

SOUTH AFRICA / JUDGMENT

Forge Packaging (Pty) Ltd v Commissioner for the South African Revenue Service (21634/2021)

[2022] ZAWCHC 119; 85 SATC 357 (13 June 2022)

[2022] ZAWCHC 119

COURT

Western Cape High Court, Cape Town

BEFORE

A.G. Binns-Ward

CASE / FILE NUMBER

21634/2021

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Republic

of South Africa

IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

No. 21634/2021

Before:

The Hon. Mr Justice Binns-Ward

Date

of hearing: 2 June 2022

Date

of judgment: 13 June 2022

In

the matter between:

FORGE

PACKAGING (PTY)

LTD

Applicant

and

THE

COMMISSIONER FOR THE

SOUTH

AFRICAN REVENUE SERVICE

Respondent

JUDGMENT

BINNS-WARD J

[1] The applicant company, which is a registered taxpayer, applied in its notice of motion for the following relief:

‘... an order:

1. Reviewing and setting aside the additional assessments raised by the [Commissioner of the South African Revenue Service (“the respondent”)] on 8 August 2018 in respect of the applicant’s 2014, 2015 and 2016 years of assessment on the grounds that the respondent failed to comply with the peremptory provisions of inter alia sections 42 and 106(5) of the Tax Administration Act 28 of 2011 (“the TAA”).

2. To the extent necessary:

2.1 Extending the period in which the application may be launched in terms of section 9(1)(b) of PAJA [the Promotion of Administrative Justice Act 3 of 2000], alternatively, condoning and/or overlooking the late filing of this application in terms of the principle of legality; and

2.2 Condoning any failure to comply with the provisions of section 11(4) of the TAA.

3. Directing the respondent to pay the costs of this application.

4. Granting the applicant further and/or alternative relief.’

The application was brought in the circumstances described below.

[2] The South African Revenue Service (SARS) issued the applicant with original assessments in respect of the returns of income made by the applicant for the 2014, 2015 and 2016 tax years. On 31 January

2018, SARS addressed a letter to the applicant informing it that its return of income for the 2016 tax period had been selected for ‘verification’. Verification is one of the three ‘information gathering’ methods identified in s 40 of the TAA, which provides: ‘SARS may select a person for inspection, verification or audit on the basis of any consideration relevant for the proper administration of a tax Act, including on a random or a risk assessment basis’.

[3] The term ‘verification’ is not defined in the TAA. The applicant’s counsel, if I understood him correctly, suggested during oral argument that it was employed only in s 40 of the Act. That is not correct. It is also used in ss 47(1)(a), 68(1)(k), 97(4)(c), 190(2) and (3), 270(2)(c) and (6A) and in item 134 of Schedule 1 (which provided for an amendment to the Value-Added Tax Act). In every instance in which the word is employed it is used in association with, and in apparent contradistinction to, the term ‘audit’. The TAA also does not specially define the term ‘audit’. The import of ‘inspection’ in the relevant sense is evident from the provisions of s 45.

- [4] The canon of construction that meaning must be applied to every word used in a statutory provision and the presumption against tautology support interpreting the words ‘verification’ and ‘audit’ used in the forementioned provisions of the TAA to denote discrete and distinguishable exercises. Certainly, on a contextual consideration, no basis for ‘functional repetition’,^[1] such as emphasis, clarity or certainty, were the terms to be construed synonymously, suggests itself. The character of the

difference, if any, between the concept of ‘verification’ and that of ‘audit’ for the purposes of the TAA is pertinent to the applicant’s reliance on the respondent’s alleged non-compliance with s 42 of the TAA for the relief sought in paragraph 1 of its notice of motion. Section 42 of the TAA sets out a framework for ongoing communication between a SARS official involved in or responsible for an ‘audit’ and the affected taxpayer. There is no equivalent provision in the TAA in respect of ‘verifications’.^[2]

- [5] Section 42, as it read prior to the amendment of subsection (1) in terms of s 16 of Act 22 of 2018, provided:

‘Keeping taxpayer informed

- (1) A SARS official involved in or responsible for an audit under this Chapter must, in the form and in the manner as may be prescribed by the Commissioner by public notice, provide the taxpayer with a report indicating the stage of completion of the audit.
- (2) Upon conclusion of the audit or a criminal investigation, and where-
 - (a) the audit or investigation was inconclusive, SARS must inform the taxpayer accordingly within 21 business days; or
 - (b) the audit identified potential adjustments of a material nature, SARS must within 21 business days, or the further period that may be required based on the complexities of the audit, provide the taxpayer with a document containing the outcome of the audit, including the grounds for the proposed assessment or decision referred to in section 104 (2).
- (3) Upon receipt of the document described in subsection (2) (b), the taxpayer must within 21 business days of delivery of the document, or the further period requested by the taxpayer that may be allowed by SARS based on the complexities of the audit, respond in writing to the facts and conclusions set out in the document.
- (4) The taxpayer may waive the right to receive the document.
- (5) Subsections (1) and (2) (b) do not apply if a senior SARS official has a reasonable belief that compliance with those subsections would impede or prejudice the purpose, progress or outcome of the audit.

