The Tax Disputes and Litigation Review

Second Edition

Editor
Simon Whitehead

Law Business Research

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THE LAW REVIEWS

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THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

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EDITOR'S PREFACE

The objective of this book is to provide tax professionals involved in disputes with revenue authorities in multiple jurisdictions with an outline of the principal issues arising in those jurisdictions. In this, the second edition, we have continued to concentrate on the key jurisdictions where disputes are likely to occur for multinational businesses.

Each chapter provides an overview of the procedural rules that govern tax appeals and highlights the pitfalls of which taxpayers need to be most aware. Aspects that are particularly relevant to multinationals, such as transfer pricing, are also considered. In particular, we have asked the authors to address an area where we have always found worrying and subtle variations in approach between courts in different jurisdictions, namely the differing ways in which double tax conventions can be interpreted and applied.

Perhaps it is merely a perception from a jurisdiction whose prime minister has publicly vilified a multinational for complying with the national tax laws, but tax avoidance seems to have become the new international evil. As such, this book provides an overview of each jurisdiction's anti-avoidance rules and any alternative mechanisms for resolving tax disputes, such as mediation, arbitration or restitution claims.

We have attempted to give readers a flavour of the tax litigation landscape in each jurisdiction. The authors have looked to the future and have summarised the policies and approaches of the revenue authorities regarding contentious matters, addressing important questions such as how long cases take and situations in which some form of settlement might be available.

We have been lucky to obtain contributions from the leading tax litigation practitioners in their jurisdictions. Many of the authors are members of the EU Tax Group, a collection of independent law firms, of which we are members, involved particularly in challenges to the compatibility of national tax laws with EU and EEA rights. We hope that you will find this book informative and useful.

Finally, I would like to acknowledge the hard work of my colleague Federico Cincotta in the editing and compilation of this book.

Simon Whitehead
Joseph Hage Aaronson LLP
London
February 2014

Chapter 20

SOUTH AFRICA

Johan Kotze[1]

I INTRODUCTION

With effect from 1 October 2012 the administration provisions of the various tax acts were moved to a new act, called the Tax Administration Act, 2012. The Tax Administration Act basically sets out the South African Revenue Service (SARS) and the taxpayer's obligations and entitlements.

The drafting of the Tax Administration Act was announced by the Minister of Finance in the 2005 Budget Review, and eventually promulgated on 4 July 2012.

In terms of the law that has created SARS, (i.e., the South African Revenue Service Act) SARS's objectives include the efficient and effective collection of taxes. Tax legislation, such as the Tax Administration Act, seeks to achieve this objective. Tax legislation typically comprises two aspects:

a tax liability provisions or 'tax charging' provisions; and
b tax administration provisions.

The Tax Administration Act only deals with tax administration, and seeks to:

a incorporate into one piece of legislation those administrative provisions that were generic to all tax acts and duplicated in the different tax acts;
b remove redundant administrative provisions; and
c harmonise the administrative provisions as far as possible.

Tax administrative procedures inevitably follow a time sequence, commonly referred to as a 'step-by-step' approach. The Tax Administration Act introduces a step-by-step methodology that helps to align the structure of tax administration to the administrative

1 Johan Kotze is a tax consultant at Bowman Gilfillan.

life cycle of taxpayers, which is illustrated by the various chapter headings of the Tax Administration Act.

Not every taxpayer will be involved in each possible step in tax administration, but taxpayers and SARS will know when to advance to the next step.

When taxpayers are aggrieved by an assessment, they have a right to dispute it. The Tax Administration Act provides the legal framework for these disputes across all tax types found in the tax acts except the Customs and Excise Act.

As the dispute resolution process is procedurally intensive, the dispute resolution legal framework in terms of the Tax Administration Act must be read with the tax dispute rules.

Currently these rules are issued under the Income Tax Act, but new rules are being formulated under the Tax Administration Act and will be issued by the Minister of Finance after consultation with the Minister of Justice and Constitutional Development.

