Synopsis

Tax today

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A monthly journal, published by PwC South Africa, that gives informed commentary on current developments in the tax arena, both locally and internationally.

Through analysis of and comment on new laws and judicial decisions of interest, Synopsis helps executives to identify developments and trends in tax law and revenue practice that may affect their business.

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Taking SARS' decisions on review

In March, the High Court in Gauteng delivered judgment in a review application in which a taxpayer had challenged the actions of SARS in invoking the GAAR provisions. The judgment provided useful guidance on the use of the review process to challenge the actions of SARS.

The matter of *Absa Bank Limited and United Towers (Pty) Ltd v CSARS* (Case No. 2019/21825 [P]) related to a preference share investment made by the taxpayers (the matter involved identical documents and assessments, and therefore the taxpayers are collectively referred to as 'Absa') in a South African company, PSIC 3, in the years 2014 to 2018, from which they derived dividend income. PSIC 3 and Absa were not connected persons for tax purposes.

PSIC 3 used the funds so invested to acquire shares in another South African company, PSIC 4, which made a capital investment in a foreign trust, DI Trust. The funds invested were used by DI Trust to acquire floating rate notes issued by MSSA, a South African subsidiary in an Australian group of companies. From here the facts outlined in the judgment are a little murky. However, it appears that DI Trust entered into arrangements whereby it swapped its interest received from MSSA for interest on Brazilian Government Bonds. The interest on the Brazilian Government Bonds was distributed by DI Trust to PSIC 4.

PSIC 4 declared dividends to PSIC 3, which distributed this income to Absa. The dividends accruing to Absa were exempt from tax.

SARS indicated its intention to invoke GAAR against Absa by issuing the prescribed notice under section 80J ('the section 80J notice'). Absa requested that the section 80J notice be withdrawn as it considered that it had not engaged in an avoidance transaction, operation or scheme. SARS refused to withdraw the section 80J notice and issued assessments.

Absa took the decision not to withdraw the section 80J notice and the issue of the assessments on review. It was accepted that, if the section 80J notice was withdrawn, the assessments would be reversed.

The issue

The court was called upon to consider whether a refusal to withdraw a notice may be taken on review and, if so, on what legal basis.

SARS' contention

SARS did not challenge Absa's statement that it had no knowledge of the transactions that ensued between PSIC 3, PSIC 4 and DI Trust, and took the position that the Brazilian Investment by DI Trust had been constructed to avoid tax. In unravelling the transactions SARS concluded that Absa was a party in the series of transactions through which it had received the benefit of a tax-exempt dividend (indirectly derived from the interest on the Brazilian Government Bonds). The proper result, it contended, was that the interest generated in the series of transactions should have been subject to tax in Absa's hands, and for these reasons SARS had issued the section 80J notice and the subsequent assessments.

Absa's contention

In acquiring the preference shares, Absa had been given to understand that the funds would be advanced to MSSA by PSIC 3 in a back-to-back arrangement to enable MSSA to repay group debt. It was unaware of the involvement of PSIC 4 and DI Trust and of the Brazilian transaction. It argued that it "could not, in a state of ignorance, have participated in an impermissible tax avoidance arrangement, nor did it have a tax avoidance motive in mind, and nor did it procure a tax benefit to which it was not entitled" (paragraph [17]).

Provisions of the Tax Administration Act ('TAA')

Absa had sought withdrawal of an administrative decision by SARS. Section 9(1) of the TAA states:

> "A decision made by a SARS official or a notice to a specific person issued by SARS under a tax Act, excluding a decision given effect to in an assessment or a notice of assessment that is subject to objection and appeal, may in the discretion of a SARS official described in paragraph *(a), (b)* or *(c)* or at the request of the relevant person, be withdrawn or amended …"

SARS argued that the decision had been given effect to in a notice of assessment and that the proper internal remedy of objection to the assessment and appeal had to be pursued and exhausted before an application for review could be adjudicated.

Absa countered that the exclusion required that the decision must have been given effect to in an assessment at the time the request for withdrawal was made, arguing that there are clear precedents where:

> "the court has dealt with tax disputes on points of law and have not compelled aggrieved taxpayers to exhaust internal remedies. (See: *Metcash Trading Ltd v C, SARS* 2001 (1) SA 1109 (CC) at (43] and (46])"

The argument continued that no damage is done to the internal processes if the issue for review is a point of law:

> "As regards the implication of the officials' discretion taking the matter out of the hands of a court, the argument is advanced that when the dispute is about a point of law there is no room to debate a range of options in making a decision: only a correct view of the law is rational and lawful, hence there is no room for deference: the decision is right or wrong."