(6) SARS may under the circumstances described in subsection (5) issue the assessment or make the decision referred to in section 104 (2) resulting from the audit and the grounds of the assessment or decision must be provided to the taxpayer within 21 business days of the assessment or the decision, or the further period that may be required based on the complexities of the audit or the decision.’

[6] The ‘public notice’ contemplated in s 42(1) is GN 788 of 2012, published in GG 35733 of 1 October 2012. It provides in relevant part as follows:

‘2 Due dates for reports

A SARS official involved in or responsible for an audit instituted before but not completed by the commencement date [ie the date of the coming into operation of the TAA] or instituted on or after the commencement date, must provide the tax payer concerned with a report indicating the stage of completion of the audit –

- (a) in the case of an audit instituted before the commencement date, within 90 days of the commencement date and within 90 day intervals thereafter; and
- (b) in the case of an audit instituted on or after the commencement date, within 90 days of the start of the audit and within 90 day intervals thereafter,

until the conclusion of the audit.

3 Details of report

The report must include the following details as at the date of the report:

- (a) A description of the current scope of the audit
- (b) The stage of completion of the audit; and
- (c) Relevant material still outstanding from the tax payer.’

[7] The letter informing the applicant that its 2016 tax return was being subjected to verification called upon it to review the information set out in the relevant notice of assessment (ITA34) issued by SARS against the applicant’s ‘[own] relevant material including the related VAT and/or PAYE returns’ and enjoined it, if it found any errors, to correct these by submitting a revised income tax return. The applicant was informed that if it did not detect any errors, it was required to complete and submit a supplementary declaration (IT14 SD). The letter also advised the applicant that it might ‘be required to provide additional relevant material’. (That the Act contemplates, and provides for the possibility of, the production of additional relevant material in the context of a ‘verification’ exercise is evident from the provisions of ss 46 and 47 of the Act.)

[8] The content of the letter suggests that by ‘verification’, SARS meant a process in which the taxpayer was called upon itself to check and confirm the accuracy and correctness of the return that it had made. Such a process is entirely consistent with the primary meaning of

the word ‘verification’ as defined in the Oxford Dictionary of the English Language,[3] viz. ‘the process of establishing the truth, accuracy, or validity of something’. The ordinary import of the word is neutral as to by whom the process of checking is undertaken; it may be by a third party, or equally by the person who produced the matter that is being checked (as, for example, is done by a claimant in summary judgment proceedings when ‘verifying’ the basis for its claim). ‘Audit’, by contrast, implies an independent review process. The Oxford Dictionary of the English Language defines ‘audit’ to mean ‘an official inspection of an organization’s accounts, typically by an independent body’.

[9] In its answering affidavit, which was deposed to by a specialist legal adviser at the Service’s Bloemfontein office, SARS set forth its understanding of ‘verification’ as follows:

‘46.2 Verification is a face-value corroboration or confirmation of the information declared by the taxpayer on the declaration or in a tax return. This process involves comparing the information declared by the taxpayer against the financial and accounting records and/or other supporting documents furnished by it. A verification’s objective entails ascertaining the correctness of the information contained in the taxpayer’s declaration and whether it represents the taxpayer’s tax position fairly and accurately.

46.3 A verification process does not extend beyond verifying the information supplied by the taxpayer and therefore does not include an interrogation of the authenticity and completeness of the supporting information. In essence, the process is limited to establishing whether the amounts declared by the taxpayer are correct and correctly represent the tax treatment described by the taxpayer. The verification process aims to determine if the tax items in a taxpayer’s return are supported.

46.4 The verification process provides a mechanism for ensuring the accuracy of a taxpayer’s assessment and identifying additional risks contained in the taxpayer’s assessment.’

[10] As to SARS’s understanding of an ‘audit’ in the relevant sense, the deponent to its answering affidavit gave the following explanation:

‘46.7 An audit does more than establish the corroboration of a taxpayer’s state of affairs; it interrogates all information supplied by the taxpayer and obtained from other sources in coming to an accurate assessment of the taxpayer’s tax position. An audit might entail extending its scope to directly obtaining third party confirmation of tax amounts.

46.8 In an audit, SARS concerns itself with more than the information disclosed to it; it also endeavours to ascertain its completeness and authenticity. This process might entail interrogating the supporting information to obtain an insight into the completeness and authenticity of the information disclosed to SARS. In addition, SARS might undertake a detailed analysis to get an understanding of the information it receives to form a view of the taxpayers state of affairs.

46.9 An audit envisages an investigation into the correctness, completeness and subsequent treatment of all aspects reflecting the taxpayer's state of affairs.'

[11] The evidence in the current application suggests that in making the impugned additional assessments SARS acted entirely upon the basis of the information provided by the applicant, and not on the basis of an independent inspection and interrogation of the company's accounts. Indeed, one of the complaints made by the applicant in its objections was that SARS applied the information provided at face value without regard to its significance in the context of the

applicant's functions within the group of companies of which it is part.

