REPUBLIC OF SOUTH AFRICA

TAX COURT OF SOUTH AFRICA

(CAPE TOWN)

Case NOs: 25330, 25331 and 25256

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
.....	.....
SIGNATURE	DATE

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Appellant

and

FP (PTY) LTD Respondent

J U D G M E N T

Court: Justice J Cloete

Heard: 7 October 2021

Delivered electronically: 19 October 2021

CLOETE J

Introduction

[1] The South African Revenue Service ("SARS") applies in terms of rule 30 of the Uniform Rules of Court[1] for an order setting aside, as an irregular step, a legality review brought by the taxpayer, under the same case numbers, in appeal proceedings already pending in this court. For present purposes SARS does not challenge the taxpayer's election to proceed by way of a legality review as opposed to one under the Promotion of Administrative Justice Act ("PAJA")[2] but at the same time does not concede that the administrative action complained of was unlawful, unreasonable or procedurally unfair.

[2] SARS contends that the review itself is both procedurally defective and irregular, since it cannot be brought in terms of the Tax Administration Act ("TAA")[3] and the rules promulgated thereunder. For convenience, unless otherwise indicated, for purposes of this judgment a reference to "uniform rule(s)" will be to the Uniform Rules of Court and "rule(s)" to the Tax Court rules.

[3] The taxpayer opposes the application on the grounds that: (a) SARS improperly relied on uniform rule 30, which is directed at procedural irregularities, and should instead have raised a point of law in terms of uniform rule 6(*d*)(iii);[4] (b) the Tax Court is not precluded from entertaining a legality review by the TAA and its rules; and (c) there is nothing improper or irregular for a review to be launched on motion in an appeal pending before the Tax Court.

Relevant factual background

[4] It bears emphasis that it is not required of me to determine, for purposes of the current application, whether there is any merit in the complaints of the taxpayer to which I refer below. It is however necessary to set out the relevant factual background.

[5] On 31 January 2018, SARS notified the taxpayer that it would be conducting an audit into its tax affairs in respect of its 2014, 2015 and 2016 years of assessment. The taxpayer mandated its accountants, who are also its tax advisors ("X"), to liaise with SARS on its behalf, and subsequent engagements were facilitated in this manner. The taxpayer was represented by X's director responsible for overseeing its tax affairs, assisted by X's Head of Department: Tax Compliance ("the taxpayer's representative").

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1 Applicable by virtue of Rule 42 of the Rules promulgated under s 103 of the Tax Administration Act 28 of 2011 in GN 550 dated 11 July 2014.

2 3 of 2000.

3 28 of 2011.

4 The parties are ad idem that there is no corresponding provision to either uniform rule 30 or uniform rule 6(d)(iii) in the Tax Court rules and therefore rule 42 thereof applies, i.e. that the most appropriate procedure under the uniform rules may be utilised.

[6] According to the taxpayer's representative it cooperated fully with the audit procedures, including providing all additional information requested by SARS. On 8 August 2018, SARS issued notices of assessment for the years in question. These reflect that: (a) additional assessments had been raised in relation to each year; and (b) understatement penalties had been levied at 25% on each.

[7] On the very same day SARS also issued a *Notification of Adjustment to Assessment* ("notice of adjustment") which, although purporting to refer only to the 2016 year of assessment, in fact reflected adjustments already made in terms of the Income Tax Act ("ITA")[5] to all of the years in question.

[8] The notice of adjustment further informed the taxpayer that the revised 'assessment' (*sic*) would be issued in due course and that, should it wish to lodge an objection to '…any of the adjustments stated in this letter, please comply with all the requirements of Section 104…' of the TAA.

[9] On 11 October 2018 the taxpayer filed objections in respect of all the additional assessments, both in relation to the capital amounts as well as the understatement penalties.

[10] The objections related not only to alleged procedural unfairness but also the merits of the assessments themselves as far as the taxpayer could understand them. Insofar as procedural unfairness is concerned, it was the taxpayer's contention that SARS raised the additional assessments out of the blue without warning, without issuing it with a letter of audit findings, and without providing it with 21 business days within which to respond thereto, as required by section 42(2) of the TAA.

