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TAX & EXCHANGE CONTROL ALERT

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Time is money (also in tax litigation): A Tax Court tale of woe

Tax litigation is no laughing matter. By the time a tax dispute reaches the Tax Court, it is likely that it will have been going on for some time already. This is because prior to the Tax Court proceedings, a taxpayer will have first objected against the assessment (most often an additional assessment) issued by the South African Revenue Service (SARS) with SARS then either partly or fully disallowing the objection. Where a taxpayer then elects to appeal against SARS' decision to disallow the objection, the taxpayer will have the option of either referring the matter to alternative dispute resolution (ADR) or choose to appeal to the Tax Court (or Tax Board depending on the *quantum*) directly.



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Once the decision is made to approach the Tax Court (whether directly or after the dispute could not be resolved during ADR), it generally takes at least 18 months to two years (often longer nowadays) before the matter is eventually heard in the Tax Court. In other words, it is safe to say that the road to the Tax Court is lengthy and as such, readiness at the time of the hearing is key. If the taxpayer is not ready when the

matter is heard, the result can be that the taxpayer is liable for not only the tax debt in dispute, but also the legal costs incurred on the road to the Tax Court.

Unfortunately, this was the outcome in the matter of *Mr K v Commissioner for the South African Revenue Service* (Case No IT24682) (as yet unreported).

Facts

- The taxpayer had appealed to the Tax Court, objecting to income tax assessments, following an audit into his income tax affairs for the 2008 to 2013 tax years.
- SARS raised additional income tax assessments for each of the tax years, including amounts of income not declared by the taxpayer in his gross income, and imposed penalties and interest.
- The matter was set down from 30 November 2020 until 4 December 2020, with the court being assisted by both an accountant and a commercial member of the court.

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The Tax Court dismissed the taxpayer's appeal, confirmed SARS' decision to invalidate the objections against the 2008 to 2010 additional assessments, and ordered the taxpayer to pay the costs of the proceedings, including the costs of the interpreter.

- Counsel for SARS travelled to Cape Town for the matter, as did the Registrar of the Tax Court.
- The interpreter, originally appointed by the taxpayer, remained to assist the court, notwithstanding the fact that he had been informed by the taxpayer that he would not be paid.
- The taxpayer failed to appear in court on 30 November 2020.
- SARS requested default judgment in terms of Rule 44(7) of the Tax Court Rules promulgated under section 104 of the Tax Administration Act 28 of 2011 (TAA).
- When the taxpayer eventually arrived at court, after the matter was initially stood down, it came to the court's attention that the taxpayer's counsel and attorney had withdrawn, the latter on the morning of the hearing as he had not been paid or had been advised that he would not be paid.
- Furthermore, upon his arrival at court, the taxpayer advised that he was not in a position to fund the services of the court-approved interpreter. Instead, he wanted the court to provide an interpreter and also suggested that SARS pay half for the interpreter. In place of a court translator, he also tendered the services of his wife as translator, which the court did not find acceptable as a replacement for a court-approved translator.

Judgment

The Tax Court dismissed the taxpayer's appeal, confirmed SARS' decision to invalidate the objections against the 2008 to 2010 additional assessments, and ordered the taxpayer to pay the costs of the proceedings, including the costs of the interpreter.

The reasons noted by the Tax Court for the decision can best be summarised as follows:

- The accountant and commercial member are highly regarded professionals who have been practicing for many years in their respective fields and their time is a valuable resource.
- The expenses incurred in respect of the appointment of the accountant, commercial member and SARS' counsel, which were significant, were funded by the fiscus, from taxpayers' money.
- The taxpayer further alleged that he was not aware of the hearing, which the court found improbable given that the matter had been ongoing for five years and that he was well aware of the fact that pre-trial attendances were concluded on his instructions by his erstwhile legal representatives.
- This was disputed by SARS, considering that, amongst other things, comprehensive pleadings had been filed on his behalf and as a pre-trial conference took place which his attorney attended on his instruction.
- The court asked SARS' representative to address the court and take the taxpayer and the court through its heads of argument. It then invited the taxpayer to make representations under oath himself. He, however, suggested that his wife give evidence on his behalf and wished to bring his accountant to give evidence.

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- The matter stood down for the taxpayer to consider what SARS' representative had argued. When the parties returned to court a discussion again ensued relating to the costs of the interpreter and the taxpayer did not take the matter any further despite the fact that the interpreter had remained. This was not acceptable to the court and further delayed proceedings.
- Ultimately, the taxpayer failed to prosecute his appeal despite having been given the opportunity to do so and the argument presented by SARS was therefore uncontested by the taxpayer.

Comment

The judgment is a reminder of the importance of taxpayers ensuring that they manage tax disputes properly, including in terms of the instructions they give to their legal representatives. Whilst one can appreciate that there are costs involved in conducting tax litigation and that these costs can be high, taxpayers should be

mindful of the potential costs they may have to incur and manage the dispute accordingly. The failure to do so may result in a taxpayer not being liable for only his legal representatives' fees, but also being liable for SARS' legal fees, in terms of a cost order. What is interesting about the matter under discussion, is that the Tax Court went a step further by also ordering the taxpayer to pay the costs of the interpreter, which does not generally form part of a cost order. In this case for example, the taxpayer could have potentially avoided the cost order, by requesting a postponement a few weeks or months in advance of the hearing.

One must also be mindful that this is not the first time in which the Tax Court has granted an application for default judgment in terms of rule 44(7) of the Tax Court Rules (see for example our Tax and Exchange Control Alert of 10 June 2021).

Louis Botha

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