REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

Case No.: **VAT 22498**

(1) REPORTABLE: **YES** / NO

(2) OF INTEREST TO OTHER JUDGES: **YES** / NO

(3) REVISED.

16 January 2024 .....
DATE SIGNATURE

In the matter between:

NOAH **Appellant/Respondent**

and

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

J U D G M E N T

Myburgh AJ

Introduction

[1] This is an appeal involving an apportionment ruling made by the Commissioner for the South African Revenue Service (**"SARS"**) in terms of section 17(1) of the Value Added Tax Act 89 of 1991 (**"the VAT Act"**) on 23 September 2021.

[2] The appeal hearing was due to commence on 6 November 2023 but three days prior, SARS brought an interlocutory application in terms of section 118(3) of the Tax Administration Act 28 of 2011 (**"the TAA"**) read with Tax Court Rules (**"the Rules"**) 35, 42(1) and 51(2). The application was that SARS be permitted, by way of a special plea, as a separate and preliminary point, to introduce a challenge to the Tax Court's jurisdiction. While the application was opposed, it made practical sense for me to determine the merits of the special plea and the parties agreed with that approach. In the circumstances I intend to grant an order permitting the amendment and will proceed to deal with the merits of the special plea.

Background

[3] The appellant, a registered bank and VAT vendor, makes certain supplies that attract VAT (**"taxable supplies"**) and others that do not (**"exempt supplies"**). A VAT vendor is entitled to deduct, as input tax, the VAT incurred by it on goods and services acquired for the purposes of consumption, use or supply in the course of making taxable supplies. Where a VAT vendor makes only taxable supplies the position in regard to the deduction of input tax is relatively simple, but not so where a vendor acquires supplies which are used, consumed, or supplied in making both taxable and exempt supplies or supplies outside the scope of VAT (i.e. supplies acquired for mixed purposes). In the latter case it is necessary to formulate and apply an apportionment method whereby the permissible deductions are determined. This is so because the expenses are not incurred solely to make taxable supplies and it is only to the extent that the goods or services are acquired to enable the making of taxable supplies that the VAT on those expenses may be claimed as VAT inputs.

[4] It is in this scenario that section 17(1) of the VAT Act[1] finds application. It provides as follows:

> **"17. Permissible deductions in respect of input tax.—**(1) Where goods or services are acquired or imported by a vendor partly for consumption, use or supply (hereinafter referred to as "the intended use") in the course of making taxable supplies and partly for another

[1] The definition of "input tax" in section 1(1) of the VAT Act provides *inter alia* that "input tax" is tax charged to the vendor "where the goods or services are acquired by the vendor partly for [the purpose of consumption, use or supply in the course of making taxable supplies], to the extent (as determined in accordance with the provisions of section 17) that the goods or services concerned are acquired by the vendor for such purpose".

> intended use, the extent to which any tax which has become payable in respect of the supply to the vendor or the importation by the vendor, as the case may be, of such goods or services or in respect of such goods under section 7(3) or any amount determined in accordance with paragraph (b) or (c) of the definition of "input tax" in section 1, is input tax, shall be the amount which bears to the full amount of such tax or amount, as the case may be, the same ratio (as determined by the Commissioner in accordance with a ruling as contemplated in Chapter 7 of the Tax Administration Act or section 41B) as the intended use of such goods or services in the course of making taxable supplies bears to the total intended use of such goods or services …"

[5] In short, section 17(1) of the VAT Act obliges a VAT vendor, that acquires supplies for mixed purposes, to make permissible deductions of input tax in accordance with an apportionment ruling made by SARS.

[6] SARS, on 25 March 2013, as contemplated in section 17(1) of the VAT Act, fulfilled its obligation to make an apportionment by issuing Binding General Ruling 16 (**"BGR16"**).[2] BGR16 imposed a standard turnover based method (**"the STB method"**) which serves as the default apportionment method when determining the ratio. However, BGR16 contains a proviso that "The vendor may only use this method if it is fair and reasonable. Where the method is not fair and reasonable or inappropriate, the vendor must apply to SARS to use an alternative method." The effect of BGR16 is that the STB method could be applied by VAT vendors as a default method, with the proviso that they apply to SARS for an alternative method if the STB method is not fair and reasonable or if it is inappropriate in their case.

