CONSTITUTIONAL COURT OF SOUTH AFRICA

Clicks Retailers (Pty) Limited v Commissioner for the South African Revenue Service

CCT 07/20

Date of hearing: 17 November 2021
Date of judgment: 21 May 2021

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 21 May 2021 at 10h00, the Constitutional Court handed down judgment in an appeal against the judgment and order of the Supreme Court of Appeal, which upheld an appeal against a decision of the Tax Court. The Tax Court had upheld an appeal by Clicks Retailers (Pty) Ltd (Clicks) against a refusal by the Commissioner for the South African Revenue Service (Commissioner) to approve an allowance claimed by Clicks in terms of section 24C of the Income Tax Act 58 of 1962 (Income Tax Act).

Section 24C creates an exception to the general rule in the Income Tax Act that expenditure is only deductible in the year of assessment in which the expenditure is actually incurred. It allows a taxpayer to defer paying tax on income if that income accrues in terms of a contract and will be used to finance future expenditure (that is, expenditure incurred in a subsequent tax year), which it is obliged to incur in terms of such contract.

For the 2009 financial year, Clicks sought to claim an allowance in terms of section 24C. Clicks based its claim to an allowance on the operation of its loyalty programme, the ClubCard programme. In terms of the loyalty programme, a Clicks customer concludes a contract with Clicks (ClubCard contract) that renders the customer eligible to earn cash back vouchers in proportion to the value of purchases made at Clicks' stores and those of Clicks' affinity partners. Clicks argued that it uses income it earns from individual contracts of sale concluded with loyalty programme members to finance its future obligation to redeem cash back vouchers. Clicks argued that both the income and the obligation to incur future expenditure arose from the same contract and therefore it was eligible to claim a section 24C allowance in respect of income it used to finance this future expenditure.

Clicks appealed the Commissioner's disallowance of its section 24C deduction to the Tax Court, which found in its favour. Relying on its recent judgment in *Big G*, the Supreme Court of Appeal upheld the Commissioner's appeal against the Tax Court's decision on the basis that the income and obligation to incur future expenditure arose from different contracts (the sale contract and ClubCard contract, respectively). The Supreme Court of Appeal's decision in *Big G* was subsequently taken on appeal to the Constitutional Court. In that matter, the Court found that the requirement of contractual sameness in section 24C can be achieved either on a same-contract basis (where the income-producing contract and obligation-imposing contract are literally the same contract) or on a sameness basis (where the income and obligation to finance expenditure are sourced in two or more contracts that are so inextricably linked that they meet the requirement of sameness).

In its appeal to the Constitutional Court, Clicks submitted that it could claim a section 24C allowance on either a same-contract basis or on a sameness basis. It contended, first, that entering into this contract of sale earns Clicks income and triggers its obligation to redeem loyalty programme vouchers. The contract of sale was therefore both income-producing and obligation-imposing. In the alternative, Clicks contended that it could claim an allowance on the basis that the income and obligation to incur expenditure arise from two inextricably linked contracts – namely, the contract of sale and the ClubCard contract. Overall, Clicks says that the contracts operate together – both in producing income for Clicks and in generating its obligation to finance future expenditure. Clicks emphasised that the conclusion of the ClubCard contract did not itself generate any real obligations and that the obligation to award points, while governed by the terms of the ClubCard contract, was only triggered and given content when a sale contract is entered into. This created a correlation between the income-generating contract and obligation-imposing contract.

In a unanimous judgment penned by Theron J and concurred in by Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Mathopo AJ, Mhlantla J, Tshiqi J and Victor AJ, the Constitutional Court dismissed the appeal because Clicks had not established the contractual sameness that is required by section 24C(2). The Court held that Clicks cannot claim an allowance on a same contract basis because Clicks generates income in terms of contracts of sale it concludes with its loyalty programme members, whereas its obligation to incur future expenditure arises from the ClubCard contract it concludes with its loyalty programme members. The ClubCard contract is the contract that entitles the customer to the discount and, if Clicks were to renege on its obligation to honour the redemption of points, the customer's cause of action would be based on the ClubCard contract.

Turning to Clicks' alternative argument, the Court accepted that there was an inextricable link between the sale contract and the ClubCard contract to the extent that (a) obligations under the ClubCard contract were triggered by the sale contracts; (b) Clicks' obligation to finance expenditure when ClubCard points are redeemed was determined with reference to the amount of income earned in terms of one or more contracts of sale; and (c) there was a significant factual overlap and nexus between the contracts. However, the Court held that the links between the two contract did not give rise to a sameness between them.

The Court noted that, whatever the outer limits of the concept of sameness in this context may be, at a minimum both the earning of income and the obligation to finance future expenditure must depend on the existence of both contracts. If either contract can be entered into and exist without the other, they cannot achieve sameness. In this case, the accrual of income under a sale contract triggered and quantified Clicks' obligation to finance future expenditure but the actual obligation was sourced in the ClubCard contract and did not depend on the existence of a sale contract.

Likewise, the existence of a ClubCard contract might have driven sales of Clicks merchandise, but income that accrued to Clicks was, in legal terms, attributable to the relevant contract of sale. Clicks would have earned the income regardless of whether there was a ClubCard contract in place. Each contract of sale constituted a complete contract on its own, with terms that were different from the ClubCard contract. In fact, the terms of each sale contract were the same regardless of whether the purchaser was a loyalty programme member and regardless of whether a ClubCard was presented at checkout. The generation of income was not regulated by the ClubCard contract and no aspect of the sale contract was dictated by the ClubCard contract.

This led the Court to conclude that the contract under which income accrued to Clicks and the contract under which the obligation to finance future expenditure arose were simply too independent of each other to meet the requirement of contractual sameness in section 24C. It followed that Clicks could not claim a section 24C allowance on either a same-contract basis or on a sameness basis.