Dispute Resolution

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Overview for this DVD – Cont.

• Tax Dispute resolution
  – Important principles:
    • Overview of the new dispute resolution rules that were gazetted in July 2014;
    • The importance of an objection;
    • The importance of asking for reasons;
    • What constitutes an assessment;
    • The role of PAJA in dispute resolution;
  – Practical issues:
    • Suspension of payment requests and the TAA;
    • Requests for reduced assessments;
Overview for this DVD – Cont.

- Understatement penalty vs additional tax;
- Late objections;
- Submission channels for dispute resolution;
- Request for reasons, objections, appeals and the ADR process.
The new dispute resolution

• The following flow chart provides an overview of the new dispute resolution rules:

Dispute resolution process flow

– Process flow available from our website: www.taxconsulting.co.za
The importance of your objection – the old rules

• HR Computek (Pty) Ltd v CSARS 75 SATC 104

– Taxpayer objected to certain penalties and interest on VAT following an audit and subsequent assessment from SARS;

– When the objection was disallowed, the taxpayer, on appeal sought to dispute the VAT liability in addition to penalties and interest.

– SARS refused to entertain the dispute iro the capital amount stating that the taxpayer cannot introduce this ground at appeal stage.
– The parties could not agree and accordingly the question of whether the taxpayer could raise the new ground for appeal was referred to the court for a decision.

– The tax court and SCA held that since the taxpayer did not raise the VAT amount in its ADR1, it was precluded from raising it in appeal.

– The taxpayer argued that it had objected to the entire VAT assessment, including VAT liability.

– The court referred to First South African Holdings (Pty) Ltd v CSARS 73 SATC 221 which dealt with the definition of ‘assessment’
–It was held that the VAT liability constituted an assessment on its own and that this was not objected to when the objection was lodged to the “entire” VAT assessment.
The importance of your objection – the new rules – Cont.

- In terms of rule 10(1)(c)(i) of the new rules, the grounds for appeal must specify in detail:

  “in respect of which grounds of the objection referred to in rule 7 the taxpayer is appealing;”

- Rule 32(3) of the new rules

  “The appellant may not include in the 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.”

- The principle is clear that, (under either the old or new rules), you only have one chance to get your grounds for objection right.
The importance of your objection

- Did you know your grounds of objection in the ADR1 binds the taxpayer throughout the entire judicial process?

- Did you know that a single assessment document actually consists of various assessments?

  – An objection is one of the most important documents you will ever draft in dealing with SARS. It is vitally important that you consider all possible angles and consider as many of them as is possible before drafting an objection.

  – If you get it wrong, you can always object again to include any omissions but prescription applies.
The Importance of asking for reasons

• Rule 6 of the rules state:

“A taxpayer who is aggrieved by an assessment may, prior to lodging an objection, request SARS to provide the reasons for the assessment required to enable the taxpayer to formulate an objection in the form and manner referred to in rule 7.”

• Requesting reasons is vital to ensuring all possible angles are covered at objection stage and so that taxpayers are not surprised at appeal stage with new grounds for the assessment.

• Can SARS change the basis of the assessment at a later stage?

• One would expect that they can’t in light of the HR Computek case.
The Importance of asking for reasons the old rules-Cont.

• In ITC 1843 72 SATC 229:

“I cannot agree with this contention nor is the taxpayer at a disadvantage if the [grounds for assessment] incorporates additional or different grounds. First of all, it cuts both ways. Both SARS and the taxpayer will be entitled to add additional grounds or additional defences in their statements. No disadvantage flows from the aforesaid interpretation, because each party will have an opportunity by adding new or different arguments and therefore be in a position to state his case better or more fully than the case set out in the preceding correspondence.” [our insertion]
• It would appear from this judgment that SARS can indeed change the grounds for assessment at a later stage provided the taxpayer is given opportunity to defend any such new ground for assessment.

• However, ITC 1843 was decided before the new rules were gazetted and before the HR Computek case. Seems unfair that the taxpayer can’t change its grounds for objection but SARS can change the basis for the assessment?

• In ITC13238 & ITC13164 (WCTC), delivered in December 2014, the court had opportunity again to consider the issue of whether or not SARS may amend its “grounds for assessment” at a later stage:
The Importance of asking for reasons the old rules-
Cont.