[7] In this matter there were several applications by the appellant for specific apportionment rulings under section 17(1) (**"ruling requests"**) and SARS responded to these requests by making apportionment rulings. On 17 June 2016, SARS ruled that a varied turnover based method (**"the VTB method"**) be applied subject to a proviso that should there be a fluctuation of more than 10% in the apportionment ratio and a fluctuation of more than 5% in bad debts, the appellant would have to approach SARS to continue being permitted to apply the VTB method. This came to pass on 27 March 2017 when the appellant requested a ruling that the VTB method continue to apply, which request was granted by SARS on 7 July 2017. A similar ruling request was made on 23 November 2018, but this time SARS declined the request and in its stead imposed a transaction count methodology (**"the TCM method"**). On 12 August 2019 SARS issued a revised ruling which clarified the application of the TCM method, to expire on 30 September 2020 (**"the revised TCM method"**).

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[2] The BGR16 was reissued on 30 March 2015.

[8] On 21 September 2020, the appellant requested a ruling that the revised TCM method continue to apply. However, on 23 September 2021 SARS declined this ruling request and ruled that a varied standard turnover-based method (**"the varied STB method"**) apply (**"the ruling"**). The appellant objected to the ruling, the objection was disallowed, and the appeal followed. In the appeal the appellant requests that the ruling be altered to one approving the ruling request.

The special plea

[9] The special plea reads as follows:

> "The respondent pleads that the Tax Court lacks jurisdiction to adjudicate upon, determine and dispose of the appeal, for the following reasons:
>
> 1. Section 117 of the Tax Administration Act 28 of 2011 ("TAA") provides that the Tax Court has jurisdiction over appeals lodged under section 107.
>
> 2. Section 107 of the TAA provides that after the delivery by the Commissioner of a notice of a decision to either allow or disallow an objection in terms of section 106(2), a taxpayer to an assessment or "decision" may appeal against the assessment or "decision" to the Tax Court.
>
> 3. Section 32(1) of the Value Added Tax Act 89 of 1991 ("VAT Act") sets out the decisions of the Commissioner that are subject to objection and appeal.
>
> 4. Section 32(1)(*a*)(iv) of the VAT Act provides that a decision by the Commissioner "refusing to approve a method for determining the ratio contemplated in section 17(1)" of the VAT Act is subject to objection and appeal.
>
> 5. Section 17(1) of the VAT Act requires that where goods or services are acquired or imported partly for taxable and partly for exempt (or other) purposes, only that portion of the input tax may be "deducted as determined by the Commissioner in accordance with a ruling as contemplated in Chapter 7 of the TAA or section 41B."
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> 6. The jurisdictional requirement of section 31(1)(a)(iv) of the VAT Act is not met in that the respondent has granted a ruling to the appellant as contemplated in section 17(1):
>
> 6.1 The appellant requested a "method for determining the ratio contemplated in section 17(1)", on 21 September 2020 ("the ruling request").
>
> 6.2 The respondent furnished the appellant with a ruling on 23 September 2021.
>
> 7. The Tax Court accordingly lacks jurisdiction to hear and determine the appeal as the "decision" by the respondent (the ruling) is not subject to appeal in terms of section 32(1)(a)(iv) of the VAT Act."

[10] In essence , SARS pleads that the Tax Court does not have jurisdiction to determine the appeal against the imposition of the varied STB method (as opposed to the revised TCM method, which was requested). As I said, I intend to grant the application to introduce the special plea and proceed with the determination of its merits.