[12] The applicant did not lodge a revised return or supplementary declaration within the period stipulated in the 31 January 2018 letter from SARS, and a final demand was consequently issued by SARS, on 2 March 2018, calling upon the applicant to do so within 30 days. The matter was being dealt with at that stage by its professional tax representative. It must be acknowledged, if one has regard to the IT14 SD form (a pro forma example is available on the SARS website) that its completion requires the affected taxpayer to give a very comprehensive analysis of its financial conduct during the tax period in question. A supplementary declaration, by way of a completed form IT14 SD, amounts to submitting a 'return' within the meaning of that word as defined in s 1 of the TAA, and as contemplated in terms of s 25 and s 27 of the Act.

[13] The applicant eventually filed a supplementary declaration on 31 May 2018, together with its 2016 annual financial statements. The submission of accompanying annual financial statements is a standard requirement when a supplementary declaration is filed. The applicant's 2016 financial statements included, in the usual way, comparative figures for the company's immediately preceding (2015) financial year.

[14] Based on the information provided, which confirmed that the applicant did not have any employees and was not registered as a vendor under the Value-Added Tax Act, SARS formed the opinion that the applicant had not been carrying on a trade, and accordingly, should not have claimed, or been allowed, as deductions from its income any expenditure and losses of the nature contemplated in s 11(a) of the Income Tax Act 58 of 1962, [4] or to carry over past assessed losses for the purposes of determining its taxable income, as provided for in terms of s 20 of the Income Tax Act. SARS was also concerned about the large capital loss claim reflected in the applicant's declaration.

[15] On 4 July 2018, SARS requested the applicant to provide it with further information in respect of the breakdown and calculation of the capital loss declared in the IT14 SD, together with the supporting documents. The applicant was also asked to provide reasons why the capital loss was 'not clogged in terms of paragraph 39 of the Eighth Schedule of the Income Tax Act'. [5]

- [16] The applicant responded on 6 August 2018. Its tax representative furnished the information requested by SARS, and conceded that the capital loss fell to be clogged and should therefore not have been claimed in its tax return. The claiming of the loss in its return was attributed by its tax accountants to 'a mere oversight by the clerk while completing the tax return'.
- [17] The erroneous capital loss claim, and the opinion formed by SARS, after its consideration of the applicant's supplementary declaration, that the company did not carry on a trade within the meaning of s 11 of the Income Tax Act, led it also to re-examine the applicant's returns of income for the 2014 and 2015 years. The evidence suggests that it undertook the exercise based on the information provided by the applicant, and not pursuant to an independent inspection of the applicant's accounts. SARS did the re-examination mindful of its obligation in terms of s 92

of the TAA, if it is at any time satisfied that an assessment does not reflect the correct application of a tax Act to the prejudice of SARS or the fiscus, to make an additional assessment to correct the prejudice.

- [18] On 8 August 2018, SARS notified the applicant of various adjustments that it had made to the applicant's assessments issued in respect of the 2014, 2015 and 2016 tax years consequent upon its finalisation of the income tax verification for the 2016 period. The letter of notification gave the following 'summary of adjustments' made:

(Find in PDF)

- [19] The notification letter appears to have been drafted in accordance with a template that provided for the insertion after the 'summary of adjustment(s) made' of the 'reasons for adjustment'. It is evident that little care was taken by the author in completing that part of the document. It went as follows:

'Reason(s) for adjustment:

- The following expense has been regarded to be capital in nature and has been disallowed.

Description

Amount

Capital loss is clogged in terms of para 39 8th schedule R19,500,844.00

- The claim of R2,224,036.00 in respect of operating expenses has not been taken into account due to the following reason(s):

[No reasons were inserted.]

- In terms of the Tax Administration Act an understatement penalty of 25% has been imposed as a result of an incorrect statement in a return and the behaviour is considered to be reasonable care not taken in completing the return. The amount can be found under "Omission of Income" on the Notice of Assessment (ITA34).'

The reasons ostensibly provided under ‘reason(s) for adjustment’ did not make any sense. Consequently, the only means afforded to the applicant to identify their character was from the information, with reference to the relevant provisions of the Income Tax Act and Practice Note 31[6] provided in the ‘summary of adjustments’. In that regard, the reference to s 20(2A) of the Income Tax Act also did not make sense as that provision relates to ‘any person other than a company’.