[11] Related complaints are that the notice of adjustment itself does not comply with section 96(2)(*a*) of the TAA, since it failed to include a statement of the grounds of assessment, alternatively insufficient grounds were provided in respect of expense or loss categorisation and, insofar as the understatement penalties are concerned, no explanation was given as to how the facts at hand justified their imposition.[6]

[12] It is common cause that the taxpayer did not avail itself of rule 6(1) which provides that 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".

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5 58 of 1962.

6 Although the objections themselves record that the taxpayer was requested to make representations in respect of the understatement penalties before they were levied, it emerged during the hearing that this was a grammatical mistake, and the word "not" had been omitted in error.

[13] According to the taxpayer, it did not elect *not* to utilise the procedure contemplated in rule 6. Rather, it simply never occurred to any of the taxpayer's directors or to anyone on the X team to do so. It maintains however that, since SARS was made aware of its complaints, the former had every opportunity to address "…these procedural non-compliances should it have wished to do so".

[14] On 11 January 2019 SARS issued notices disallowing all three objections. The taxpayer maintains that these notices similarly display a singular lack of detail in terms of the reasons provided, and thus fall foul of the peremptory requirements of section 106 of the TAA. As is standard, SARS informed the taxpayer in the notices of disallowance of objection that if not satisfied "…you have the right to appeal against this decision".

[15] On about 27 February 2019 the taxpayer proceeded to file its appeals, which to all intents and purposes included the same objections to the procedural fairness referred to above, but also engaged with the merits as the taxpayer understood them. The parties thereafter attempted alternative dispute resolution, but to no avail, and the matter was referred to the Tax Court.

[16] On 9 December 2020, SARS delivered its rule 31 statement (which was not included in the papers before me). According to the taxpayer's representative it was only then that legal advice was obtained and it became aware of "…the possibility of bringing a review application of the present nature, and therefore elected to proceed on this basis in an attempt to avoid a protracted Tax Court appeal and the significant legal expenses associated therewith". As a result the taxpayer has not yet delivered its rule 32 statement.

[17] The review application was launched on 16 April 2021 and the taxpayer seeks therein an order in the following terms:

> "1. To the extent necessary, condoning the applicant's non-compliance with Tax Court Rule 57(2).
>
> 2. Reviewing and setting aside the additional assessments raised in respect of the applicant's 2014, 2015 and 2016 years of assessment.
>
> 3. In the alternative to prayer 2 above, and only in the event that the Court is not persuaded to set the additional assessments referred to in prayer 2 aside in their entirety:
>
> 3.1 Reviewing and setting aside the understatement penalties levied in terms of the additional assessments raised in respect of the applicant's 2014, 2015 and 2016 years of assessment.
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> 4. Directing the respondent to pay the costs of this application as contemplated in section 130(3)(*b*) of the Tax Administration Act, 28 of 2011 read with Tax Court Rule 50(5)(*a*).

5. Further and/or alternative relief."

[18] It is a "stand alone" review application in the sense that no relief is sought to have it heard *in limine* by the Tax Court ultimately seized with the appeal, nor that it be heard simultaneously therewith, nor that it be dealt with as a separated issue. According to the taxpayer, the rationale for this approach is that determination of the review in its favour will dispense of the appeal as a whole. It was in response to the review application that SARS launched the rule 30 application which is before me.

The case for SARS

[19] The grounds relied on by SARS may be summarised as follows:

[19.1] The taxpayer's attempt to challenge and set aside assessments on the basis of alleged administrative non-compliance *on application* to the Tax Court, instead of following the pleading process, is irregular, since the Tax Court is a creature of statute with its jurisdiction, ambit and operation confined to the TAA and its rules which do not permit such a procedure;

[19.2] In terms of section 104 of the TAA a taxpayer may only dispute an assessment or "decision" as described therein by way of appeal in the Tax Court, unless a High Court directs otherwise in accordance with section 105 thereof. Administrative actions in terms of section 42 and section 106 do not constitute "decisions" as contemplated in section 104.

[20] SARS' argument is as follows. In terms of section 104(1) of the TAA, a taxpayer who is aggrieved by an assessment may object thereto. Section 104(2) sets out the 'decisions' that may be objected to and appealed against in the same manner as an assessment. These are the following *numerus clausus*: (a) one made under section 104(4) not to extend the period for lodging an objection (section 104(2)(*a*)); (b) one made under section 107(2) not to extend the period for lodging an appeal (section 104(2)(*b*)); and – relevant for present purposes – section 104(2)(*c*) which stipulates "any other decision that may be objected to or appealed against under a tax Act".

