REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

(HELD AT GAUTENG DIVISION, JOHANNESBURG)

Case No.: **IT 24852**

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

4 January 2024 ....
DATE SIGNATURE

In the matter between:

ZYX LIMITED **Appellant**

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **Respondent**

J U D G M E N T

DOSIO J

Introduction

[1] The issue to be decided pertains to the jurisdiction of the Tax Court. The appeal did not proceed as the respondent objected to this Court's jurisdiction on the day that the appeal was to proceed.

[2] The appeal relates to the disallowance of a deduction claimed by the appellant which at its core relates to customs excise duties and levies that the appellant was precluded from claiming in terms of the Customs legislation as they had prescribed.

[3] The respondent did not raise its objection to the jurisdiction of the Tax Court by way of a special plea or by way of an exception. Instead, in paragraphs 57, 58 and 59 of the respondent's amended statement of grounds of assessment and opposing appeal it pleaded as follows:

> "57. The amount properly refundable can only be established with reference to the customs legislation, which is not in dispute before the Honourable Court.
>
> 58. The Tax Court does not have the jurisdiction in respect of the Customs and Excise Act as:
>
> 58.1 Section 4 states that the Tax Administration Act applies to every person who is liable to comply with a provision of a tax Act (whether personally or on behalf of another person) and binds SARS.
>
> 58.2 A 'tax Act' is defined in section 1 to mean the Tax Administration Act or an Act referred to in section 4 of the SARS Act excluding the Customs and Excise Act No 91 of 1964.
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> 59. The appellant has thus far failed to prove that the total claimed as a deduction would have been permitted as a refund for customs purposes had they not prescribed."

[4] The respondent's objections to the jurisdiction of this Court were also raised in the respondent's revised heads of argument dated 22 September 2023 in the following paragraphs, namely, 6.11.1; 115.1 to 115.2 and 116 to 132.

Background

[5] Following an income tax audit of the appellant's 2015 year of assessment, the respondent issued a letter of audit findings dated 8 December 2017, in which it indicated that it intended to disallow this deduction and to impose an understatement penalty (**"USP"**) in terms of the Tax Administration Act 28 of 2011 (**"TAA"**).

[6] On 29 January 2018, and consequent to being granted an extension of time within which to respond to the letter of audit findings, the appellant's then legal representative, namely, KPMG Services (Pty) Ltd, responded and motivated for the prescribed claims to be permitted as a deduction and stated, amongst others, that:

a. The appellant used a third party to submit (customs refund) claims on its behalf.

b. Certain of its claims were rejected by the respondent owing to having prescribed; and certain of the claims were not submitted as they had already prescribed.

c. The appellant incurred losses because of the excise duties and levies not being refundable and therefore that such losses were claimable as a deduction in terms of section 11(*a*) of the Income Tax Act 58 of 1962 (**"the Income Tax Act"**) in its 2015 year of assessment.

d. On 24 May 2018, the respondent issued a finalisation of audit letter and notified the appellant that it had disallowed its claim for a deduction. In addition, the respondent imposed USP and interest in terms of the TAA. An additional assessment was duly issued by the respondent giving effect to these adjustments.

e. On 03 July 2018, the appellant lodged an objection to the additional assessment.

f. On 11 October 2018, the respondent disallowed the objection.

g. On 09 November 2018, the appellant lodged a notice of appeal against the disallowance of the objection.

h. After an unsuccessful attempt to resolve the dispute through alternate dispute resolution proceedings, the respondent issued its statement of grounds of assessment and opposing appeal which was later replaced by an amended statement on 20 November 2019.

i. In the statement the respondent raised two preliminary points, namely, that the claims had prescribed and that they had not been quantified. The first point was finally resolved by the Full Bench of the High Court: Gauteng Division, Pretoria, in a judgment dated 20 September 2022 and is not in issue. The second, point was not raised as a preliminary point but was part of the argument in opposition of the tax appeal. The respondent argued that the claim for the deduction could not be permitted as there was noncompliance with the requirements of section 11(*a*) of the Income Tax Act. Finally, the respondent argued that the interest and penalties levied were payable.

j. The appellant filed its amended statement of grounds of appeal on 31 January 2020 and argued that the claim for the deduction of the prescribed claims should

be permitted as it constituted a loss for purposes of section 11(*a*) of the Income Tax Act.

k. The respondent filed a reply to the amended statement of grounds of appeal on 28 February 2020 and raised the further grounds that the Tax Court did not have the requisite jurisdiction to determine the appeal.