- [20] The notification letter advised that ‘the revised assessment’ would be issued in due course’ and alerted the applicant that should it wish to lodge an objection to any of the adjustments, it should comply with the provisions of s 104 of the TAA. Corresponding additional assessments for each of the three tax years in question were issued on the same day as the forementioned summary of adjustments.
- [21] Inasmuch as some of the reasons for the adjustments did not read sensibly, it was open to the applicant (which was represented throughout in its dealings with SARS by its professional tax advisers) in terms of rule 6 of the cumbrously entitled ‘Rules Promulgated under Section 103 of the Act Prescribing the Procedures to be Followed in Lodging and Objection and Appeal against an Assessment or Decision Subject to Objection and Appeal Referred to in Section 104(2) of that Act etc.’ (hereinafter referred to as the ‘Tax Court Rules’), [7] to request SARS to provide further and better reasons for the assessments to enable it to formulate its objection. It did not do so.
- [22] The applicant’s tax representative submitted objections, in which it addressed each and every one of the items referred to in SARS’s forementioned summary of adjustments. It is not necessary for present purposes to describe the nature of the objections in any detail. Suffice it to say that the objections took issue with SARS’s assessment that the applicant, in performing its function as a treasury company within a group of companies, did not derive an income from carrying on any trade. They also placed in issue whether SARS had provided adequate reasons for its imposition of the understatement penalties. They also pointed out that the figure of R2 224 036 referred to in the summary of adjustments in respect of the applicant’s 2016 tax year did not relate to the applicant’s actual operating expenses in any of the tax years under review and was therefore ‘presumed [to be an amount] not applicable to the Taxpayer’. None of the objections raised, in terms, SARS’s alleged non-compliance with s 42 of the TAA.
- [23] SARS gave notice, in January 2019, of its rejection of the applicant’s objections. The notices of rejection did not engage in any detailed manner with the substance of the objections. They did, however, advise the applicant of its right to appeal, and provided particulars of the time period within which a notice of appeal had to be filed and where the applicant could obtain the prescribed notice of appeal form.

[24] In February 2019, the applicant lodged its notices of appeal in respect of the adjustments affected to its assessments for each of the years in issue and indicated therein, as provided in Tax Court rule 10(2)(e),[8] that it wished to make use of the alternative dispute resolution procedures provided for in Part C of the Tax Court Rules.

Alternative dispute resolution was duly attempted between the parties, but it was not successful. The alternative dispute

resolution process was terminated in August 2019.

[25] SARS thereafter delivered its ‘Statement of grounds of assessment and opposing appeal’, as prescribed in terms of Rule 31 of the Tax Court Rules. In its rule 31 statement, SARS, inconsistently with the terminology used in the correspondence with the applicant in January and March 2018, referred to the information gathering exercise triggered by its 31 January 2018 letter as a conducted ‘audit’, rather than a ‘verification’. However, assuming, as I am inclined to do, that the exercises are discrete in character, determining which label properly applied would turn on an assessment of the facts.

[26] SARS identified the ‘issues in dispute’ for the purposes of the appeal as follows in paragraph 15 of its rule 31 statement:

‘15.1 Whether the Appellant should be allowed an assessed loss in the amount of R3 120 646 in the 2014 tax year with such assessed loss set off against the Appellant’s income for that year in terms of section 20 of the ITA;

15.2 Whether the Appellant is entitled to deductions claimed in terms of Section 11(a) of the ITA for each of the tax years in question despite generating no income from trade in those periods;

15.3 Whether SARS is correct in imposing an understatement penalty of 25% on the appellant.’

The correspondence between the issues identified by SARS for the purpose of the appeal and the items in the summary of adjustments that were not conceded by the applicants seems clear to me, but the applicant contends in its supporting affidavit in this application that there is a stark disparity between ‘the disallowance of its objections and the facts and grounds contained in the Rule 31 [statement]’. It is unnecessary for present purposes to determine that complaint. Suffice it to note that, in terms of Tax Court rule 31(3), SARS is forbidden from including ‘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’. Accordingly, as the respondent has pointed out in its answering affidavit, it is open to the applicant to note an exception to SARS’s rule 31 statement or to apply for the objectionable parts of it to be struck out if its content offends against the prohibition in rule 31(3).

[27] The applicant was required, in terms of Rule 32 of the Tax Court Rules, after receipt of the rule 31 statement of SARS to deliver its statement of grounds of appeal, in which it had to set out the grounds upon which it was appealing and to state the legal grounds and facts in the

rule 31 statement that it admitted and those that it 'opposed'. It did not do so, however. Instead, it brought an application in the Tax Court for the judicial review and setting aside of the additional assessments. SARS thereupon applied in terms of Tax Court rule 42 read with Uniform Rule 30 to strike out the review application as an irregular step on the grounds that it was an impermissible procedure in the Tax Court.

- [28] The strike out application was heard by Cloete J in the Tax Court, sitting alone, as contemplated by s 118(3) of the TAA. On 19 October 2021, the learned judge upheld SARS's objections and set aside the applicant's review application. However, apparently influenced by the judgment in *Absa Bank Ltd and Another v Commissioner, SARS* [2021] ZAGPPHC 127 (11 March 2021), 2021 (3) SA 513 (GP), the judge was persuaded to grant an order staying the appeal pending the determination of equivalent review proceedings to be instituted by the appellant in the High Court, provided such proceedings were instituted within 30 calendar days of the date on which the stay was granted. The current application was thereafter instituted on 17 December 2021, well outside the 30-day period provided in the Tax Court's staying order.
- [29] The only effect of the applicant's failure to comply with the time limit stipulated in the Tax Court's order seems to me to be that the applicant's tax appeal pending in that court is no longer stayed. Consistently with that effect, SARS demanded that the applicant deliver its statement of grounds of appeal. The applicant did so on 21 January 2022. In the result the applicant is prosecuting the current application in parallel with its appeal in the Tax Court. Both sets of proceedings are directed at obtaining the same result – the setting aside of the additional assessments.
- [30] SARS opposes the current application on the following grounds:
- (a) That it was instituted outside the timeframe provided in terms of the forementioned order by Cloete J in the Tax Court.
 - (b) That there has been an unreasonable delay in the institution of review proceedings and it is brought outside the 180-day limit provided in s 7 of PAJA.
 - (c) That the review proceeds on the misplaced premise that the applicant was subjected to an 'audit' within the meaning of s 42 of the TAA, when, so SARS alleges, it is clear that SARS 'conducted an income tax verification and not an audit'.
 - (d) That the applicant had failed to obtain the required direction from this court in terms of s 105 of the TAA permitting it to bring the application.[9]
- [31] It is convenient to deal with the lastmentioned ground of opposition by the respondent first. (I have, in effect, already disposed, in paragraph [29] above, of the point identified in paragraph [30](a). The basis for opposition described in paragraph [30](c) falls to be determinatively adjudicated only if the review application is entertained pursuant to a direction in terms of s 105 of the TAA.)