[21] The TAA itself only refers to four instances of "any other decision" as contemplated (in addition to those set out in section 104(2)(*a*) and (*b*)). These are contained in section 190(6) which relates to a decision not to authorise a refund of an excess payment; section 220 which pertains to a decision not to remit a penalty; section 224 as read with section 222 and section 223 dealing with the imposition of, or decision not to remit, an understatement penalty; and finally section 231(2) pertaining to decisions made in respect of the withdrawal of voluntary disclosure relief.

[22] In each instance the right to object and appeal is entrenched within the section concerned itself. However, in respect of alleged procedural non-compliance with section 42 and section 106 of the TAA, there is no entrenched right to object and appeal and these are thus not "decisions" for purposes of section 104(2)(*c*). Moreover the taxpayer does not suggest that a provision in any other tax Act confers a right to object and appeal against such a decision.

[23] In any event, so the argument goes, in the review application the taxpayer stated that it was brought "…as contemplated in section 118(3) of the TAA read with Tax Court Rule 51(2) (and to the extent necessary, Tax Court Rule 42(1))". Section 118 deals only with the composition (or "constitution") of the Tax Court, and section 118(3) merely provides that "[i]f an appeal to the tax court involves a matter of law only or is an interlocutory application or application in a procedural matter under the 'rules', the president of the court sitting alone must decide the appeal".

[24] In turn rule 51(2) stipulates that "[a]n interlocutory application relating to an objection or appeal must, unless the tax court before which an appeal is set down otherwise directs, be brought in the manner provided for in this Part". The taxpayer (correctly) does not contend that the review application is an interlocutory one and rule 51(2) therefore similarly does not apply.

[25] Section 129(2) of the TAA provides that the Tax Court may only make a decision on an application referred to in section 117(3). The latter subsection provides as follows:

> "The court may hear and decide an interlocutory application or an application in a procedural matter relating to a dispute under this Chapter as provided for in the 'rules'."

[26] Given the taxpayer's concession that the review application is not an interlocutory one, the only reliance which it can place, in terms of section 117(3), is on the review application being a "procedural matter" as envisaged therein. In the answering affidavit the taxpayer however confirmed that the review application "…is not an application in a procedural matter so SARS' complaint in this regard is misguided...".

[27] SARS thus argues that the taxpayer's attempt to circumvent the TAA and its rules by leapfrogging the relief it seeks under the guise of a legality review in the Tax Court is an irregular step which falls to be set aside.

[28] SARS submits that the taxpayer is not without other recourse. First, it may approach the High Court under section 105 of the TAA while simultaneously requesting a stay of the pending Tax Court appeal proceedings until the High Court has determined the merits of its review application (SARS does not suggest that the High Court lacks jurisdiction to entertain a legality review). Second, it remains open to the taxpayer to file a rule 32 statement in the tax appeal and deal with all of its procedural complaints, along with the merits, in the context of

those proceedings. I deal briefly with the latter submission under the heading "Costs" at the end of this judgment.

The case for the taxpayer

[29] In its answering affidavit the taxpayer did not challenge SARS' reliance on uniform rule 30. This arose for the first time in the heads of argument filed on its behalf, in which it was submitted that an objection that a court has no jurisdiction must be raised by way of a special plea or exception and not as an irregular step in terms of uniform rule 30.

[30] When it was pointed out to counsel for the taxpayer during argument that neither a special plea nor an exception have any place in motion proceedings (i.e. the review application) an alternative argument was advanced, namely that SARS should have dealt with its objection by way of uniform rule 6(*d*)(iii), i.e. by notice raising a question of law.

[31] Counsel for the taxpayer also submitted that if the court were to find that uniform rule 30 was correctly invoked then, in any event, the application must fail since SARS has failed to prove prejudice, alternatively the court should exercise its "residual discretion" not to set aside the review application as an irregular step.

[32] The taxpayer's argument is otherwise as follows. In terms of section 117(1) of the TAA the Tax Court, for purposes of Chapter 9 (i.e. dispute resolution) has jurisdiction over tax appeals lodged under section 107. In *South Atlantic Jazz Festival (Pty) Ltd v CSARS*[7] it was held that:

> "The fact that the determination of the appeal might entail the tax court in considering the legality of an administrative decision, that was integral to the making of the assessment, does not deprive the court of its jurisdiction to decide the appeal. To interpret and apply the legislation, as requiring the dichotomous procedures enjoined in the argument advanced on behalf of the Commissioner, would in many cases defeat the very purpose of the establishment of the specialist tax court. The jurisdiction of the tax court to determine tax appeals is conferred without any limitation in s 117(1) of the TAA. The court must be taken to have been invested with all the powers that are inherently necessary for it to fulfil its expressly provided functions."