• In summary the court seems to express doubt on the correctness of the HR Computek case:

“It may also be that in Computek the court was influenced by the decision in Matla Coal v Commissioner for Inland Revenue 1987 (1) SA 108 (A) 10 which I would respectfully observe was decided at a time when s 83(7) (b) of the Income Tax Act expressly said that a taxpayer is limited to the grounds set out in his notice of objection. That provision was removed at a later stage from the Income Tax Act.”
The Importance of asking for reasons the old rules-Cont.

• The court then draws a distinction between disputes on fact and law and disputes involving the exercise by SARS of a discretion based on being satisfied of particular matters.

• In the case of a dispute on fact and law, the court comments that both SARS and the taxpayer should be allowed to change their grounds at any stage before trial, “subject to fair play and the other party being sufficiently forewarned before trial”.

• Where the commissioner is required to be satisfied of certain matters however it is a different story:
“One is not dealing with a situation where the law prescribes that certain expenses shall be disallowed or certain income shall be taxed if a certain state of affairs objectively exists. One is dealing, rather, with a situation where a particular fiscal result follows only if the Commissioner himself is satisfied of certain matters.”

- In this regard, the court held that:

SARS cannot “support [its] existing assessment on the basis of matters on which [it] was not satisfied when [it] issued that first assessment.”[our insertions].
The Importance of asking for reasons the old rules-Cont.

• In summary, the current position appears to be that taxpayers cannot change the grounds for objection unless SARS changes the grounds for assessment; and

• SARS can change the grounds for assessment iro of disputes of facts and law but not where the liability to tax depends on SARS being satisfied about certain matters at the time of issuing the assessment.

—In these cases it is even more important that SARS be asked for reasons so a change in the basis for the assessment can be better challenged.
The Importance of asking for reasons the new rules

• Rule 31(3):

“SARS may not include in the statement a ground that constitutes a novation of the whole of the factual or legal basis of the disputed assessment or which requires the issue of a revised assessment.”

• No guidance from the courts on the new rules yet. Notice however the difference in wording between rule 31(3) and 32(3).

• Our view is that the same conclusions are likely to follow the new rules as followed the old rules.
What constitutes an assessment?

• There has been no case on the meaning of the word “assessment” as defined in the TAA. However, in CSARS v South African Custodial Services (Pty) Ltd 2012 (1) SA 522 (SCA) it was held that an assessment letter from SARS constitutes an assessment as it was defined under the income tax Act (similar wording under TAA):

  – Why is this important. The actual assessment (or what we commonly know as an assessment) may, and often does, follow quite some time after the assessment letter has been issued. Taxpayers are allowed 30 days to object to the assessment. It is advisable to take a prudent approach and count the number of days from the date of the assessment letter was issued and not to wait for the “actual assessment” to be issued.
What constitutes an assessment?

- First South African Holdings (Pty) Ltd v CSARS 73 SATC 221
  
  – Each line on an assessment, constitutes an assessment on its own. It is therefore crucially important, when drafting the objection, that you object to each of the assessments contained in a single assessment document.
  
  – Failing to do so may result in your client suffering the same fate as HR Computek.
The role of PAJA in tax dispute resolution - case law

- PAJA allows for the High Court to review administrative action of SARS.
- Most actions of SARS constitute administrative action and hence most actions of SARS may be reviewed under PAJA.

- This is exactly what was done in:
  - Ackermans V C:SARS;
  - Chittenden N.O and others v C:SARS; and
  - MTN v C:SARS;
Ackermans V C:SARS

• Facts:
  • SARS started and investigation in October 2003;
  • SARS requested information which was supplied in around 2005;
  • SARS raised additional assessments in 2011

• Arguments for the taxpayer:
  • The lengthy period of delay between 2005 and 2011 constitutes unreasonable administrative action.
• Held:

• Whether or not the period of delay is unreasonable depends on whether or not the assessment in question had prescribed or not. I.e. whether there was non-disclosure of material facts, fraud or misrepresentation.

• Deciding on this point requires an enquiry into the merits of the case;

• As this is a review application, the court cannot entertain the merits of the dispute; and

• Application dismissed.
Chittenden N.0 v C:SARS

• Facts:
  • SARS refused to issue a tax clearance certificate to the taxpayer.