[32] The applicant did not apply in its papers for a direction in terms of s 105 of the TAA. As the relief it seeks is an order setting aside the assessments, it clearly required such a direction in order to prosecute proceedings to that end at first instance in any jurisdiction other than in the Tax Court. Mr Kotze, who appeared for the applicant, did not explain the applicant's failure to apply for a direction, and gave every appearance, without actually saying so, that he thought that it was not necessary. His approach may have been informed by the omission by the court in Absa Bank *supra* to expressly give such a direction. It is clear from the judgment in Absa Bank, however, that the court did regard such an application as necessary. Sutherland ADJP dealt with the point, in para 25, holding that the application for a direction could be brought together with, and in the same proceedings as, the application to the High Court for the substantive relief being sought. It was only when I pressed him on the point that Mr Kotze applied for the required direction orally from the bar, after first seeking, unsuccessfully, to persuade me that it could be granted

pursuant to the applicant's prayer for 'further and/or alternative relief'. [10] The respondent's counsel did not object to the application for a direction being moved in that informal manner. They did contend, however, that a case for a direction had not been made out on the papers.

[33] The applicant's counsel relied heavily on the judgment in Absa Bank in support of the application for a direction in terms of s 105.

[34] I was informed from the bar by SARS's counsel, Mr Sholto-Douglas SC, who appeared together with Mr Sidaki, that some aspects of the judgment in Absa Bank are regarded by SARS as controversial, and that an appeal from the judgment is currently pending in the Supreme Court of Appeal. Be that as it may, it is fortunately not necessary for me in this matter to adopt a view on the merits of the judgment in that case. The Absa Bank case was in any event materially distinguishable on its facts and legal context.

[35] There is, in my view, however, nothing controversial about the finding in ABSA Bank that the TAA does not oust the jurisdiction of the High Court to decide tax matters, notwithstanding the establishment by the Act of the Tax Court as a specialised court specifically to deal with them. That finding is well supported by the authorities. One need look no further than to the judgment of the Constitutional Court in *Metcash Trading Limited v Commissioner for the South African Revenue Service and Another*

[2000] ZACC 21 (24 November 2000); 2001 (1) SA 1109 (CC); 2001 (1) BCLR 1 (CC), especially at para 43-47. It is not material that the judgment in Metcash was given when the specialist court referred to in the since repealed provisions of s 36 of the Value-Added Tax Act was the tax court provided for in (the now also repealed) s 83(2) of the Income Tax Act, 1962. There are no relevant points of distinction between the regime provided in the previously applicable provisions of Part III of Chapter 3 of the Income Tax Act in place when Metcash was decided and their replacement in Chapter 9 of the TAA.

[36] As Sutherland ADJP pointed out in Absa Bank, the concurrent jurisdiction of the High Court is now confirmed in terms by the provisions of Part B of Chapter 9 of the TAA.

Those provisions, read with s 117 (which is in Part D of the Chapter), establish that the Tax Court has jurisdiction only in respect of tax appeals lodged under s 107. Appeals lodged under s 107 are appeals against assessments or any of the 'decisions' referred to in s 104(2). Section 105 of the TAA provides that '[a] taxpayer may only dispute an assessment or "decision" as described in section 104 in proceedings [in the Tax Court], unless [the] High Court[11] otherwise directs'. There does not seem to me to be any cogent basis to question the validity of Sutherland ADJP's construction of s 105 to the effect that while the Tax Court is the 'default route' for appeals against assessments and 'decisions', the High Court may direct otherwise if it deems meet.

[37] The tenor of s 105 of the TAA implies that the High Court should deem it meet to 'otherwise direct' only when it is evident that that the 'default route' would be less appropriate. In that sense, the current legislation gives a stronger indication than the equivalent preceding provisions did that resort to the Tax Court in matters in which it has jurisdiction is the ordinarily indicated course for obtaining redress when the setting aside of an assessment is sought.[12] It is consequently incumbent on any party seeking a direction in terms of s 105 to show good cause why an exception should be allowed from the ordinarily indicated course. It appears that one of the well-recognised situations in which the High Court will exercise its jurisdiction in tax matters is when the question for determination turns wholly on a point of law.