Appellant's submissions

[7] The appellant submits that this Court does have the requisite jurisdiction to adjudicate the appellant's Tax Court appeal, against the respondent's disallowance of the appellant's objection and thus against the respondent's additional assessment. It was contended that this additional assessment was raised by the appellant in respect of the appellant's 2015 income tax year of assessment. The assessment dated 25 May 2018 stipulates a net amount payable thereunder after allowable credits of R2 671 570.30.

[8] It was contended that in terms of section 117(1) of the TAA a Tax Court has jurisdiction over tax appeals lodged under section 107 of the TAA.

[9] It was contended that it cannot be gainsaid, in the present instance, that the appellant's appeal is an appeal lodged under section 107(1) of the TAA. In addition, it was contended that it cannot be gainsaid that, at a procedural level, the appellant and the respondent complied with the provisions of Part E of the Tax Court Rules by timeously delivering their rule 31, rule 32 and rule 33 statements in which the issues in appeal were pleaded by them.

[10] The appellant's counsel contended that from a reading of the respondent's finalisation of audit letter dated 24 May 2018 it appears that:

a. The matter concerns the respondent's additional assessment relating to income tax and in particular in respect of the appellant's 2015 income tax year of assessment.

b. In the respondent's finalisation of audit letter, it informed the appellant, as it was obliged to do, of its "right to lodge an objection in terms of section 104 of the Tax Administration Act".

[11] It was argued that as a result, the matter for adjudication before this Court is that of an appeal against an assessment or decision, as contemplated in section 107 of the TAA.

[12] It was argued that the bespoke dispute resolution provisions contained in the TAA governs the resolution of the dispute and the only available remedy against the disallowance of the appellant's objection against the additional assessment is that of an appeal to the Tax Court.

[13] It was argued that the manner in which the respondent elected to raise its objections against the jurisdiction of this honourable Court, as well as the substantive content thereof, cannot be allowed to stand.

[14] The appellant contends that if the Tax Court finds that the appellant was entitled by law to claim a deduction from its income in respect of its 2015 year of assessment, based on its failure to timeously claim refunds of duties and levies paid in its 2013 year of assessment, then the respondent's contention that the Tax Court does not have jurisdiction to adjudicate whether the appellant complied with the customs and excise legislation is wrong as the respondent ignores the following:

a. At no point did the respondent dispute the correctness of the quantum of the losses claimed by the appellant in the form of a deduction from income, to determine taxable income, under section 11(*a*) of the Income Tax Act;

b. It was agreed between the parties that there exists no factual disputes whatsoever which includes the quantum of the deduction of the losses claimed by the appellant in its 2015 year of assessment;

c. The only remaining issue in dispute between the parties, in this Tax Court appeal, is whether the appellant was in law entitled to claim the deduction of losses, which losses take the form of time-expired claims for refunds of duties and levies paid by the appellant in its 2013 year of assessment, under the rubric of the Customs and Excise Act 91 of 1964 (**"Customs and Excise Act"**);

d. Even if the quantum of the losses claimed should be regarded as being in dispute, which the appellant denied, the nature of the losses claimed as a deduction from income can never be determinative of the jurisdiction of this court. It was contended that either this is an appeal under the rubric of section 107 of the TAA, in which instance this court has the requisite jurisdiction to adjudicate the dispute(s), or it is not such an appeal;

e. The respondent's attack on the jurisdiction of this court will, if upheld, have the effect that no court would have the requisite jurisdiction to adjudicate the dispute;

f. The respondent's election, as it was obliged to do, to inform the appellant of its right to appeal against the disallowance of its objection, follows that the TAA dispute resolutions find application, as a result, this appeal has properly been brought to this Court, in terms of the relevant provisions contained in the TAA.

The respondent's submissions

[15] The respondent contends that the Tax Court does not have the requisite jurisdiction to determine any matter of a customs and excise nature.

