



Tax Cases and SARS Interpretation

Turn complex tax cases into clear strategies

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YOUR KEY TO THE TAX COMMUNITY

Agenda

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- 2 Greyvensteyn vs CSARS
- 3 IT 45931; VAT 22285
- 4 Questions and Answers



Keitumetse Sesana MTP (SA)

LLM (Tax Law), registered SARS Tax Practitioner and Master Tax Practitioner

Keitumetse Sesana is Strategic Lead for Stakeholder Engagement Legislation at SAIT.

Keitumetse currently specialises in tax legislative policy engagement and leads strategic initiatives aimed at shaping and refining the tax legislative framework. She plays a key role in managing key stakeholder relations, including facilitating collaboration with key government departments such as Parliament, National Treasury, SARS, and other key entities. Her strategic oversight extends to leading the SAIT Tax Technical workgroups, ensuring that tax specialists within the group collaborate effectively to draft and submit policy proposals that influence legislative reform.

In addition to her policy and stakeholder engagement responsibilities, Keitumetse leads webinars and curates content aimed at supporting tax practitioners' Continuous Professional Development (CPD). She is dedicated to helping tax professionals stay ahead in an ever-evolving tax landscape through insightful webinars and contributions to various SAIT publications.

Keitumetse holds a Master of Laws (LLM) specialising in Tax Law, a Bachelor of Laws (LLB), and a Bachelor of Commerce (BCom) Law degree.



Althea Soobyah

Head of Tax for Forvis Mazars South Africa.

Althea joined Mazars as a Director - Tax Consulting in May 2020 and focuses on all areas of corporate tax, including mining tax, corporate rules, transfer pricing controversy and tax dispute resolution.

She was previously employed by one of the Big 4 accounting firms where she was involved in advising clients on matters related to Dispute Resolution, Tax Administration, and providing tax advisory services to clients across multiple sectors such as mining, telecommunications, IT and retail.

Prior to her employment with a Big 4 she spent 14 years with the South African Revenue Service and held various roles from legal tax consultant to Senior Manager and Senior Specialist within Head Office and the Large Business Centre.

Althea Soobyah

Head of Tax for Forvis Mazars South Africa.

Her primary focus in these positions was to provide advisory services to the regional offices on Corporate Tax issues, transfer pricing, general tax, audit related including but not limited to areas such as mining, transfer assistance and dispute resolution assistance as well as to provide input to tax policy at a head office level.

During her time at the South African Revenue Service, Althea also participated in and contributed to tax policy initiatives driven by SARS from a corporate tax, mining as well as research and development perspective.

Areas of expertise include but are not limited to: M & A and corporate restructuring, Tax due diligence, Corporate Tax, Mining Tax, Tax Controversy and dispute resolution, VAT and Transfer Pricing controversy



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What is new in the Courtroom

Greyvensteyn and Others v CSARS and Others

- **Introduction**

- The applicant in this matter is Mr Andries Greyvensteyn. There are four respondents, namely the Commissioner for SARS (first respondent), the Minister of Finance (second respondent), SARS (third respondent), and Gold Kid Trading Pty (Ltd) (fourth respondent). (Paragraph [1])

- **Facts of the case**

- The fourth respondent claims to purchase unwrought gold bars and jewelry containing gold from suppliers who were registered vendors under the Value-Added Tax Act 89 of 1991 (VAT Act) and to have paid the purchase prices including VAT to its suppliers. It then refines the gold and sells it to South African clients who pay the purchase prices plus VAT. (Paragraph [20])
- The taxpayer claimed input VAT on zero rated supplies.
- The first applicant in the matter was responsible for the financial management of Gold Kid Trading.
- SARS invoked the provisions of section 180, 184(2) and 186(3) of the TAA to collect the outstanding tax debt of the fourth respondent against the first respondent.
- The applicant applied to the High Court to challenge the constitutionality of the aforesaid provisions.

Greyvensteyn and Others v CSARS and Others

- **Legal provisions challenged**

- Section 180: A person is personally liable for any tax debt of the taxpayer to the extent that the person's negligence or fraud resulted in the failure to pay the tax debt if- (a) the person controls or is regularly involved in the management of the overall financial affairs of a taxpayer; and (b) a senior SARS official is satisfied that the person is or was negligent or fraudulent in respect of the payment of the tax debts of the taxpayer.
- Section 184(2): SARS must provide a person referred to in subsection (1) with an opportunity to make representations- (a) before the person is held liable for the tax debt of the taxpayer in terms of section 155, 157, 179, 180, 181, 182 or 183, if this will not place the collection of tax in jeopardy; or (b) as soon as practical after the person is held liable for the tax debt of the taxpayer in terms of section 155, 157, 179, 180, 181, 182 or 183.
- Section 186(3): A senior SARS official may apply to the High Court for an order compelling the taxpayer to repatriate assets located outside the Republic within a period prescribed by the court in order to satisfy the tax debt. In addition to issuing the order described in subsection (2), the court may- (a) limit the taxpayer's right to travel outside the Republic and require the taxpayer to surrender his or her passport to SARS; (b) withdraw a taxpayer's authorization to conduct business in the Republic, if applicable; (c) require the taxpayer to cease trading; or (d) issue any other order it deems fit.

