Recent case on judicial review of SARS' actions in terms of PAJA

By Hanneke Farrand and Esther Geldenhuys, ENS – Edward Nathan Sonnenbergs

The South African Revenue Service ("SARS") increased their audit activity and focus on the collection of tax. Taxpayers often rely on protection in terms of administrative law and in particular, the Promotion of Administrative Justice Act, No. 3 of 2000 ("PAJA"). An important rule under PAJA is that judicial review can only be used as a last resort after all other internal remedies have been exhausted and taxpayers therefore first have to make use of the objection and appeal procedures provided for in the Tax Administration Act, No. 28 of 2011. The case outlined below highlights the nature of some of SARS' actions that may be brought under judicial review in terms of section 6 of PAJA and the circumstances under which such a review application might be dismissed.

MTN International (Mauritius) Limited v Commissioner for the South African Revenue Service (unreported, case number 23203/11)

In the recent North Gauteng High Court judgement of *MTN International (Mauritius) Limited v Commissioner for the South African Revenue Service*, the taxpayer brought an application in terms of section 6 of PAJA for the review of the procedural defects and actions of the Commissioner for SARS in the raising of an additional income tax assessment. An order was sought to set aside the assessment and to refund monies withheld by SARS.

The taxpayer in this case was a company registered in Mauritius, registered as a taxpayer with SARS and a subsidiary

of a South African holding company. The taxpayer incurred interest expenditures on loans granted by its holding company and claimed a deduction on the interest in terms of the Income Tax Act, No. 58 of 1962 ("the Act"). The original assessment was issued on 1 April 2008. Issues arose regarding whether the taxpayer was allowed to claim the deduction and the Commissioner for SARS decided to conduct an audit based on its view that the interest expenditure was 'unproductive interest'.

A letter of findings was issued to the taxpayer on 24 February 2011 and the taxpayer replied on 25 March 2011. On 31 March 2011 SARS raised an additional assessment and emailed the assessment on the same day to the applicant, but indicated the 'due date' of the assessment as 30 March 2011. It is important to note that SARS' power to raise an additional assessment would have prescribed in terms of section 79 of the Act on 31 March 2011. SARS also indicated the 'second date' as being 31 March 2011 instead of setting it at 30 days later as normally done in practice. The taxpayer submitted that SARS could not raise an assessment that omitted the period for payment entirely, and that by predating the 'due date', the taxpayer was deprived of the 30 days from 'due date' within which to object or to request reasons or time within which to pay the assessed amount.

SARS relied on the Constitutional Court decision in *Metcash Trading Limited v Commissioner, South African Revenue Services 2001 (1) SA 1109 (CC)* and submitted that where a specialist court, such as the Tax Court, had been assigned to hear appeals against tax assessments, the High Court did not have jurisdiction to adjudicate where there is only a dispute of fact and no question of law. The court agreed that there was indeed a dispute of fact because of the allegation made against SARS, which revolved around the reasons for raising the assessment and for fixing the 'due date' and the 'second date'. The court held that it could not decide whether the

alleged manipulation of the dates was mala fide (in bad faith) since it was an issue that had to be decided by the Tax Court.

It is not clear from the case whether all internal remedies were first exhausted by the taxpayer or whether the application in terms of section 6 of PAJA was brought due to the fact that the taxpayer felt it was deprived of the opportunity to object. The important point illustrated by the case is that a review application under PAJA is not suitable where there might be a dispute of facts.