[38] Mr Kotze submitted that the applicant's grounds for impugning the assessments were wholly predicated on points of law and that there were no relevant factual disputes. I do not agree. The alleged non-compliance by SARS with s 42 of the TAA is only

one of the issues in the applicant's appeal pending before the Tax Court. The applicant's statement of grounds of appeal delivered in terms of rule 32 of the Tax Court Rules identifies three other grounds of appeal or objection. Two of them involve factual as well as legal issues. Therefore, assuming, *ex hypothesi*, that the applicant's counsel is correct in his contention that the s 42-related ground of appeal is a purely legal issue, the applicant, by seeking to have it determined on review to the High Court rather than in the context of the appeal pending in the Tax Court, is setting up a situation in which the appeal could be determined in piecemeal fashion.

[39] What if the review application in the High Court were dismissed? Would the pending appeal then be resumed in the Tax Court? And how would the Tax Court deal with the result of the review if the decision adverse to the applicant in the High Court became the subject of parallel appeals to the full court, or the SCA or the Constitutional Court? The potential for unwholesome delay and forensic dislocation if one of the issues in the pending appeal in the Tax Court is separated for determination in another jurisdiction is starkly evident.

[40] The position in the current matter is quite distinguishable in this respect from those that presented in Metcash and Absa Bank. In neither of those cases did the taxpayer approach the High Court in respect of relief that was germane in an appeal already pending before the specialist tax court.

[41] I should not be misunderstood, however, to suggest that the fact that there is already an appeal pending before Tax Court ousts this court's jurisdiction to entertain the review. That is manifestly not so. What I am saying is that the course that the applicant seeks to pursue in the peculiar context of the current matter strikes me as inappropriate and pregnant with undesirable complications. It seems to me that it would be inappropriate in

such circumstances for this court to give the direction in terms of s 105 of the TAA that the applicant needs to be able to proceed with the review application in this court.

[42] Mr Kotze argued, however, that the applicant should not be put through the 'protracted slog'[13] of trial-like proceedings in the Tax Court. The short answer is that if the appeal really is amenable to determination on a purely legal question without the need for any oral evidence on the facts, a protracted slog in the Tax Court should not be necessary.

[43] Section 118(3) of the TAA provides that if an appeal to the Tax Court involves a matter of law only, the president of the court must decide it sitting alone. If the matter of law arises out of facts that are common ground or undisputed, there is nothing to prevent the Tax Court, so constituted, from dealing with the appeal on a stated case,

or on the facts that are discernibly common ground on a reading of the respective statements delivered by the parties in terms of Tax Court rules 31 and 32.

[44] Moreover, if, as in the current matter, the appeal is brought on a number of discrete grounds, and only one of them involves only a matter of law that, if decided in favour of the taxpayer, would be dispositive of the validity of the impugned assessment or 'decision', there is nothing to prevent the taxpayer from requesting the Tax Court, in terms of Tax Court rule 42 read with Uniform Rule 33(4), to decide that ground separately from, and before, the remaining issues in the appeal. I cannot imagine that the court would not accede to such an application if the president of the court were persuaded that it would be convenient to do so. [14]

[45] But, quite apart from the foregoing considerations, I am not persuaded that the issue involved in the contemplated review is purely one of law. The question whether the exercise was a 'verification' as contended by SARS or an 'audit' turns, in my view, on the determination a court will have to make based on the factual evidence of what the exercise entailed.

That there is a factual issue involved is adumbrated in the respondent's ground of opposition described in paragraph [30](c) above. I have indicated that the evidence on the papers suggests to me that it was not an audit. That prima facie view

could, however, well be altered by the effect of a fuller picture given in oral evidence. Another factual question that could

require determining if the court were to determine that the exercise was an ‘audit’, not a ‘verification’, is the extent to which the exchanges between SARS and the taxpayer in the context of the exercise might have constituted substantial compliance with the requirements of the public notice published in terms of s 42(1) of the TAA.[15] Oral evidence is exceptional in review proceedings brought on motion in the High Court, but not in appeals in the Tax Court.

[46] Taking all the forementioned factors into account, I am not persuaded that good cause has been shown for this court to give a direction in terms of s 105 of the TAA that the applicant’s intended judicial review application should, exceptionally, be entertained by this court. It is strictly unnecessary in the circumstances for me to say anything further on the intended review, but in the peculiar circumstances of the case I think it is nevertheless desirable that I should do so, in particular concerning the applicant’s related application for condonation, in terms of s 9 of PAJA, of the delayed institution of the review application.

[47] Mr Kotze initially hedged his position as to whether the application involved a review of an administrative decision under PAJA, or a so-called legality review. His ambivalence was probably inspired by the debate before the court in the Absa Bank matter as to the juristic character of the review in that case. The debate in that matter arose in a very different context to that of the current case. If I understood counsel correctly, he ultimately conceded, correctly in my judgment, that the

intended review in this matter is one that resorts under PAJA. A decision by the Commissioner to issue a notice of assessment

is undoubtedly an administrative decision.

