

Tax & Exchange Control

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- When an alternative tax argument comes too late



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When an alternative tax argument comes too late

Tax disputes often evolve as the legal and factual issues come into sharper focus. A key question is the extent to which a taxpayer may refine or change its legal position once an objection has been lodged and an appeal is underway. This has been a recent hot topic of debate in several cases. In particular, the recent decision of the Supreme Court of Appeal (SCA) in *Baseline Civil Contractors (Pty) Ltd v The Commissioner for the South African Revenue Service*; [2026] 2 All SA 12 (SCA) (24 February 2026) considers this issue and has important implications for how objections and appeals should be approached in practice.

The dispute involved the alleged income tax liability of Baseline Civil Contractors Proprietary Limited (Baseline) for the 2018 tax year. In the course of the appeal, Baseline brought an interlocutory application seeking to introduce a new ground of appeal in its Rule 32 statement of grounds of

appeal. The application was dismissed in the Tax Court and in the Western Cape Division of the High Court, and the matter then went before the SCA. We previously discussed the Tax Court's decision in our [Tax & Exchange Control Alert](#) of 26 January 2023.

Facts

In its income tax returns for the 2018 tax year, Baseline declared a gross income amount of R320,846,361 as having been received by or accrued to it. The same gross income was reflected in its annual financial statements.

Baseline claimed a deduction from its taxable income under the general deduction formula in terms of section 11(a), read with section 23(g) of the Income Tax Act 58 of 1962 (ITA). This deduction included an amount of R11,072,237 (the disputed amount), which Baseline claimed was in respect of a distribution of profits to its partner in terms of a partnership agreement.

The South African Revenue Service (SARS) disallowed the deduction on the basis that, *inter alia*, the payment of the disputed amount was not incurred in the production of income and therefore, the requirements of the general deduction formula were not met. Accordingly, SARS issued an additional assessment reflecting the disallowance. Baseline objected against the additional assessment in terms of Rule 7. Its grounds of objection were premised on the contention that it had met all the requirements to claim a deduction, which SARS denied.

Baseline lodged a notice of appeal against SARS' disallowance of its objection, following which SARS duly delivered its Rule 31 statement of grounds of assessment and opposing the appeal. Baseline then filed its Rule 32 statement, in which it allegedly introduced a new ground of appeal that purportedly differed from the earlier position adopted in its grounds of objection. Previously, Baseline had arguably not taken issue with the disputed amount forming part of its gross income. Instead, it had focused on its deductibility. In its Rule 32 statement, Baseline pleaded in the alternative, that the disputed amount was never received by nor accrued to it and should never have been included in its gross income at all. It submitted that the disputed amount accrued to the partnership for the benefit of the partnership, rather than to Baseline itself.

For clarity, Baseline's Rule 32 statement contained the following grounds:

- first, that the disputed amount formed part of its gross income, but was deductible under the general deduction formula and should therefore be excluded from its taxable income; and

- alternatively, if it was not deductible, the disputed amount was neither received by nor accrued to Baseline for its own benefit and accordingly did not form part of its gross income at all.

The SCA aptly described these two grounds as the "*deduction ground*" and the "*receipt/accrual ground*", respectively.

The legal issue was the correct interpretation of Rule 32(3) of the Tax Court Rules.

The law

At the time of the hearing of the interlocutory application, Rule 32(3) provided that a taxpayer may not include in its Rule 32 statement, a ground of appeal that constitutes "*a new ground of objection against a part or amount of the disputed assessment not objected to under Rule 7*". Rule 32(3) had been amended by the time of the judgment; as such, the SCA considered both the earlier wording and the prevailing wording of the provision.

Under both versions of Rule 32(3), a taxpayer is, in principle, permitted to introduce a new ground of appeal in its Rule 32 statement. The critical

question, however, is determining the scope of that permission. In the context of the facts, the central consideration was whether Baseline's introduction of the receipt/accrual ground was permissible.

Arguments raised by the parties

SARS opposed Baseline's new ground of appeal arguing that, *inter alia*, it fell outside of the scope permitted by Rule 32(3). It submitted that Baseline had not, at any stage during the audit, alleged that the disputed amount did not form part of its gross income.

Baseline contended that the new ground was nothing more than an additional ground in support of the same part and the same amount of the disputed assessment that had already been objected to under Rule 7. It further submitted that the facts underlying both the deduction ground and the receipt/accrual ground were identical.

The SCA's findings

The SCA considered *ITC 1912 80 SATC 417* and held that, if a taxpayer advances a new ground or different legal approach to attack the same part or amount that was objected to under Rule 7,

it would be permitted provided the new argument does not change the substance of the original objection. On the other hand, where a taxpayer introduces a new factual or legal basis that targets a different part or amount of the disputed assessment that was not raised in the objection, that would be prohibited under Rule 32(3).

