

# When may SARS challenge the jurisdiction of the Tax Court?



Our tax cases contain a few instances in which SARS, or its predecessor, Inland Revenue, has sought to avert an anticipated unfavourable judgment by challenging the procedure under which the dispute has been raised.

The most recent attempt was in the matter of ABC (Pty) Ltd v Commissioner for the South African Revenue Service [2015] ZAWCHC 8 (judgment delivered on 6 February 2015) ('the ABC Case').

The recent challenge is perplexing, as SARS had readily entertained an objection against the assessments in question and had contested the appeal in the Tax Court, and had not at any stage of those proceedings suggested that the decision in question was not subject to objection and appeal.

## Background

In the ABC Case SARS had assessed a vendor, an international event organiser, for value-added tax which had not been declared in a return in respect of benefits granted to sponsors under a number of sponsorship agreements that it had concluded with large parastatal organisations. The liability of the vendor was determined by reference to the value of the supplies that the sponsors undertook to provide in consideration for the benefits, as specified in the sponsorship agreements. The assessment was made in terms of section 31 of the Value-Added Tax Act ('VAT Act').

The vendor claimed that it was entitled to an input tax

deduction in respect of the supplies that it had acquired by reason of the grant to the sponsors. SARS rejected this assertion because the sponsors, despite requests to do so, had not issued tax invoices in respect of the supplies that they had made. SARS relied on section 16(1)(a) of the VAT Act, which states that no amount may be claimed as input tax deduction unless the vendor is in possession of a valid tax invoice. It rejected the assertion by the vendor that the sponsorship agreements contained adequate documentary proof of the supplies, as provided in section 16(1)(f) of the VAT Act, and that the sponsorship agreements could be relied upon in order to allow its claim.

The vendor therefore objected to the assessment, and, on disallowance of the objection, appealed to the Tax Court. The Tax Court decided the matter in favour of SARS and the matter then proceeded on appeal to the High Court .

#### The procedural argument

In the course of the argument in the High Court, SARS' counsel suggested that the matter could not be determined by objection and appeal because the reason for the dispute was an administrative decision by SARS not to apply section 16(1)(f) of the VAT Act. This decision, it was argued, was not subject to objection and appeal in terms of the VAT Act (and its successor in this regard, the Tax Administration Act ('TAA')) but could only be contested by way of a review under the Promotion of Administrative Justice Act ('PAJA').

#### The right to objection and appeal

Section 32(1)(b) of the VAT Act, at the relevant time, specified that a person aggrieved by any assessment made in terms of section 31 had the right to object to that assessment. This provision has been superseded by section 104(1) of the TAA, which states that a taxpayer who is aggrieved by an assessment made against the taxpayer may

object to the assessment.

In the event that an objection is disallowed, section 107 of the TAA confers upon the taxpayer the right to appeal to the Tax Court against the decision to disallow the objection. Section 117 of the TAA provides that the Tax Court has jurisdiction over tax appeals.

Any decision of SARS is not subject to objection unless the VAT Act or the TAA specifically provides that it is.

Where a decision is not subject to objection, the only recourse is to challenge the decision under section 6 of PAJA, which entitles any person who is aggrieved by an administrative action to apply to the High Court for a review of the administrative action.

The history

In that matter the majority ruled that the notification of a decision by the Commissioner was not notice of an altered or reduced assessment against which an objection or appeal could be noted. The minority held that no appeal lay against the decision, which was an administrative decision, but found that the notice in question had been improperly issued and applied.

Two conflicting judgments emerged in the Cape Special Income Tax Court in 1959 and 1960. Both cases considered the application of a dictum from the dissenting judgment of Schreiner JA in *Irvin and Johnson (SA) Ltd v CIR*:

*Despite, therefore, the right of appeal given by section 79(1) to a taxpayer who is dissatisfied with 'any' decision of the Commissioner as notified under section 77(6), Act 31 of 1941, if it appears that the decision has been given under a section which requires the Commissioner to exercise an administrative discretion, no appeal lies to the Special Court . . . Had the Legislature intended that an appeal to the Special Court should lie in cases falling under the*

*proviso it would, in all probability, have made express provisions therefor as it did in sections 40, 64(2), 66(2), and 90 of Act 31 of 1941.*

In ITC 892 23 SATC 358 (C), the validity of a decision to disallow a claim for the deduction of a bad debt was challenged by the taxpayer. O'Hagan J held that the decision was an administrative decision, and, on the strength of the passage cited above, the court did not have jurisdiction to consider the appeal. The Court held, at page 361:

*The jurisdiction of the Supreme Court in matters of this character is an inherent one, as pointed out by Innes C.J. in Johannesburg – Connolly v Ferguson, 1909 T.S. 195. The only jurisdiction given to this Court by section 79(1) is to entertain appeals from any decision of the Commissioner as notified in terms of section 77(6). If in a particular matter an appeal does not lie this Court has no jurisdiction to deal with the matter. It may well be that in cases where it can be proved that the Commissioner has not applied his mind to a matter entrusted to his judgment alone under section 11(2)(g) of the Act, the Supreme Court can interfere on review – see Rand Ropes (Pty.) Ltd. v C.I.R., 1944 A.D. 142 at 150-2. The Special Court has, however, no jurisdiction to do so.*

In ITC 936 24 SATC 361 (C), the jurisdiction of the Special Income Tax Court was again challenged by counsel for the Commissioner. Here the Commissioner had valued a farmer's produce, and raised an assessment against which objection had been made. Counsel's argument was that the method of valuation of the produce was a determination made in the exercise of the Commissioner's discretion. This was an administrative action, and the appropriate procedure was to bring an application to the (then) Supreme Court for review.