Sutherland ADJP, who delivered the judgment, agreed with the arguments advanced by Absa and found that section 9 of the TAA did not preclude the court from considering the application for review.

The judgment continued (at [23]) that section 105 of the TAA provides:

> "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*." (court's emphasis)

The right of objection in section 104 of the TAA is then limited to objections against assessments or "any other decision that may be objected to or appealed against under a tax Act."

Section 105 of the TAA plainly gives a court power to depart from the procedure prescribed in section 104. It was found (at [25]):

> "In as much as the section is couched in terms which imply permission needs to be procured to do so, there is no sound reason why such approval cannot be sought simultaneously in the proceedings seeking a review, where an appropriate case is made out. It was common cause that such appropriate circumstances should be labelled 'exceptional circumstances'. The court would require a justification to depart from the usual procedure and, this, by definition, would be 'exceptional'. However, the quality of exceptionality need not be exotic or rare or bizarre; rather it needs simply be, properly construed, circumstances which sensibly justify an alternative route. When a dispute is entirely a dispute about a point of law, that attribute. in my view, would satisfy exceptionably (*sic*)."

It was therefore found that sections 104 and 105 of the TAA did not debar the court from considering the application.

The Promotion of Administrative Justice Act ('PAJA')

SARS contended that the provisions of PAJA did not empower the court to hear an application where the impugned decision was not a final decision and placed no immediate adverse burden on Absa. It was therefore not an 'administrative decision' contemplated in PAJA. Absa, however, argued that the application was not brought under PAJA but that it had relied on the principle of legality.

Sutherland ADJP disposed of these arguments (at [29]):

> "It is unnecessary, in my view, to decide this question because it seems to me that it can fairly be said that the attributes of the decision to refuse lies in the borderlands of which review-regime should prevail, ie, PAJA or Legality. The refusal undoubtedly had an effect even if it can plausibly be argued that it was not final in effect. More important, in my view, is that the decision to refuse was plainly a decision by an organ of state exercising a statutory power and its notional non-final attribute is not a bar, precisely because it nevertheless had an impact. Similar non-final decisions have been held be susceptible to review. (See: *C,SARS v United Manganese of Kalahari (Pty) Ltd* 2020 (4) SA 428 (SCA) at [4]; *C,SARS v Langholm Farms (Pty) Ltd* [2019] ZASCA 163 at [7] - [10]. *Earthlife Africa (CT) v DG, Dept of Environmental Affairs and Tourism* 2005 (3) SA 156 (C) at [35] to [37])."

Accordingly, it was considered appropriate to proceed on the legality principle, which requires that the point at issue should be a point of law and not involve questions of fact.

Law or fact

Absa's argument was that, in the statement of facts relating to Absa's role contained in the section 80J notices and in the subsequent letters of assessment, which relied on the identical premise, SARS had not rebutted Absa's assertions that it was ignorant of the transactions involving PSIC 4, DI Trust and the Brazilian transaction. In effect, SARS acted on the proposition that Absa's ignorance was not a defence. The judgment set out the relevant statement and Sutherland ADJP remarked (at [33]):

> "No rebuttal of the facts described herein appears in the section 80J notice, nor subsequently in the answering affidavits. No clear allegation of mendacity appears anywhere."

SARS asserted that the passages cited in the judgment did not signify acceptance of Absa's explanation. It was SARS' contention that the only way in which to establish the facts was by discovery of documents and examination of the witnesses in an appeal. The onus would be on the taxpayer in an appeal to establish that no tax was due.