The SCA highlighted that the purpose of Rule 32(3) is to prevent a so-called “*trial by ambush*”. Essentially, it seeks to prevent parties from shifting their case midstream in order to protect the integrity of the objection and appeal processes, this being achieved by ensuring that a taxpayer who relies on a ground not raised in an objection gives notice before doing so. In turn, this promotes finality and efficiency in proceedings. Where a new ground is raised that is not covered by the objection or appeal, it amounts to the introduction of a different case altogether.

In light of the facts, the SCA held that the receipt/accrual ground differed fundamentally from the deduction ground. In substance, the receipt/accrual ground was not the same as what was stated or foreshadowed in the initial objection, and it did not help that *Baseline* had not sought to exclude the disputed amount from its gross income at the objection stage. Therefore, the introduction of the receipt/accrual ground amounted to the building of an entirely new case, which is not allowed.

The court held that a deduction ground and a receipt/accrual ground cannot exist side by side. It held that it is not possible to argue that the disputed amount is an expense which should be allowed as a deduction from taxable income, while simultaneously arguing that the same amount never formed part of gross income.

Ultimately, the SCA rejected the introduction of the receipt/accrual ground, holding that it contradicted the ground put forward in the objection, which is not permissible under Rule 32(3).

Reconciling *Baseline* with the *Free State Development* decision

It would seem that the SCA’s decision was premised on the fact that the two grounds are mutually exclusive; a deduction necessarily assumes that the amount was first included in gross income, whereas the receipt/accrual argument denies such inclusion. The new ground therefore did not explain or refine the original objection ground but directly contradicted it.

However, when the *Baseline* decision is considered against the backdrop of earlier judgments dealing with Rule 32(3), a broader uncertainty may emerge as to where the line is drawn between a permissible new ground of appeal and an impermissible one. The courts do not appear to necessarily speak with one voice on how far a taxpayer is permitted to adjust or refine its legal arguments from the objection to the appeal stages.

The uncertainty is quite apparent when *Baseline* is compared to the SCA’s earlier decision in *Commissioner for The South African Revenue Service v Free State Development Corporation* (1222/2021) [2023] ZASCA 84 (31 May 2023), a case expressly referred to by the SCA in *Baseline*. In the *Free State Development* judgment, the taxpayer initially objected against certain value-added tax (VAT) assessments on the basis that the transactions in question constituted supplies but were zero-rated for VAT purposes. Subsequently, the taxpayer sought to amend its Rule 32 statement in terms of Rule 10(3) (which was similarly worded to Rule 32(3)) and sought to plead an alternative ground; being, that the transactions were neither supplies nor deemed supplies, and, as a result, were not subject to VAT at all. The taxpayer argued that the amendment was not a new factual basis, but merely a correction of an erroneous conclusion based on the same facts relied upon in the objection. The SCA permitted the amendment, holding that the amended ground had been foreshadowed in the original objection.

Notably, the SCA in *Baseline* did refer to *Free State Development*, albeit somewhat fleetingly, holding that it did not assist the taxpayer with reference to the facts in *Baseline*. While the reconciliation of these two decisions is not straightforward because they, *inter alia*, dealt with two different types of taxes, it is not clear whether the shift from “*there is a supply, but it is zero-rated*” to “*there is no supply or deemed supply at all*” is different from “*the amount was received or accrued, but is deductible*” to “*the amount was never received/accrued*”. In both cases, the grounds are mutually exclusive: zero-rating assumes a taxable supply, just as deductibility assumes that an amount was first included in gross income.

It is not immediately evident why the approach in the *Free State Development* case did not come to the taxpayer’s rescue in *Baseline*. The following statement from *Free State Development* is apposite: “*The nature of the taxpayer’s objection to the whole of SARS’ assessment*

has always been (and continues to be) the legality of imposing a VAT liability on the transactions under consideration.” The question then is whether, in applying this principle, the taxpayer did not also effectively broadly object to the income tax liability in *Baseline*, especially as the latter judgment refers to an objection against the adjustments in the additional assessment.

Final observations

A broader concern is how taxpayers should approach the foreshadowing aspect going forward. The *Baseline* decision raises the question of whether objections lodged under Rule 7 must now canvas every conceivable legal argument in order to preserve flexibility on appeal; or alternatively, be framed in very general terms (e.g. “*no tax liability*”, full stop) to avoid committing to specific legal grounds too early. Either way, objections risk becoming open ended, potentially undermining their intended function as a focused administrative engagement with SARS.

It is clear that greater clarity is needed on the scope of Rule 32(3). Without clearer guidance on how far a taxpayer’s reasoning may evolve between objection and appeal, taxpayers face a dilemma of casting the net too wide at the objection stage or risking procedural limitations at the appeal stage.

Importantly, *Baseline* is a reminder that the strategic framing of an objection is critical in tax disputes.

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