[16] The respondent contends that it is not competent for the appellant to call witnesses to provide evidence in the Tax Court in an attempt to show that the respondent could have/may have permitted a refund of either a portion or the whole claim of the excise duties and levies had it not been for prescription. It was contended this Court is not competent for the following reasons:

a. The Tax Court does not have jurisdiction in respect of customs legislation.
b. The jurisdiction of the Tax Court does not extend to being the first arbiter in a tax dispute.
c. The customs legislation has its own dispute mechanisms.

Tax Court jurisdiction

[17] It was contended by the respondent that a “tax Act” is defined in section 1 of the TAA to mean the TAA or an Act referred to in section 4 of the SARS Act, excluding the customs and excise legislation. It was contended that the customs and excise legislation means the Customs and Excise Act No 91 of 1964, the Customs Duty Act No 30 of 2014, or the Customs Control Act No 31 of 2014.

[18] It was contended that an assessment, in accordance with the TAA of whether or not the respondent could/may have permitted a refund claim necessitates an investigation of whether the appellant complied with the customs legislation and thus adhered to the prescribed requirements. In making this assessment, the Tax Court will be called upon to delve into the customs legislation and thereby make enquires on whether the appellant complied with all the requirements and thereby qualified for the refund claimed.

[19] It was contended that the Tax Court does not have jurisdiction to ascertain whether or not the appellant complied with the Customs and Excise Act and/or other related customs Acts. This is so because, whether there was indeed a customs duties and levies refund due or claim payable, is not a matter within the mandate of SARS: Revenue and the TAA does not apply to customs.

The Tax Court as first arbiter

[20] The respondent referred to the matter of *SARS v Afriguard* (***“Afriguard”***)[1] where reference was made to the matter of *CIR v Da Costa*[2] where the Appellate Division, (as it then

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[1] *SARS v Afriguard* (A5017/15 VA1132) [2016] ZAGPJHC 144 (27 May 2016).
[2] *CIR v Da Costa* 1985 (3) SA 768 (A).

was), stated what the function of the Tax Court is. The Court in the matter of *Afriguard*[3] held that:

> "On the established approach, the Tax Court conducts a re-hearing. It may admit new evidence. It has wide appeal powers and, critically, exercises its own discretion in making a decision."[4]

[21] The respondent contends this implies the court rehearing the matter assesses the decision made by the respondent. This envisions a situation where the respondent, charged with all the relevant information, made a decision upon which a taxpayer objected and appealed and the Tax Court is now called upon to rehear the issue. The appeal that the Tax Court would be called upon to rule on and thereby replace its decision, would be whether despite the appellant complying with all the customs requirements for a refund, the respondent still did not permit the refund. The respondent contends that as there was no such decision by the respondent, the Tax Court cannot rehear the matter.

[22] Accordingly, it was argued by the respondent that in acceding to the appellant's argument, the Tax Court would be sitting as a first arbiter in the matter as it would be making a decision for the respondent who was not enabled to make the decision, owing to the claims not being filed and being rejected for being filed late.

[23] The effect of permitting the appellant's appeal would be that the Tax Court would be making a decision, which should have been made by the Commissioner, on whether the claims were refundable.

The Customs legislation

[24] It was contended by the respondent that there are processes prescribed in terms of the customs legislation on procedures to follow should there be a refusal to grant a refund. As a result, the appellant should have, had this been possible, followed the customs legislation in order to appeal the refusal of the refund.

[25] The respondent argued that the appeal should be dismissed and the additional assessments issued by the respondent on 25 May 2018 in respect of the 2015 tax year of assessment be confirmed.

Evaluation

[26] In terms of section 129(2) of the TAA, a Tax Court after hearing the appeal has the power to:

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[3] *Afriguard* (note 1 above).
[4] Ibid para 59.

a. confirm the assessment or "decision";

b. order the assessment or "decision" to be altered; or

c. refer the assessment back to SARS for further examination and assessment

[27] In the event of the Tax Rules not providing for a procedure in the Tax Court, then Tax Court rule 42(1) provides as follows:

> "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 utilized by a party or the tax court …"

[28] Uniform Rule 33(3) provides as follows:

> "If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on application of any party make such order unless it appears that the questions cannot conveniently be decided separately."