Jurisdiction

[11] A few things about the Tax Court: First, the Tax Court is a creature of statute.[3] Its jurisdiction does not extend beyond the confines of its empowering statutory provisions which, in this case, is section 104 of the TAA read with sections 17(1) and 32(1)(*a*)(iv) of the VAT Act. Second, as to the nature of the Tax Court, it is a specialist court of revision rather than "a court of appeal in the ordinary sense". It hears evidence and considers SARS's assessment or decision which it then either upholds or overrules. It is also at liberty to substitute SARS's assessment or decision with one of its own.[4] Proceedings in a Tax Court are, in this sense,

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[3] ITC 1866 (2013) 75 SATC 269; De Koker *et al* **Silke on South African Income Tax** at 18.114.

[4] Section 129(2) of the TAA provides that:

> **"129. Decision by tax court.**—
>
> (2) 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;
>
> [Para. (*b*) amended by s. 19 (*a*) of Act No. 22 of 2018.]
>
> (*c*) refer the assessment back to SARS for further examination and assessment; or
>
> [Para. (c) amended by s. 19 (b) of Act No. 22 of 2018.]
>
> (*d*) make an appropriate order in a procedural matter.
>
> [Sub-s. (2) amended by s. 52(*a*) of Act No. 39 of 2013 deemed to have come into operation on 1 October 2012. Para. (d) added by s. 19(*c*) of Act No. 22 of 2018.]

See *Africa Cash and Carry v Commissioner, South African Revenue Service* [2019] ZASCA 148, 2020 (2) SA 19 (SCA) where Koen AJA in a unanimous decision, held that:

> "The point of departure should always be that a tax court is a court of revision and, 'not a court of appeal in the ordinary sense'. The legislature 'intended that there could be a re-hearing of the whole matter by the Special Court and that the Court could substitute its own decision for that of the Commissioner', if justified on the evidence before it. A tax court accordingly rehears the issues before it and decides afresh whether an estimated assessment is reasonable. It is not bound by what the Commissioner found. In rehearing the case, it can either uphold the opinion of SARS or overrule it and substitute it with its own opinion. The powers of the tax court and its functions are unique. It places itself in the shoes of the functionary and re-evaluates the facts and circumstances of the subject matter on which the assessments were based . . ."

akin to civil trial proceedings. Third, the Tax Court has powers of review in relation to tax appeals before it.[5]

[12] Turning to the empowering provisions. Section 104 of the TAA reads as follows:

> **"104. Objection against assessment or decision.—**(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."

[13] Of relevance in this case is section 104(2)(*c*) which provides that, in the absence of an assessment (as is the case here) the objection procedure may be utilised to challenge a SARS decision if it is "a decision that may be objected to or appealed against under a tax Act".

[14] Section 32(1)(*a*)(iv) of the VAT Act is a provision in a tax Act. It reads as follows:

> **"32. Objection to certain decisions.—(1)** The following decisions of the Commissioner are subject to objection and appeal:
>
> (*a*) Any decision given in writing by the Commissioner—
>
> . . .
>
> (iv) refusing to approve a method for determining the ratio contemplated in section 17(1);"

[15] The question is whether the ruling is a "refusal to approve a method for determining the ratio contemplated in section 17(1)" and addressing this question involves the interpretation of the cited statutory provisions. Three cases, *Capitec v Coral Lagoon*,[6] *Tshwane City v Blair Atholl*[7] and *ITC 1930*[8] are instructive.

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5 *FP (Pty) Ltd v Commissioner, South African Revenue Service* [2022] ZAWCHC 119, 85 SATC 357, at para 51 and *South Atlantic Jazz Festival (Pty) Ltd v Commissioner, South African Revenue Service* 2015 (6) SA 78 (WCC) at paras 21 – 24.

6 *Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Ltd* [2021] ZASCA 99, 2022 (1) SA 100 (SCA).

7 2019 (3) SA 298 (SCA).

8 *ITC 1930* 82 SATC 271.

