**Cancelling a sale can be risky business**

“Payment of tax is what the law prescribes, and tax laws are not always regarded as ‘fair’. The tax statute must be applied even if in certain circumstances a taxpayer may feel aggrieved at the outcome.” These were the words of the Supreme Court of Appeal (SCA) in the recent judgment *New Adventure Shelf 122 (Pty) Ltd v Commissioner of SARS*. This case examined the consequences of Capital Gains Tax (CGT) where the sale of a property was cancelled before the seller had been paid in full.

In the 2007 year of assessment a property was sold and a substantial capital gain was taken into account in the seller’s tax assessment for that year. Unfortunately, the purchaser defaulted, only paying a portion of the purchase price, resulting in an agreement to cancel the sale several years later. The property was returned to the seller, who also retained the payments made to it as pre-determined damages for breach of contract.

The seller’s difficulty was that it was taxed on a capital gain it did not receive. Although the cancellation years later led to a capital loss, it had no corresponding gain to set off against this loss. The seller thus instituted review proceedings to set aside its 2007 assessment.

As the seller had never initially disputed the assessment, and three years had lapsed, SARS argued that the assessment was now final. The seller, however, contended that para 35(3)(c) and 25(2) of the 8th Schedule to the Income Tax Act, 1962 allowed it to re-open the original assessment and re-determine its capital gain.

While para 35(3) does allow for a reduction in the proceeds from a sale because of a cancellation of an agreement, the SCA held that for this to apply the cancellation must take place in the same year of assessment as the disposal of the asset. Regarding para 25, the SCA held that, should there be a redetermination of a capital gain or loss that occurred in a prior year of assessment, such redetermination does not take place in the prior year but in the current year. In other words, in the year in which the event occurs (e.g. sale cancellation) giving rise to the redetermination.

In dismissing the seller’s appeal, the SCA highlighted that an assessed capital loss is a valuable asset for a taxpayer, and whether it was used to set-off against a future capital gain was entirely within the taxpayer’s control.

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**NOTE: This information should not be regarded as legal advice and is merely provided for information purposes on various aspects of litigation.**

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