Greyvensteyn and Others v CSARS and Others

- **Applicant's arguments**

- Section 180 and 184(2): The applicant avers that section 180 read with section 184(2) of the Act violates his right to access to court under section 34 of the Constitution, on the basis that the sections allow SARS to resort to self-help thus undermining his access to court.
- Section 186(3): The applicant contends that section 186(3) of the Act violates his sections 21 and 22 rights of the Constitution because his rights to travel outside South Africa and to earn a living are limited.

Greyvensteyn and Others v CSARS and Others

- **Court's analysis**

- Section 180 and 184(2): When a senior SARS official invokes the provisions of section 180 of the Act, such action constitutes an administrative action and an exercise of public powers or the performance of a public function in terms of section 1(a)(ii) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). This means that SARS' decisions can be reviewed under the Promotion of Administrative Justice Act (PAJA), which provides for both procedural and substantive review and the right to access to court is not infringed.
- Section 186(3): In light of the above, the limitation that section 186(3) of the Act places on sections 21 and 22 of the Constitution is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

Greyvensteyn and Others v CSARS and Others

- **Key Takeaways**

- Constitutionality: Section 186(3) of the Act does not violate sections 21 and 22 of the Constitution.
- Judicial Oversight: Sections 180, 184(2), and 186(3) of the Tax Administration Act 28 of 2011 are constitutionally valid.

Greyvensteyn and Others v CSARS and Others

- **Implications for Future Cases**

The court's decision has several important implications for future cases:

- 1. Reaffirmation of SARS' Powers:**

- The judgment reaffirms SARS' legal authority to hold third parties personally liable for the tax debts of taxpayers under certain conditions.
- It confirms that any action by SARS to recover tax debts from a third-party who is responsible for the financial management of the taxpayer's affairs, including the repatriation of foreign assets and limiting the ability of individuals to travel or conduct business constitutes an administrative action as defined under PAJA.

- 2. Judicial Oversight and Review:**

- The decision underscores the importance of judicial oversight in ensuring that SARS' actions do not violate constitutional rights.
- It highlights the role of judicial review in providing a mechanism for individuals to challenge SARS' decisions, ensuring procedural fairness, substantive reasonableness and protecting the right to access to court.

Greyvensteyn and Others v CSARS and Others

- Implications for Future Cases (continued)

3. **Balancing Public Interest and Individual Rights:**

- The judgment demonstrates the court's approach to balancing the need for effective tax collection with the protection of individual constitutional rights.
- It sets a precedent for how similar cases will be handled in the future, emphasizing the importance of proportionality and reasonableness in limiting constitutional rights for public interest purposes.

4. **Guidance for SARS and Taxpayers:**

- The decision provides clear guidance for SARS on the proper exercise of its powers under the Tax Administration Act.
- It also informs taxpayers and third parties of their rights and the legal avenues available to them to challenge SARS' actions.

Greyvensteyn and Others v CSARS and Others

- Media Statement
- SARS' powers and duties of recovery of taxes are not absolute and this judgement confirms that though SARS may not carry out its powers and duties in a way that violates constitutional rights, the court confirmed that the current provisions do not infringe taxpayers' constitutional rights.

Commissioner Kieswetter said that “**this precedent setting decision reaffirms SARS’ legal authority to discharge its work of collecting all revenue due to the state in an efficient and effective manner.** Importantly, was the court’s reiteration that the **provisions that allow SARS to determine third-party liability, repatriation of foreign assets and restrictions of travel are lawful and constitutional.** SARS will continue to provide certainty and clarity to taxpayers while making it easy and simple to transact with the organisation. However, **SARS will vehemently oppose any action by the taxpayer intended to undermine its mandate**”.

Taxpayer S v Commissioner for SARS

Facts

• **Parties Involved:**

- Applicant: Taxpayer S
- Respondent: Commissioner for the South African Revenue Service (SARS)

• **Issue:**

- The applicant sought to compel SARS to discover documents and records during the appeal process relating to Income Tax and VAT assessments issued by SARS in respect of the years 2014 to 2019.

• **Background:**

- The applicant objected to the income tax and VAT assessments on several grounds, including improper authority for audits, failure to account for inter-account transfers, and incorrect accounting for property and non-taxable items.
- During the discovery process, the applicant requested SARS to discover various documents, including minutes of meetings, internal memoranda, documents relied on to issue the assessments, and bank statements.