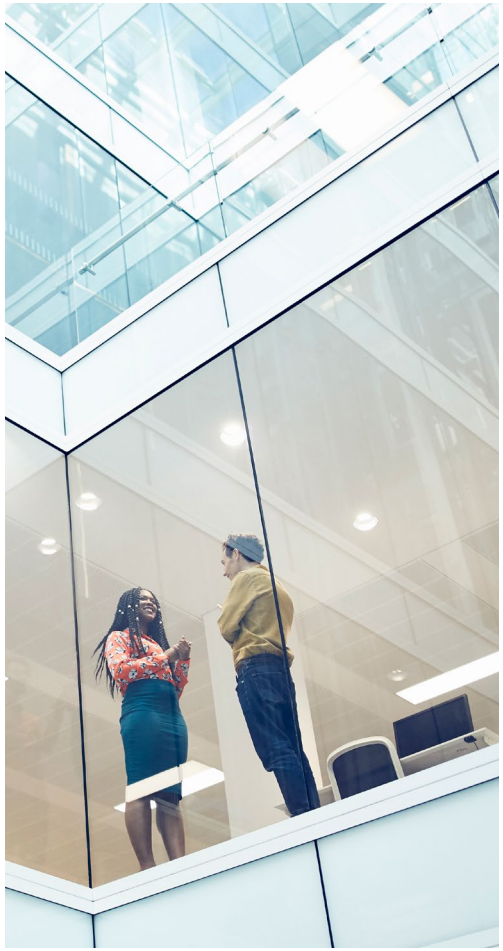
Sutherland ADJP found that this argument had been overtaken by the fact that SARS had issued letters of assessment with the same premise as the section 80J notices. He stated (at [35]):

> "The significance of the letters of assessment to this specific analysis is limited to the effect it has on understanding and interpreting the stance adopted by SARS in the section 80J notice. … Put bluntly: If you seek to assess and collect tax on the basis that it is due despite Absa being ignorant, then it is not open to claim that you deserve a chance to go behind the premise of the assessment levied, so you can afterwards attempt to prove Absa did have knowledge."

This led to the court's conclusion (at [36])

> "Accordingly, there is no room for a plausible dispute of fact. Absa was served a section 80J notice and subsequently served with letters of assessment on the facts reported by Absa about its role in the series of transactions. A semantic gyration cannot tum a Naartjie into an orange."

It was therefore held that the court had power to review the decision, which was a decision on a point of law.



The takeaway

Applying for pre-emptive review is a procedure that may be resorted to in disputes between taxpayers and SARS. This judgment provided useful pointers and added to the body of law concerning the review of decisions before such decisions are given effect to in an assessment.

- The principle that decisions may be taken on review in appropriate circumstances, even where the statute may prescribe a dispute resolution process, was affirmed. A court will not lightly be persuaded to depart from the prescribed procedures and will do so only where the circumstances are exceptional.
- Where the point at issue is a point of law, this is an indication of exceptionality which may justify a court to depart from the default process of objection and appeal as laid down in the TAA and consider an application for review.
- PAJA is the usual statute under which to pursue a review of administrative decisions. However, where PAJA may not apply (for example because the administrative action is not an administrative decision as contemplated in PAJA), administrative action may be taken on review on the grounds of of legality. At the heart of this is the principle that the exercise of public power, even if it does not constitute administrative action, must comply with the Constitution, which enshrines a right to lawful, reasonable and procedurally fair administration.

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Changes in the law concerning emigration and the liquidation of certain retirement funding

From 1 March 2021 changes to the law that affect certain South Africans who have left or are thinking of leaving the country permanently came into force. These changes will affect people who have certain types of retirement funding, such as retirement annuities and preservation funds (with an important proviso to the preservation funds). This article will explain from a high level how the changes may affect you if you are thinking of leaving the country permanently or have already left.

The starting point in discussing the changes is to establish the law before the changes were made. Prior to 1 March 2021 you could not access your retirement annuity unless you were 55 years of age, the fund was worth less than R7 000, you became permanently disabled or you followed the formal/financial emigration process with the South African Reserve Bank. From 1 March 2021 the South African Reserve Bank financial/formal emigration process no longer exists (unless your application to the Reserve Bank was received on or before 28 February 2021).

The law now states that anyone who wishes to access his/her retirement annuity may only do so if you have reached 55 years of age, the fund value is less than R15,000, you become permanently disabled or if you have been a non-resident for South African tax purposes for a period of three consecutive years on or after 1 March 2021 (i.e. if you were a non-resident for tax purposes from1 March 2018 to 1 March 2021 you will qualify). This last part is the important change for people who are thinking of leaving the country or have already left the country. If you want to access your retirement annuity (and the other provisos do not apply to you) you may no longer follow the formal/financial emigration process with the Reserve Bank; you must have been a non-resident for South African tax purposes for a period of at least three years.

The first issue is, therefore, understanding what is meant by breaking your tax residency so that you can apply to access your retirement annuity after a three-year period. This area of our tax law is complex and each person's circumstances need to be considered, but the general rule is that if you leave or have left South Africa permanently without the intention of coming back (or if you become 'treaty resident' of a country with which South Africa has a double taxation agreement) you should be able to prove to SARS that you have broken your tax residency as you no longer consider South Africa your true home. Please note that it never was a requirement that you had to financially/formally emigrate with the Reserve Bank in order to break South African tax residency.