Van Winsen J rejected this assertion. After having regard to the decision in ITC 892, the Court expressed the view that the

passage relied upon by O'Hagan J could not be interpreted as decisive in this regard. The learned judge examined the powers of the Special Income Tax Court. This forum was a creature of statute and could only act in accordance with the powers conferred upon it by statute. These powers included a right to alter, reduce or confirm an assessment, or, if it thought fit, to refer the assessment back to the Commissioner.

The law permitted an objection against an assessment without regard to the nature of the processes which led to its coming into existence. It was held that a decision of the Commissioner in the exercise of his discretion – against which no objection could be made – which contributed to the making of that assessment cannot render the assessment immune to an objection. It followed that, if the objection was disallowed, the matter could be taken on appeal to the Special Income Tax Court, which had jurisdiction to decide the matter under the laws that brought it into existence.

A jurisdictional challenge was again raised in 1985 in the matter of KBI v Transvaal Suikerkorporasie Bpk 47 SATC 34 (T). Van der Walt J (who delivered the judgment of the Full Court) cited the judgment of van Winsen J in ITC 936 with approval, and quoted extensively from that judgment. Again the Court had regard to the powers that were conferred by statute on the Special Income Tax Court, which at the time were found in section 79(13) of the Income Tax Act.

Van der Walt J found, at page 43:

*In my opinion, this section grants the Special Court power to review an assessment that is wrong by altering, reducing or referring it back to the Commissioner. The Court has these powers notwithstanding that the error in the assessment can be ascribed to the fact that the Commissioner has exercised his discretionary powers improperly. As I see it, it cannot be inferred from section 79(13) that the Court is given power only where the dispute arose in a case in which the*

*discretionary power of the Commissioner is not involved, or, where it is involved, the exercise thereof is expressly made subject to appeal. (our translation from the Afrikaans judgment)*

The question of the jurisdiction of the Income Tax Special Court was not addressed by the Appellate Division when the Commissioner took this decision on appeal. However, the decision of the Full Court of the Transvaal Provincial Division stood unchallenged for almost 30 years, and has been applied in the Tax Court (see ITC 1697 63 SATC 146).

Why has the issue again been raised?.

It would appear that the enactments of PAJA and the TAA were seen as events that might afford SARS the opportunity to question the powers of the Tax Court anew. Counsel for SARS in the ABC Case pointed out that the power to review administrative action under PAJA was reserved to a 'court' as defined in that statute. This definition did not include the Tax Court: therefore, it followed (so the argument went) that the Tax Court lacked the power to determine whether or not the administrative action of SARS in refusing to apply section 16(1)(f) of the VAT Act was justifiable.

Binns-Ward J, who delivered the judgment of the Full Court of the Western Cape Division in the ABC Case, remarked that the jurisdictional challenge was similar to that raised in KBI v Transvaalse Suikerkorporasie Bpk. After setting out the argument as summarised by the Court in that matter, the learned judge stated (at para [22]):

*The Full Court rejected the argument. It held that save in respect of decisions in relation to which a right of appeal was expressly excluded by the tax legislation, the tax court was empowered to take into consideration whether or not the Commissioner had properly exercised his discretion in respect of making assessments that were subject to appeal. In*

*that context, so the Court held, where the exercise of discretion is pertinent to the making of the impugned assessment, the 'appeal' is in reality a 'review' of the Commissioner's decision on customary review grounds.*

Turning then to the question whether PAJA applied in the matter before the Court in priority to the TAA, Binns-Ward J stated (at para [23]):

*PAJA regulates the bringing and determination of review applications in terms of s 6 of the statute; it is not directed at the bringing and determination of appeals in terms of the tax laws administered under the TAA. The appellant in the current matter was exercising a right of appeal to the tax court against the assessments; it was not seeking the review and setting aside of a decision in terms of s 16(2)(f) of the VAT Act. The fact that the determination of the appeal might entail the tax court in considering the legality of an administrative decision that was integral to the making of the assessment does not deprive the court of its jurisdiction to decide the appeal. To interpret and apply the legislation as requiring the dichotomous procedures enjoined in the argument advanced on behalf of the Commissioner would in many cases defeat the very purpose of the establishment of the specialist tax court. The jurisdiction of the tax court to determine tax appeals is conferred without any limitation in s 117(1) of the TAA. The court must be taken to have been invested with all the powers that are inherently necessary for it to fulfil its expressly provided functions.*

SARS' challenge was therefore rejected.

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