THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case no: 785/2021

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE — **APPELLANT**

and

AIRPORTS COMPANY SOUTH AFRICA — **RESPONDENT**

Neutral citation: *The Commissioner for the South African Revenue Service v Airports Company for South Africa* (Case no 785/2021) [2022] ZASCA 132 (7 October 2022)

Coram: PONNAN and HUGHES JJA and BASSON, WEINER and WINDELL AJJA

Heard: 8 September 2022

Delivered: 7 October 2022

Summary: Tax Administration Act 28 of 2011 – application for amendment to objection against an additional assessment - no procedure in the Act for amendment of an objection - taxpayer not entitled to amendment in terms of Uniform rule 28(1), read with rule 42(1), of the tax court rules.

ORDER

On appeal from: Tax Court, Johannesburg (Ally AJ sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the tax court is set aside and replaced with the following:

'The application is dismissed'.

JUDGMENT

WINDELL AJA (PONNAN and HUGHES JJA, WEINER and BASSON AJJA concurring)

[1] Two questions arise in this appeal. First, is it permissible to amend the grounds of objection against an additional assessment issued by the appellant, the Commissioner for the South African Revenue Service (SARS), after the expiry of the periods prescribed in the tax court rules?[1] Second, is such an order appealable? Although the second is the logically anterior question, I shall first consider the former, which as shall presently become apparent is necessarily dispositive of the latter.

[2] The tax court (Ally AJ) held that the taxpayer, Airports Company South Africa (the taxpayer), is permitted, under rule 42(1) of the tax court rules (rule 42(1)), read with rule 28(1) of the Uniform Rules of Court (Uniform rule 28), to

[1] The tax court rules were promulgated in terms of section 103 of the Tax Administration Act 28 of 2011 and came into effect on 11 July 2014.

amend its objection against an additional assessment issued by SARS on 30 March 2016 in respect of the taxpayer's 2011 year of assessment. The appeal is with the leave of the tax court.

Background facts

[3] During December 2015 to February 2016, SARS conducted an income tax audit in respect of the taxpayer's 2011 year of assessment. SARS issued a Letter of Audit findings on 8 February 2016. The taxpayer was advised that SARS intended to, inter alia: (a) disallow a deduction claimed by the taxpayer in respect of corporate social investment (CSI) expenditure in terms of s 11(a), read with s 23(g), of the Income Tax Act 58 of 1962 (the Act); (b) disallow an allowance claimed by the taxpayer in terms of s 13quin of the Act; (c) disallow an allowance claimed by the taxpayer in terms of s 12F of the Act; and (d) impose understatement penalties (USPs) in terms of the Tax Administration Act 28 of 2011 (TAA).

[4] In a letter dated 8 March 2016, the taxpayer, through its erstwhile attorneys, addressed the adjustments in relation to (a) and (b) above and sought an extension to deal with (c). A week later, on 15 March 2016, the taxpayer addressed a further letter to SARS in which it indicated that it 'deemed it appropriate to concede to the findings made by SARS in the Letter of Findings in respect of the application of section 12F'. On 30 March 2016, SARS issued a Finalisation of Audit letter in respect of the taxpayer's 2011 year of assessment and issued an additional assessment. It disallowed the CSI expenditure, as well as the s 13*quin* and s 12F allowance, and imposed USPs and interest in terms of the TAA.

[5] On 12 May 2016, the taxpayer lodged an objection to the additional assessment. It only objected to the disallowance of the CSI expenditure. No objection was lodged to the s 13*quin* and s 12F allowances and the imposition of USPs and interest. The objection to the disallowance of the CSI expenditure did

not find favour with SARS. On 28 October 2016, the taxpayer lodged a notice of appeal in respect of the disallowance of the CSI expenditure.

