

A departure from 'adequate reasons' and common sense to the proposed draft Tax Court Rules

All taxation, in one way or another, may impact upon fundamental human rights. However, to ensure that the imposition is not absolute, section 5 of the Promotion of Administrative Justice Act provides that every person whose rights may have been materially and adversely affected by administrative action, may request written reasons for that action from the administrator responsible.

It is interesting to compare the current cautious right to reason (also in the light of the discussion that follows with regard to reasons for assessments) with the generous right to reason per the Interim Constitution, which gave every person the right to be furnished with reasons, in writing, for administrative action that affected any of his/her rights or interest, unless the reasons for such action have been made public.

This right is for tax purposes manifested in the Tax Court Rules (the Current Rules) which provides in Rule 3 that a taxpayer who is aggrieved by any assessment may request SARS to furnish reasons for that assessment.

SARS, at least, has to furnish 'adequate reasons', which if it has already been provided, SARS must notify the taxpayer accordingly, which notice must refer to the documents wherein such reasons were provided, or if it has not been provided, SARS must provide such reasons in writing.

The concept of 'adequate reasons' was never defined in the Current Rules, the Income Tax Act or any other tax Act and its interpretation was bound to appear before the Courts eventually.

The meaning of 'adequate reasons' was first discussed in the Tax Court case of *Income Tax Case No. 1811*, where the Gauteng Tax Court expressed agreement with the standard of what constitutes 'adequate reasons' as laid down, in the context of Administrative Law, by the *Minister of Environmental Affairs and Tourism v Phambili Fisheries* quoting the Federal Court of Australia in *Ansett Transport Industries (Operations) Pty Ltd and Another v Wraith and Others*. The Tax Court was of the view that:

'...the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute) and the reasoning process which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation.'

Accordingly, the Tax Court quoted the SARS *Guide on Tax Dispute Resolution* and found that 'adequate reasons' requires the decision maker to explain his decision in a way which would enable a person aggrieved to say: 'Even though I may not agree with it, I now understand why the decision went against me'. Ideally, the aggrieved taxpayer should be in a position to decide whether that decision is worth challenging. In this regard, the Tax Court commented that this was a relatively high standard which SARS set for itself to comply in giving reasons. In a latter issue of SARS' *Guide on Tax Dispute Resolution* this standard was dropped, which one may argue is in disrespect of the letter of the law.

The meaning of 'adequate reasons', for purposes of the Current Rules, was finally put to rest in the Supreme Court of Appeals case of *Commissioner for South African Revenue Service v Sprigg Investment 117CC T/A Global Investment*, which confirmed the

meaning attributed to it in *Minister of Environmental Affairs and Tourism v Phambili Fisheries*.

In February 2013 the South African Revenue Service (SARS) released the draft Tax Court rules to be promulgated under section 103 of the Tax Administration Act, 2011(TAAAct) (Proposed Rules). The Proposed Rules, which are expected to replace the existing Tax Court Rules, promulgated under section 107A of the Income Tax Act (Current Rules), prescribe the procedures to be followed in respect of objections and appeal proceedings against assessments or certain other administrative decisions made by SARS.

For the most part, the Proposed Rules are similar to the Current Rules, but, as always, there are a few notable departures. One of these departures is the rule regulating the request for reasons of an assessment.

Given the furor surrounding the concept of 'adequate reasons', it is surprising that SARS, in drafting the Proposed Rules, did not allocate a concrete meaning to it. The rule regulating reasons for an assessment can be found in Rule 6 of the Proposed Rules. Rule 6 (4) and (5) provides a clue why SARS neglected to allocate a meaning to concept of 'adequate reasons', and reads as follows:

'(4) SARS must provide reasons for the assessment within 45 days after delivery of the request for reasons.

(5) The period for providing reasons may be extended by SARS if a SARS official is satisfied that more time is required by SARS to provide reasons due to exceptional circumstances, the complexity of the matter or the principle or the amount involved.'
(our underlining)

It is clear that Rule 6 of the Proposed Rules discards the concept of 'adequate reasons' and simply prescribes that SARS must provide *reasons* for an assessment. Given the judicial progression of the meaning of 'adequate reasons' and the finality of its meaning attributed by the SCA, it is surprising that SARS simply chose to ignore such judicial insight and opt for the lower threshold of simply providing 'reasons'.

The concept of what constitutes 'reasons' in the context of an assessment issued by SARS is bound to create uncertainty and come under judicial scrutiny in much the same vein as the meaning of 'adequate reasons'.

Or is it? Another noteworthy departure can be found in Rule 6(7) which provides that the provision of reasons given by SARS under Rule 6 is final. Does this finality mean that reason provided by SARS can never be challenged by an aggrieved taxpayer regardless of how thin they are? If the provision remains in the final version of the Proposed Rules who will then determine what would constitute 'reasons'? SARS the law onto themselves? This provision is clearly beyond the powers of SARS and contradicts numerous well established constitutional and common law principles.

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