



NATIONAL TREASURY

REPUBLIC OF SOUTH AFRICA

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SPEECH BY JABULANI P MOLEKETI, DEPUTY MINISTER OF FINANCE AT THE LAUNCH OF THE NEW TAX COURT AT THE LARGE BUSINESS CENTRE

Distinguished Guests

Ladies and Gentlemen

Today as we launch the new Tax Court situated here at SARS' Large Business Centre in Sunninghill, it is my pleasure to welcome here :

Members of the judiciary who regularly preside in the Tax Court (mention e.g. Judge-President Ngoepe and other Judges to be nominated by JP Ngoepe);

Members of the Bar association who specialize in tax law and regularly appear in tax cases;

Prominent tax practitioners from both the legal and accounting professions;

Academics lecturing tax law at our tertiary institutions;

Representatives from the National Treasury;

The representatives from SARS who are involved in the litigation process.

At the launch of a new Tax Court it might be appropriate to perhaps consider the general relationship between the taxpaying public and the *fiscus*.

The reality is that any litigation process is largely adversarial in the sense that the litigating parties' pecuniary interests and interpretations of the law are often quite different – that is why the matter has to be adjudicated in an independent forum in the first place. Taking account of this everyday reality, in the case of tax disputes, the Tax Court is specifically catered for in the Income Tax Act.

With tax, the litigation stage is right at the end of a process that starts much earlier, namely when the taxpayer takes advice and completes his/her tax return, whereupon SARS subsequently assesses same. Before looking at the litigation stage, one should, therefore, pause and consider some notions that underpin the overall relationship between taxpayer and *fiscus*.

The first aspect that I shall refer to is the practice of tax planning.

Taxpayer's liberty in respect of tax planning:

In 1936 Lord Tomlin in the House of Lords stated the following in his speech in the well-known English case of *Duke of Westminster*:

“Every man is entitled if he can to order his affairs so ~~as~~ that the tax attaching under the appropriate Acts is less than it otherwise would be. If he ~~is~~ succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioner of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax.”

The judgement by Chief Justice Watermeyer in *CIR v King* (decided by the Appellate Division in 1947 already) also confirmed that the South African taxpayer is at liberty to structure his affairs in a tax efficient manner.

Why then, if the taxpayer is principally at liberty to structure his affairs in a tax efficient manner, do so many disputes arise in respect of a taxpayer's tax obligations?

In order to answer this question one first has to understand the nature of a so-called “tax dispute”.

The nature of tax disputes:

When Adam Smith wrote his seminal work *“An Inquiry into and the Nature and Causes of Wealth of Nations”* in 1776 he identified as one of the maxims with regard to taxes in general that there should be certainty regarding the time, manner and quantity of tax to be paid.

As those of you involved in the world of tax will confirm, the everyday reality shows that absolute certainty regarding the precise quantum of tax payable is often quite elusive – it is often the subject of intense debate between the SARS and taxpayers. A standard textbook on Income Tax tells us simply that:

“Income tax, like all taxes, is imposed by legislative enactment ... the parameters of a taxpayer’s liability to income tax are laid down in the Income Tax Act as interpreted by the courts”.

If it was only that easy! Or If only it was that easy!

The truth is that ordinary everyday language remains the vehicle of the Legislature’s communication with the taxpaying public regarding the individual’s tax obligations. A further reality is that fiscal legislation is often directed at highly complicated transactions found in the modern commercial world.

In this regard a standard work on the Interpretation of Statutes points out:

“It is difficult to express ideas in words with complete accuracy; and the more complex the idea the greater the difficulty. The law has to regulate an intricate and sophisticated society. Axiomatically this requires complicated laws involving language of a fair degree of sophistication, which compounds the difficulties inherent in the process of statutory interpretation...”

The above-quoted statement probably applies even more so in respect of fiscal legislation which is of a technical nature and which applies to intricate commercial transactions involving very substantial sums of money!

If it were possible for the Legislature, through an ideal medium of communication to precisely define the exact ambit, scope and intended effect of each and every provision of a tax statute with absolute clarity and certainty with regard to all possible factual situations (both past, present and in future), then the taxpayer’s factual situations would, when

viewed objectively and with a complete understanding thereof, simply fall within or beyond the clearly discernible parameters of the potentially applicable provision of the relevant tax provision.

Unfortunately such an ideal medium of communication is not available to the Legislature and hence disputes between the *fiscus* and taxpayers are a part of our lives – I guess especially so for those of you gathered here today!

So now we know:

Taxpayers are at liberty to structure their tax affairs as long as they remain within the bounds of the applicable statute;

The parameters of the applicable tax provisions are often hard to discern due to the inherent inadequacy of the language and because differing interpretations are possible.

The end-result: tax disputes will continue to arise and, for those present today, it probably means that working in tax does provide some job security....??

