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Do not go gently into that good Declaratory Order

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A declaratory order is a flexible remedy which can assist in clarifying issues of law expeditiously. It is by no means a new and faster means of obtaining certainty in disputes with the South African Revenue Service (SARS). The application for a declaratory order will only apply where the issue at hand is purely a question of law, or is interlocutory in nature.

A taxpayer may appeal to the Tax Court after having exhausted all internal remedies provided in Chapter 9 of the Tax Administration Act, 28 of 2011 (the TAA).

Despite the fact that the Tax Court (as a court of first instance) generally has exclusive jurisdiction over tax cases,[1] the decision of the Commissioner is subject to judicial intervention in circumstances where the dispute concerns a question of law only.

In terms of section 118(3), where an appeal to the Tax Court involves an interpretation of the law only, the president of the Tax Court sitting alone (without a representative of the commercial community or an accountant), must decide the appeal. However, the Tax Court does not have the power to hear applications which are not specifically listed under Rule 52 of the Tax Court Rules.

Section 21(1)(c) of the Superior Courts Act 10 of 2013 (the Superior Courts Act) states that a division of the High Court has the power:

> *"in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."*

As a result, a party seeking declaratory relief will be required to make an application to the High Court in terms of section 118(3) of the TAA, read with Tax Court Rule 42(1) and Rule 33(6) of the Uniform Rules of Court. Where the Tax Court Rule does not provide suitable procedure, Tax Court Rule 42(1) permits a taxpayer to use the most appropriate rule under the Rules for the High Court.

In Friedman and Others NNO v Commissioner for the Inland Revenue: In Re Phillip Framewell Trust v Commissioner for the Inland Revenue[2] the High Court was asked to resolve a legal question. A preliminary point was whether the Appellate Division (the current day equivalent is the Supreme Court of Appeal) had the power to hear the matter. In this regard, McCreath J concluded as follows:

> *"I am in agreement ...that where the dispute involved no question of fact and is simply one of lawthe 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."*

More recently, in United Manganese of Kalahari (Proprietary) Limited v Commissioner for the South African Revenue Service[3] (the UMK case), the jurisdictional principle that the High Court has the power to decide tax matters where the relief sought is for declaratory orders involving questions of law only or, that are interlocutory in nature, was affirmed. The application for the declaratory order will be conducted as a motion proceeding. Therefore, unlike a trial, no oral evidence (witnesses) is heard by the court and the only documents referred to are those attached to or provided with the application.

In the UMK case, UMK approached the courts to obtain clarity on the treatment and deductibility of transport insurance and handling costs (TIH costs) that mining companies incur when transporting minerals to customers. According to SARS, these costs from part of the gross sales amount unless the mining company can show that these costs were specifically recovered.

The main issue in dispute was the interpretation of the Mineral and Petroleum Resources Royalty Act (the Royalty Act), which in essence was purely a legal question.

The court reaffirmed that it had jurisdiction to hear tax cases that turned on legal issues only.[4] This applied to the UMK case because the crisp question before the court was the proper construction of a section of the Royalty Act - in particular whether the taxpayer was entitled to calculate its gross income by deducting the TIH costs.

However, UMK also sought a declaratory order that entitled it to deduct specific amounts reflected in an annexure to its court papers. The court declined to give this order, ruling that:[5]

> *"This dispute is not simply one of lawthat involves no question of fact ... It is relief that is directed specifically at UMK's royalty liability for the 2010 and 2011 years of assessment."*

In respect of the declaratory order sought by UMK concerning the specific deductions it claimed, the High Court could therefore not come to UMK's assistance. To do so would have required the court to "enquire into the facts and make factual findings inter alia on the correctness of the amounts [in the schedule] and that they are appropriately deducted .... The determination of this claim calls for judicial deference and not for this court to usurp the function of SARS."[6]

The UMK case thus illustrates both of the trite principles in relation to the High Court's jurisdiction to issue declaratory orders in tax cases:

- If the issue is a purely legal one, such as the proper interpretation of a particular statute only, then the High Court can be requested to issue a declaratory order; but
- If the issue is a factual one, or a mixed question of law and fact, the High Court will have to defer to the Tax Court and permit the Tax Court to decide upon the facts and interpret the law as applied to the facts.

In seeking a declaratory order, the main points to consider are that:

- the granting of the declaratory order is a discretionary decision exercised by the court in relation to the particular circumstances of the case; and
- a court will not enquire into and make findings of fact in order to answer a question of law.

Taxpayers are therefore cautioned to properly consider whether they meet the jurisdictional test before launching an application for a declaratory order.

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