[48] The significance of the review being one in terms of PAJA is the applicant’s failure to have instituted the proceedings within the 180-day limit determined by s 7(1) of PAJA. It is established that it is not competent for a court to entertain an application for judicial review brought outside that limit unless it has granted an appropriate extension of time for the institution of the review proceedings pursuant to an application in terms of s 9(1) of PAJA. [16] A court may grant such an application if the interests of justice so require (s 9(2)).

[49] There is no *numerus clausus* of factors to be considered in determining whether it would be in the interests of justice to grant condonation in terms of s 9 of PAJA. The extent of the delay and the explanation for it are obviously important considerations, as are the importance of the matter in issue and the prospects of success in the review.

[50] In the current matter, the delay has been considerable and the explanation for it unconvincing. The importance of the matter is not clear because the nature and effect of the adverse effect of any non-compliance by SARS with ss 42 and 106(5) of the TAA in relation to the issuing of the impugned additional assessments are obscure.[17] It is by no means obvious that the appropriate remedy on review, even were the alleged non-compliance

established, would be a setting aside of the assessments. Moreover, for the reasons given earlier in this judgment, I am inclined to the view that the applicant's 2016 tax return was subject to 'verification', not 'audit', and that s 42 was not of application. In the result, I am unable to find that the applicant's intended review enjoys good prospects of success.

[51] The potentially dislocating effect, discussed above, of the intended review on the pending proceedings in the Tax Court would also be a factor weighing against a finding that it would be in the interests of justice to condone the delay. Another important consideration is that there is nothing preventing the applicant from relying on the alleged non-compliance with s 42 and s 106(5) in its appeal in the Tax Court.[18] The object of its appeal is to avoid the coercive effect of the additional assessments. It does not wish to be subject to the obligatory effect of the assessments. That is what its appeal in the Tax Court is about fundamentally. The applicant is therefore entitled to rely in the pending appeal on the allegedly vitiating effect of SARS's non-compliance with s 42 and s 106(5) of the TAA – if it is able to establish the fact – by way of a defensive or collateral challenge to the legality of the Commissioner's decision; cf. *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*

[2004] ZASCA 48 (28 May 2004); [2004] 3 All SA 1 (SCA); 2004 (6) SA 222 (SCA) at para 32-36. Delay cannot be held against it in that context; the court has no discretion not to hear the challenge.

It is clear that the Tax Court is competent to decide such a challenge as an incident of the appeal; cf. *South Atlantic Jazz Festival (Pty) Ltd v CSARS* 2015 (6) SA 78 (WCC) at para 21-24.

[52] For all these reasons, I would not have granted the applicant's application in terms of s 9 of PAJA had it been successful in obtaining a direction in terms of s 105 of the TAA allowing it to prosecute challenge the legality of assessments in this court under PAJA rather than in its appeal in the Tax Court.

[53] Finally, lest it be thought to have been overlooked, I should mention that the applicant did not give the Commissioner prior notice of its intention to institute these proceedings, as required in terms of s 11(4) of the TAA. Although the respondent took the point on the papers, Mr Sholto-Douglas, judiciously, did not press it in oral argument. To the extent that condonation for the non-compliance was required, it may be taken to have been granted.

[54] An order will issue in the following terms:

- (a) The application for a direction in terms of s 105 of the Tax Administration Act 28 of 2011 that the applicant's application for the review and setting aside of the additional assessments issued to the applicant by the respondent in respect of the 2014, 2015 and 2016 tax years be entertained in this Court is refused.
- (b) The applicant's aforementioned application for judicial review is struck from the roll.
- (c) The applicant shall pay the respondent's costs of suit, including the fees of two counsel.

A.G. BINNS-WARD

Judge of the High Court

APPEARANCES

Applicant's counsel:

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Respondent's attorneys: Mathopo Moshimane Mulangaphuma Inc

Practising as DM5 Incorporated

[1] LAWSA Vol 25(1) – Second Edition, LM Du Plessis 'Statute Law and Interpretation' at para 353.

[2] The applicant's counsel's submission that it was held in *A Way to Explore v Commissioner for South African Revenue Services*

[2017] ZAGPPHC 541 (23 August 2017); 80 SATC 211 that s 42 of the TAA applied also in the case of 'verifications' is not sustainable on a proper reading of the judgment. The judgment does not suggest that any consideration was given to the distinguishing characteristics between 'verification' and 'audit'.

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[4] Section 11(a) allows for the deduction from the taxable income of any person from carrying on any trade expenditure and losses actually incurred

in the production of the income, provided such expenditure and losses are not of a capital nature.

[5] Paragraph 39 of the Eighth Schedule to the Income Tax Act regulates capital losses determined in respect of disposals to certain connected persons. It restricts the ability of a taxpayer to claim any capital loss determined in respect of the disposal of any asset to any person who was, amongst other cases, a member of the same group of companies as that person. The applicant company is a non-operational member of a group of companies, and reportedly functions as the treasury company in the group. The clogged loss rule in terms of

paragraph 39 generally disallows a set off or deduction of losses on disposals to connected persons or group companies, and provides that it can be set off only against subsequent capital gains made on the same disposal provided that the person to which it was made is still a connected person to the taxpayer.