(Emphasis supplied)

[33] At the time when *South Atlantic Jazz Festival* was decided, section 105 of the TAA read as follows:

> "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."

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7 2015 (6) SA 78 (WCC) at para [23].

[34] Section 105 was subsequently amended[8] and in its current form provides that:

> "A taxpayer may only dispute an assessment or 'decision' as described in section 104 in proceedings under this Chapter, unless a High Court otherwise directs."

[35] The taxpayer submits that the effect of this amendment is to bolster the finding in *South Atlantic Jazz Festival* that the Tax Court has jurisdiction to adjudicate, in the taxpayer's words "…all types of disputes arising in the context of appeals that come before it", since to interpret the amendment in any other manner would be to render it "superfluous". Moreover, so the argument goes, such an interpretation is consistent with the recent decision in *Absa Bank Ltd and Another v CSARS*[9] (I deal with this later).

[36] The taxpayer also referred, for purposes of "persuasive" value only[10], to the decision of the Tax Court in ITC1921 where the court set aside additional assessments by way of a legality review argued as a point *in limine* to the appeal proceedings. The result was that the remainder of the appeal on the merits, and the need for trial proceedings, were disposed of in their entirety. Again, I deal with this decision hereunder.

[37] The taxpayer argues that, if it is accepted that the Tax Court has the necessary jurisdiction to adjudicate legality reviews, the most appropriate manner in which they should be brought is by way of motion proceedings. Although section 117(3) of the TAA is the only provision which deals with the types of application that may be brought before a Tax Court, the subsection employs permissive language by use of the word "*may"* therein (i.e. the court *may* hear and decide, not *must* do so). This should be interpreted to extend the ambit of section 117(3) to include review applications in order to given procedural effect to the true ambit of section 117(1).

[38] Moreover, the taxpayer submits, it would be irrational if the Tax Court's procedural powers were to be read to constrain its jurisdiction. In any event, statutory provisions should be read to promote cohesion and not dichotomy, and where the language employed does not give effect to the apparent intention of the legislature, or where a literal interpretation would result in irrational or oppressive consequences, a court is at liberty to depart from the literal meaning of the words used – and to either "cut down" or "expand" their meaning.[11]

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8 Section 52 of Act 23 of 2015, which came into effect on 8 January 2016.

9 2021 (3) SA 513 (GP).

10 Tax Court judgments bind the parties to the particular dispute but do not create binding legal precedent: *ABC CC v CSARS* IT 4036 (14 August 2017) at para [23].

11 *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at para [48]; *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others* 2020 (4) SA 51 (SCA) at paras [67] to [72].

[39] The taxpayer argues that it would be patently unfair, oppressive and irrational to force it to incur the expense of preparing for an appeal, only to be given the opportunity for the first time to deal with a legality review that is potentially dispositive of the whole dispute on the first day of that appeal hearing. The interpretation for which SARS contends would moreover lead to an undesirable dichotomy between the High Court on the one hand and the Tax Court on the other (something against which the court in *South Atlantic Jazz Festival* cautioned).

[40] It would result in a scenario where both the Tax Court and the High Court have jurisdiction to adjudicate legality reviews in principle, but only the High Court may do so on motion prior to the hearing of a tax appeal. A taxpayer would then be forced to seek leave from the High Court in terms of section 105 of the TAA, thus stepping away from the tax appeal proceedings themselves, and launch parallel proceedings to adjudicate on a matter of administrative law that is integral to the contemporaneous determination of the disputed assessments before the Tax Court.

[41] Finally, the taxpayer submits that SARS' reliance on the rules themselves containing a *numerus clausus* of applications that may be determined by a tax court is defeated by the principle that "subordinate legislation" must be rational. If the rules are interpreted to result in irrationality (when compared to the provisions of the TAA) they would, to that extent, be "unlawful and invalid" and must therefore be interpreted in such a manner as to avoid this.