II COMMENCING DISPUTES

SARS can raise an original assessment, an additional assessment, a reduced assessment or a jeopardy assessment, and if a taxpayer is aggrieved by such an assessment, this may result in a tax dispute between SARS and the taxpayer.

The tax dispute resolution rules provide that a taxpayer may either request reasons for the assessment or immediately commence the dispute by instituting grievance procedures by objecting to the assessment. Technically a tax dispute is not commenced if a taxpayer requests reasons for the assessment, as the taxpayer has to decide whether the reasons are sufficient to accept the SARS assessment. If the taxpayer does not accept SARS' reasons, the taxpayer may object to the assessment.

Not only assessments are subject to objection; certain decisions can also be objected to via the tax dispute resolution rules, and other decisions can be directed to the High Court.

III THE COURTS AND TRIBUNALS

Tax appeals, in the first instance, are heard by either the Tax Board or the Tax Court.

i Tax Board

The Tax Board is established by the Minister of Finance in terms of the Tax Administration Act and consists of an advocate or an attorney as chairperson. Such an advocate or attorney is appointed to a panel of suitable advocates or attorneys by the Minister of Finance in consultation with the Judge President of the relevant provincial division. The Tax Board may hear tax appeals in disputes involving tax that does not exceed 200,000 rand.

The sittings of the Tax Board are not public and the Board's decisions are not published by SARS. The decisions of the Tax Board are binding on the parties but have no precedent value.

The unsuccessful party in a Tax Board hearing may appeal to the Tax Court.

ii Tax Court

The Tax Court is a court established in terms of the Constitution of South Africa, 1996. It is established by the President of South Africa in terms of the Tax Administration Act. The Tax Court has jurisdiction over tax appeals lodged and may also hear interlocutory applications relating to objections and appeals.

The sittings of the Tax Court are generally not public, although the president of the Tax Court may, in exceptional circumstances allow a sitting to be public. The Tax Court consists of a judge of the High Court as well as an accountant member and a commercial member, selected from a panel of members appointed by the President of South Africa. The Tax Court may also, in disputes involving tax in excess of 50 million rand, consist of three judges of the High Court and the two members.

The judgments of the Tax Court must be published for general information but, if the sitting was not public, in a form that does not reveal the taxpayer's identity. A taxpayer or SARS may appeal against the Tax Court's judgment to the full bench of the provincial division of the High Court or to the Supreme Court of Appeal (SCA), without an intermediate appeal to the provincial division, if the president of the Tax Court has granted leave to do so. The judgments of the Tax Court are binding on the parties in the matter and of persuasive value in other Tax Courts, the High Courts and the SCA.

iii High Court

The High Court, which has previously been called the Supreme Court, has provincial divisions throughout South Africa. Each has jurisdiction over the defined provincial area in which it is situated and over all persons residing or present in that area. These courts hear matters that are of such a serious nature that the lower courts would not be competent to make an appropriate judgment or to impose a penalty, as well as matters referred to them by law.

In terms of the Tax Administration Act, a taxpayer or SARS may appeal against the Tax Court's judgment to the full bench of the provincial division of the High Court that has jurisdiction in the area in which the Tax Court sitting was held. The sittings of the High Courts are public and its judgments are published for general information.

The judgments of the High Court are binding on all lower courts and tribunals and of persuasive value in other High Courts, the Supreme Court of Appeal and the Constitutional Court.

iv Supreme Court of Appeal

The SCA is seated in Bloemfontein. It generally only deals with cases referred from the High Court, but statutory provision is made for direct access from the Tax Court.

SCA hearings consist of five judges.

The sittings of the SCA are public and its judgments are published for general information. The judgments of the SCA are binding on all lower courts and tribunals and, except for the Constitutional Court, no other court can overturn a decision of the SCA.

v Constitutional Court

The Constitutional Court is the highest court in all constitutional matters. The Constitutional Court makes the final decision on whether an Act of Parliament, a provincial Act or the conduct of the President is constitutional. In the context of pure tax appeals, it has limited jurisdiction to review an SCA judgment dealing with tax law *per se*.