- [6] Practice Note 31 provides as follows: ‘Income Tax: Interest paid on moneys borrowed 1. To qualify as a deduction in terms of section 11(a) of the Income Tax Act (the Act), expenditure must be incurred in the carrying on of any “trade” as defined in section 1 of the Act. In determining whether a person is carrying on a trade, the

Commissioner must have regard to, inter alia, the intention of the person. Should a person, therefore, borrow money at a certain rate of interest with the specific purpose of making a profit by lending it out at a higher rate of interest, it may well be that the person has entered into a “venture” and is thus carrying on a trade (50 SATC 40). In other words, interest paid on funds borrowed for purposes of lending them out at a higher rate of interest will, in terms of section 11(a) of the Act, constitute an admissible deduction from the interest so received by virtue of the fact that this activity constitutes a profit making venture. 2. While it is evident that a person (not being a moneylender) earning interest on capital or surplus funds invested does not carry on a trade and that any expenditure incurred in the production of such interest cannot be allowed as a deduction, it is nevertheless the practice of Inland Revenue to allow expenditure incurred in the production of the interest to the extent that it does not exceed such income. This practice will also be applied in cases where funds are borrowed at a certain rate of interest and invested at a lower rate. Although, strictly in terms of the law, there is no justification for the deduction, this practice has developed over the years and will be followed by Inland Revenue.’

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‘Income Tax: Interest paid on moneys borrowed

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Commissioner must have regard to, inter alia, the intention of the person. Should a person, therefore, borrow money at a certain rate of interest with the specific purpose of making a profit by lending it out at a higher rate of interest, it may well be that the person has entered into a “venture” and is thus carrying on a trade (50 SATC 40). In other words, interest paid on funds borrowed for purposes of lending them out at a higher rate of interest will, in terms of section 11(a) of the Act, constitute an admissible deduction from the interest so received by virtue of the fact that this activity constitutes a profit making venture.

2. While it is evident that a person (not being a moneylender) earning interest on capital or surplus funds invested does not carry on a trade and that any expenditure incurred in the production of such interest cannot be allowed as a deduction, it is nevertheless the practice of Inland Revenue to allow expenditure incurred in the production of the interest to the

extent that it does not exceed such income. This practice will also be applied in cases where funds are borrowed at a certain rate of interest and invested at a lower rate. Although, strictly in terms of the law, there is no justification for the deduction, this practice has developed over the years and will be followed by Inland Revenue.'

- [7] Published in GN 550 in GG 37819, dated 11 July 2014.
- [8] Read with s 107(5) of the TAA.
- [9] Section 105 is quoted in paragraph [36] below.
- [10] As Harms DP noted in *National Stadium (South Africa) Pty Ltd and Others v Firststrand Bank Ltd* 2011 (2) SA 157 (SCA), in para 45, '... this superfluous prayer does not entitle a court to grant relief that is inconsistent with ... the terms of the express claim'. See also *Combustion Technology (Pty) Ltd v Technoburn (Pty) Ltd* 2003 (1) SA 265 (C) at para 11, and the other authorities there referred to.
- [11] The provision, which predates the Superior Courts Act 10 of 2013, speaks of 'a High Court', inconsistently with s 166(c) of the Constitution which has since the 17th Amendment Act of 2012 provided that with effect from 23 August 2013 for a unitary 'High Court of South Africa'.
- [12] Prior to its substitution in terms of s 52 of the Tax Administration Laws Amendment Act 23 of 2015, w.e.f. 8 January 2016, s 105 of the TAA provided: 'A taxpayer may not dispute an assessment or "decision" as described in section 104 in any court or other proceedings, except in proceedings under this Chapter or by application to the High Court for review'. The free choice that taxpayers previously enjoyed as to forum and character of proceedings has accordingly been significantly limited by the current iteration of s 105.
- [13] The expression used in para 18.2 of the judgment in *Absa Bank supra*.
- [14] Cf. ITC 1921 81 SATC 373 at para 8-9, which exemplifies a separation of issues by agreement between the parties in a tax appeal in the Tax Court.
- [15] Quoted above in paragraph [6].
- [16] See, amongst others, *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others*
- [2013] ZASCA 148 (9 October 2013); [2013] 4 All SA 639 (SCA) in para 26 and *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited*
- [2019] ZACC 15 (16 April 2019); 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) in para 49.
- [17] Applicant's counsel submitted in his heads of argument that SARS had also been in breach of its obligation in terms of s 96(2)(a) of the TAA, but no such basis for review was made out in the applicant's founding papers. It is in any event not clear to me that s 96(2)(a) was of application because the assessments were made based on the returns made by the taxpayer. It was not suggested that the returns were incorrect in the sense that is pertinent for the

purposes of s 95(1)(b), only that the taxpayer's treatment of the information for purposes of the calculation its income tax liability had been incorrect.

[18] A reliance, in an appeal against an assessment, on non-compliance with s 42 of the TAA succeeded in ITC 1921 81 SATC 373. It is not necessary, or indeed inappropriate, for the purposes of this judgment to express any view on the correctness of the result in that appeal.

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