(My emphasis)

[29] This Court finds that the issue of the jurisdiction of this Court constitutes an issue that can conveniently be decided separately prior to the continuation of the Tax Court appeal hearing.

[30] Section 11(*a*) of the Income Tax Act states as follows:

> "For the purpose of determining the taxable income derived by any person from carrying on any trade, there shall be allowed as deductions from the income of such person so derived—
>
> (*a*) expenditure and losses actually incurred in the production of the income, provided such expenditure and losses are not of a capital nature."

[31] Section 11A of the Income Tax Act states as follows:

> "(1) For purposes of determining the taxable income derived during any year of assessment by a 'person from carrying on any trade, there shall be allowed as a deduction from the income so derived, any expenditure and losses—
>
> (*a*) actually incurred by that person prior to the commencement of and in preparation for carrying on that trade;
>
> (*b*) which would have been allowed as a deduction in terms of section 11 (other than section 11(*x*)), 11B, 11D or 24J, had the expenditure or losses been incurred after that person commenced carrying on that trade; and

(*c*) which were not allowed as a deduction in that year or any previous year of assessment.'

(My emphasis)

[32] It is clear that at no point did the respondent dispute the correctness of the quantum of the losses claimed by the appellant in the form of a deduction from income, to determine taxable income, under section 11(A) of the Income Tax Act.

[33] In the matter of *Lion Match Company (Pty) Ltd v Commissioner for the South African Revenue Service,* [5] the Supreme Court of Appeal stated that:

> "the Tax Court is constituted in terms of the TAA. As such, the scope of its jurisdiction, its powers and the ambit of any right of appeal from its decisions are defined in the TAA."[6]

[34] Section 104(1) to (5) of the TAA states as follows:

> "(1) A taxpayer who is aggrieved by an assessment made in respect of the taxpayer may object to the assessment.
>
> (2) The following decisions may be objected to and appealed against in the same manner as an assessment:
>
> (*a*) a decision under subsection (4) not to extend the period for lodging an objection;
>
> (*b*) a decision under section 107(2) not to extend the period for lodging an appeal; and
>
> (*c*) any other decision that may be objected to or appealed against under a tax Act.'

(My emphasis)

[35] This Court is aware that the definition of "tax Act" in the TAA means the TAA or an Act, or portion of an Act, referred to in section 4 of the SARS Act, excluding customs and excise legislation.

[36] However, this must be read in conjunction with section 107 of the TAA.

[37] Section 107 of the TAA states as follows:

> "107.(1) After delivery of the notice of the decision referred to in section 106(4), a taxpayer objecting to an assessment or 'decision' may appeal against the assessment or 'decision' to the tax board or tax court in the manner, under the terms and within the period prescribed in this Act and the 'rules'."

(My emphasis)

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5 *Lion Match Company (Pty) Ltd v Commissioner for the South African Revenue Service* [2018] ZASCA 36.

6 Ibid para 6.

[38] Section 117 of the TAA states as follows:

> "117.(1) The tax court for purposes of this Chapter has jurisdiction over tax appeals lodged under section 107.
>
> (2) The place where an appeal is heard is determined by the 'rules'.
>
> (3) The court may hear an interlocutory application relating to an objection or appeal and may decide on a procedural matter as provided for in the 'rules'."

(My emphasis)

[39] Section 107 of the TAA allows a taxpayer objecting to an assessment or "decision" to appeal against an assessment or decision to the tax board or Tax Court. The definition of assessment in the TAA "means the determination of the amount of a tax liability or refund, by way of self-assessment by the taxpayer or assessment by SARS". In terms of section 107(1) "a taxpayer objecting to an assessment or 'decision' may appeal against the assessment or 'decision' to the tax board or tax court in the manner, under the terms and within the period prescribed in this Act and the 'rules' ". A "decision" is defined in section 101 of the TAA as "a decision referred to in section 104(2)". Three decisions are referred to in section 104(2) of the TAA, as stated *supra*, with the all-inclusive decision stipulated at section 104(2)(*c*) which includes "any other decision that may be objected to or appealed against under a tax Act".