Discussion

[42] I first deal with whether SARS correctly invoked uniform rule 30. To my mind the taxpayer has misconstrued the true nature of SARS' complaint, namely that to proceed on motion for review in the Tax Court in pending appeal proceedings is a procedural step not permitted by the TAA and its rules, and is therefore irregular. While the objection involves a consideration of jurisdiction, this does not detract from, and should not be conflated with, what SARS contends is a procedural irregularity.

[43] Put differently, the complaint is directed at non-observance of the rules promulgated under the TAA. These rules do not exist independently of the TAA but instead are intended to give procedural effect to its provisions. To the extent that the procedural irregularity complained of necessarily requires a determination on jurisdiction, a matter of law, then so be it.

[44] Furthermore this falls squarely within the authority relied upon by the taxpayer itself, namely *S A Metropolitan Lewensversekeringsmaatskappy Bpk v Louw NO*[12] where it was held that uniform rule 30 is:

> "…intended as a procedure whereby a hindrance to the future conducting of the litigation, whether it is created by a non-observance of what the Rules of Court intended or otherwise, is removed…"

[45] In the present context it is the "*hindrance"* of the review on motion which will be removed from the future conduct of the pending tax appeal should the review be set aside as an irregular step. I am accordingly persuaded that SARS cannot be criticised for invoking uniform rule 30 rather than uniform rule 6(*d*)(iii), and I turn to consider the merits of its application on that basis.

[46] As stated above the taxpayer has conceded that its review on motion in this court is neither an interlocutory application nor one in a procedural matter as envisaged in section 117(3) of the TAA.

[47] As correctly submitted by counsel for the taxpayer the debate about whether or not section 117(3) must be interpreted in such a manner as to give meaningful content to the Tax Court's powers under section 117(1) only has relevance if it is found that section 117(1) confers on a Tax Court the authority to entertain a legality review on motion in pending tax appeal proceedings.

[48] Although the taxpayer, at least in argument, seemingly drew no distinction between a review on motion where no appeal is pending and one in pending appeal proceedings, as a matter of fact the actual issue before me is the latter and not the former. I intend confining myself to the actual issue, particularly given that a Tax Court is not a court of precedent.

[49] I now consider whether the quoted passage in *South Atlantic Jazz Festival* upon which the taxpayer primarily relies in support of its argument is authority for its proposition.

[50] The first distinguishing feature is that there the taxpayer was exercising a right of appeal before the Tax Court and not, as pointed out by Binns-Ward J, the review and setting aside of an administrative decision (made in terms of section 16(2)(f) of the VAT Act).[13] In the present matter the taxpayer has brought a "stand alone" review application (albeit under the same case numbers as those in the appeal) for the specific purpose of avoiding having to exercise its right of appeal.

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[12] 1981 (4) SA 329 (O) at 333G-H.

[13] At para [21].

[51] The second is that it was never contended by SARS in *South Atlantic Jazz Festival* that the administrative decision it made, which was integral to the issuing of the assessments, was not susceptible to objection and appeal. In the present matter SARS has specifically raised this as part of its objection.

[52] Indeed Binns-Ward J relied on *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk*[14] where it was held that *save* in respect of decisions in relation to which a right of appeal was expressly excluded by the tax legislation, the Tax Court was empowered to take into consideration whether the Commissioner had properly exercised his discretion in making the assessments that were subject to appeal. It is accordingly my view that the taxpayer's reliance on *South African Jazz Festival* as authority for its proposition stretches it too far.

[53] It bears emphasis however that I am not required to decide whether or not SARS is correct when it submits that decisions made under section 42 and section 106 of the TAA are not subject to objection and appeal. This is a matter for a later court to determine, and in doing so regard will no doubt be had to the right to just administrative action entrenched in section 33 of the Constitution.

[54] It should also be borne in mind that section 105 of the TAA, as it read at the time, gave the taxpayer two options. The first was to dispute an assessment or "decision" described in section 104 in accordance with Chapter 9 of the TAA and the rules. The other was to apply to the High Court for review.

[55] However as presently worded, s 105 makes clear that a taxpayer may only dispute an assessment or "decision" as described in section 104 in accordance with Chapter 9 of the TAA and its rules in the Tax Court *unless* a High Court otherwise directs. To my mind the current wording of section 105 militates against the interpretation proffered by the taxpayer, rather than bolstering it.