As an example, if you decide that you are going to leave South Africa and move to the UK on a permanent basis you should in theory be able to break your South African tax residency the day you leave the country. You would then need to wait for three years after this date to be able to access your retirement annuity, at which point you would be able to liquidate the full value of the fund and be liable to pay the applicable withdrawal taxes.

Please note that if you have already reached the age of 55 you can access your retirement annuity at any point and the above three-year waiting period does not apply to you (although at this point you will be restricted to taking one third of the value of the fund as a lump sum and the remainder will need to go into a living annuity).

The change in the law is also applicable to certain preservation funds. A preservation

fund is a retirement vehicle which contains funds from previous pension or provident funds – i.e., if you leave an employer where you had a pension you have the option of putting the pension funds into a preservation fund. You do not make any further contributions to this fund, but it should hopefully grow over time with the investments that it holds. However, what a lot of people forget is that if you have not already made one withdrawal from a preservation fund there are no restrictions in accessing this fund. In other words, if you have a preservation fund but have not made a withdrawal from that fund, you can access the full value of that fund at any point (but must pay the requisite tax) and there is no three-year waiting period as discussed above.

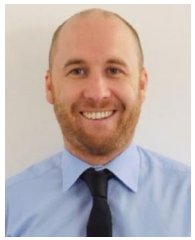
It is only if you have already made a withdrawal from a preservation fund that you must have broken your South African tax residency and have waited the three-year period, as discussed above, in order to access that fund. Alternatively, if you have reached the retirement date of your fund (each fund has its own rules and retirement date) you will also have access to your preservation fund subject to the one-third lump sum and two-third annuity restriction (with certain exceptions for provident preservation funds, which fall outside the scope of this article).

If you are still in South Africa and have a pension or provident fund with your employer, you will have full access to that fund when you terminate your employment and the three-year waiting period will not apply to you either.

The takeaway

It is, therefore, only certain retirement funding (retirement annuities and preservation funds that you have already withdrawn from) that are affected by the change in law and will require that you wait a three-year period from the date of breaking your South African tax residency in order to access the funds.

While specific guidance around how this three-year period of non-residence is to be proved to the South African authorities has yet to be provided (i.e., in terms of South African tax disclosures, filing requirements or foreign country tax residence certificate requirements), it is recommended that any impacted individual seek specialised South African tax advice to ensure correct disclosures to SARS are made.



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SARS Watch

SARS Watch 1 April 2021 – 30 April 2021

Legislation		
22 April 2021	Draft amendments to rules under sections 49 and 120 – SACUM-EPA tariff rate quotas	Comments must be submitted to SARS by 7 May 2021.
16 April 2021	Draft amendments to Part 1 of Schedule 1 – Notes 9 and 10 in Chapter 99 in order to apply the consolidated tariff subheadings 9999.00.10 and 9999.00.20 to various other rebate items in Schedule No. 4	Comments must be submitted to SARS by 17 May 2021.
12 April 2021	Draft amendments to rules under section 38 – SACU UCR Botswana and Namibia	Comments must be submitted to SARS by 26 April 2021.
9 April 2021	Amendment to rules under sections 54AA and 120 – Substitution of the DA180 carbon tax account (DAR 209)	Notice R328 published in Government Gazette No. 44428 with an implementation date of 9 April 2021.
9 April 2021	Amendment to Part 1 of Schedule No.1, by the amendment of various tariff subheadings under Chapter 49 as well as the insertion of Additional Note 6, in order to create separate 8-digit tariff subheadings for banknotes, postage stamps and revenue stamps	Notice R329 published in Government Gazettes No. 44428 with an implementation date of 9 April 2021.
1 April 2021	Notice prescribing a list of transactions or matters in respect of which the Commissioner may decline to make a decision in terms of section 72 of the Value-Added Tax Act	Notice 300 published in Government Gazette No. 44383 with an implementation date of 1 April 2021.
1 April 2021	Application and cost recovery fees for binding private rulings and binding class rulings under section 81 of the Act and section 72 of the Value-Added Tax Act, 1991	Notice 299 published in Government Gazette 44383 with an implementation date of 1 April 2021.
1 April 2021	Promulgation of rules to section 58A of the Customs and Excise Act, 1964, to implement anti-forestalling measures in respect of anticipated increases in excise duties – DAR 208	Notice R305 published in Government Gazette No. 44384 with an implementation date of 1 April 2021.
1 April 2021	Section 58A of the Customs and Excise Act No. 91 of 1964, as inserted by section 5 of the Tax Administration Laws Amendment Act No. 22 of 2018, shall come into effect on the date of publication	Proclamation No. 6 published in Government Gazette 44384 with an effective date of 1 April 2021.
1 April 2021	Amendment to Part 3F of Schedule No. 1, by an increase of 5.2 per cent in the rate of environmental levy on carbon dioxide equivalent from R127 to R134 per tonne, to give effect to the Budget proposals announced by the Minister of Finance on 24 February 2021	Notice R308 published in Government Gazette No. 44410 with effect from 7 April 2021.
1 April 2021	Amendment to Part 5A of Schedule No. 1, by an increase of 15c/li in the rate of the general fuel levy from 370c/li to 385c/li and 355c/li to 370c/li on petrol and diesel respectively, the substitution to Note 8 as well the increase of 1c in the carbon fuel levy from 7c/li to 8c/li for petrol and from 8c/li to 9c/li for diesel, respectively, to give effect to the Budget proposals announced by the Minister of Finance on 24 February 2021	Notice R311 published in Government Gazette No. 44410 with effect from 7 April 2021.
1 April 2021	Amendment to Part 5B of Schedule No. 1, by an increase of 11c/li in the RAF levy from 207c/li to 218c/li on both petrol and diesel, to give effect to the Budget proposals announced by the Minister of Finance on 24 February 2021	Notice R310 published in Government Gazette No. 44410 with effect from 7 April 2021.