[16] In *Capitec*, Unterhalter AJA said this about the correct approach when interpreting words in a document:

> "[25] . . . The much cited passages from *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)* offer guidance as to how to approach the interpretation of words used in a document. It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As Endumeni emphasises, citing well-known cases, "[t]he inevitable point of departure is the language of the provision itself".
>
> "[50] . . . The meaning of a contested term of a contract (or provision in a statute) is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but also understanding the words and sentences that compromise the contested term as they fit into the larger structure of the agreement, its context and purpose. Meaning is ultimately the most compelling and coherent account the interpreter can provide, making use of the sources of interpretation. It is not a partial selection of interpretational materials directed at a predetermined result.
>
> [51] . . . The proposition that context is everything is not a license to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text."

[17] In *Tshwane City v Blair Atholl* it was observed that the Court:

> "[63] . . .has consistently stated that in the interpretation exercise the point of departure is the language of the document in question. Without the written text there would be no interpretive exercise. In cases of this nature, the written text is what is presented as the basis for a justiciable issue."

[18] In *ITC 1930*, where SARS challenged the Tax Court's jurisdiction to determine a dispute regarding the retrospective application of a SARS apportionment ruling issued in terms of section 17(1) of the VAT Act, Savage J held that:

> "[6] SARS contended, both in its Rule 31 statement and its heads of argument filed, that this Court lacks jurisdiction to determine the appeal on the basis that in terms of section 32(1)(*a*)(iv) a vendor is allowed to object to, and appeal against, any decision given in writing by SARS 'refusing to approve a method for determining the ratio contemplated in section 17(1)'. Since SARS had not refused to approve a method but had refused the retrospective application of the method approved given proviso (iii) to section 17(1) of the VAT Act, SARS contends that this refusal is not a decision contemplated in section 32(1)(*a*)(iv). Consequently, it submits that this Court lacks jurisdiction and the appellant should instead have

challenged the decision by way of review, presumably under the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').

[7] . . . On a purposive and contextual reading of section 32(1)(*a*)(iv) a refusal to approve a method for determination of the ratio contemplated in section 17(1) must necessarily include the refusal to apply any method approved retrospectively. To find differently would be to strain at the language of the provision and lead to an unbusinesslike and unwieldy result, which I am not persuaded was intended by the legislature, to limit the right of appeal and require a review where the issue of retrospectivity is in issue. The provision expressly provides for the right to appeal a refusal to approve a method. The effect of a refusal to allow the retrospective application of a method is to refuse the application of the method in respect of such period. Had it been intended by the legislature that this Court, as a specialist court established to determine tax disputes of this nature, was not to have jurisdiction to determine a matter such as this, this would have been expected to have been expressly stated in the statute, which it is not. If SARS was correct in its submission, this would serve to remove the right of appeal, only in respect of a narrow group of disputes, from the ambit of this Court's jurisdiction without as much being expressly stated in the statute. That could not have been the legislative intent. It follows for these reasons that from a plain reading of the provision, and having regard to its purpose and context, the matter falls squarely within the ambit of this Court's jurisdiction." [9]

[19] Informed by the cited cases I understand the guiding principles to be the following:

19.1. The interpretive exercise is a search for the meaning of the text, this being "the most compelling and coherent account the interpreter can provide".

19.2. Meaning must be found or ascertained by way of a unitary exercise "making use of the sources of interpretation" (i.e. the triad of text, context, and purpose) in an open-minded fashion.

19.3. The interpretative exercise must not be aimed at the rationalisation of a predetermined result.

19.4. Regard must be had to the relationship between the words, the concepts, or ideas they express, and the place of the contested provision within the whole.

19.5. One must guard against the application of the triad of text, context, and purpose in a mechanical fashion.

19.6. Words and language matter. Without them there can be no interpretive exercise. They are the inevitable point of departure.

19.7. Context is not everything. It is not a licence to attribute a meaning that is untethered to the text and structure of the document.