• Arguments for the taxpayer
  • SARS’ refusal creates harm to the taxpayer;
  • The court is requested to order issuance of the tax clearance certificate under PAJA
Held:

- The court accepts that issuance of a TCC constitutes administrative Action under PAJA
- The court however cannot give an order for the issuance of a tax clearance certificate.
- Doing so would “set a precedent that would negatively impact on the first respondent’s tax administration.”
Henceforth every taxpayer whose application for a clearance certificate had been refused would simply be entitled to approach the court and without having to address the merits of the refusal obtain an order compelling the first respondent to issue him/her with the certificate”. (Our emphasis)
MTN v C:SARS

• Facts:
  – SARS disallowed certain expenses claimed by MTN
  – In raising the assessment, SARS manually set the due date to the day before the original assessment would prescribe.

• Arguments for the taxpayer:
  – SARS acted in bad faith by manually fixing the due date to the day before the original assessment would prescribe.
  – Court asked to set aside the additional assessment
MTN v C:SARS

- Held
  - There is a dispute of fact and accordingly, the court cannot entertain the application under PAJA. Disputes should be resolved in the tax court.
Observation

• Using PAJA seems to be an attempt to play the man (SARS) rather than the ball (the merits of SARS’ case).

• Why would a taxpayer play the man rather than the ball?
  – Either the taxpayer plainly dislikes the man; or
  – There are no merits in the taxpayer’s case.

• Like a good referee, our courts have identified this and have blown the whistle in favour of SARS.
Observation

• Play the ball. If you need to play the man, chances are you are going to lose in any event so why take the risk?
Practical issues

• Suspension of payments;
• Requests for reduced assessments;
• Understatement penalties vs old additional tax;
• Late objections;
• Submission channels;
• What needs to be in your objection;
• What needs to be in your appeal; and
• The ADR process summary.
Suspension of payment – Cont.

• Section 164 of the TAA allows taxpayers to request a suspension of payment if:
  – The taxpayer intends to lodge an objection/
  – The taxpayer has lodged an objection

• SSO must take the following into account when considering whether or not suspend payment:
  – Recovery of tax will be jeopardised/risk of asset dissipation;
  – Compliance history of the taxpayer;
  – Whether fraud is involved in the origin of the dispute;
Suspension of payment – Cont.

– Whether payment will result in irreparable hardship; and
– Whether taxpayer has tendered adequate security.
Suspension of payment – Cont.

- Application is a letter which you submit to SARS office where the taxpayer is registered.

- What if SARS does not respond?
Suspension of payment – Automatic suspension.

- Section 164(6) of the TAA:

  “(6) During the period commencing on the day that—
  (a) SARS receives a request for suspension under subsection (2); or
  (b) a suspension is revoked under subsection (5),
  and ending 10 business days after notice of SARS’ decision or revocation has been issued to the taxpayer, no recovery proceedings may be taken unless SARS has a reasonable belief that there is a risk of dissipation of assets by the person concerned.”
Requests for reduced assessments

• If you made a mistake on the tax return, whether VAT, PAYE or income tax, there are two ways to fix it:
  – Either request a correction; or
  – Request for a reduced assessment under section 93(d) of the TAA which states that SARS may issue a reduced assessment if:

  “SARS is satisfied that there is an error in the assessment as a result of an undisputed error by—
    (i) SARS; or
    (ii) the taxpayer in a return.”
Requests for reduced assessments

Practically SARS normally responds: please file a corrected return.
Understatement penalty vs additional tax

• Understatement penalties (later) are the equivalent of the old 200% additional tax imposed under now repealed section 76 of the Income Tax Act and 60 of the VAT Act.

• SARS can however impose these additional taxes as “understatement penalties” after promulgation of the TAA

• So what?
  – The grounds for remittance of understatement penalties are much more stringent than the grounds for remittance of additional taxes.
Grounds for remittance of additional tax

• SARS may remit additional tax with *open discretion* but if there was intentional evasion involved, SARS can only remit if there are extenuating circumstances.

• SARS must remit understatement penalty only if taxpayer was in possession of a valid tax opinion before the relevant return was due.