IV PENALTIES

The Tax Administration Act provides for two types of penalties:

a administrative non-compliance penalties; and

b understatement penalties.

i Administrative non-compliance penalties

An administrative non-compliance penalty means a penalty imposed by SARS in accordance with the Tax Administration Act. It comprises fixed-amount and percentage-based penalties. There are a number of obligations that a taxpayer is legally required to comply with, and a fixed-amount penalty is imposed when a taxpayer does not comply with an administrative obligation. The amount of the penalty imposed in a penalty assessment will increase automatically for each month, or part thereof, until the person complies.

Percentage-based penalties are imposed under the Tax Administration Act if SARS is satisfied that an amount of tax was not paid as and when required under a tax act. SARS may impose a penalty equal to the percentage of the amount of unpaid tax, as prescribed in the relevant tax act. The procedures for the imposition and remittance of a percentage-based penalty are regulated by the Tax Administration Act, but the circumstances that trigger the imposition of the penalty remain in the tax act.

ii Understatement penalties

Prior to the commencement of the Tax Administration Act SARS had an open-ended discretion to impose 'additional tax' of up to 200 per cent in the event of default or omission. The additional tax was applicable if a taxpayer made a default in rendering a tax return, omitted from his return any amount that ought to have been included therein or made an incorrect statement in any return.

The Tax Administration Act replaced the 'additional tax' regime with an understatement penalty framework that is aimed at ensuring consistent treatment of taxpayers in comparable circumstances.

An understatement penalty may only be imposed if the treasury is prejudiced by the taxpayer's conduct in reporting. The treasury will be prejudiced if there is a shortfall. In simple terms, the shortfall is the difference between the correct amount of tax that should have been declared and the amount that was declared by the taxpayer. If there is prejudice, this must have been caused by a taxpayer who did not file a return, filed a return but omitted an item from that return or filed a return in which an incorrect statement was made.

The penalty should be determined by locating each case within a table that assigns a percentage to subjective and objective criteria.

To locate the applicable understatement penalty (which can vary from 10 per cent to 200 per cent) on the table, SARS has to identify a taxpayer's behaviour in terms of the following descriptions:

a substantial understatement;
b reasonable care not taken in completing return;
c no reasonable grounds for 'tax position' taken;
d gross negligence; and
e intentional tax evasion.

Once the taxpayer's behaviour has been indentified, SARS must decide whether the understatement amounts to:

a a standard case;
b the taxpayer being obstructive or a repeat offender;
c voluntary disclosure after notification of an audit; or
d voluntary disclosure before notification of an audit.

SARS has the onus to prove that the grounds exist for imposing an understatement penalty.

An understatement penalty will be included in an assessment issued by SARS and must be paid by the date specified in the notice of assessment.

A specific rule is provided in the Tax Administration Act that allows the remittance of a substantial understatement. In terms thereof SARS must remit a penalty imposed for a substantial understatement if the taxpayer made full disclosure of the arrangement and the taxpayer is in possession of an opinion by a registered tax practitioner that confirms that the taxpayer's position is more likely than not to be upheld if the matter proceeds to court.

V TAX CLAIMS

i Recovering overpaid tax

The payment of a refund is a significant risk area because a number of people submit incorrect or false refund claims. Therefore, even though a taxpayer is entitled to be refunded, SARS has the right to establish the legitimacy of a claim.

A taxpayer is entitled to a refund in two instances:

a when the refund is correctly stated in a return or an assessment; and
b if a taxpayer made a mistake and paid an amount greater than that contained in a return or an assessment.

Even though a taxpayer is entitled to a refund, SARS may withhold payment of a refund:

a to determine the correctness of the refund; and
b if a taxpayer has not submitted income tax, provisional tax, employees' tax or VAT returns.

If a taxpayer provides acceptable security, SARS must release a refund before a verification, inspection or audit is finalised. A decision not to authorise a refund is subject to objection and appeal.

If a refund relates to a self-assessment tax, then the refund must be claimed within five years from the date of the assessment. In the case of a SARS assessment, the person must claim the refund within three years of the date of assessment.