[6] Subsequent to the filing of the notice of appeal, the parties entered into 'without prejudice' settlement discussions in relation to the CSI expenditure. They agreed to suspend the appeal litigation. As a result, the taxpayer did not file a statement in terms of rule 31. On 25 January 2017, the parties commenced alternative dispute resolution proceedings (ADR), which were ultimately unsuccessful.

[7] On 22 January 2019, SARS issued a Letter of Audit Findings in respect of the taxpayer's 2012 to 2016 years of assessment. Consistent with its earlier stance adopted in respect of the 2011 tax year, it indicated that it intended to disallow the deductions claimed by the taxpayer in respect of the CSI expenditure, the 13*quin* and 12F allowances, and to impose USPs and interest, in terms of the TAA. In a reply to the Letter of Audit Findings, the taxpayer queried the disallowances and imposition of USPs and interest. On 29 March 2019, SARS issued a Finalisation of Audit Letter and disallowed the aforementioned deductions and allowances claimed, and imposed USPs and interest, in terms of the TAA.

[8] On 6 September 2019, the taxpayer addressed a letter through its newly appointed attorneys, Edward Nathan Sonnenberg (ENS), to SARS seeking an indulgence to amend the objection that it had lodged in May 2016 in respect of the 2011 year of assessment. The taxpayer sought to object to the adjustments effected by SARS in respect of the allowances claimed in terms of ss 13*quin* and 12F, as well as the imposition of USPs and interest. SARS refused to allow the objection as it was of the opinion that s 104 of the TAA, read with rule 7 of the tax court rules (rule 7), precluded such an amendment and that the taxpayer was seeking to introduce new grounds of objection, which was impermissible in terms of rule 32(3) of the tax court rules.

[9] As neither the Act, nor the tax court rules, make provision for the amendment of an objection to an additional assessment, the taxpayer applied to the tax court, Johannesburg for leave to amend in terms of Uniform rule 28(1), read with rule 42(1).

[10] Rule 42(1) reads:

'If these rules do not provide for a procedure *in the tax court*, then the most *appropriate rule under the rules for the High Court* made in accordance with the Rules Board for Courts of Law Act *and to the extent consistent with the Act and these rules*, may be utilised by a party or the tax court.' (My emphasis.)

[11] The taxpayer asserted that Uniform rule 28(1) was the most appropriate rule under the rules for the High Court, which states that '[a]ny party desiring to amend a pleading or document other than a sworn statement, filed in connection with *any proceedings*, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment'. (My emphasis.)

[12] The tax court held that 'rule 42 of the Tax Court Rules permits an applicant to approach a court for an amendment in terms of rule 28 of the Uniform Rules of Court'. This constitutes the full extent of the tax court's analysis of the applicable provisions. It failed to address the legal arguments advanced on behalf of SARS and made no findings as to the legal basis for its conclusion. The approach adopted by the tax court, which offers no guidance, is regrettable.

The application of Uniform rule 28(1)

[13] Uniform rule 28(1) is applicable to pleadings and documents filed once legal proceedings have commenced. Uniform rule 28(1) does not, for example, apply to correspondence or notices exchanged between the parties, before the commencement of legal proceedings. Rule 42(1) specifically caters for a situation where the tax court rules do not provide for 'a procedure in the *tax court*'. This suggests that should Uniform rule 28(1) find application at all in the tax court, it will

only apply to pleadings and documents that have been filed once legal proceedings have commenced. The first issue that therefore arises is when do legal proceedings commence in the tax court? Secondly, is an objection a pleading or a document filed in connection with legal proceedings in the tax court?

[14] When the TAA and the tax court rules came into operation, the rules provided for the filing of a statement of grounds of assessment and opposing appeal by SARS (rule 31), a statement of grounds of appeal by the taxpayer (rule 32) and a reply to the grounds of appeal (rule 33). Rule 34 of the tax court rules provides that the issues in an appeal to the tax court will be those contained in the rule 31 and rule 32 statements and the rule 33 reply, if any. Rule 35 provides that such statements may be amended, either by consent or with the leave of the court in terms of rule 52(7). Neither the TAA, nor the tax court rules provide for the amendment of an objection against an assessment or decision.

