Tax disputes ... more than one way of skinning the cat

By Johan Kotze

Many aggrieved taxpayers, and SARS officials, may regard the Tax Court as the only mechanism to resolve a tax dispute.

SARS's general function is to raise assessments based on its conviction that a certain amount should be taxed. A taxpayer who disagrees with a SARS assessment may either capitulate and pay the tax, or declare a dispute via an objection and appeal process.

Yet this is not the only course of action open to SARS. Others are not subject to objection and appeal and therefore oblige an aggrieved taxpayer to explore alternative legal means to deal with SARS.

One is to approach a court by notice of motion for a declaratory order.

In such a matter the taxpayer would be the 'applicant', as opposed to the 'appellant' in the case of an objection and appeal to the Tax Court.

Declaratory orders are far from common. Even so, it is worth noting that in each of these cases SARS has argued that this is the domain of the Tax Court, implying that a taxpayer may not directly approach the High Court for a declaratory order.

In *Shell's Annandale Farm (Pty) Ltd v C:SARS,* Judge Dennis Davis held that the Tax Court was not the only competent authority to decided on tax issues. Where the

question was simply one of law – that is, the facts are not in dispute – the matter could be resolved by the High Court by way of a declaratory order.

The judge said the court had a discretion to consider an application for a declaratory order; it had to decide whether a specific case was suitable for this purpose. In exercising that discretion, considerations of public policy came into play, because of SARS being placed in an invidious position where it might be faced with taxpayers attempting to short-circuit the Act's procedural provisions.

In *Grain SA v C:SARS*, a case in which the writer has been involved, Grain SA approached the Free State High Court to declare that a VAT ruling issued by SARS was wrong and that amounts Grain SA received from the Maize Trust were in fact 'donations' for purposes of the Value-Added Tax Act.

SARS argued that it was not appropriate for the Court to make a declaratory order at that stage, since there were various reasons why SARS should not be curtailed in its duties to exercise its so-called *unfettered discretion* when performing its duties. SARS further argued that Grain SA had to wait until it was assessed before going the way of objection and appeal.

It was common cause that SARS gave a VAT ruling – in terms of section 41B of the VAT Act – with which Grain SA did not agree.

The provisions of the VAT Act dealing with objection and appeal do not cater for rulings.

If SARS was correct that Grain SA had to wait, one wonders for how long. In the meantime its auditors would have insisted that any disputed VAT should be provided for in Grain SA's financial statements.

Judge Jordaan accepted that the dispute between Grain SA and SARS was appropriate for a declaratory order.

SARS then argued that the matter should not be dealt with as a declaratory order as the relevant facts had not been thrashed out to the bone, as would have been possible in a formal trial. Judge Jordaan disagreed on the grounds that SARS had been presented with a set of facts, and then furnished with a specific VAT ruling. Thereafter, Grain SA provided SARS with another representation and met with SARS, upon which SARS had furnished another ruling on the matter.

A declaratory order has several benefits, among them:

- it is quick, since the parties' arguments are based on affidavits without having to deal with evidence and witnesses in court; and
- costs follow the suit, whereas in the Tax Court a taxpayer may amongst other only be granted a cost order against SARS if SARS had been unreasonable.

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