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[9] The issue at hand did not feature in the appeal which is cited as *Mukuru Africa (Pty) Ltd v Commissioner for South African Revenue Service* 84 SATC 304.

19.8. One must guard against a meaning that strains the language of the provision and leads to an unbusinesslike and unwieldly result.

[20] So what is the most compelling and coherent account of the provisions in question?

[21] The jurisdiction of the Tax Court is dealt with in Part D of Chapter 9 (under the heading "Dispute resolution"). Section 117 provides pertinently that:

> **"117. Jurisdiction of the Tax Court.—(1)** The Tax Court for purposes of this Chapter has jurisdiction over tax appeals lodged under section 107.
>
> (2) . . .
>
> (3) 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".

[22] Section 107(1), to which we are referred in section 117(1), provides that:

> **"107. Appeal against assessment or decision.—**(1) After delivery of the notice of decision referred to in section 106(4), a taxpayer objecting to an assessment or "decision" may appeal against the assessment or "decision" within the period prescribed in this Act and the "rules".

[23] The mention of a "decision" in section 107 is, in turn, foreshadowed in section 104 (already cited) where the objection and appeal process are made to apply to both assessments and certain SARS decisions. Section 104(2)(*c*) is the part which brings a decision that may be objected to or appealed against in terms of a tax Act into the objection and appeals procedure net.

[24] The VAT Act is a tax Act, and section 32 thereof subjects to the process of objection and appeal inter alia a decision given in writing[10] "refusing to approve a method for determining the ratio contemplated in section 17(1)." As already mentioned above, the question then is whether the ruling is "a refusal to approve a method for determining the ratio contemplated in section 17(1)".

[25] The other decisions, listed in section 32(1)(*a*) of the VAT Act are the refusal to register a person as a VAT vendor[11], a decision by SARS to cancel the registration of a VAT vendor or a refusal to cancel the registration of a VAT vendor[12]

[26] The purpose of the provision in question is thus to describe the decisions that fall into the objection and appeal net and the question, in this case, is whether the ruling fits the description of one such decision. But counsel for SARS in their written submissions formulated

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[10] No more needs to be said about this jurisdictional fact as the decision was in writing.
[11] Section 32(*a*)(1)(i) of the VAT Act.
[12] Section 32(*a*)(1)(ii) of the VAT Act.

the question somewhat differently. The submission was that "The refusal ("refusing") by the Commissioner is qualified by the words appearing immediately thereafter, "to approve a method for determining the ratio contemplated in section 17(1)". It is thus important to consider whether the Commissioner has "refused" to do what section 17(1) requires of him to do."

[27] While I agree with counsel's introduction to the question posed, I disagree with the formulation of the question. The question, in my view, is simply whether the ruling fits the description of the type of decision described in section 32(1)(*a*)(iv) of the VAT Act. It is not whether SARS refused to do something it should have done.

[28] None of the four decisions listed in section 32(10)(*a*) can be described as "refusals" by SARS to do something:

28.1. The refusal to register a person who has applied to be a VAT vendor is not the failure to do something, it the decision consequent on a view that the applicant does not meet the criteria of a VAT vendor.

28.2. The decision to cancel a VAT registration is based on a view that a VAT vendor no longer meets the criteria and is not permitted to be a VAT vendor.

28.3. The refusal to cancel the VAT registration of an existing VAT vendor is a decision consequent on the view that the VAT vendor meets the criteria for compulsory registration and hence is not permitted to cancel its registration.

28.4. The refusal to approve an apportionment method is not the refusal to do something, such as refusing to deal with a ruling request, it is the making of a decision that the apportionment method requested by the VAT vendor is not fit for purpose. Put differently it is "the product of deciding"[13] rather than an omission, as would be the refusal or failure to make a decision at all.

[29] SARS did not refuse to do what section 17(1) of the VAT Act requires of it to do. The contrary is true. SARS made an apportionment ruling as it was required to do. The quarrel that the appellant has with SARS is not that it refused to do something but that it did the wrong thing, i.e. made the wrong decision by refusing the ruling sought by it. In my view, the interpretation advanced on behalf of SARS is untethered to the text and structure of the provisions in question.