[15] Objections against an assessment or decision are dealt with in Part B of Chapter 9 of the TAA, which is concerned with dispute resolution. Section 104(3) provides that a taxpayer aggrieved by an assessment may object to an assessment and must lodge an objection in the manner, under the terms and within the period prescribed in the rules. In the tax court rules, the procedures dealing with objections and appeals are dealt with in Part B under the heading '[r]easons for assessment, objection, appeal and test cases'. Rule 7 of the tax court rules sets out in detail the procedure for the lodging of an objection.

[16] This period of objection may be extended in terms of s 104(4) of the TAA and as prescribed in rule 7, by a senior SARS official if they are satisfied that reasonable grounds exist for the delay in lodging the objection. In terms of s 104(4) of the TAA, a senior SARS official may extend the period within which the objections must be made as prescribed in rule 7, if they are satisfied that reasonable grounds exist for the delay in lodging the objection. The period for an objection may, however, not be extended for a period exceeding 30 business days,

unless a senior SARS official is satisfied that exceptional circumstances exist which gave rise to the delay in lodging the objection, or if more than three years have lapsed from the date of assessment or the 'decision'.[2]

[17] The next step provided for in the TAA is for SARS to consider the objection in terms of s 106. It may either allow or disallow the objection in whole or in part.[3] After SARS has made its decision,[4] a taxpayer objecting to an assessment may appeal against the assessment to the tax board or tax court in the manner prescribed in the TAA and the tax court rules.[5] The taxpayer and SARS may still attempt to resolve the dispute through ADR[6] and the proceedings on the appeal are suspended, while that procedure is ongoing.[7] SARS may also concede an appeal before the matter is heard by the tax board or the tax court.[8]

[18] If the dispute is not resolved, it will ordinarily proceed to the tax court. The further conduct of the matter will then fall to be governed in terms of Part E of the tax court rules, headed, 'Procedures of the tax court', which only come into operation once the objection and appeal stages governed under Part B of the tax court rules have run their course.

[19] If regard is had to the procedure outlined above, legal proceedings before the tax court only commence once the appeal is noted to the tax court.[9] The rule 31, rule 32 and the rule 33 statements constitute the pleadings in the appeal which may be amended in terms of tax court rule 35.

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[2] Section 104(5) *(a)* and *(b)* of the TAA.

[3] Ibid, s 106(2).

[4] Ibid, s 106(4).

[5] Ibid, s 107(1).

[6] Ibid, s 107(5).

[7] Ibid, s 107(6).

[8] Ibid, s 107(7).

[9] See *Commissioner of Taxes v Pan African Roadways Ltd* 1957 (2) SA 539 (FC) at 541 E-G.

[20] The objection phase described above is part of the pre-litigation administrative process referred to by Kriegler J in *Metcash Trading Ltd v Commissioner, South African Revenue Service and Another*,[10] when he said that '[t]he Commissioner is not a judicial officer and assessments and concomitant decisions by the Commissioner are administrative, not judicial actions'.[11] It also accords with SARS' 'Dispute Resolution Guide: Guide on the rules promulgated in terms of s103 of the Tax Administration Act, 2011', where it is stated that 'an objection is decided at branch level by a committee the majority of which comprise officials not involved in the audit and assessment process'.

[21] An objection is therefore part of the pre-litigation administrative process and is not a pleading. It is also not a document filed in connection with judicial proceedings envisaged in terms of Uniform rule 28(1). Furthermore, rule 42(1) only comes into play when the tax court rules do not make provision for a procedure *in the tax court*. Rule 42(1) does not apply to those procedures governed under Part B of the tax court rules, which constitute pre-litigation administrative procedures such as an objection to an assessment. The tax court thus erred in granting leave to the taxpayer to amend its notice of objection in terms of Uniform rule 28.

