



# Tax Practice – On the move

Tax Controversy 1 of 5

**When can a taxpayer challenge an assessment  
in the High Court directly?**

Judge Dennis Davis

Nico Theron CTA (SA)

*YOUR KEY TO THE TAX COMMUNITY*

# Meet the Speakers: Judge Dennis Martin Davis



Educated at Herzlia School and Universities of Cape Town and Cambridge. judge of High Court, Cape Town from 1998 to 2020 and Judge President, Competition Appeal Court from 1999 to 2020.

Honorary professor at University of Cape Town, University of the Western Cape and Wits teaching tax, constitutional law, jurisprudence and competition law.

Chair of the Davis Tax Committee, was one of the drafters of the Competition Act 1998 and Companies Act in 2008.

Author of eleven books and more than 200 articles in academic journals. Held visiting professorial posts at Toronto, Melbourne, Harvard, NYU, Florida Brown and Georgetown.

Host of Judge for Yourself on ENCA.

Married to Claudette with two children Liat and Joshua.

Very anxious Manchester United supporter

# Meet the Speakers: Nico Theron



Nico is the founder of Unicus Tax Specialists SA, Unicus Tax Academy, the co-author and founder of Lexis Nexis' Practical Guide to Handling Tax Disputes and chairs SAIT's Tax Administration Work Group. He is an industry recognized expert in the tax dispute resolution, lecturing on tax dispute resolution at various universities across South Africa at post graduate level and to other tax professionals in practice. Unicus Tax has a 100% success rate in resolving tax disputes in favor of taxpayers through the objection and appeal remedy thereby saving taxpayers hundreds of millions of rands in taxes, penalties and interest.

Area of specialisation – Tax Dispute Resolution and Voluntary Disclosure Programmes

# Introduction

## **When can a taxpayer challenge an assessment in the High Court directly?**

- Why?
  - Time and cost?
  - Jurisdiction of the Tax Court on administrative issues?
    - “not a valid ground for objection”
    - These issues can only be decided on by the High Court
    - Pre-assessment issues fall outside the ambit of the jurisdiction of the Tax Court?
- Some contradictory judgments which create confusion.
- Let's try to answer the question and then determine what other questions arise in light of the answer.

# Pre-TAA

- Friedman and Others v CIR (1991)

"I am in agreement with the finding of the Court in that case that where the dispute involved no question of fact and is **simply one of law** the Commissioner and the **Special Court are not the only competent authorities** to decide the issue - at any rate when a declaratory order such as that in the present case is being sought."

# Pre-TAA

- Metcash (2000)

At paragraph 43:

"Although the Act vests jurisdiction to vary or set aside assessments - and other decisions by the Commissioner- in the Special Court in the first instance (and prescribes the avenue for further consideration of the case by the ordinary courts thereafter), **there is nothing in section 36 to suggest that the inherent jurisdiction of a high court to grant appropriate other or ancillary relief is excluded.**"

# Pre-TAA

- Metcash (2000)

At paragraph 44:

"Indeed, it has for many years been settled law that the Supreme Court has jurisdiction to hear and determine **income tax cases turning on legal issues**"

# Pre-TAA

- No legislative interference with inherent jurisdiction

# Post-TAA (2012 – 2015)

- Section 105 TAA

"A Taxpayer may not dispute an assessment or decision as described in section 104 in any court or other proceedings, except in proceedings under this Chapter **or** by application to the High Court for Review"

# Post-TAA (2012 – 2015)

- Comment

Based on the wording of section 105 in this period, section 105 did not change the position pre-TAA as there is **no exclusion/interference with the inherent jurisdiction of the High Court.**

# Post-TAA (2015 - Date)

- Section 105 TAA amended in 2015

"A taxpayer **may only dispute** an assessment or decision as described in section 104 in proceedings **under this chapter**, unless a High Court otherwise directs."

# Post-TAA (2015 - Date)

- The 2015 EM:

"The 2015 EM: ""The current wording of section 105 creates the impression that a dispute arising under Chapter 9 may either be heard by the tax court or a High Court for review. This section is intended to ensure that internal remedies, such as the objection and appeal process and the resolution thereof by means of alternative dispute resolution or before the tax board or the **tax court, be exhausted before a higher court is approached and that the tax court deal with the dispute as court of first instance on a trial basis.** This is in line with both domestic and international case law. **The proposed amendment makes the intention clear but preserves the right of a High Court to direct otherwise should the specific circumstances of a case require it.**"""

# Post-TAA (2015 - Date)

- Legislative interference with inherent jurisdiction
- When can the High Court direct otherwise?

# Recent case law

## **ABSA (High Court) (March 2021)**

- Background:
  - Review - GAAR notice and assessments.
  - Court considers section 105 (post-2015).
  - When can the court direct otherwise?
  - In exceptional circumstances.
  - Exceptional circumstances - "circumstances which sensibly justify an alternative route".
  - With reliance on Metcash - when the dispute turns only on a point of law it satisfies "exceptional circumstances".
  - Held - "Common cause" facts of ABSA's ignorance of Brazilian bond investments - Issue turns only on a point of law - Jurisdiction established - notice and assessments set aside.

