

## **DIGICALL SOLUTIONS – Trafficking in tax losses in perspective**

Shepstone & Wylie Attorneys' Johan Kotze (Tax Executive – Dispute Resolution) and Jenifer Woker (Partner) successfully defended Digicall Solutions (Pty) Ltd in its dispute against SARS, based on the judgment handed down by Cloete J in the Western Cape High Court.

SARS assessed Digicall by disallowing the utilization of tax losses in terms of section 103(2) of the Income Tax Act. Section 103 is headed 'Transactions, operations or schemes for purposes of avoiding or postponing liability for or reducing amounts of taxes on income' and sub-section (2) specifically aims to stem the trafficking in tax losses.

This was the third time Digicall and SARS encountered each other in court in this dispute.

The first time was in front of Rogers J when SARS wanted to expand its assessment by adding another change in shareholding, but the amendment was struck out.

The second time was in front of Allie J in the Tax Court in Cape Town, in which she agreed with Digicall that it did not fall foul of section 103(2).

And now on appeal SARS has again been unsuccessful.

Taxpayers in a section 103(2) dispute almost always start with a somehow disadvantage. Section 103 is directed at tax avoidance schemes and it has been held numerous times, that section 103 should be interpreted in a way that advances the remedy provided by the section while suppressing the mischief against which it is directed.

Fortunately, Cloete J acknowledged what Willis J (as he then was) said in ITC 1847: *'[furthermore], taking advantage of an assessed loss is not an inherent wrong. On the contrary, the advantages presented by such losses can influence strategic decisions which can save companies and turn them around to the obvious benefit of employees and the Revenue Service, among others. Each case must be decided on its own merits.'*

Cloete J accepted that the 'trafficking' contemplated in section 103(2) must be determined with reference to the sole or main purpose of the 'trafficee', rather than the 'trafficker'.

She further accepted that Digicall was always beyond section 103(2) because no income was set-off by it against the assessed loss pursuant to the change in shareholding which SARS assessed. The change in shareholding was too remote from the accrual of income.

An important aspect, often overlooked on appeal from the Tax Court, is that the court of appeal will not lightly disturb the factual findings of a Tax Court.

For more information on the above, please contact:

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