If SARS pays an amount in error, the recipient is obliged to repay the amount on demand. If the person does not repay the amount, SARS may recover the amount as if the amount was a tax debt.

This means that SARS' expedited powers of recovery may be used to recover any amount of money that was paid out in error. A refund, and interest on the refund, must be set off against a taxpayer's tax debt under a tax act.

ii Challenging administrative decisions

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.

Objections and appeals to the Tax Court do not only have to be against assessment grievances.

A taxpayer may also object to:

a a decision by SARS not to extend the period for objection or appeal where the taxpayer requested such an extension;
b any decision that may be objected to or appealed against under a tax act;
c a decision not to authorise a refund;
d a decision not to remit an administrative non-compliance penalty; and
e a decision not to remit an understatement penalty.

In the areas in which the Tax Court does not have jurisdiction, a taxpayer may take the matter to the High Court.

In this regard a taxpayer can approach a court by notice of motion for a declaratory order. Declaratory orders are far from common in tax. Where the question is 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.

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.

Even so, 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 terms of the Promotion of Administrative Justice Act, 2000, an administrative action that materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

A fair administrative procedure depends on the circumstances of each case, but SARS must give effect to the right of procedurally fair administrative action and must give a person:

a adequate notice of the nature and purpose of the proposed administrative action;
b a reasonable opportunity to make representations;

c a clear statement of the administrative action;
d adequate notice of any right of review or internal appeal, where applicable; and
e adequate notice of the right to request reasons.

Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action of SARS, if:
a SARS was not authorised to do so by the empowering provision;
b SARS acted under a delegation of power that was not authorised by the empowering provision;
c SARS was biased or reasonably suspected of bias;
d a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
e the action was procedurally unfair;
f the action was materially influenced by an error of law;
g the action was taken for a reason not authorised by the empowering provision;
h the action was taken for an ulterior purpose or motive;
i the action was taken because irrelevant considerations were taken into account or relevant considerations were not considered;
j the action was taken because of the unauthorised or unwarranted dictates of another person or body;
k the action was taken in bad faith;
l the action was taken arbitrarily or capriciously;
m the action itself contravenes a law or is not authorised by the empowering provision; or
n the action itself is not rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before SARS or the reasons given for it by SARS;
o the action concerned consists of a failure to take a decision;
p the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
q the action is otherwise unconstitutional or unlawful.

The court or tribunal, in proceedings for judicial review, may grant any order that is just and equitable, including orders:
a directing SARS to give reasons;
b directing SARS to act in the manner the court or tribunal requires;
c prohibiting SARS from acting in a particular manner;
d setting aside the administrative action and remitting the matter for reconsideration to SARS, with or without directions;
e setting aside the administrative action and in exceptional cases substituting or varying the administrative action or correcting a defect resulting from the administrative action;
f setting aside the administrative action and in exceptional cases directing SARS or any other party to the proceedings to pay compensation;

g declaring the rights of the parties in respect of any matter to which the administrative action relates;
h granting a temporary interdict or other temporary relief; or
i as to costs.

iii Claimants

The obligation to pay tax, which arises upon the issue of an assessment, is not automatically suspended by an objection or appeal. The obligation can only be suspended by SARS upon request by the taxpayer.

A taxpayer who pays disputed tax and whose objection or appeal is upheld, is entitled to interest from the date of payment of the disputed amount to the date on which such amount is refunded. This rule applies across all taxes.

The suspension of payment of disputed tax is not an automatic right and a taxpayer must apply for the suspension in the form and manner prescribed by SARS.

In view of the fact that the due date for the payment of tax under an assessment is normally before the due date for lodging an objection and to cater for pre-objection requests for reasons, a suspension request may be made before an objection is lodged.

VI COSTS

Costs in and up to the Tax Court are generally for the parties' own account. In certain circumstances the Tax Court may order that costs are awarded. Costs may essentially be awarded by the Tax Court if the basis of the position taken by SARS or the 'appellant' is unreasonable.

