Lion Match Company (Pty) Ltd v Commissioner for the South African Revenue Service* [2025] JDR 3336 (SCA (28 July 2025)): the withdrawal of a taxpayer's legal representation, even at the last minute, does not equate to the withdrawal of the appeal itself. Most importantly, the SCA has confirmed that section 129(1) of the Tax Administration Act 28 of 2011 (TAA) does not preclude the Tax Court from altering an assessment in the South African Revenue Service's (SARS) favour, as contemplated in section 129(2) of the TAA, even if the taxpayer is absent when the appeal is heard.

Though this may seem uncontroversial, the judgment is important as it corrects a fundamental procedural misstep by the Tax Court and affirms the proper interpretation of section 129 of the TAA and Rules 44 and 46 of the Tax Court Rules. It underscores why procedural disengagement can backfire and how SARS could secure harsher relief in a taxpayer's absence.

Background

The dispute originated in a capital gains tax appeal brought by the Lion Match Company (LMC), which was set down for hearing in November 2019. A month prior to trial, LMC's longstanding attorneys of record withdrew. On the morning of the hearing, new representatives appeared solely to move for a postponement. When this was refused, they too withdrew.

Counsel for SARS proceeded to lead evidence in support of an upward adjustment to the original additional assessment. The Tax Court, however, declined to entertain the relief, holding that the withdrawal of LMC's representatives had the effect of a withdrawal of the appeal, thereby ousting the Tax Court's jurisdiction.

In reaching this conclusion, the Tax Court relied on section 116(1) of the TAA, which provides that the Tax Court hears appeals lodged under section 107, and section 129(1), which states that:

> *"...the tax court, **after** hearing the appellant's appeal lodged under section 107 against an assessment or 'decision', must decide the matter..."*.

The Tax Court interpreted these provisions together to mean that it could only exercise its powers under section 129(2) after hearing the appellant's appeal, which, in its view, required the taxpayer's active participation in the hearing. Once the appellant's representatives withdrew, it considered there to be no *"appeal"* before it to be heard. The court further held that Rule 44(7) of the Tax Court Rules, which allows the Tax Court to decide a matter in a party's absence, could not override sections 116 and 129(1) of the TAA.

Absent but not off the hook: Tax Court's jurisdiction to alter assessments confirmed

CONTINUED

Withdrawal must be express

On appeal, the High Court (Full Bench), squarely rejected the Tax Court's approach. The High Court emphasised that Rule 46 of the Tax Court Rules governs the withdrawal of appeals and provides as follows: *"A party who has lodged an appeal may withdraw it by delivering a notice of withdrawal to the registrar and to the other parties."*

No such notice was delivered by or on behalf of LMC. The High Court found the Tax Court's interpretation *"with respect wrong"* and inconsistent with the principles outlined in *African Cash & Carry (Pty) Ltd v C:SARS* 2020 (2) SA 19 SCA. In the absence of compliance with Rule 46, there was no valid withdrawal of the appeal. The mere withdrawal of legal representatives or non-appearance at the hearing does not suffice.

Jurisdiction is retained

The High Court further held that the Tax Court remained fully empowered to decide the matter under section 129 of the TAA, read with Rule 44(7) of the Tax Court Rules.

Section 129(2) provides:

> *"In the case of an appeal against an assessment or 'decision referred to in section 104(2)', the tax court may – (a) confirm the assessment or decision; (b) order the assessment or decision to be altered; or (c) refer the assessment or decision back to SARS for further examination and assessment"*

Rule 44(7) complements this, stating:

> *"If a party or a person authorised to appear on the party's behalf fails to appear before the tax court at the time and place appointed for the hearing of the appeal, the tax court may decide the appeal under section 129(2) ..."*

There is nothing in either provision that makes taxpayer participation a prerequisite for the Tax Court's jurisdiction. Once an appeal is validly lodged under section 107, the Tax Court retains its full powers to determine the matter, including to alter an assessment upwards in SARS' favour (if the revision is justified on pleadings and evidence) even if the taxpayer is not present to contest the evidence.

The SCA endorsed the High Court's reasoning and upheld the High Court's order that LMC's additional assessments be increased accordingly.

Both the High Court and SCA in *Lion Match* confirmed that an upward adjustment by the Tax Court under section 129 must be grounded in the case before it, namely SARS' pleaded grounds of assessment and supporting evidence. It is therefore clear that the Tax Court's jurisdiction to adjust an assessment is not abstract or open-ended but anchored in the Rule 31 statement and supporting material.

Absent but not off the hook: Tax Court's jurisdiction to alter assessments confirmed

CONTINUED

In this regard, the earlier Tax Court interlocutory ruling in *Lion Match Company (Pty) Ltd v C:SARS* (IT13950 (30 January 2017)) underscores the procedural limits of SARS' pleaded case. This judgment made it clear that while SARS may amplify an existing ground of assessment, it cannot substitute an entirely new factual or legal basis through its Rule 31 pleading, doing so requires a fresh additional assessment. Although the interlocutory ruling in *Lion Match* was not tested in the subsequent High Court or SCA appeals, this principle was reaffirmed in the more recent Tax Court judgment of *C:SARS v SC* (Pty) Ltd (case number 45840, 15 April 2025).