[56] Linked to this is the taxpayer's reliance on *Absa Bank Ltd and Another v CSARS* (*supra*) where Sutherland J dealt with the interpretation of section 105 of the TAA as presently worded in the context of the taxpayer's direct approach to the High Court for a legality review prior to any appeal proceedings in the Tax Court. I quote fairly extensively from the judgment:

> "[2] The origin of this case lies in a controversy about whether or not an impermissible tax avoidance arrangement was conceived to evade a tax liability. It involves the application of the general anti-avoidance regime (GAAR) provisions (sections 80A – 80-L) of the Income Tax

[14] 1985 (2) SA 668 (T).

Act 58 of 1962, (ITA). Section 80B empowers SARS to impose tax liability in circumstances where a liability is impermissibly avoided…

[4] The first decision of SARS sought to be reviewed is a refusal to comply with a request by Absa to withdraw section 80J notices in respect of each applicant about a specific transaction. Section 80J(3)(*b*) contemplates a withdrawal of the notice upon consideration of a taxpayer's response to the notice. SARS did not comply with the request. Instead, it determined a tax liability for Absa as contemplated in section 80J(3)(*c*)…

[6] The second decision by SARS sought to be reviewed is the issue of letters of assessment to each of the applicants in respect of a tax liability imposed in terms of section 80B on Absa in respect of the alleged arrangement. The letters of assessment were issued while the review on the first decision was pending. The two section 80J notices are identical. The two letters of assessment are identical. The basis for the assessments is identical to the section 80J notices…

[7] The two review applications are inextricably linked. Had the first decision to issue the section 80J notices been withdrawn no letters of assessment could have followed. Because the rationale for the assessments is also the rationale in the section 80J notices, should the notices be set aside the letters of assessment must, logically, be set aside too…

The Controversy about the reviewability of the decisions

[18] The rival contentions proceed from opposite points of departure. At the level of generality, they are thus:

18.1 SARS's view is that it is anathema to the dispute resolution scheme crafted by the tax legislation to be able to opt out of the internal remedies and evade a progression through a process of objections, appeals and eventually, a trial in the special tax court, by approaching, directly, a court of law at the inception of a dispute about tax liability. The section 80J notice is manifestly an integral step in a multi-step process, the integrity of which process is violated by a parallel process. In any event, so it is argued, Section 9 of TAA, properly interpreted, is not a valid nor legitimate hook upon which to hang a review of a decision in an anti-tax-avoidance dispute.

18.2 Absa's standpoint to refute this stance is founded on two bases. First, the scope of the dispute is a pure point of law, an attribute which lends itself to broader considerations than those that dominate the stance taken by SARS. Second, allied to the first point, the guarantee in section 34 of the Constitution of access by a person to a court to resolve a dispute has not been compromised by the provision of a system of internal remedies leading to the Special Tax Court. This is demonstrated by the abundant precedent for the courts' dealing with tax disputes on points of law. Insofar as a court has a discretion to deal with a tax dispute or insist that internal remedies be

> exhausted, it is argued that a court would regard a pure point-of-law-dispute as an appropriate rationale to hear and dispose of the controversy, in preference to condemning the parties to a protracted slog through all the internal steps towards the Special Tax Court and then, if necessary, to a court of law to which the parties could have approached directly at the outset. In my view this general proposition as advanced on behalf of Absa is correct.
>
> [25] It was contended that the provisions of section 105 indicate a confined arena in which to conduct any disputations over a tax liability. However, plainly, if a court [i.e. a High Court] may '…otherwise direct…' that results in an environment for dispute resolution in which there is more than one process. A court plainly has a discretion to approve a deviation from what might fairly be called the default route. In as much as the section is couched in terms which imply permission needs to be procured to do so, there is no sound reason why such approval cannot be sought simultaneously in the proceedings seeking a review, where an appropriate case is made out. It was common cause that such appropriate circumstances should be labelled "exceptional circumstances". The court would require a justification to depart from the usual procedure and, this, by definition, would be "exceptional". However, the quality of exceptionality need not be exotic or rare or bizarre; rather it needs simply be, properly construed, circumstances which sensibly justify an alternative route. When a dispute is entirely a dispute about a point of law, that attribute, in my view, would satisfy exceptionably.
>
> [26] Accordingly, Sections 104 and 105 do not impinge adversely on the course of action launched by Absa."