When a tax matter is dealt with in the High Court, the rules are different. Costs are generally awarded to the successful litigant, which is to indemnify the litigant for the actual expense that he or she has been put through having been unjustly compelled to initiate or defend litigation, as the case may be. Such an award is seldom a complete indemnity. Normally only the court that has jurisdiction in respect of the merits has jurisdiction in respect of costs.

VII ALTERNATIVE DISPUTE RESOLUTION

South Africa has an alternative dispute resolution (ADR) facet to its tax dispute rules, but under this heading one also has to consider the other mechanisms provided for in the Tax Administration Act that may prevent or resolve classic disputes.

i Tax rulings

The purpose of the advance ruling system is to promote clarity, consistency and certainty regarding the interpretation and application of a tax act.

The ruling will be binding upon SARS when a taxpayer is assessed in connection with that proposed transaction, unless the taxpayer has not disclosed all the facts in connection with the proposed transaction or has not concluded the transaction as described in the taxpayer's application.

ii ADR

The tax dispute rules introduced alternative dispute resolution procedures and settlement regulations to allow for the resolution of tax disputes outside the litigation arena. This created a structure within which disputes may be resolved or settled.

An ADR procedure can be initiated by either the taxpayer or SARS. Where the taxpayer requests an ADR procedure SARS must inform the taxpayer by notice within 20 days of receipt of the notice of appeal whether SARS is of the opinion that the matter is appropriate for ADR and may be resolved by way of the ADR procedures.

An ADR procedure will only take place if the taxpayer accepts the ADR terms; this acceptance is effected when the taxpayer indicates an ADR procedure in the notice of appeal.

The ADR process must be concluded within 90 days, or such further period as SARS may agree to.

The period within which the ADR proceeding is conducted commences 20 days after the date of receipt by SARS of the notice of appeal, and ends on the date of termination of the proceedings in the manner provided for in the terms governing the ADR procedures.

SARS will appoint a facilitator (who may be an appropriately qualified employee of SARS) and will be bound by a Code of Conduct. The facilitator's objective is to seek a fair, equitable and legal resolution of the dispute between the taxpayer and SARS.

At the conclusion of the ADR process the facilitator must record the terms of any agreement or settlement. If no agreement or settlement is reached, that must also be recorded.

The ADR proceedings will be without prejudice. Essentially, this means that the ADR proceedings are not one of record, and any representation made or document tendered in the course of the proceedings may not (barring certain exceptions) be tendered in any subsequent proceedings as evidence by any other party.

Should SARS or the taxpayer not be amenable to the proposed settlement or agreement, the matter may still proceed to the Tax Court.

iii Settlements

By law SARS is not entitled to forego any tax that a taxpayer is legally liable to pay. The Tax Administration Act, however, sets out the circumstances under which SARS may settle a dispute between SARS and a taxpayer, where the settlement would be to the best advantage of the state. These settlement circumstances were inserted in line with the approach that more emphasis should be placed on resolving disputes by means other than litigation.

iv Compromise

It must be emphasised that the basic rule still remains that SARS must enforce all legislation under its administration and is obliged to assess and collect all amounts due to the state. There are, however, certain circumstances that justify that this basic rule be tempered for purposes of good management of the tax system and where it would be to the best advantage of the state.

Tax debtors are expected to take responsibility for their tax obligations and to organise their affairs in such a way as to be able to discharge those responsibilities when required. If tax debtors cannot, or anticipate they will not be in a position to meet their tax obligations they should contact SARS to discuss the matter and make appropriate alternative arrangements, preferably before the due date for payment.

The broad principle is that SARS is obliged to enforce the provisions of a tax act to the fullest extent, to collect what is due and not forego taxes. However, the provisions relating to settlements and compromises recognise and give effect to special circumstances that might arise during disputes and in the collection environment. A senior SARS official may authorise a compromise request by a taxpayer if the purpose of the compromise is to secure the highest net return from the recovery of the tax debt and the compromise is consistent with considerations of good management of the tax system and administrative efficiency.