[40] As stated in the matter of the *Commissioner for the South African Revenue Service v Rappa Resources (Pty) Ltd* [7] (**"*Rappa"***) (SCA) the Supreme Court of Appeal held that:

> "…section 104(1) [of the TAA] provides that a taxpayer 'who is aggrieved by an assessment' may object to it. The language is clearly very wide. The taxpayer may object on the ground of any grievance of whatever kind. Second, SARS may allow or disallow the objection under section 106(2). If SARS disallows the objection, the taxpayer may appeal against the assessment or decision to the tax board or tax court under section 107(1). Section 107(1) does not in any way limit the grounds upon which the taxpayer may do so. Third, the tax court determines the appeal in terms of section 117(1). It has jurisdiction to determine all the issues raised in such an appeal. The tax court determines 'the matter', that is, the entire appeal, in terms of section 129(1). It may, in terms of section 129(1), confirm the assessment; order the assessment to be altered; refer the assessment back to SARS or 'make an appropriate order in a procedural matter'." [8]

(My emphasis)

[41] Section 105 of the TAA as amended adds that "a taxpayer may only dispute an assessment or 'decision' as described in section 104 in proceedings under this Chapter,

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[7] *Commissioner for the South African Revenue Service v Rappa Resources (Pty) Ltd* [2023] ZASCA 28; 2023. (4) SA 488 (SCA).

[8] Ibid para 12.

unless a High Court otherwise directs". This is confirmed in the matter of *Rappa* [9] where the Supreme Court of Appeal stated that:

> "section 105 is an innovation introduced by the TAA from 1 October 2011. It has moreover been narrowed down by an amendment made in 2015. Its purpose is to make clear that the default rule is that a taxpayer may only dispute an assessment by the objection and appeal procedure under the TAA and may not resort to the high court unless permitted to do so by order of that court. The high court will only permit such a deviation in exceptional circumstances. This much is clear from the language, context, history and purpose of the section. Thus, a taxpayer may only dispute an assessment by the objection and appeal procedure under the TAA, unless a high court directs otherwise."[10]

(My emphasis)

[42] Thus, the goal of section 105 of the TAA is plainly to ensure that tax disputes are brought before the Tax Court in the ordinary process. As a result, unless otherwise directed, the High Court has no jurisdiction in tax issues.

[43] In the matter of *Wingate-Pearse v Commissioner for the South African Revenue Service* [11] (**"*Wingate-Pearse"***) the Court held that:

> "…tax cases are generally reserved for the exclusive jurisdiction of the tax court in the first Instance..." [12]

[44] The Court in *Wingate-Pearse* reflecting on section 105 of the TAA, prior to its amendment and the effect after the amendment held that:

> "section 105 provided that '[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'. A taxpayer was thus specifically compelled to make an election in instances where both the tax court and the high court have jurisdiction. Section 105 was amended by section 52 of Act 23 of 2015 with effect from 8 January 2016, and now provides that '[a] taxpayer may only dispute an assessment or "decision" as described in section 104 in proceedings under this Chapter [dispute resolution], unless a High Court otherwise directs'. In its amended form section 105 thus makes it plain that 'unless a High Court otherwise directs', an assessment may only be disputed by means of the objection and appeal process."[13]

(My emphasis)

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9 *Rappa* (note 7 above).

10 Ibid para 17.

11 *Wingate-Pearse v Commissioner for the South African Revenue Service* [2019] ZAGPJHC 218; 2019 (6) SA 196 (GJ); [2019] 4 All SA 601 (GJ).

12 Ibid para 45.

13 Ibid para 45.

[45] In the matter *in casu*, a High Court has not directed otherwise. The purpose of section 105 of the TAA is clearly to ensure that in the ordinary course tax disputes are taken to the Tax Court. If this Tax Court does not have jurisdiction, no other Court can potentially have jurisdiction to adjudicate on the raising of the additional assessment and the disallowance of the objection thereto. That is the subject matter for adjudication in this Court.