[57] In my view the decision in *Absa* in fact reinforces SARS' argument that the taxpayer's review application to the Tax Court, when there is already an appeal pending before it, constitutes an irregular step. Even if one assumes that the taxpayer had no procedural control over the referral of the appeal to the Tax Court, it remained open to it (and still does) to approach the High Court for leave to institute a review application in that court, while simultaneously seeking a stay of the appeal proceedings pending the determination of the review.

[58] The taxpayer's complaint that it was deprived of fair administrative action, particularly in view of the stance adopted by SARS in respect of section 42 and section 106 of the TAA, should qualify as an "exceptional circumstance" since it goes to the root of the taxpayer's constitutionally entrenched section 33 right, although it is not for me, but the High Court, to make a determination in this regard.

[59] The other decision to which the taxpayer referred is that of the Tax Court in ITC1921,[15] where it was found *inter alia* that SARS' non-compliance with section 42 of the TAA was a breach of the taxpayer's section 33 rights, rendering the subsequent assessment made invalid.

[60] In that matter the issue was raised *in limine* by the taxpayer in the context of a tax appeal. It appears from that judgment that SARS had not contended that no objection and appeal lies against an administrative decision made in terms of section 42 of the TAA, and the review point was raised integrally to the appeal. Moreover it seems that no reliance was placed by either party on section 105 of the TAA as currently worded, and the judgment itself makes no mention of it either.

[61] For all of the above reasons I am persuaded that the launching of a review application in appeal proceedings already pending before the Tax Court is an irregular step as envisaged in uniform rule 30. This leaves the questions whether SARS has demonstrated prejudice, and whether I should exercise my discretion to nonetheless refuse to set the irregular step aside.

[62] Although not set out in specific terms in its papers, it is apparent from their perusal as a whole that the prejudice to SARS lies in the taxpayer potentially being permitted by this court to run parallel litigation in the Tax Court where it is not legally entitled to do so. The prejudice is thus self-evident. The same considerations militate persuasively against nonetheless allowing the irregular step to stand.

Alternative relief

[63] In the answering affidavit the taxpayer sought an order in the alternative that, in the event of this court concluding that its review application could only be brought in the High Court, it be directed that the appeal proceedings be stayed pending the determination of such an application to be instituted within such time period as this court may direct. This was rejected outright by SARS on the basis that no provision exists in the TAA and its rules to permit such a stay.

[64] In my view SARS' approach is overly formalistic. This court is empowered by section 117(3) of the TAA to hear and determine an interlocutory application (i.e. a stay application) relating to a pending tax appeal. SARS was well aware of the alternative relief sought by the taxpayer before the matter was argued, even though it was not brought in the form of a conditional counter-application.

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[15] 81 SATC 373 dated 13 February 2018.

[65] It also makes no sense to refuse the alternative relief sought. If it is refused all that will happen is that the taxpayer will be forced to bring another application before another court for the same relief on essentially the same facts. This can hardly be to the benefit of the *fiscus* and moreover the Supreme Court of Appeal has very recently reiterated that litigation is not a game.[16]

Costs

[66] SARS contended that the taxpayer's election to proceed in the manner it did constitutes an abuse of the court process which should attract a punitive costs order.

[67] I am far from persuaded that this contention has merit. There is no basis to conclude, as SARS submitted, that the taxpayer intentionally sought to flout the relevant provisions of the TAA and its rules. In any event the issue was certainly not as clear cut as SARS claimed; and SARS itself muddied the waters by submitting on the one hand that the taxpayer has no right to object and appeal decisions made in terms of section 42 and section 106 of the TAA, but on the other that the procedural irregularities complained of should be dealt with at the same time as the merits of the appeal. In the circumstances it is appropriate that each party should bear its own costs.

[68] **The following order is made:**

1. **The respondent's review application in this court is set aside as an irregular step in terms of rule 30 of the uniform rules of court as read with rule 42 of the Tax Court rules;**
2. **The appeal proceedings in the Tax Court are stayed pending the determination of a review application to be launched in the High Court, which application shall be instituted by the respondent within 30 (thirty) calendar days from date of this order, failing which the appeal shall proceed; and**
3. **Each party shall pay its own costs.**

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J I CLOETE

[16] *McGrane v Cape Royale The Residence (Pty) Ltd* (831/2020) [2021] ZASCA 139 (6 October 2021) at para [23].