When deciding the most appropriate manner in which to deal with outstanding tax obligations, SARS will give considerable weight to the tax debtors' individual circumstances and its compliance history. For example, the history in lodging correct returns and documents and paying taxes on time. It may, however, occur that taxpayers cannot pay a tax debt or that it would be uneconomical to pursue a tax debt, hence the need for provisions dealing with the write-off or compromise of a tax debt.

Tax may be written off temporarily or permanently when a debt is irrecoverable and the effort and cost pursuing it will prove ineffective or pursuing it is a legal impossibility. A temporary write-off is generally merely a suspension of the recovery of a debt, and the debt may still be recoverable prior to prescription. The prescription period, under the Tax Administration Act, is 15 years from the date a tax debt comes into existence.

However, a permanent write-off will be final.

VIII ANTI-AVOIDANCE

South Africa's tax acts provide for general anti-avoidance and specific anti-avoidance.

The general anti-avoidance rule was previously contained in the repealed Section 103(1) of the Income Tax Act (the 'old' GAAR) and is now contained in Sections 80A to 80L of the Income Tax Act (the 'new' GAAR).

The old GAAR was replaced on 2 November 2006 by the new GAAR.

Misleading statements in returns and a lack of full disclosure are common features of many tax schemes and can come to light many years later. For this reason, too, Section 103(1) will remain a potential threat to taxpayers for many years to come – indeed there is no definitive 'sunset' date when Section 103(1) can finally be consigned to history.

A further reason why Section 103(1) remains relevant despite its repeal is that the new GAAR has borrowed many terms and concepts from Section 103(1). There is an extensive body of case law on the interpretation of those terms and it is inevitable that the courts, when they seek to interpret similar terms in the new GAAR, will turn to those decisions for guidance.

At the heart of Section 103(1) were two interlocking criteria: first, the subjective sole or main purpose of the taxpayer to avoid or reduce liability for tax; and, second, the objective abnormality or otherwise of the means or manner in which the transaction was entered into or carried out or of the rights and obligations thereby created.

For Section 103(1) to apply to a 'transaction, operation or scheme', both the subjective intention and the objective abnormality had to be concurrently present.

As a result, a taxpayer could, with impunity, enter into any transaction, no matter how (objectively) abnormal, as long as he or she did not have a (subjective) sole or main purpose of tax avoidance; conversely, he or she could with impunity enter into any transaction with the (subjective) sole or main purpose of tax avoidance, provided that the transaction was not (objectively) abnormal in the requisite sense.

The South African courts have not clearly pronounced on the purpose and underlying philosophy of the general anti-avoidance provision in the Income Tax Act or its relationship with the several specific anti-avoidance provisions. Nor indeed have the courts been forthcoming with regard to the perceived relationship between the general anti-avoidance provision and the rest of the Income Tax Act. Nor is the Act itself explicit on this fundamental issue.

It is significant that Section 80A(c)(ii) defines an 'impermissible avoidance arrangement' as including one that 'would result directly or indirectly in the misuse or abuse of the provisions of this Act [including the provisions of the GAAR in Part IIA]'. Whether a particular arrangement falls foul of this provision can only be determined once the purpose of the Act in general and the GAAR in particular has been identified.

If our courts do not have a clear conception of the core, underlying purpose of key provisions of the Act, such as the general anti-avoidance provision, then their judgments will inevitably be inconsistent and perhaps misdirected.

The new GAAR, which applies to 'impermissible avoidance arrangements' entered into on or after 2 November 2006, introduces a number of new concepts while retaining some elements of the old GAAR.

The new GAAR attempts to distinguish between permissible and impermissible tax avoidance by establishing a balance between the right of taxpayers to arrange their affairs to minimise their tax liability and the need to protect the tax base. This dividing line is unfortunately blurred and will remain so until the courts have had the opportunity to speak on the interpretation of key aspects of the new GAAR.