[46] In the matter of *Commissioner for The South African Revenue Service v Free State Development Corporation* [14], the Supreme Court of Appeal confirmed that:

> "the Tax Court has jurisdiction over tax appeals lodged under section 107 of the Tax Administration Act (TAA). In terms of section 117(3), it may hear interlocutory applications, or any application in a procedural matter relating to a dispute under Chapter 9 of the TAA (the chapter dealing with disputes and appeals). Its powers in relation to an assessment or a 'decision' under appeal, or in relation to an application in a procedural matter referred to in section 117(3), are set out in section 129(2) of the TAA. It reads as follows:
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> > 'In the case of an assessment or "decision" under appeal or an application in a procedural matter referred to in section 117 (3), the tax court may—
> >
> > (*a*) confirm the assessment or "decision";
> >
> > (*b*) order the assessment or "decision" to be altered;
> >
> > (*c*) refer the assessment back to SARS for further examination and assessment; or
> >
> > (*d*) make an appropriate order in a procedural matter.' " [15]

(My emphasis)

[47] The Supreme Court of Appeal once again confirmed in *United Manganese of Kalahari (Pty) Ltd v Commissioner for the South African Revenue Service* (**"*United Manganese*"**) [16] that:

> "the current wording of section 105 creates the impression that a dispute arising under Chapter 9 may either be heard by the tax court or a High Court for review. This section is intended to ensure that internal remedies, such as the objection and appeal process and the resolution thereof by means of alternative dispute resolution or before the tax board or the tax court, be exhausted before a higher court is approached and that the tax court deal with the dispute as court of first instance on a trial basis. This is in line with both domestic and international case

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[14] *Commissioner for The South African Revenue Service v Free State Development Corporation* [2023] ZASCA 84.

[15] Ibid para 4.

[16] *United Manganese of Kalahari (Pty) Ltd v Commissioner for the South African Revenue Service* [2023] ZASCA 29.

> law. The proposed amendment makes the intention clear but preserves the right of a High Court to direct otherwise should the specific circumstances of a case require it."[17]

(My emphasis)

[48] From the wording in the matter of *United Manganese* [18], the purpose of section 105 of the TAA is clearly to ensure that, in the ordinary course, tax disputes are taken to the Tax Court. The High Court consequently does not have jurisdiction in tax disputes unless it directs otherwise. It is worth noting that in the matter of *Rappa* [19] the Supreme Court of Appeal noted that there could be a deviance from this process, but only under "exceptional circumstances". [20]

[49] Although it is not quite clear what "exceptional circumstances" precisely mean, the court In the matter of *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas* [21] stated that:

> "1. What is ordinarily contemplated by the words 'exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different; 'besonder', 'seldsaam', 'uitsonderlik', or 'in hoë mate ongewoon'.
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> 2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.
>
> 3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the court must decide accordingly,
>
> 4. Depending on the context in which it is used, the word 'exceptional' has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.
>
> 5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional."[22]

[50] Based on the decision of *MV Ais Mamas Seatrans Maritime*[23] this Court finds that the Tax Court does have jurisdiction to hear and decide the matter at hand. There are no

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[17] Ibid para 11.
[18] Ibid.
[19] *Rappa* (note 7 above).
[20] Ibid para 17.
[21] *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas* 2002 (6) SA 150 (C).
[22] Ibid at 156H-157C.
[23] Ibid.

"exceptional circumstances" in this case that would justify deviating from the ordinary provisions of section 105 of TAA as amended.

[51] Once the jurisdiction of a Tax Court has been established it continues to exist. Thus, the respondent cannot approbate and reprobate. The respondent cannot argue that this Court has jurisdiction to adjudicate whether the appellant ought to have claimed a deduction of expenditure incurred in 2013, namely, the duties and levies paid by the appellant, yet also argue that if this Court finds that the appellant correctly claimed the deduction of losses incurred in 2015, then jurisdiction of the court seizes to exist. Once a Tax Court has jurisdiction to adjudicate a case, which in the matter *in casu* the main case is the income-tax Tax Court Appeal, it assumes jurisdiction over all ancillary matters relevant thereto, which includes of course the calculation of the quantum. [24]

[52] Without having all the relevant facts, the respondent in the matter *in casu* disallowed the deduction by the appellant, which had prescribed and which related to customs and excise duties. The respondent did not dispute the amount claimed. Whether this was done negligently or not, the fact remains a decision was made by the respondent.

