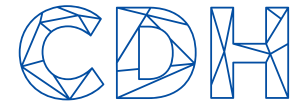


Tax & Exchange Control



ALERT | 22 May 2025

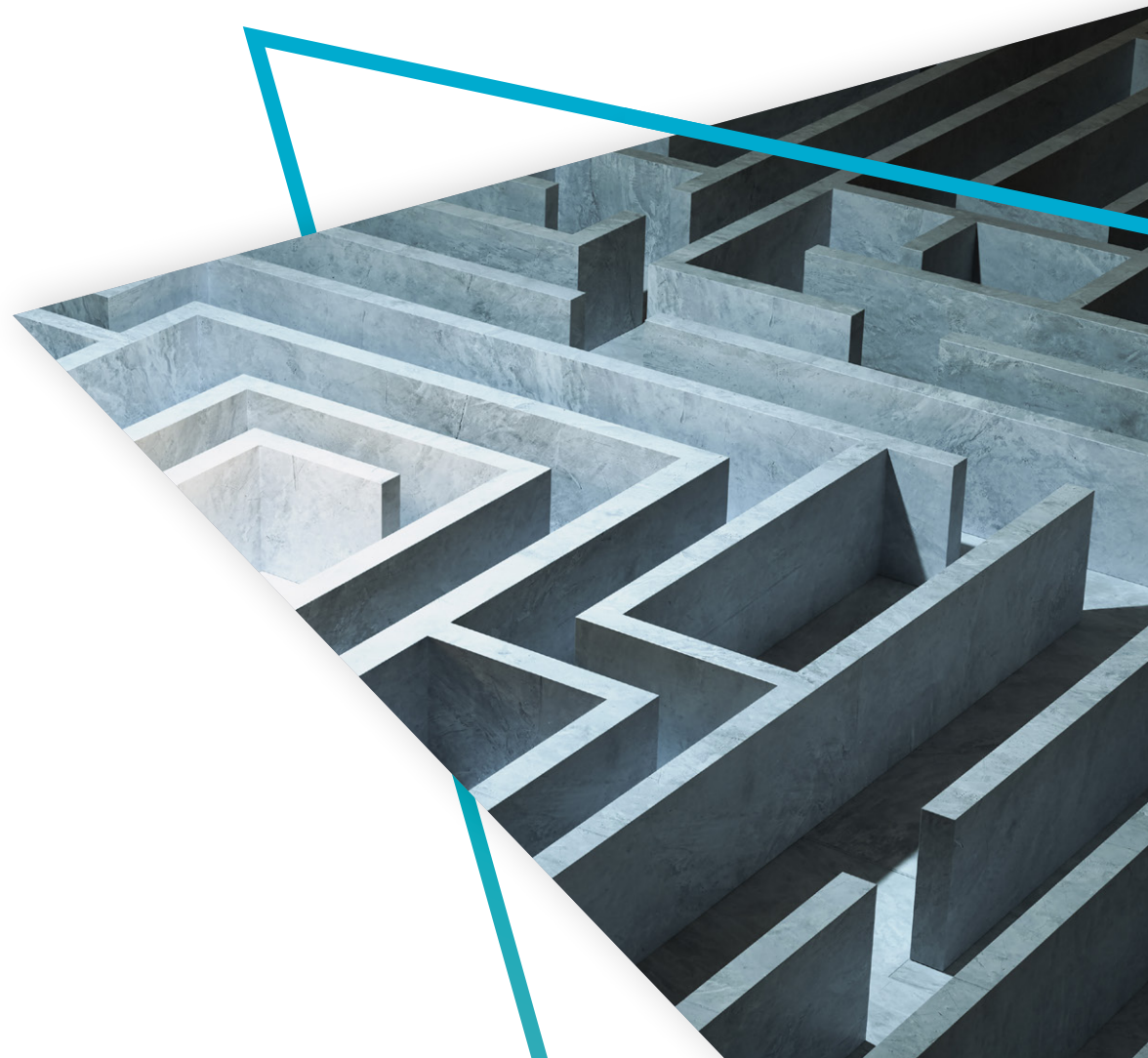
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SOUTH AFRICA

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Court or nought? The status of the Tax Court revisited

Considerable uncertainty has arisen about the status of the Tax Court. Despite the name and the nature of its presiding officers, unlike other specialist “courts” established by Parliament to consider matters in specific areas of law, recent judgments have commented that the Tax Court is currently neither a court of law nor a judicial tribunal, but rather functions as an administrative tribunal. In light of the debatable justification for this state of affairs, this article posits that it may be worth reconsidering the composition and function of the Tax Court.