There are two main reasons for this uncertainty. The first is that the components of the mechanical provisions of the new GAAR are extremely complex. Secondly, some of the new concepts appear to be based on the jurisprudence of countries such as Canada, the United Kingdom and the United States. The jurisprudence of these countries (particularly those where the courts apply a domestically aligned textual, contextual and purposive analysis in relation to statutory interpretation) clashes with South Africa's fiscal jurisprudence, which generally takes a literal approach to statutory interpretation and may need to be revised to accommodate the new concepts now thrust upon it.

Broadly stated, Section 80A defines what constitutes an 'impermissible avoidance arrangement' and, once an arrangement is shown to fall within this category, the powers of SARS to prevent or diminish the tax benefit in question are activated.

A specific anti-avoidance measure, Section 103(2), curbs the trafficking in assessed losses, capital losses or assessed capital losses of companies, close corporations and trusts.

IX DOUBLE TAXATION TREATIES

South Africa's Constitution provides the following:

> *231. International agreements*
> *1. The negotiating and signing of all international agreements is the responsibility of the national executive.*
> *2. An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).*
> *3. An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.*
> *4. Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.*
> *5. The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.*

Section 108(1) of the Income Tax Act provides that '[the] National Executive may enter into an agreement with the government of any other country, whereby arrangements are made with such government with a view to the prevention, mitigation or discontinuance of the levying, under the laws of South Africa and of such other country, of tax in respect of the same income, profits or gains, or tax imposed in respect of the same donation, or to the rendering of reciprocal assistance in the administration of and the collection of taxes under the said laws of South Africa and of such other country'.

Section 108(2) of the Income Tax Act requires the arrangement to be published in the Gazette and the arrangements so notified shall thereupon have the effect as if enacted in the Income Tax Act.

South Africa has entered into comprehensive agreements with a number of other countries to prevent the levying of tax twice on the same income by more than one country.

South Africa has also entered into sea and air transport agreements with certain foreign countries.

X AREAS OF FOCUS

SARS actively guards against VAT refunds and the collection of outstanding tax.

VAT refunds are almost always subject to audit, which entails a letter being sent to the taxpayer requesting supporting information for the VAT refund. If the taxpayer fails to reply, the input taxes are merely denied, which will lead to a tax dispute.

SARS is also very fast to collect outstanding tax debt. SARS has two mechanisms to force taxpayers to pay outstanding tax debt:

a to appoint a third party, who owes money to or holds money for the taxpayer, such as the taxpayer's bank, the taxpayer's employer or a debtor of the taxpayer, to immediately pay the money to SARS; or

b to take civil judgment against the taxpayer, in which case a warrant for execution may be issued for the Sheriff of the Court to attach and sell a taxpayer's assets.

XI OUTLOOK AND CONCLUSIONS

The tax dispute rules are about to be replaced by a new set of rules. Taxpayers in dispute should be mindful of the new rules and especially of transitional rules covering disputes commenced under the existing rules but not finalised by the time the new rules are promulgated.

The tax dispute rules were intended to give structure to disputes, encourage taxpayers and SARS to resolve disputes and shorten dispute periods, but the reality is very different: taxpayers have to actively manage disputes conducted according to the tax dispute rules otherwise the dispute process may take a very long time to be finalised.

Appendix 1

ABOUT THE AUTHORS

JOHAN KOTZE

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Johan Kotze is the head of tax dispute resolution at Bowman Gilfillan. Johan has more than 20 years of tax experience, including 10 years at the South African Revenue Service and the time thereafter also spent working in tax dispute resolution. Johan attends to tax queries, requests reasons for grievance assessments and objections, arranges payment deferments, settles disputes, attends to ADR, appeals, takes matters on review, applies for declaratory orders and prepares cases for court. Johan advises in all spheres of tax, keeps himself regularly up to date and has good relationships at the South African Revenue Service. His areas of specialisation are income tax, VAT and employees' tax. Being a qualified master tax auditor, Johan is often involved in tax due diligences and other investigations aiming at reducing tax charges or other compliance burdens. Johan also assists a number of corporates on a continuous basis managing tax burdens. Johan is based in Gauteng but assists clients all over South Africa, Namibia, Botswana, Lesotho and Swaziland.

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