[53] As a result, the respondent reached a decision subject to objection and appeal in terms of section 105 read with section 104 and then also under the rubric of section 117 of the TAA. The appellant accordingly has a right in terms of section 11A(*c*) of the Income Tax Act to appeal a decision where a deduction was disallowed. Even if the quantum of the losses is still in dispute, after it was claimed by the appellant, such nature of the losses claimed as a deduction cannot be determinative of the jurisdiction of the Tax Court. The respondent cannot now come and give flavour to its jurisdiction argument, by electing to say that the quantum must now be adjudicated and reference must be made to the Customs and Excise legislation.

[54] Even though the definition of "tax act" in the TAA excludes customs and excise legislation, the respondent in its finalization of audit letter dated 24 May 2018 stated that the appellant had a "right to lodge an objection in terms of section 104 of the Tax Administration Act". As a result, the appellant filed its appeal as directed by the respondent. According to section 117 of the TAA, the Tax Court has jurisdiction over appeals lodged under section 107 and this appeal has been brought by the appellant in terms of section 107.

[55] As regards the objection that the Tax Court would be the first arbiter, yes, this Tax Court appeal hearing takes the form of a trial, whereupon everything will be adjudicated and the Tax Court places itself in the shoes of or decides what the respondent ought to have done. However, it is not the first arbiter, as alluded to in the respondent's heads of argument. The

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[24] See *Communication Workers Union v Telkom SA Limited* in 1999, a volume 2 SA Law Reports decision on page 586, Transvaal Provincial Division.

first decision, namely, the appealed decision, is the decision that forms the subject matter for adjudication in this Tax Court appeal which was the decision to raise the additional assessment, in 2015, in respect of income tax, not customs-and-excise type of duties.

[56] This started as an income tax dispute and it remains such. It will not change in nature. If this is an appeal in terms of section 107 of the TAA, then nothing is to be excluded. Once the Tax Court has jurisdiction, it continues to have jurisdiction up to the end, inclusive of the determining of the quantum of a loss or losses claimed as a deduction in terms of section 11A of the Income Tax Act.

[57] The objection raised by the respondent as to the Tax Court's jurisdiction is accordingly dismissed.

Costs

[58] The normal rule in the Tax Court is that the successful party does not obtain a costs order in its or his favour.

[59] Section 130(1) of the TAA states that:

> "(1) A tax court may, in dealing with an appeal under this Chapter and on application by an aggrieved party, grant an order for costs in favour of the party, if—
>
> (*a*) the SARS grounds of assessment or 'decision' are held to be unreasonable;
>
> (*b*) the 'appellant's' grounds of appeal are held to be unreasonable;
>
> (*c*) the tax board's decision is substantially confirmed;
>
> (*d*) the hearing of the appeal is postponed at the request of the other party; or
>
> (*e*) the appeal is withdrawn or conceded by the other party after the 'registrar' allocates a date of hearing.
>
> (2) The costs referred to in subsection (1) must be determined in accordance with the fees prescribed by the rules of the High Court.
>
> (3) A cost order in favour of SARS constitutes funds of SARS within the meaning of section 24 of the SARS Act."

[60] Section 117(3) of the TAA states that:

> "The Court may herein decide an interlocutory application or an application in a procedural matter relating to a dispute under this chapter as provided for in the rules."

[61] In terms of section 130(3)(*b*) read with section 117(3) of the TAA, it provides *inter alia* that this Court may hear and decide an interlocutory consideration and the Tax Court may in the exercise of its judicial discretion make an order as to costs.

[62] The issue of jurisdiction is such an issue. Furthermore, in accordance with the respondent's directions, the appellant noted an appeal timeously in the correct form. In addition, the attack on jurisdiction ought to have been contained in a special plea or an *in limine* defence format. It was not. It was slipped in the rule 33 statement and also in the heads of argument pertaining to the appeal.

[63] In light of the dismissal of the respondent's objection to this Court having jurisdiction there is no reason why costs should not follow the event.

Order

[64] In the premises the following order is made:

(1) The respondent's attack on the jurisdiction of this Court is dismissed.

(2) The respondent is to pay the costs of 9 October, 10 October and the wasted costs in respect to 11 October 2023.

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JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of Hearing: 8 November 2023

Date of Judgment: 16 January 2024