# Recent case law

## **Forge Packaging (High Court) (June 2022)**

- Background:
  - Review - non-compliance with section 42 TAA.
  - When can the court otherwise direct:
    - if the issue for determination turns wholly on a point of law (Reliance on ABSA and Metcash).
  - Held: - issue of both fact and law (IT14SD: audit vs verification) - Application struck from the roll.

# Recent case law

## Rappa (SCA) (March 2023)

- Background:
  - High Court Order to compel disclosure of documents by SARS in respect of review application relating to VAT assessments (including penalties and interest) appealed by SARS based on the jurisdiction in review application not having been established.
  - When can the High Court otherwise direct.
  - Indeed, only in exceptional circumstances
  - When the dispute turns only on a point of law?
    - "not without more"
  - The court seems to suggest that the tax court can also consider disputes turning solely on a point of law and therefore is not "exceptional"
    - reference to the ambit of section 104 - taxpayer's grievance of any kind can be raised in objection and therefore in the tax court.
    - appeal is a complete rehearing (Africa Cash and Carry etc).
    - tax court can determine the legality of an assessment (Transvaal Suikerkorporasie, South Atlantic Jazz Festival, Wingate Pearse).
      - Interesting: Tax Court: ITC 1956 (84 SATC 321) – Tax Court cannot hear a legality review (standalone review application) – pre Rappa  
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# Recent case law

## Rappa (SCA) (March 2023)

- Exceptional Circumstances guided by CC judgment in MV Ais Mamas Seatrans Maritime

“1. What is ordinarily contemplated by the words “exceptional circumstances” is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different . . . 2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case. 3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly. 4. Depending on the context in which it is used, the word ‘exceptional’ has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different. 5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.”

- Held: no order was made in the application to compel re-jurisdiction - SARS' appeal upheld.

# Recent case law

## **The trustees of the CC Trust and others v CSARS (High Court) (24 July 2023)**

- Background:
  - Review: SARS' failure to comply with 42 TAA (GAAR notices do not comply with 42 TAA).
  - When can the High Court Otherwise direct.
  - In exceptional circumstances.
  - That the dispute revolves only on a point of law is not sufficient.
  - That you may have good prospects of success in the High Court is not enough
  - that going through the tax court process makes you subject to "pay now argue later" is not enough.
  - Yet non-compliance with section 42(2)(b) was considered on the basis that (1) it is a point of law and (2) it is a **novel issue?**
  - Held: no case made out for 105 - application dismissed.

# Recent case law

## Pieter Johannes Erasmus (High Court) (August 2023)

- Background:
  - Review - GAAR notices and notice of assessment.
  - When can the high court otherwise direct.
  - Point of law (or even point of fact) is not sufficient .
  - ABSA is wrong insofar as its test for exceptionality is set at "circumstances which sensibly justify an alternative route".
  - Exceptionality test: MV Ais Mamas Seatrans Maritime.
  - **There must be circumstances present that are so out of the ordinary, unusual or uncommon** so as to justify a departure from the default rule the principles in Metcash can no longer be followed because they are pre-TAA.
  - Held: application struck - no case made under section 105.

# Recent case law

## **ABSA (SCA) (September 2023)**

- Background:
  - The high court erred in finding that the statute Dispute turned only on a point of law
  - SARS disputed certain facts which ABSA contended were common cause.
  - since the High Court made the decision on the basis that there is only a dispute of law and not of fact also, the High Court's decision is overturned.
- ...

# Conclusion

- It appears the current position is that:
  - To challenge an assessment or decision in the high court directly you need to request the court to direct otherwise
  - In doing so, you must make out a case that there are exceptional circumstances for the court to direct otherwise (and also in the interest of justice – PAJA requirement).
  - That the dispute turns only on a point of law will not be sufficient
  - you will have to prove the case can be classified as being "**so out of the ordinary, unusual or uncommon so as to justify a departure from the default rule**"

# Conclusion

'1. What is ordinarily contemplated by the words "exceptional circumstances" is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different . . . 2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case. 3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly. 4. Depending on the context in which it is used, the word 'exceptional' has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different. 5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.'

# Conclusion

- Bear in mind :
  - tax court can hear and decide these matters but not on a standalone application basis – must be part of s104 objection (Rappa – grievance of any kind, South Atlantic Jazz Festival, Wingate Pearse, ITC1956) only if
    - You raise these points as part of the objection and appeal in the tax court process

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# Questions

- Given the current position and that tax court can deal review applications - in what sort of circumstances would approaching the high court be "exceptional"?
- Does the current state not effectively always force taxpayers to go through the tax court process first?
- Does the current state not impact on taxpayer's constitutional rights?
- Should the tax court rules and TAA be updated to allow for immediate access to tax court on points of law as opposed to being part of the objection and appeal?
- Interestingly: Rampersahd and another V CSARS and section 93(1)(d) - effective challenge against an assessment yet because a decision to decline a s93(1)(d) is not a section 104 decision, it's not caught by section 105 (nor by PAJA s7).