

# Invalid tax assessments are subject to objection and appeal



By [Heinrich Louw](#)

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The Supreme Court of Appeal (SCA) in the case of Medox Limited v Commissioner for the South African Revenue Service delivered judgment on 27 May 2015.



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While under provisional liquidation, Medox Limited (Taxpayer) incurred an assessed loss during its 1996 year of assessment. The Taxpayer failed to submit a return for the 1997 year of assessment. In its returns for the 1998 and subsequent tax years, it neglected to carry forward the assessed loss from 1996.

The Taxpayer only realised in 2009 that the assessed loss had not been accounted for and set off against its income in the subsequent years of assessment. However, the Taxpayer did not object to the assessments issued by the Commissioner for the South African Revenue Service (Commissioner) in respect of the 1998 and subsequent years of assessment. Rather, the Taxpayer took the view that the issuing of these assessments without taking into account the assessed loss from 1996 was ultra vires, and the assessments were therefore void. On this basis, the Taxpayer approached the High Court in Pretoria for relief, but the High Court dismissed the matter. The Taxpayer then appealed to the SCA.

The SCA reasoned that, in order for the Taxpayer to succeed, the Taxpayer had to show that it had an existing, future, or contingent right to have the assessments set aside. However, as was submitted by the Commissioner, the Taxpayer never objected to the assessments and they had thus become final and binding in terms of s81(5) of the Income Tax Act, No 58 of 1962 (Act) - now s100 of the Tax Administration Act, No 28 of 2011 (TAA).

The Commissioner also argued that three years had lapsed since the date of all the relevant assessments, and any right to object had effectively prescribed in terms of s81(2) of the Act - now s104(5)(b) of the TAA.

It was submitted on behalf of the Taxpayer that the provisions relating to the finality of assessments only applied to valid assessments, being assessments that were correctly issued in terms of the Act. However, the SCA noted that if this argument is followed through, it would mean that any assessment in terms of which an amount is incorrectly included, or a deduction incorrectly refused, would be invalid, and accordingly not subject to s81 to s83 of the Act, rendering the objection and appeal process irrelevant. This would mean that taxpayers could bypass the Tax Court and directly approach the High Court.

The SCA specifically noted that the Taxpayer did not base its case on the assessments having been issued as a result of iustus error or fraud. It seems therefore that taxpayers could potentially approach a High Court to set aside assessments in such circumstances.

The court accordingly refused to read s81 as applying only to valid and correct assessments, as such an interpretation would conflict with the intention of the legislature, which presumably was for the objection and appeal procedure to apply to all assessments, whether they are valid and correct, or not.

The Taxpayer essentially contended that it was the Commissioner's duty to set off the loss from 1996 against income from the subsequent years. However, the SCA held that it was the Taxpayer's duty to render a return carrying forward any such assessed losses from previous years, and the burden of proof in respect of any set-off of assessed losses lies with the Taxpayer. In this matter, the Taxpayer did not render a return for the 1997 year of assessment, and did not claim the assessed loss in any of the subsequent years.

The appeal was therefore dismissed.

## **Dissatisfaction with State attorney**

An additional matter that warrants mention is the SCA's manifest dissatisfaction with the State attorney, who acted for the Commissioner. It appears that the State attorney failed to file timeously its heads of argument and accompanying practice note, which initially led the court to believe that the appeal would not be opposed. The SCA noted that:

"...[D]ue to a litany of administrative deficiencies, no steps were taken to forward the heads of argument to this court nor was any practice note prepared for filing. The administrative deficiencies leading to this sorry state of affairs can only be described as grossly negligent, demonstrating a flagrant disregard for the rules of this court. It is clear that, had this court not brought the failure to file the heads of argument and practice note to the attention of the State attorney, nothing would have been done and the appeal would have been heard without the Commissioner being represented...this court has been seriously inconvenienced by the supine attitude adopted by the State attorney..."

As a sanction, the court disallowed the Commissioner's costs by not making any cost order.

## **ABOUT HEINRICH LOUW**

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