Taxpayer S v Commissioner for SARS

The Law

•Relevant Provisions:

- **Uniform Rule 35(3):** Allows a party to request discovery of documents believed to be in the possession of the other party.
- **Tax Administration Act 28 of 2011:** Governs the administration of tax laws in South Africa.
- **Section 42(1) of the Act:** Pertains to the requirements for discovery of documents by SARS.

Taxpayer S v Commissioner for SARS

Application of the Law

- **Applicant's Arguments:**

- The applicant argued that SARS did not discover all relevant documents and that the discovered documents did not comply with the requirements of Section 42(1) of the Act.
- The applicant contended that the discovery of redacted documents and the lack of specific information hindered his preparation for trial.

- **SARS' Arguments:**

- SARS argued that it had discovered all relevant documents and that the applicant's request for additional documents was unwarranted.
- SARS contended that the discovery of redacted documents was necessary to protect personal information and information about other taxpayers.
- SARS maintained that the assessments were based on estimates due to the applicant's failure to provide adequate information.

Taxpayer S v Commissioner for SARS

Court's Analysis

• **Discovery Requirements:**

- The court emphasized that discovery is intended to ensure that both parties are aware of all documentary evidence before trial.
- The court noted that the rules require discovery of documents in the possession or control of the other party, not the creation of new documents or documents in a specific format.

• **Redacted Documents:**

- The court found that the discovery of redacted documents was acceptable as it protected personal information and did not prejudice the applicant.
- The information in the redacted documents were sufficient to enable the taxpayer to understand the reasons for the assessments issued by SARS.

• **Estimates and Assessments:**

- The court reaffirmed SARS's powers to issue an estimated assessment in the absence of information or a return from the taxpayer
- The court held that it was not required to order SARS to discover documents that it did not have in its possession

Taxpayer S v Commissioner for SARS

Key Takeaways

- **Discovery Process:** The court clarified the purpose of the discovery process to narrow the issues and to eliminate a debate on points that are incontrovertible. The purpose of discovery is to assess whether the documents could be used in the court process to wither advance one's case or damage the other party's case.
- **Protection of Information:** The court upheld the discovery of redacted documents to protect personal information and information about other taxpayers.
- **Estimates in Assessments:** The court recognized the validity of SARS' use of estimates in assessments when the taxpayer fails to provide adequate information.
- **Costs:** The court ordered SARS to pay the applicant's costs up to the date of the second supplementary discovery affidavit but made no order as to costs for the application itself.

Taxpayer S v Commissioner for SARS

Implications for Future Cases

The court's decision in **Taxpayer S v Commissioner** for SARS has several important implications for future cases:

1. Clarification of Discovery Process:

- The judgment provides clear guidance on the scope and limitations of the discovery process in tax disputes. It emphasizes that discovery is limited to documents that are in the possession or control of the other party and does not extend to the creation of new documents or documents in a specific format preferred by the requesting party.
- This clarification helps both taxpayers and SARS understand their rights and obligations during the discovery process, reducing the likelihood of disputes over the adequacy of discovery.

2. Protection of Personal Information:

- The court upheld the discovery of redacted documents to protect personal information and information about other taxpayers. This sets a precedent for the protection of sensitive information in tax disputes.
- Future cases will likely follow this approach, ensuring that personal information of SARS officials and other taxpayers is safeguarded while still providing access to relevant information for the parties involved in the dispute.

Taxpayer S v Commissioner for SARS

Implications for Future Cases

3. Use of Estimates in Assessments:

- The court recognized the validity of SARS' use of estimates in assessments when the taxpayer fails to provide adequate information. This reinforces SARS' authority to make assessments based on available information when taxpayers do not comply with their obligations to provide accurate and complete information.
- This precedent supports SARS' ability to enforce tax compliance and ensures that taxpayers cannot evade their tax liabilities by withholding information.

4. Judicial Oversight and Review:

- The decision emphasizes the importance of judicial oversight in the discovery process and the assessment of tax liabilities. It highlights the role of the courts in ensuring that SARS' actions are reasonable and justifiable.
- Future cases will benefit from this judgment, as it provides a framework for judicial review of SARS' decisions, ensuring that taxpayers have recourse to challenge any perceived unfairness or arbitrariness in the assessment process.

Taxpayer S v Commissioner for SARS

Implications for Future Cases

Costs and Conduct of SARS:

- The court's decision to award costs against SARS is positive as it reinforces the fact that SARS, in spite of being successful in challenging the matter, will be held accountable for the unnecessary costs incurred by the taxpayer. This hopefully serves as a deterrent for SARS in dealing with disputes more efficiently in future matters.
- Taxpayers can take comfort in knowing that the courts will hold SARS accountable for any unreasonable conduct during the discovery process, potentially reducing the burden on taxpayers to pursue lengthy and costly litigation to obtain necessary documents.



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Questions and Answers



Thank you