Read together with the SCA's judgment, these authorities show the full picture. The Tax Court's jurisdiction under section 129 is wide, even extending to upward adjustments in the taxpayer's absence, but it is exercised strictly within the confines of SARS' pleaded case. The rationale is to balance SARS' ability to pursue higher liability where the evidence supports it, against the taxpayer's right not to face a *"moving target"* in the form of shifting or entirely new grounds of assessment.

Conclusion

The *Lion Match* line of cases underscores both the reach and the limits of the Tax Court's powers. Even in a taxpayer's absence, the court retains full jurisdiction under section 129 to adjust assessments, including upwards, where SARS' pleadings and evidence warrant it. But those powers are confined to the grounds of assessment actually advanced by SARS, they cannot be recast through its Rule 31 statement. This balance ensures that while SARS may seek harsher relief, taxpayers are shielded from facing a case that shifts beneath their feet.

Mariska Delport

TAX & EXCHANGE CONTROL ALERT

SARS v PAJA: The saga continues

Beginning most prominently with the original hearing of *ABSA Bank Limited v Commissioner, SARS* [2021] (3) SA 513 (GP) in the High Court (which we previously discussed here), a taxpayer's right to approach the High Court to request the administrative review of SARS' decisions has been a bone of contention between SARS and taxpayers. Although the *ABSA* case was put to bed by the Constitutional Court earlier this year (it was consolidated with four other cases in *United Manganese of Kalahari Proprietary Limited v Commissioner, SARS and Four Other Cases* [2025] (5) BCLR 530 (CC)), the most recent case to reach the High Court in this saga between SARS and taxpayers came in the form of *Kerbyn Cape 2 Proprietary Limited v Commissioner, SARS* (15899/2023) [2025] ZAWCHC 308.

Background facts in *Kerbyn* Cape

SARS selected Kerbyn Cape for an income tax audit and value-added tax (VAT) audit. Following the finalisation of these audits, SARS issued Kerbyn Cape with additional assessments for both income tax and VAT on 5 February 2016.

At the time the additional assessments were received by Kerbyn Cape, its sole director was overseas. As a result of company documents being stored at his private residence and thus being inaccessible (these being required in order to object to the additional assessments), and due to seeking expert tax advice prior to lodging its objections, Kerbyn Cape took longer than the then prescribed 30 business days in which to lodge its objections. In fact, Kerbyn Cape took until 27 May 2016 to lodge its objection to the income tax additional assessment, and until 29 October 2016 to lodge its objection to the VAT additional assessment.

SARS declined to consider Kerbyn Cape's first income tax objection on the basis that it was invalid as it had been filed outside of the prescribed time period without exceptional circumstances having been shown for this delay. Despite this, SARS invited Kerbyn Cape to submit a second objection addressing whether exceptional circumstances existed to warrant SARS considering its objection. This Kerbyn Cape did, but SARS also declined to consider this second objection.

Nevertheless, SARS again invited Kerbyn Cape to submit a third objection, which Kerbyn Cape did in October 2016, and again invited Kerbyn Cape to submit a fourth objection following SARS declining to consider its third objection, which Kerbyn Cape did on 17 August 2017. Finally, SARS issued a letter to Kerbyn Cape on 21 September 2017 indicating that it did not consider exceptional circumstances to exist that would warrant it considering Kerbyn Cape's income tax objections, and thus these were declined.

A similar process occurred in respect of Kerbyn Cape's VAT objections. SARS declined to consider Kerbyn Cape's first VAT objection on the basis that it was invalid. Kerbyn Cape therefore submitted a second VAT objection on 7 August 2017. On 29 August 2017, SARS issued a letter to Kerbyn Cape indicating that it did not consider exceptional circumstances to exist that would warrant it considering Kerbyn Cape's VAT objections, and thus these were declined.

SARS v PAJA: The saga continues

CONTINUED

As a result, Kerbyn Cape decided to turn to the Tax Ombud, filing a complaint against SARS in June 2018 in respect of both the income tax and VAT additional assessments. Nothing came of this, and on 6 March 2019 Kerbyn Cape filed a consolidated objection to both additional assessments.

SARS declined the consolidated objection on the basis that exceptional circumstances were not demonstrated by Kerbyn Cape for the late filing of this objection, and that the additional assessments had already prescribed. Therefore, Kerbyn Cape applied to the High Court in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) for the review of SARS' decision not to consider its objections.

High Court's decision

SARS raised two points *in limine* (i.e. procedural points which had to be decided prior to the merits of the matter being heard, and the outcome of which could impact whether the court would consider the merits). These were that: (i) the High Court lacked jurisdiction to hear the matter as the Tax Court had exclusive jurisdiction over tax matters; and (ii) Kerbyn Cape had not exhausted internal remedies as required by section 7(2) of PAJA.