Background

A number of specialist ‘courts’ have been established by Parliament to consider matters in specific areas of law. These include the Competition Appeal Court, the Electoral Court, the Labour Court, the Land Court and the Tax Court. On a related note, the Johannesburg High Court recently decided to pilot a dedicated insolvency court, which we discussed in our [Corporate Debt, Turnaround & Restructuring Alert of 30 April 2025](#).

Most of these specialist ‘courts’ have equivalent status and powers to the High Court, except the Tax Court, which has been described in recent judgments as an administrative tribunal falling outside the judicial system. Typically, these specialist courts have specialised judges with extensive experience in the relevant field of law, whereas the Tax Court has High Court judges seconded to it, who do not always necessarily have specific experience in tax law (or even commercial law) matters.

Several key issues and challenges have arisen lately regarding the status of the Tax Court. Below we highlight those key issues and raise the question about whether it is time to undertake an investigation into the efficacy of the Tax Court, with a view to potential reforms to bring it in line with best practice. Reforms may also assist in clarifying certain issues which have arisen, thereby ensuring that the Tax Court is fit for purpose. The history of the establishment of the Tax Court (and other specialist courts) is key as it may reveal why certain positions have been recently adopted and clarify the purpose of the structure of the Tax Court.

Case law

In *Poulter v The Commissioner for the South African Revenue Service* 86 SATC 415, the High Court considered several factors to determine whether the Tax Court constitutes a court of law. The context for the case was a dispute as to whether the taxpayer’s father, a layperson, could represent his daughter in proceedings before the Tax Court. (See our [Dispute Resolution and Tax & Exchange Control Alert of 18 April 2024](#) for more detail.)



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In the case, *Binns-Ward J* analysed various characteristics of the Tax Court, such as (i) its lack of an inherent power to regulate its own proceedings, (ii) the fact that Tax Court decisions are determinative only of a specific taxpayer's liability in a given case and do not create general binding precedent, and (iii) that (according to the reasoning in the judgment) the Tax Court is established by proclamation by the President instead of an act of Parliament, as contemplated in section 166(e) of the Constitution. In light of these factors, the learned judge arrived at the conclusion that the function of the Tax Court is essentially that of an administrative tribunal and "*court of revision*" rather than a "*court of law*", albeit one with all the trappings of a court in the judicial sense. This led to a finding that the provisions of the Legal Practice Act 28 of 2014 governing the appearance of laypersons as representatives in courts of law were not applicable to the Tax Court.

This judgment has found some criticism on various grounds. One such ground is the questionable accuracy of the statement (in the judgment) that it is "*very unusual in the context of tax disputes*" for a dispute to involve a question of law exclusively (rather than being mixed with questions of fact). Another ground is a possible flaw in the learned judge's interpretation of section 116 of the Tax Administration Act 28 of 2011 (TAA) as meaning that the Tax Court is not established or recognised by an act of Parliament – despite sections 116 to 132 of the TAA setting out in detail how the Tax Court is established and should function.

In *United Manganese of Kalahari (Pty) Limited v Commissioner of the South African Revenue Service and Four Other cases* [2025] (5) BCLR 530 (CC), the main issue was the correct test to be applied when a taxpayer seeks a direction in terms of section 105 of the TAA to deviate from the default forum for disputing an assessment or decision. The Constitutional Court stated that the Tax Court is not a superior court with inherent jurisdiction.

In particular, Rogers J stated in the judgment that the Tax Court is neither a "*court*" nor a "*tribunal*" as contemplated in section 33(3)(a) of the Constitution, read with the definitions of "*court*" and "*tribunal*" in the Promotion of Administrative Justice Act 3 of 2000 (PAJA). However, the question was expressly left open as to whether it is correct that, constitutionally, the Tax Court is not a "*court*" as contemplated in section 166(e) read with section 170 of the Constitution. These issues are important in the context of, among other things, whether a Tax Court can entertain a PAJA review.

It is evident, therefore, that there is currently a level of uncertainty in relation to the jurisdiction, status, operating procedures and purpose of the Tax Court.

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History and statutory framework of the specialist courts

To help understand how we have arrived at the current position, it is useful to consider the history of the establishment of the Tax Court, and the specialist courts in general.

South Africa's court system has undergone substantial development over the years, particularly with respect to the structure and jurisdiction of the superior courts. As already mentioned, related to this is the creation of various specialist "courts" in terms of specific legislation, such as the Labour Court and Labour Appeal Court in terms of the Labour Relations Act 66 of 1995 (LRA), the Competition Appeal Court in terms of the Competition Act 89 of 1998, the Land Claims Court in terms of the Restitution of Land Rights Act 22 of 1994 (now the Land Court in terms of the Land Court Act 6 of 2023), the Electoral Court in terms of the Electoral Commission Act 51 of 1996, and the Tax Court previously in terms of section 83 of the Income Tax Act 58 of 1962 (ITA) but now in terms of the TAA.