[22] Moreover, once an objection has been disallowed, rule 10(2)*(c)*(iii) of the tax court rules makes provision for a taxpayer to introduce a new ground upon which it appeals against an assessment. Rule 10(3), however, provides that such new ground cannot constitute a new objection against a part or amount of the disputed assessment not objected to in the notice of objection under rule 7.

[23] The effect of the amendment sought by the taxpayer will be to extend the period for the filing of an objection (or the filing of new grounds of objection) long after the peremptory periods prescribed in s 104 of the TAA, read with rule 7, have

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[10] *Metcash Trading Ltd v Commissioner, South African Revenue Service and Another* 2001 (1) SA 1109 (CC).

[11] Ibid para 32.

expired. The prescribed time periods provided for in the TAA, read with rule 7, taken together with the ability of a taxpayer to secure an extension of time within the permitted parameters, achieves a fair balance between SARS and the taxpayer. To permit amendments to an objection would unjustifiably undermine the principles of certainty and finality referred to in *Commissioner, South African Revenue Service v Brummeria Renaissance (Pty) Ltd and Others,*[12] which underpin a revenue authority's duty to collect taxes.

[24] It would also permit the taxpayer to impermissibly introduce new grounds of objection to the additional assessment. In terms of s 100(1) of the TAA an assessment or a decision referred to in s 104 (2) is final if, in relation to the assessment or decision –

'*(a) . . .*

(b) no objection has been made, or an objection has been withdrawn;

(c) after the decision of an objection, no notice of appeal has been filed or a notice has been filed and is withdrawn.'

[25] The term 'assessment' is defined in s 1 of the TAA as 'the determination of the amount of a tax liability or refund, by way of self-assessment by the taxpayer or assessment by SARS'. In *First South African Holdings Pty Ltd v Commissioner for South African Revenue Service*,[13] Harms DP stated that an assessment was a determination by the Commissioner of 'one or more matters'.[14] This is expressly contemplated in s 104, read with rule 7(2)*(b)* of the tax court rules, which clearly and unambiguously state that a taxpayer who lodges an objection must specify the grounds of the objection in detail, *including the part or specific amount of the*

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[12] *Commissioner for the South African Revenue Service v Brummeria Renaissance Pty Ltd* 2007 (6) SA 601 (SCA) para 26. See also *Matla Coal Ltd v Commissioner for Inland Revenue* 1987 (1) SA 108 (A) at 125C-J; *HR Computek (Pty) Ltd v Commissioner South Africa Revenue Services* [2012] ZASCA 178.

[13] *First South African Holdings Pty Ltd v Commissioner for South African Revenue Service* [2011] ZASCA 67 para 15.

[14] See also *HR Computek* fn 12 above.

*disputed assessment objected to***.** As no objection was made against the disallowance of the allowances in terms of ss 13quin and 12F of the Act and the USPs, that assessment became final and conclusive.

Appealability of the order

[26] The taxpayer contends that the order of the tax court is interlocutory and thus not appealable. As I have shown the tax court wholly misconceived the matter. As a result, the order issued is plainly wrong and it can hardly be in the interests of justice to permit it to stand.[15]

[27] In the result the following order is made:

1 The appeal is upheld with costs

2 The order of the tax court is set aside and replaced with the following:

'The application is dismissed'.

L WINDELL

ACTING JUDGE OF APPEAL

[15] See *Director-General, Department of Home Affairs and Another v Islam and Others* [2018] ZASCA 48 para 10 and the cases there cited.

APPEARANCES

For appellant:	G D Goldman
Instructed by:	Vezi De Beer Attorneys, Pretoria
	Mcintyre Van Der Post, Bloemfontein
For taxpayer:	P A Swanepoel with R M Molea
Instructed by:	Edward Nathan Sonnenbergs Inc Johannesburg
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