On the point of jurisdiction, section 105 of the Tax Administration Act 28 of 2011 (TAA) provides that: *"A taxpayer may only dispute an assessment or decision in section 104 in proceedings under this Chapter,* ***unless a High Court otherwise directs.***" (emphasis added)

Based on previous cases (most notably *Commissioner, SARS v Rappa Resources Proprietary Limited* [2023] (4) SA 488 (SCA)), SARS submitted that Kerbyn Cape could only approach the High Court to request that it hear the matter where exceptional circumstances existed.

On the point of internal remedies, SARS argued that Kerbyn Cape had not made out any case for having exhausted these. In response, Kerbyn Cape argued that due to the lapse of time, it was prohibited from approaching the Tax Court for condonation of the late filing of its objections (as any condonation application had to be filed within 20 business days of SARS' decision not to accept the objection as valid in terms of rule 50 of the Rules Promulgated Under Section 103 of the TAA).

Considering these arguments, the High Court found that Kerbyn Cape had not made out an argument under section 105 for why the High Court should direct that the matter be heard by it. Therefore, the court decided SARS' first point *in limine* in its favour.

SARS v PAJA: The saga continues

CONTINUED

With respect to exhausting internal remedies, the High Court pointed out that a decision by SARS that an objection is invalid for being filed outside the prescribed time period is in and of itself subject to objection. Therefore, the court concluded that Kerbyn Cape should have filed an objection to SARS' first decision not to consider its first income tax and VAT objections (as opposed to filing subsequent objections). On this basis, the court decided SARS' second point *in limine* in its favour as well.

Implications of *Kerbyn Cape* for taxpayers

With the recent hearing of *United Manganese of Kalahari* in the Constitutional Court, the decision in *Kerbyn Cape* with respect to jurisdiction and a taxpayer's ability to approach the High Court under section 105 of the TAA has been somewhat overshadowed. Importantly, *United Manganese of Kalahar*i has clarified that when seeking the High Court's directive that it hears a tax matter, exceptional circumstances are not required to be shown by a taxpayer – the relevant considerations for whether a High Court should direct that it hears a matter under section 105 of the TAA are fact-specific, hinge on the nature of relief being requested from the High Court, and include, among other things, whether the matter is capable of being subject to appeal to the Tax Court or not, and whether it is desirable in the circumstances for a specific point in the matter to be separated from the remainder of the dispute and heard in the High Court.

That being said, *Kerbyn Cape* still provides guidance to taxpayers when considering whether all internal remedies have been exhausted (and therefore whether, under PAJA, administrative review is possible). Interestingly, the court in *Kerbyn Cape* decided to ignore the fact that SARS invited the taxpayer to submit further objections on no less than three occasions. Instead, the court held that the taxpayer should have objected to SARS' decision not to consider its first income tax and VAT objections. Where a taxpayer has submitted an objection which SARS considers invalid, it is not uncommon for SARS to decline the objection but invite the taxpayer to submit a second objection remedying the invalidity of the first. On the facts in *Kerbyn Cape*, it would not be unreasonable for the taxpayer to take SARS up on this invitation and file a second objection (or third or even fourth, as was the case).

Some views have been expressed that SARS should not be permitted to 'run the clock down' on a taxpayer by issuing successive invitations to submit further objections until an additional assessment has prescribed. The High Court's decision in *Kerbyn Cape* should not be read as condoning this. However, once SARS had issued its letters of 29 August and 21 September 2017 about the income tax and VAT objections respectively, it was at this time incumbent on the taxpayer to object to SARS' decision not to consider its objections, and then appeal this to the Tax Court.

Kerbyn Cape therefore reminds a taxpayer that knowing what decisions it can object against, and knowing when to object, are as important as the merits of its case. Even the strongest merits stand no chance if a court refuses to consider them on procedural grounds. Due to the specific dispute resolution process contained in the TAA, this is all the more important for tax disputes. For this reason, seeking expert advice during a tax dispute can be as important procedurally as it is when formulating the merits of an objection.

Nicholas Carroll

OUR TEAM

For more information about our Tax & Exchange Control practice and services in South Africa, Kenya and Namibia, please contact:

Emil Brincker
Practice Head & Director:
Tax & Exchange Control
T +27 (0)11 562 1063
E emil.brincker@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

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

Mariska Delport
Associate:
Tax & Exchange Control
T +27 (0)11 562 1574
E mariska.delport@cdhlegal.com

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

Sophie Muzamhindo
Associate:
Tax & Exchange Control
T +27 (0)11 562 1729
E sophie.muzamhindo@cdhlegal.com

Savera Singh
Associate:
Tax & Exchange Control
T +27 (0)11 562 1575
E savera.singh@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

NAMIBIA
1st Floor Maerua Office Tower, Cnr Robert Mugabe Avenue and Jan Jonker Street, Windhoek 10005, Namibia
PO Box 97115, Maerua Mall, Windhoek, Namibia, 10020
T +264 833 730 100 E cdhnamibia@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com