Between 2003 and 2012, various iterations of Superior Courts Bills and Constitution Amendment Bills were drafted and circulated for deliberation and consultation with interested parties. The aim of this process and the draft legislation included **rationalising** the court structure and legislation and providing a uniform framework for the judicial administration of judicial functions of courts. The future of specialist courts was a major point of discussion, with the initial drafts of these bills proposing to bring these courts into the fold of the unified High Court as "*Special Divisions*". Some common critiques against dedicated specialist courts were that they could lead to **forum shopping** and/or were not cost-effective.

At the time of drafting the Superior Courts Bill, 2010, it was intended for the Tax Court to become similar in status to the High Court, as was the case with the other specialist courts. Alternatively, the drafters may have considered this to be the case already. In this regard, the Memorandum on the Objects of the Superior Courts Bill, 2010, referred to the incorporation of:

*"[E]xisting specialist courts that are similar in status to the High Court (namely the Competition Appeals Court, Electoral Court, **Tax Court**, Labour Court, and Land Claims Court), into the High Court of South Africa as Special Divisions of the Court."*

A [document](#) compiled by Parliament's Research Unit and shared during deliberations on the Superior Courts Bill, 2011, further stated that "[t]he Special Income Tax Courts sit within divisions of the High Court".

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However, the proposed integration of the specialist courts into the High Court was controversial, particularly in the realm of labour matters, and concerns were raised about a potential loss of skills and of the speedy resolution of specialised disputes. This proposal was later omitted, with the Memorandum on the Objects of the Superior Courts Bill, 2011, noting that this was done “[o]n consideration of the comments received, and particularly as a result of further consultation with the Heads of the Superior Courts”. It is not altogether clear whether there was an appreciation of the impact of this omission on the future status of the Tax Court, as the only “existing specialist court”, the establishing legislation of which did not explicitly confer High Court equivalent status. When the TAA was introduced, it repealed but substantially reproduced section 83 of the ITA – perhaps a missed opportunity to clarify the position.

Comments

Whatever the correct view of the current status of the Tax Court is, the question remains as to whether there is an opportunity for an investigation into and potential reform of the Tax Court system, including its composition, status and jurisdiction. For example, it appears somewhat contradictory and inefficient for a Tax Court, which consists of at least one High Court judge, assisted by two non-judicial members, to serve as an administrative tribunal only. If the Tax Court is to remain, there may essentially be three alternatives to consider: retaining the status quo, i.e. an unusual marriage of an administrative tribunal and a court, making it a High Court equivalent, or embracing its administrative tribunal role.

With the first alternative, it is worth considering updating the nomenclature and certain of the processes of the Tax Court to clarify whether the Tax Court is in fact a “court” in terms of section 166(e) of the Constitution, albeit not on the same level as the other specialist courts.

With the second alternative, Parliament could make the Tax Court a court of law with equivalent status to the High Court, with its own specialised judges. Tax Court decisions on general questions of law could then create binding precedent, rather than being binding only on the parties and carrying persuasive value. It would then also avoid debates whether it has inherent jurisdiction to hear a PAJA review, thereby avoiding some of the complications in the *United Manganese* case. There is perhaps a challenge in reclassifying the Tax Court as a superior court with inherent powers while retaining the current general constraints against publicity of the identities of taxpayers, but this challenge should not be insurmountable.



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With the third alternative, the Tax Court could become more like the Taxation Review Authority (TRA) in New Zealand, where a TRA is presided over by a specialist tax practitioner (who does not need to be a judge) appointed by the Governor-General. In fact, predecessors of the current South African Tax Court, namely the Special Court established under section 58 of the Income Tax Act 40 of 1925 and section 79 of the Income Tax Act 31 of 1941, also originally provided that the “court” would be presided over by an advocate of the equivalent of the High Court rather than a judge. A return to such a composition, to align with the Tax Court’s administrative tribunal status, could be accompanied by a simplification of the Tax Court rules and process, which would hopefully yield more efficient resolution of tax disputes and free up judicial resources for other matters.

However, each alternative should be considered with reference to whether the existing Tax Board’s jurisdiction should rather be extended to involve a greater scope, thereby freeing up resources in the Tax Court for more complex, higher value matters.

The precise alternative to be adopted, if any, is a matter that requires detailed deliberation. There is no simple solution and answer to what is a vexed, yet important, question. In the interim, it would certainly be useful to get clarity in the legislation in relation to some of the more pressing issues.

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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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