The next aspect that I wish to touch on is the relationship between the SARS, the South African taxpayer and his / her advisers.

The relationship between *fiscus* and taxpayer:

One probably also has to accept that with regard to fiscal legislation (more so ~~than~~ in respect of other legislation) the taxpayer's own monetary interests plays a strong role.

It is true that, on the one hand, the State has to generate the required revenue to achieve, in the interests of all South Africans, its socio-economic objectives, and in this regard great progress has been made over the last number of years. On the other hand, like we have seen, the taxpayer is at liberty to structure his affairs in a tax effective manner.

It is small wonder then that, in a well-known tax journal, the relationship between the *fiscus* and the taxpayers has been described as follows:

“... it is necessary for both the tax gatherer and taxpayer to recognize that they stand in an inherently adversarial relationship to each other, the former wishing to gather as much tax as possible and the latter wishing to pay as little as is legitimately possible.”

It does not mean, however, that the engagement, even in litigation, between the taxpayer and the *fiscus* cannot be constructive.

Let us now consider the crucial role of the Tax Court in this regard.

Role of the Tax Court:

As we know, the litigation between taxpayer and *fiscus* in the Tax Court is adversarial in nature (shall we concede, sometimes even acrimonious?) with each party vigorously and forcefully arguing the merits of its case. Naturally, this is to be expected: important legal principles and vast sums of money are at stake!

Despite, the above, the truth is that there are many benefits to a vibrant court process – especially with regards to the application of tax laws. Some of these are:

The tax dispute is heard before an independent tribunal guaranteeing impartiality, and hopefully equity, regarding the outcome. The striving for justice is strengthened through an appeal procedure that could go to the High Court, the Supreme Court of Appeal and potentially right to the Constitutional Court;

The judgements of the High Courts and Constitutional Court serve to provide precedent in respect of the application of tax laws. This brings clarity regarding the correct interpretation of the applicable provisions and also guides the *fiscus* as to the appropriate application of such laws;

Court decisions serve as a stimuli in the development of tax law in so far as an adverse judgement to the *fiscus* could necessitate a revisit of the applicable Act of Parliament in order to remedy any past deficiency there might have been ... the often spoken of “loopholes” that some taxpayers and advisers have a keen eye for!;

Since it is sometimes SARS's procedure that comes under scrutiny (as opposed to the merits of the case), court judgements serve to draw the boundaries with regard to the correct administrative processes that SARS should follow. This, in turn, gives substance to the principle in our Constitution that everybody is entitled to procedurally fair administrative treatment by organs of State.

It is probably fair to say that a robust court system is crucial to the well-being of our young democracy. The Tax Court as constituted in the Income Tax Court is thus as important when it comes to the adjudication of tax disputes between taxpayer and tax collector.

Although, it might sometimes be difficult for non-lawyers to view any litigation process as constructive, one has to be realistic and acknowledge that there will always be instances where the taxpayer and SARS will have to say "...let's agree to disagree" and let the matter proceed to the Tax Court. Such a process is both healthy and, if used correctly, does add to the overall development of the tax framework as has already been pointed out earlier.

Looking at the Tax Court that is being launched here today one would have to acknowledge that these state of the art facilities should be conducive to a proper ventilation of the complex tax issues. I am sure that you will agree that these premises are both convenient and user-friendly for purposes of conducting intricate litigation. It is hoped that these premises will do justice to the arguments of counsel and representatives who appear in them!

Furthermore, one should also keep in mind the utmost important role of the Judges and members presiding before the Tax Court, who are called on to make the sometimes hard decisions involving many millions of Rands. It is therefore good that proper care has also been taken to ensure that their chambers are conducive to the thinking and deliberating that has to happen in there! We should point out that Judge-President Ngoepe (TPD) and Judge-President Schabert (WLD, and now retired), both took a hands-on approach in assisting the SARS team with the lay-out, the design and specifications of this Tax Court. We thank them for their contribution in supporting this initiative and for the valuable inputs they made.

Conclusion:

The reality is that Gauteng is the hub of the South African economic landscape. A large majority of JSE-listed companies is located in Johannesburg and a significant percentage of South Africa's high-net-worth individuals reside in Gauteng.

It is to be lauded that SARS, in aiming to provide an improved service to taxpayers (both corporates and individuals), has developed this Tax Court facility as part of its Large Business Centre. The Large Business Centre will, to some extent, constitute the "flagship" premises in respect of SARS's Gauteng operations. In light of the make-up of the Gauteng taxpayer base on register with SARS, it can be expected that the bulk of the more

substantial tax appeals generated country-wide would emanate from Gauteng and eventually find their way to this Court. It is trusted that this facility will assist all stakeholders in adjudicating such tax appeals effectively.

I thank you.