

# Do your objections and appeals to Sars correctly

..... or else it could become very costly.

The taxpayer in H R Computek (Pty) Ltd v CSars (830/2011) [2012] ZASCA 178 learnt a painful and expensive lesson about the importance of adhering to the rules and provisions relating to objection and appeal. In particular, this judgement reminds taxpayers, not for the first time, that the grounds of your objection are extremely important because you are stuck with them all the way through the judicial process.

The taxpayer company, after being subjected to a VAT audit, was assessed to tax in a total amount of some R4.04 million, consisting of a capital amount of R1.246 million representing output tax not accounted for, additional tax of R2.492 million (200% of the capital amount), a penalty of R125 000, and interest of R177 000. The taxpayer, represented by the sole member, submitted an objection on the regulation form ADR1, on which it ticked the boxes indicating that the objection covered the penalty, the additional tax, the interest and "other". Fatally, as it turned out for the taxpayer, the representative did not tick the box marked "There is a miscalculation on the assessment in that an amount(s) was taken into account/not taken into account to determine the liability for tax". In an amplifying addendum to the form, relating to the "other", the taxpayer described the grounds as:

"Unfair application of procedural matters by Sars Special Investigations.

Excessive add tax of 200% plus penalties and interest charges. Interference of Sars Special Investigation office into the affairs of the businesses including HR & Associates without any form of negotiations or consultations.

Reparations of damages caused by Sars interference in the said businesses in order to put things right.

Sars contraventions of its own Sars CHARTER and Sars SSMO and Dispute Resolution process.”

In a separate attachment the taxpayer wrote. “Uncontested VAT Assessment value of R1 246 177.69 was presented to the said business on the 10th March 2004”.

After Sars had disallowed this objection, the taxpayer’s tax adviser replied in a letter dated 7 October 2004 that “we are in agreement with your turnover figures. The difference between your figures and those of the VAT returns relate to different methods of accounting for VAT liabilities. A further letter will be addressed to you”.

Nearly three years later, on 22 January 2007 the taxpayer filed notice of appeal. Yet again, it made no reference to the tax itself but mentioned only the additional tax, penalty, interest and “unfair tax procedural matters”. When Sars pointed out that the liability for the capital amount was therefore not in dispute, the taxpayer for the first time asserted that Sars had incorrectly included the turnover figures of a related entity. Sars contended that the rules governing the tax court precluded the taxpayer from introducing an additional ground at this late stage. The parties could not agree and this preliminary issue was referred to the tax court, which found against the taxpayer but granted it leave to appeal to the SCA.

The thrust of the taxpayer’s argument was that the objection, appeal, meetings and correspondence with Sars taken together showed that it was presenting a globular objection to the entire assessment. The SCA rejected this contention and upheld the finding of the tax court. The court referred to three cases in support of its decision.

In First South African Holdings (Pty) Ltd v CSars 73 SATC 221

the court stated that an assessment is the determination by the Commissioner of one or more of a number of amounts, each punctuated by the word "or". It followed that "the definition does not countenance an objection to a globular amount. The capital amount was an assessment to tax in terms of s 31 of the VAT Act with which the taxpayer was dissatisfied and to which it ought to have objected pursuant to the provisions of s 32(1)(b). That it did not do".

The court then addressed the effect of the taxpayer's failure to object and referred to *Matla Coal Ltd v CIR* 48 SATC 223, where the court, after pointing out that every objection was required to be in writing and specify in detail the grounds on which it was made, stated that this limitation was for the benefit of the Commissioner, who should not be prejudiced by an appellant shifting the grounds of objection. He went further to observe that in interpreting and applying the provision the court should not be unduly technical or rigid in its approach. "It should look at the substance of the objection and the issue as to whether it covers the point which the appellant wishes to advance on appeal must be adjudged on the particular facts of the case".

Counterbalancing this provision, which favoured the Commissioner, was the three year limit imposed on the Commissioner within which to raise an amended assessment, as discussed in *CSars v Brummeria Renaissance (Pty) Ltd & others* 69 SATC 205. These two provisions balanced the scales between taxpayer and Sars.

In the event, it followed that the taxpayer, having failed to object to the capital amount (and indeed having explicitly accepted its correctness in the 7 October 2004 letter), was seeking to raise a new objection by advancing the argument it did on 22 January 2007. Because the taxpayer had not objected to the capital amount of the assessment, it had become final and conclusive in April 2007 together with the additional tax, penalty and interest. And for this reason the taxpayer could

not lawfully require the Commissioner to revisit the assessment. The appeal therefore failed entirely.

On the matter of costs, however, the taxpayer had a small victory to salve its wounds to at least some extent. The court found that the matter was “devoid of any factual or legal complexity” and Sars had been unjustified in using two counsel where one would have been adequate. Accordingly, although the taxpayer lost with costs, at least these included those of only one counsel.

So the taxpayer learned an expensive lesson. Your objection, often submitted in haste and in the heat of your reaction to an assessment that makes your blood boil, is one of the most important documents you will ever draft in your relationship with Sars.

\*Prof Peter Surtees is a director at Norton Rose in SA.

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