[30] The meaning advanced by SARS strains the language of the provision and leads to an unbusinesslike and unwieldy result as was the case in *ITC 1930*.

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[13] Chambers Twentieth Century Dictionary New Edition 1983 at 323.

[31] In *ITC 1930* SARS, in response to a ruling request, approved the method requested but ruled that it should apply from 1 March 2016 rather than from 1 February 2014 as requested by the VAT vendor. This decision was underpinned by SARS's view that it was precluded by section 17(1)(iii) from making the apportionment method applicable from an earlier date. It was the refusal to apply the method retrospectively in the manner which the VAT vendor requested that the latter took on appeal. SARS argued that as it had not refused to approve a method but had only refused the retrospective application of a method, it was not a decision as contemplated in section 32(1)(*a*)(iv) of the VAT Act. Savage J found that the refusal to apply the method retrospectively necessarily included the refusal to apply the method requested and that to find differently would "strain at the language of the provision and lead to an unbusinesslike and unwieldy result". The unbusinesslike and unwieldy result was that the VAT vendor would be limited to a review, and this would "serve to remove the right of appeal only in respect of a narrow group of disputes, from the ambit of this Court's jurisdiction without as much being expressly stated in the statute".

[32] In my view the facts of this case are, in an essential sense, similar. The ruling, by definition, encapsulated the refusal to approve the method requested by the appellant. In its stead SARS ruled that a different method should apply. SARS thus made a decision as contemplated in section 17(1) of the VAT Act. In *ITC 1930* SARS refused to approve the method requested by the VAT vendor, in its completeness i.e. it ruled that its inception date would be 1 March 2016 instead of 1 February 2014. In this case SARS also refused what was requested and ruled that something different should apply, and similarly made a decision as contemplated in section 17(1) of the VAT Act.

[33] In my view to find as SARS has argued, would "strain at the language of the provision and lead to an unbusinesslike and unwieldy result". SARS's interpretation is unbusinesslike and unwieldy in the sense that if SARS refused to do anything at all (i.e. ignored the ruling request), that would be subject to objection and appeal – permitting the Court to order the decision to be altered to one approving a particular apportionment method under section 129(2)(*b*) of the TAA to one which the Court considered fair and reasonable. However, if it refused the method suggested by a vendor and approved a different method, then then the taxpayer in terms of section 105 would have to challenge the ruling within the narrow scope of a review. Stated plainly, the High Court would deal with the merits of the method imposed (but would be limited to interfering with it on review grounds only) and the Tax Court (a specialist tribunal) would deal with the procedural issue (but would then, if it upheld the appeal, be able to stand in SARS's shoes and approve an appropriate method). This would be an unwieldy and unbusinesslike result.

[34] I do not agree with SARS's submission that section 17(1) of the VAT Act is not concerned with the method of apportionment requested by the vendor. A ruling in terms of section 17(1) of the VAT Act and Chapter 7 of the TAA is made in response to a request to apply a particular method. If SARS agrees with the vendor, it approves the method contained in the request. If SARS disagrees with the method requested by the vendor, it refuses or declines the request and determines which method is to apply. That decision is subject to objection and appeal to this Court, which may in the exercise of its powers of revision discard the method imposed by SARS and approve a different method. This is in keeping with the purpose of section 17(1), which is to ensure that the most appropriate apportionment method for a particular vendor is adopted. The interpretation of section 32(1)(iv) of the VAT Act referred to above advances this purpose.

Conclusion

[35] In the premises I order as follows:

35.1. SARS's application to introduce a special plea is granted.

35.2. The special plea challenging the jurisdiction of the Tax Court to this appeal is dismissed with costs.

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MYBURGH AJ
Cape Town
16 January 2024

Date of hearing: 8 November 2023

Date of judgment: 16 January 2024