• Forcing taxpayers to deal with the much less lenient grounds for remittance? Fair?
Provisions to address the unfairness – 270(6A) TAA

• SARS can only impose an understatement penalty when the default relates to a period before promulgation of the TAA if:
  – Additional tax was capable of being imposed at the time of promulgation of the TAA but was not imposed
  – Capable of being imposed means:
    • The verification, audit or investigation necessary to determine the additional tax had been completed before commencement date of the TAA
    • PAYE example
Provisions to address the unfairness

• The requirement to have an opinion before the relevant return was due to get remittance of an understatement penalty is removed if the return was submitted before commencement date of the TAA (s 270(6B));

• If SARS can still impose a understatement penalty in respect of a return submitted before commencement date of the TAA (example a 2012 income tax return):
  – Grounds for remittance of understatement penalty is expanded to allow SARS to remit if:
Provisions to address the unfairness

- In the case of Income tax there are extenuating circumstances (example of SARS invitations to object again).
- In the case of VAT and PAYE, if there was no intention to evade tax (s 270(6D) of the TAA).
Late objections

• Taxpayers have 30 days from date of assessment to file an objection
• What if you don’t file within 30 days?
  – Invalid objection
• Request condonation for late objection.
Late objection – condonation request

- SARS’ Interpretation note 15 sets out in what circumstances SARS may condone a late objection.
- If your objection is filed late you need to give SARS the necessary information to allow them to consider whether or not they will condone the late objection.
- In terms of Interstation Note 15, SARS takes the following into account to decide on whether or not they will condone a late objection:
  - The prospects of success;
  - The reason for the delay;
  - The length of the delay;
  - Other relevant factors
Late objection – condonation request

• What if SARS still declares the objection as invalid?

• A decision not to condone a late objection is subject to objection and appeal and hence, you object to that decision.
<table>
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<tr>
<th>Type of Tax</th>
<th>Request for remission</th>
<th>Notice of objection (NOO)</th>
<th>Notice of appeal (NOA)</th>
<th>ADR1</th>
<th>ADR2</th>
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<td>Trust</td>
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<td>X</td>
<td>x</td>
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Request for reasons

• Requests for reasons are governed by rule 6 of the rules:
  – Must be in the prescribed form and manner;
  – Specify an address at which the taxpayer will accept delivery of the reasons;
• NB – Must be delivered to SARS within 30 days from the date of assessment.
• Extension: Up to 45 days (must be obtained before 30 days lapse)
The objection

- Objections are governed by rule 7 of the rules:
  - Must be made in the prescribed form and manner (above);
  - Must be filed within 30 days from the date of assessment or the date on which reasons were given.
  - Must:
    - Include the part of specific amount objected to;
    - Include which grounds for assessment are disputed;
    - Include relevant supporting documents (not previously submitted to SARS);
The objection

• If not on e-filing (i.e. ADR1’s and ADR2’s), specify an address at which the taxpayer will accept delivery of the feedback from SARS;
• Be signed by the taxpayer or duly authorised representative.
  – If above requirements are not complied with – invalid objection.
• If an objection is declared invalid, taxpayers have another 20 days from the date on which the objection was filed to resubmit a valid objection (no need to ask for extension).

• Extension: No more than 21 days (no extension may be granted if more than 3 years have lapsed from date of assessment)
Appeals

- Appeals are governed by rule 10 of the rules:
  - Must be filed within 30 days from date of notice of disallowance;
  - Must be in the prescribed form and manner
  - Must include:
    - Indicate which grounds for objection is relied upon in appeal;
    - Indicate any new ground;
    - Supporting documents (not previously delivered to SARS);
    - Signed by the taxpayer or duly authorised representative;
Appeals

- Indicate whether or not ADR process wants to be used;
- Extension: 21 days/45 days in exceptional circumstances
The ADR process

• In general, the ADR process is one where the taxpayer (mostly accompanied by the advisor) meets with SARS (normally the relevant assessor/auditor and a person from legal) and a facilitator (always a SARS official but doesn’t have to be) to come, hopefully, to an agreement or to settle the dispute.

• Most, in our experience either ends with SARS agreeing to reduce the assessment or in a settlement.