1 April 2021	Imposition of provisional payment in relation to anti-dumping against the alleged dumping of pasta originating in or imported from Egypt, Latvia, Lithuania and Turkey classifiable in tariff heading 1901.11 and 1901.12 – ITAC Report No. 655	Notice R304 published in Government Gazette No. 44384 with effect from 1 April 2021 up to and including 16 September 2021.
1 April 2021	Amendment to Part 3 of Schedule No. 6, as a consequence of the increase in the fuel and RAF levy as announced by the Minister of Finance in his budget speech of 24 February 2021; the diesel refund provisions are adjusted accordingly	Notice R312 published in Government Gazette No. 44410 with effect from 7 April 2021.
Case law		
In accordance with date of judgment		
7 April 2021	CSARS v Levi Strauss SA (Pty) Ltd (509/2019) [2021] ZASCA 32	Whether goods consigned directly from one member state to another member state, qualifying for favourable rate of duty in terms of protocol, whether commission on purchases through a related company constituted buyer's commission, and whether royalties due directly or indirectly as a condition of sale of the goods for export to South Africa.
Rulings		
6 April 2021	BGR 56 – Application for a decision under section 72	This BGR prescribes the requirements and conditions relating to an application for a decision under section 72, pursuant to section 72(2) read with section 90 of the Tax Administration Act 28 of 2011.
Guides and forms		
6 April 2021	VAT Section 72 Decisions Process Reference Guide	This guide provides information and guidelines on value-added tax decisions under section 72 of the Value-Added Tax Act 89 of 1991, read with Chapter 7 of the Tax Administration Act 28 of 2011. It sets out the steps to be followed when applying for a section 72 decision and explains certain terms.
Other publications		
26 April 2021	Tax Alert – Meal reimbursements and travel logbooks: update to Interpretation Note 14	This alert discusses the updated Interpretation Note 14, which provides guidance on allowances, advances and reimbursements to employees.
13 April 2021	SA-TIED Dialogues – Research into Policy series	During the months of April, May, and June, the SA-TIED programme will host six online policy dialogues as part of the SA-TIED Dialogues – Research into Policy series.
12 April 2021	Tax Alert: The importance of contracts and VAT	This alert discusses a recent tax court judgment which considered the nature of services provided by a company and concluded that the international commission received was in respect of marketing and promotion services and is not related to the arranging of international transport services.
7 April 2021	OECD Secretary-General Tax Report to G20 Finance Ministers and Central Bank Governors.	This report provides an update on G20 tax deliverables including tax transparency, BEPS implementation, supporting developing countries, tax certainty and addressing tax evasion.
1 April 2021	OECD: Prevention of Tax Treaty Abuse – Third Peer Review Report on Treaty Shopping	This report reflects the outcome of the third peer review of the implementation of the Action 6 minimum standard on treaty shopping as approved by the Inclusive Framework.

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